AMUZU v OKLIKAH
[1997-98] 1 GLR 89

Division: SUPREME COURT, ACCRA

Date: 26 MARCH 1997

Before: AIKINS, CHARLES HAYFRON-BENJAMIN, AMPIAH, ATUGUBA AND AKUFFO JSC

Land registration—Registration—Agreement for sale of land—Whether "instrument" within section 36 of Act 122—Whether appellant's contract for sale of land registrable instrument under section 24(1) of Act 12—Land Registry Act, 1962 (Act 122), ss 24(1) and 36.

Practice and procedure—Pleadings—Fraud—Mode of pleading fraud—Failure of appellant to plead respondent's fraud in acquiring land already purchased by appellant from vendor—No objection by respondent to appellant's evidence—Whether court to find fraud against respondent even though not pleaded by appellant—Evidence Decree, 1975 (NRCD 323), ss 5, 6 and 11—High Court (Civil Procedure) Rules, 1954 (LN 140A), Order 19, rr 6 and 16.

Land registration—Instruments affecting land—Registration—Priorities—Effect of equitable doctrines of notice and fraud—Equitable doctrines not abolished by Act 122—Court obliged to interprete Act 122 not to facilitate fraud—Respondent with actual notice of appellant's prior purchase of land in dispute before purchasing same land from vendor—Whether respondent bound by contract between appellant and vendor—Whether respondent's registered document, exhibit B, acquiring priority over appellant's unregistered document from vendor—Act 122, s 24(1).

Land registration—Instruments affecting land—Non-registration, effect of—Unregistered document not null and void—Circumstance in which unregistered document enforceable—Act 122, s 24(1)—Conveyancing Decree, 1975 (NRCD 175), s 1(1) and (2).

HEADNOTES

If 1(1)2 2 [sic] is provided by section 24(1) of the Lands Registry Act, 1962 (Act 122) that:

> "24. (1) Subject to subsection (2), of this section, an instrument other than,
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> (a) a will, or
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> (b) a judge's certificate
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> first executed after the commencement of this Act shall be of no effect until it is registered."

In October 1987 the appellant, on behalf of his principal, agreed to purchase from the vendor a piece of land with an uncompleted building on it for ¢9 million. The parties agreed that the appellant was to pay a deposit of ¢4.5

million which the vendor was to use in completing the building and the balance to be paid on completion of the building and transfer of the property to the appellant. The parties reduced the transaction into writing, exhibit D dated 30 November 19987. The appellant duly paid the deposit. After a few months when the vendor failed to carry on with the work on the building, the appellant took possession of the land and continued with the construction of the building at his own expense. However, on or about 11 May 1988 while the appellant was still in possession of the land, the vendor surreptitiously granted the same piece of land to the respondent for ¢6.5 million and hurriedly prepared and executed a conveyance, exhibit B, for the respondent who had it duly stamped and registered with the Land Registry. The appellant, however, resisted an attempt by the respondent to enter the land. The respondent therefore brought an action at the circuit court against the appellant for, inter alia, declaration of title to the land. The appellant resisted that claim and also counterclaimed for a similar relief. At the trial the circuit court found, inter alia, that: (i) not only did the respondent who was a friend of the plaintiff's principal know of the sale of the disputed plot to the appellant but had sought the appellant's assistance to be sold the plot next to the disputed one; (ii) the respondent was aware that the appellant had taken possession of the uncompleted building on the land and was carrying on with further construction to complete it. However, the trial judge gave judgment for the respondent and dismissed the appellant's counterclaim on the ground that the title deed of the respondent, exhibit B, had fully described his root of title, had been stamped and registered under the Lands Registry Act, 1962 (Act 122), while the appellant's document, exhibit D, had neither described his root of title nor had been registered under Act 122, and therefore, by the provision of section 24(1) of Act 122, exhibit D was ineffective and invalid. An appeal by the appellant from that judgment to the Court of Appeal was also dismissed on the grounds that: (a) the appellant's document, exhibit D, was an instrument under sections 24(1) and 36 of Act 122 and since it had not been registered, it had no priority over the respondent's document, exhibit B; (b) although the respondent had notice of the appellant's prior interest and possession, yet the provisions of section 24(1) of Act 122 were so categorical that the common law principles of notice and fraud could not be invoked to create exceptions to it; and (c) since the appellant had not pleaded the issue of fraud during the trial, he could not rely upon it on appeal. Dissatisfied with that decision, he appealed from it to the Supreme Court.

