GHANA / JUDGMENT

FYNN-SACKEY VRS OPOKU & ANOTHER (H1/218/2021) [2023] GHACA 171 (19 January 2023)

[2023] GHACA 171

COURT	CASE / FILE NUMBER
Court of Appeal	H1/218/2021

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IN THE SUPERIOR COURT OF JUSTICE COURT OF APPEAL ACCRA CORAM: HENRY KWOFIE, JA (PRESIDING) ANTHONY OPPONG, JA RICHARD ADJEI-FRIMPONG, JA SUIT NO H1/218/2021 DATE: 19TH JANUARY 2023 EDWARD FYNN-SACKEY PLAINTIFF/APPELLANT VRS.

1. IRENE FYNN OPOKU. DEFENDANT/ RESPONDENT

2. RAPHAEL FYNN-SACKEY J U D G M E N T ANTHONY OPPONG, JA The plaintiff/appellant, hereafter to be referred to simply as appellant and the defendants/respondents, hereafter to be referred to also as respondents, are children of Emmanuel Fynn-Sackey who died intestate on the 2nd day of August 2016. In the life time of the late Emmanuel Fynn-Sackey, he acquired House Number J81 Buade, Nungua in the name of the appellant. The appellant contended therefore that his late father intended that property as a gift to him; invoking the principle of presumption of advancement of that property in his favour. When letters of administration in respect of the estate of their deceased father were to be applied for, the applicants sought to list the H/No J81 as part of the inventory of the estate of the late Emmanuel Fynn-Sackey. The appellant protested and the dispute arising therefrom culminated in the suit the appellant instituted against the respondents by which the appellant sought for a declaration that in acquiring H/No. J81 Buade, Nungua in the name of appellant his late father intended it as a gift to him and that same does not form part of the estate of the late father Emmanuel Fynn- Sackey. After the trial of the case the trial High Court dismissed the appellant's case on the basis that the presumption of advancement was effectively rebutted on the preponderance of the evidence. The appellant being dissatisfied of the judgment of the trial High Court appealed to this court on the following grounds:

1. The judgment is against the weight of the evidence adduced at the trial;

2. The learned trial judge erred in concluding that the evidence on record adequately rebutted the presumption of advancement;

3. The learned trial judge erred in concluding that the signature on Exhibit C2 was not that of the plaintiff/appellant;

4. The learned trial judge erred in concluding that because Exhibit C2 was signed by the father of the plaintiff/appellant the presumption of advancement has been rebutted. By the grounds of appeal, the appellant is inviting this court to rehear the case, that is, he is impressing upon this court that there are certain pieces of evidence on the record which, if applied in his favour could have changed the judgment in his favour, or there are certain pieces of evidence that have been wrongly applied against him. The summary of the duty of this court where the appellant is alleging that the judgment of the trial High Court is against the weight of evidence could not be better stated than what Akamba JSC said in Nortey (No. 2) v African Institute of Journalism and Communication & Others (2013-2014) 1 SCGLR 703 after referring to Tuakwa v Bosom (2001-2002) SCGLR 61; Quarcoopome v Sanyo Electric Trading Co Ltd (2009) SCGLR 213; Oppong v Anarfi (2011) 1 SCGLR 556 "that an appeal is by way of rehearing, particularly, where the appellant alleges as in the omnibus ground that the decision of the trial court is against the weight of evidence. In such a case, it is incumbent on an appellate court such as this, 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 probabilities, that the conclusions of the trial judge are reasonably or amply supported by the evidence". There is no dispute that the late Emmanuel Fynn-Sackey, the father of the appellant acquired house number J81, Buade, Nungua in the name of the appellant. Indeed, the evidence showed clearly that the late Emmanuel Fynn-Sackey acquired the said property in 1998 and that the payment for that property was made solely by him. However, the late Emmanuel Fynn-Sackey took the conveyance of the property in the name of his son, the appellant. Exhibit C series eloquently speak to the fact that the late Emmanuel Fynn-Sackey did not only acquire the land on which the building was constructed in the name of his son, the appellant, but all other documents including the building plan are also in the name of the appellant. For all intends and purposes therefore, the presumption of advancement of the property in favour of the appellant was manifestly clear. This is expressive of the law that when a father like the late Emmanuel Fynn-Sackey obtains a conveyance of a property in the name of his son like the appellant, the presumption is that of advancement in favour of his son. (See Juliana Richards vs. Jimmy Nkrumah (2013-2014) SCGLR 1577) In the case of Sasu-Twum v Twum (1976) 1 GLR 23, Abban J (as he then was) expatiated the law in words that I hereby adopt when he held that: "a father was under an obligation to support or make provision for his child. So where the father took conveyance of property in the name of his child, as in the present case, there would be a presumption of advancement in favour of the child. In other words, there would be a presumption that the father intended to part with both his legal and beneficial interest in the property to the child and that the property was intended to be a gift to the child" It must be remarked that the presumption of advancement arising from a father obtaining conveyance of a property in the name of his child is held so strong in the corridors of the common law such that there is no room for one to even

question the unreasonableness or otherwise of the advancement. Thus, in the Sasu Twum case supra, the deceased father had four sons and yet he acquired two of his properties in the name of his first son. It was therefore argued that it would not be reasonable to advocate presumption of advancement of those two properties in favour of the first son and that the Court should resort to equitable construction so as to achieve the goal of making all the four sons to equally benefit from those two properties. The High Court per Abban J citing the case of Northern Canadian Trust Co. v. Smith

(1947) 3 DLR 135, C. A. expressed the view, which view I endorse in toto, that: "there was nothing to prevent a father from advancing one child at the expense of other children, so long as there had been no duress, fraud or undue influence and furthermore the law did not put it upon the child or the person alleging the presumption of advancement to prove the reasonableness of the gift. The act of advancement was one within the father's right, however unreasonable or unjust towards the others might appear" In Richards (Juliana) v Nkrumah case supra, where the deceased father obtained conveyance of a property in Kumasi in the name of his sons, the High Court gave judgment in favour of the sons on the basis of presumption of advancement and an appeal against that judgment was dismissed and further appeal to the Supreme Court was also dismissed, all the courts upholding the presumption of advancement in favour of the sons. An advancement being a presumptuous intention of a gift from a father to his child is essentially rebuttable. The presumption of advancement might be rebutted by evidence of a contrary intention deducible from the act or declaration of the parties before or at the time of the transaction. It is trite that the burden of rebutting the presumption of advancement is on the party disputing the advancement. Indeed section 20 of the Evidence Act, 1975 (NRCD 323) provides that: "A rebuttable presumption imposes upon the party against whom it operates the burden of providing evidence and the burden of persuasion as to the non-existence of the presumed fact" Abban J in the Sasu Twum case emphasized that evidence in rebuttal of presumption must be strong, such as a contemporaneous, not subsequent, declaration or act of the father manifesting a clear intention that the child is to hold as a trustee; so that even if the subsequent acts of the deceased were admissible, they would be of no value, and would have no weight sufficient to offset the presumption, especially because they could not be a guide to his intentions. In this appeal the argument of the appellant in the main is that there does not exist sufficient evidence on the record capable of rebutting the presumption of advancement. The trial High Court held otherwise; holding that there exist pieces of evidence that rebutted the presumption of advancement. The pertinent question that this court ought to answer therefore is whether the presumption of advancement in favour of the appellant was effectively rebutted on the preponderance of the evidence. In my view, contrary to the holding by the trial high court, the presumption of advancement was not rebutted. The respondents on whom the burden of rebutting the presumption lies failed to adduce cogent and sufficient evidence relating to any conduct or declarations or statements made by the late Emmanuel Fynn-Sackey before or at the time of the conveyance or contemporaneous with the conveyance that was

contrary to the intention of the gift or out of which one can infer that the father did not actually intend the property to go to appellant as a gift. The position of the law as to the sort of evidence capable of rebutting presumption of advancement is that the evidence must not only be strong and convincing but must also relate to conduct or statements made before or contemporaneous with the execution of the conveyance. Thus the Supreme Court in the Juliana Richards case supra approved and adopted the legal position stated by Abban J (as he then was) in the Sasu-Twum case supra in the following words: "There was evidence of subsequent activities by the deceased father before the Court. There was evidence that upon completion of one of the houses, the father occupied it with the plaintiff and the children. He (deceased) later moved out and let it out to tenants. There was evidence also that the deceased collected the rents and made use of same. Of all these subsequent activities, Abban J held that such subsequent acts and dealings of the father in relation to the house were inadmissible to rebut the presumption. What could rebut the presumption was evidence that at the time he caused the houses to be put in the name of the eldest son, the father made some statements which tended to indicate that he never really intended to advance those houses to that son. The 'Sasu' decision is a correct summation of the present state of the law on advancement in Ghana, which we affirm" As observed earlier on, the respondents did not live up to the expectation regarding the discharge of the burden of rebutting the presumption of advancement on them. A close look at the relevant paragraphs of their statement of defence underscores the failure of respondents to proffer effective rebuttal to the claim of appellant which was essentially on the advancement. The relevant paragraphs of the eleven paragraph statement of defence read as follows: "6. If indeed the site plan is in the name of the plaintiff, the same did not confer title to him; 7. by the pleadings of the plaintiff, he came to the knowledge of the site plan being in his name recently and this is long after the said site plan had been made and the property acquired by the deceased father 8. the defendants aver that the plaintiff did not make any financial or other contribution towards the acquisition of the said property and therefore has no legal interest in the same apart from his interest as a son of the deceased 9. in further answer, the defendants aver that all the properties acquired by the deceased father form part of his estate 10. the deceased during his lifetime never gifted any of his properties to any of his children" It may be observed that there was no averment in the defence relating to any conduct, statement or declaration of the late father of appellant before or at the time or even contemporaneous with the execution of Exhibit C, the conveyance in the name of the appellant, that would have had the least probative value going into negating the intention of the gift of the property in favour of appellant. On this score, the was no justifiable reason that supports the dismissal of the appellant's case. The learned trial judge claimed he was persuaded by the respondents' argument that since in 1998 when the appellant's father took the conveyance in the name of the appellant, the latter was twenty years and yet Exhibit C, the conveyance document, was signed by the father, the father did not intend that property to be an advancement to the appellant. The learned trial judge concluded therefore that the fact that the appellant's father signed Exhibit C is an act contemporaneous with the execution of the instrument of conveyance