Held allowing the appeal:

(1) (Aikins JSC dissenting) an agreement for sale of land clogs the land in an estate particular. It was therefore an instrument affecting land within the definition of "instrument" in sections 36 of the Land Registry Act, 1962 (Act 122). Accordingly, since in the instant case, the appellant's contract for sale of land was a writing affecting land manifestly situated in Ghana, it was a registrable instrument within section 24(1) of Act 122.

(2) Although contrary to the requirement of Order 19, rr 6 and 16 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) that fraud had to be specifically pleaded and the particulars given in the pleading, the

appellant failed to plead the respondent's fraud, yet since the respondent did not object to the appellant's evidence that the respondent had been aware of the fraud perpetrated by the vendor and as such he was a particeps criminis, the respondent had not been taken by surprise when the issue of fraud was raised. Accordingly, by the provisions of sections 5, 6 and 11 of the Evidence Decree, 1975 (NCRD 323) the court was entitled to make its own inferences and findings on the issue and interpretation of any legislation relevant to the issue of fraud. Since from the record the evidence of

the respondent's fraud was clear, the court would not ignore it, notwithstanding the fact that it had not been pleaded by the appellant.

(3) The Land Registry Act, 1962 (Act 122) did not abolish the equitable doctrines of notice and fraud and neither had it conferred on a registered instrument a state-guaranteed title. Besides, since equity would not permit a statute to be used as an instrument of fraud or inequitable conduct, section 24(12) of Act 122 should not be interpreted in a way that would facilitate fraud in the acquisition and sale of lands. Accordingly, a later executed instrument could only obtain priority over an earlier one by registration under section 24(1) of Act 122 if the later instrument was obtained without fraud and without notice of the earlier unregistered instrument. Thus registration did not create an absolute title. Accordingly, in the instant case, the respondent's later instrument, exhibit B, could not take priority over the appellant's earlier instrument, exhibit A, by its registration under section 24(1) of Act 122 because since the respondent had actual notice of the appellant's purchase of the disputed property, he would be held to have had constructive notice of and to have been bound by the contract of sale between the appellant and the vendor, and the terms of the contract including equities which under the contract the appellant had against the vendor. Accordingly, the judgments of the High Court and the Court of Appeal would be set aside. *Hockman v Arkhurst* (1921) FC '20-'21, 101 and Crayem v Consolidated African Trust Ltd (1949) 12 WACA 443 applied. *Boateng v Dwinfour* [1979] 360, CA cited. *Asare v Brobbey* [1971] 2 GLR 331, CA not followed.

(4) Non-compliance with the provision of section 24(1) of Act 122 did not render an instrument null, void or invalid. Its effectiveness at law was deferred until or unless it was so registered. However, by the provisions of section 1(1) and (2) of the Conveyancing Decree, 1973 (NRCD 175) a document affecting land even if unregistered could be enforced against a vendor who sought to overreach the holder of that document, who could also use the unregistered document in an action for specific performance against the vendor.

CASES REFERRED TO

(1) Boateng v Dwinfour [1979] GLR 360, CA.

(2) Botchway v Okine [1987-88] 2 GLR 1, CA.

(3) Donkor v Alhassan [1987-88] 2 GLR 253, CA.

(4) Odoi v Hammond [1971] 1 GLR 375, CA.

(5) Lysaght v Edwards (1876) 2 Ch D 499.

(6) Hadley v London Bank of Scotland Ltd (1863) 3 De J & Sm 63;12 LT 747; 46 ER 562.

(7) Crayem v Consolidated African Trust Ltd (1949) 12 WACA 443.

(8) Hockman v Arkhurst (1921) FC '20-'21, 101.

(9) Amefinu v Odametey [1977] 2 GLR 135, CA.

(10) Nasali v Addy [1987-88] 1 GLR 143, SC.

(11) Odametey v Clocuh [1989-90] 1 GLR 14, SC.

(12) Clerical Medical & General Life Assurance Society v Carter (1889) 22 QBD 444, CA.

(13) Fanny M Carvill River Wear Commissioners v Adamson (1876) 1 QBD 546.

(14) Calidonian Rail Co v North British Rail Co (1881) 6 AC 114, HL.

(15) Asare v Brobbey [1971] 2 GLR 331, CA.

(16) Hammond v Odoi [1982-83] GLR 1215, SC.

(17) Ussher Darko [1977] 1 GLR 476, CA.

(18) Khoury v Khoury (1952) 12 WACA 261, PC.

(19) Khoury v Azar (1952) 12 WACA 268, PC.

(20) Nartey v Mechanical Lloyd Plant Ltd [1987-88] 2 GLR 314, SC.

(21) Ntem v Ankwandah [1977] 2 GLR 452, CA.

(22) Mansah v Asamoah [1975] 1 GLR 225, CA.

(23) Akrofi v Wiresi (1957) 2 WALR 257, WACA.

(24) Crowly v Bergthail [1899] AC 374.

(25) Ashanti Construction Corporation v Bossman [1962] 1 GLR 435, SC.

(26) Kuenyehia v Archer [1993-94] 2 GLR 525, SC.

(27) National Assistance Board v Wilkinson [1952] 2 QB 648; [1952] All ER 255; [1952] 2 TLR 11, DC

(28) Ahumah v Akorli (No 2) [1975] 1 GLR 473.

(29) Adu v Kyereme [1984-86] 1 GLR 1; [1984-86] GLRD, CA.

(30) In re Markham (Decd); Markham v Afeku [1987-88] 1 GLR 34; CA.

(31) Djomoa v Amargyei [1961] GLR 170, SC.

(32) Okofoh Estates Ltd v Modern Signs Ltd [1995-96] 1 GLR 310, SC; [1996-97] SCGLR 224.

(33) Asamoah v Servordzie [1987-88] 1 GLR 67, SC.

(34) Atta v Adu [1987-88] 1 GLR 233 SC.

(35) Samarasinghe v Sbaiti [1977] 2 GLR 442, CA.

(36) Schandorf v Zeini [1976] 2 GLR 418, CA.

(37) Abdilmasih v Amarh [1972] 2 GLR 414.

(38) Surakatu v Dende (1941) 7 WACA 50.

(39) Creaves v Tofield (1880) 14 CRD 563.

(40) Wyatt v Barwell (1815) 19 Ves 435.

(41) Mahama v Soli [1977] 1 GLR 205, CA.

(42) Maclean v Akwei [1991] 1 GLR 54, CCA.

(43) Bannerman v Fretete Odomankoma Jewellery Ltd [1989-90] 1 GLR 534, CA.

NATURE OF PROCEEDINGS

APPEAL from the unanimous decision of the Court of Appeal, dismissing an appeal by the defendant from the decision of the Circuit Court, Accra, which had granted, inter alia, the plaintiff's claim for declaration of title to and possession of the disputed land and had dismissed the defendant's counterclaim for title to and possession of the same land. The facts are sufficiently stated in the judgment of Ampiah JSC.

COUNSEL

Kwami Tetteh (with him Dr Baku) for the defendant-appellant.

E D Kom (with him T E K Amesimeku and Nyahe) for the plaintiff-respondent.

JUDGMENT OF AIKINS JSC.

On 5 March 1997 this court gave a unanimous judgment allowing the appeal of the defendant-appellant (hereinafter referred to as the appellant), setting aside the judgment of the Court of Appeal together with that of the trial High Court, and granting possession of the disputed house to the appellant and perpetual injunction restraining the plaintiff-respondent (hereinafter referred to as the respondent), his agents, privies and assigns from interfering in any way with the disputed property. I now give my reasons for concurring with the decision of the court.

The respondent in this case secured judgment in the Circuit Court, Accra on 16 February 1994. The learned trial judge based his judgment on the fact that the title deed of the respondent,

exhibit B, had fully described his root of title, was stamped and registered under the Lands Registry Act, 1962 (Act 122); while the appellant's document, exhibit D, had not described his root of title in full and though duly stamped, had not been registered under Act 122, and therefore caught by section 24(1) of Act 122. However, the trial judge found as a fact that the respondent was aware of the appellant's prior interest in the property at the time the respondent purchased it.

Dissatisfied with the decision of the trial judge, the appellant appealed to the Court of Appeal which unanimously dismissed the appeal, and as a result this court is called upon to overturn the decision of the Court of Appeal by the defendant-appellant. The Court of Appeal held that:

(a) Exhibit D was an instrument under sections 24(1) and 36 of Act 122, and since it was not registered the respondent's deed had priority.

(b) Though the respondent had notice of the appellant's interest and possession, yet the provisions of 24(1) are so categorical that the common law principles of notice and fraud cannot be invoked to create exceptions.

(c) Even though Boateng v Dwinfour [1979] GLR 360 and Botchway v Okine [1987-88] 2 GLR 1, CA also esta-

blish that the equitable doctrines of notice and fraud have not been abolished, they are distinguishable in the sense that the appellant cannot properly base his case on fraud in the absence of pleading and particularising the fraud during the trial or by amendment before it could be relied upon. Secondly, though the conduct of the respondent may be descried as being unconscienable3(2)sic or without scruples, he can hardly be said to have acted fraudulently, and that the conduct of the vendor could not be attributed to the respondent.