that constituted a high probative and convincing of the fact that appellant's father did intend the appellant to hold the subject property on a resulting trust to his estate. In our considered view, the learned trial judge was wrong in coming to that conclusion. Exhibit C is a document that speaks for itself. Exhibit C names Edward Fynn-Sackey, the appellant, as the lessee and on the face of it "was signed, sealed and delivered by Edward Fynn-Sackey, the within named Lessee". The document was witnessed by Emmanuel Fynn-Sackey, appellant's late father. In the absence of any proof of deceit or fraud, what appears on the face of Exhibit C is entitled to its due weight and that it will be perceptibly wrong for one to allow oral evidence to disavow the contents of Exhibit C, especially so when one of the key parties to the document, Emmanuel Fynn-Sackey, is dead and cannot speak to it. At any rate the effectiveness of an indenture does not depend on the signature of the lessee but rather the signature of the lessor. Section 1(1) of the Conveyancing Act, 1973 (NRCD175) provides that "A transfer of an interest in land shall be by writing signed by the person making the transfer or by the agent of that person duly authorized, unless relieved against the need for a writing by section 3". In effect, as long as Exhibit C was signed by the lessor its effectiveness cannot be impugned just because of any controversy as to who signed it as a lessee. It appears from the record that the learned trial judge was influenced by the majority decision of the Supreme Court in the case of Hannah Kwarteng v. Adwoa Tiwa & Adwoa Fosuaa (2017-2018)1 SCLRG 595 in which Gbadegbe JSC attempted to modify the standard of proof of rebuttal of presumption of advancement by saying that: "The proof of a rebuttal presumption is not limited to only acts which accompany the purchase, but may extend to subsequent acts, such as the conduct of the purchaser and the person in whose name the legal title resides" This position of the law conflicts with the same apex court decision which endorsed Abban J's statement of the law in the Sasu's case in the Juliana Richards' case. It is a matter of concern to observe that the majority of the Supreme Court made no reference to the Juliana Richards' case and, quite importantly, there was no indication that they were departing from their decision in the Juliana Richards case. In any event, the facts of the case in the Juliana Richard case where the court considered an advancement from a father to sons are more in accord in this case where we are considering an advancement from a father to a son than Hannah Kwarteng's case where the purported advancement being from an uncle to a nephew was unknown in common law. Anin Yeboah JSC (as he then was) rightly observed in his dissenting opinion in the Hannah Kwarteng's case that "the presumption of advancement has stood for close to two centuries and the common law courts have been very strict in limiting the class of people who can raise the presumption in their favour" We will therefore follow the position of the law as spelt out by the Supreme Court in the Juliana Richards case in which case I will regard as wrong the attempt by the trial judge to giving probative weight to subsequent acts of the late father of appellant in holding that such subsequent acts rebutted the presumption of advancement. In conclusion, the appellant's case deserved favourable judgment and there was no justifiable legal or factual basis for the trial high court to dismiss his claim. Accordingly, the appeal succeeds and the judgment of the trial court is set aside. Judgment is entered for the appellant. It is hereby declared that in

acquiring H/No J81 in the name of the plaintiff (appellant) his late father intended it as a gift to him and that the said property does not form part of the estate of the deceased father. Costs of GH¢10,000.00 for Appellant SGD ..... JUSTICE ANTHONY OPPONG (JUSTICE OF THE COURT OF APPEAL) SGD I AGREE ..... JUSTICE HENRY KWOFIE (JUSTICE OF THE COURT OF APPEAL) SGD I ALSO AGREE ..... JUSTICE RICHARD ADJEI-FRIMPONG (JUSTICE OF THE COURT OF APPEAL) COUNSEL: SOLOMON KOFI ADDO FOR PLAINTIFF/APPELLANT AKUA AMERLEY FOR DEFENDANT/RESPONDENT 11

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