However, the Court of Appeal found as a fact that: (i) the respondent, his representative in Ghana, and his agent had prior knowledge of Dotse's purchase through the appellant, and possession of the disputed property, and (ii) when the appellant stated categorically that "the plaintiff was aware that Dotse bought the property in dispute", he was not cross-examined or in any way challenged on these averment, and recommended that Act 122 deserves urgent attention and review "that would meet the hardships encountered by innocent purchasers of land without doing violence to the integrity of the Land Registry regime."

The appellant raised very important and thought provoking legal issues in his first five grounds of appeal, namely,

"(a) The Court of Appeal erred in holding that the respondent was entitled to the reliefs sought even though he had notice of the prior interest and possession of the appellant.

(b) The Court of Appeal misdirected itself by non-direction on the principle that even if an equitable interest in a property is contained in an unregistered document, a subsequent purchaser with notice of such equitable interest takes the legal title subject to equity.

(c) The Court of Appeal erred in not applying the principle that section 24 of Act 122 did not render an unregistered document void, and that the equity recorded therein also did not become void, and a purchaser with notice of such interest would become charged with notice of the equity.

(d) The Court of Appeal erred in overlooking the principle that registration under Act 122 does not confer title where there is none, and that a subsequent buyer acquires no interest whatsoever in law unless he is a bona fide purchaser for value without notice.

(e) The Court of Appeal erred in holding that Act 122 protects a purchaser who buys with notice of prior purchase of the same property."

Later two further grounds of appeal were filed by the appellant, namely:

"(i) The learned judges below erred in holding that exhibit D is an instrument within the meaning and ambit of Act 122.

(ii) The Court of Appeal erred in raising suo motu the pleading point that the appellant ought not to be heard on fraud because he did not plead fraud."

The main reason for the Court of Appeal's dismissal of the appeal is that the appellant's document, exhibit D, is an instrument under sections 24(1) and 36 of Act 122, and that it was caught squarely under Act 122 as it was not registered vis-a-vis the respondent's title deed which was registered. Brobbey JA said in his judgment:

"Mr Kwame Tetteh was right in his contention that the decided cases seem to draw a distinction between the two meanings assigned to the word 'affect' in section 36. In Donkor v Alhassan [1987-88]

2 GLR 253, CA this court held that a receipt did not transfer interest. At least that provided an instance of the circumstance when a document may be said to relate to or concern land but will not necessarily transfer interest in the land. In the instant case, exhibit D is explicit on its face by the words used that title in the disputed property will be passed in the future."

(The emphasis is mine.) The learned justice continued later:

"This is a clear case in which law and equity conflict. The equity in the case is the resulting trust which gave rise to the equitable interest upon payment of the ¢4.5 million by Dotse to the vendor. The equitable interest was in writing but it was not registered. By all the authorities referred to in this judgment and Act 122, s 24(1), that unregistered interest conveys no valid title even though it was prior in time. The equitable interest created in exhibit D therefore conveyed no valid title."

(The emphasis is mine.) On the same issue Afreh JA has this to say:

"Exhibit D is an an agreement to transfer an interest in land. The defendant relies upon it for his counterclaim for a declaration of title to the disputed property. And in argument in the court below and before this court counsel for the defendant argued that the immediate effect of exhibit D as a binding contract was to pass the equitable title in the land to the purchaser, the defendant. In my opinion even applying the interpretation of the words 'affecting land' as meaning transfering or 'moving title', exhibit D is an instrument under sec 36 for it purports to create an interest in land."

(The emphasis is mine.).

Clearly there is a confusion of thought here. While Brobbey JA is saying that exhibit D is explicit on its face that title in the disputed property will be passed in the future, Afreh J A says that exhibit D is an agreement to transfer an interest in land, and that the exhibit is an instrument under section 36 of Act 122 for it purports to create an interest in land. Which dictum is correct in law? Section 36 of Act 122 simply defines "instrument" as "any writing affecting land situate in Ghana." The question is, does exhibit D purport to transfer an interest in land? To me it does not. According to the interpretation of Afreh JA, because exhibit D is a writing affecting land situate in Ghana, by his interpretation of section 36 of Act 122, the exhibit creates an interest in land. This is a statement based on a fallacy. The learned judge supports his argument with the dictum of Azu Crabbe JA (as he then was) in

Odoi v Hammond [1971] 1 GLR 375 at 391, CA. Even though it may be said that exhibit D is a document in writing affecting land situate in Ghana, it is not a deed or a conveyance. It does not purport to create an interest in land. Paragraph (1) of the agreement (ie exhibit D) talks about the purchase money of the property, ie ¢9 million; paragraph (2) talks about the undertaking of the vendor to complete the house within two months from the date of the agreement; paragraph (3) talks about the purchaser paying the balance of the purchase money, ie ¢4.5 million to top up the ¢4.5 million down payment on completion of the house. The paragraph continues: "The purchaser paying the balance of his purchase-money shall be let into possession of the said property." Then comes paragraph (4) which states:

"4. The vendor shall within fourteen days from the date hereof deliver and surrender to the solicitors for the purchaser, Messrs Fugar and Co of Kuottam House, Kojo Thompson Road, Tudu the title deeds on the property."

(The emphasis is mine.)

It is clear from the foregoing, that exhibit D relates to the surrender of the title deeds on the property at a future date, ie fourteen days after the purchaser has been let into possession as correctly stated by Brobbey JA vis-à-vis a conveyance (or title deed) in writing by which an interest in land is transferred. Azu Crabbe JA (as he then was) deals with the latter in the passage quoted by Afreh JA, ie in Odoi v Hammond (supra) at 391, CA. The passage reads:

> "In section 36 it is provided that, unless the context otherwise requires, 'instrument' means any writing affecting land situate in Ghana, including a judge's certificate and a memorandum of deposit of title deeds.' Surely, exhibit E is a 'writing affecting land situate in Ghana,' for it purports to confirm or revive an interest in land, and, therefore, it is caught squarely by section 24."

(The emphasis is mine.)

By this reasoning Azu Crabbe JA (as he then was) is not saying that because exhibit E is a "writing affecting land situate in Ghana" it necessarily purports to confirm or revive an interest in land, and, therefore it is caught squarely by section 24 of Act 122. What I understand him to be saying is that because exhibit E purports to confirm or revive an interest in land, it is a writing affecting land situate in Ghana, and therefore caught by section 24 of Act 122. Exhibit D in the instant case does not purport to confirm or revive or create an interest in land. Hence Alfreh JA was in error when he stated in his judgment that "Exhibit D is an instrument under section 36 of Act 122 for it purports to create an interest in land."

Brobbey JA's dictum was not free from error either. The learned judge cited Donkor v Alhassan [1987-88] 2 GLR 253, CA to show that unlike exhibit D, a receipt did not transfer interest, stressing that that case provided an instance of the circumstance when a document may be said to relate to or concern land but will not necessarily transfer interest in the land. In other words, if exhibit D had been a receipt or had not been reduced into writing it would have been taken out of the ambit of section 24(1) of Act 122. In that case it was held, as stated in the headnote, that:

> "(1) the receipts, exhibits A and B, were not meant to transfer by themselves any interests in land but only evidenced payment in pursuance of an agreement to transfer an interest in land. They were therefore not required to be registered under the Land Registry Act, 1962 (Act 122), s 24(1) to be effective.
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> (2) Since the agreement between the parties was one for the transfer of an interest in land its enforceability depended upon whether or not it was in writing and satisfied the requirements of section 2(a) of the Conveyancing Decree, 1973 (NRCD 175). On the evidence, the receipts, exhibits A and B, showed the payment of money by the respondent to the appellant for the transfer of the appellant's interest in the house, both had been signed by the appellant, and were clear as to the intention of the parties . . .
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> (4) Since there had been full payment for an identifiable house and all that was left to be done was the execution of an

> instrument of transfer to the respondent, provided there had been no fraud, duress or unconscionability, the court could enforce the contract."

The particulars of the receipt in the Donkor case (supra) can be gleaned from the foregoing holdings, namely,

(i) the exhibits A and B were not meant to transfer by themselves any interest in the land but only evidential payment in pursuance of an agreement to transfer an interest in land;

(ii) the agreement between the parties was one for the transfer of an interest in land; its enforceability depended upon whether or not it was in writing and satisfied the requirements of section 2(a) of NRCD 175; and

(iii) "there had been full payment for an identifiable house and all that was left to be done was the execution of an instrument of transfer to the respondent, provided there had been no fraud, duress or unconscionability . . . "

The above particulars fit in harmoniously with the particulars in exhibit D:

(i) exhibit D was not meant to transfer by itself any interest in the disputed property but only evidenced payment in pursuance of an agreement to transfer an interest in land;

(ii) the agreement between the appellant and the vendor was one for the transfer of an interest in land, if certain conditions are fulfilled, but does not by itself per se transfer an interest in land; and

(iii) there had been part-payment for the identifiable house and all that was left was for the vendor to complete the house within two months from the date of the agreement, payment of the balance and the execution of an instrument of transfer to the appellant.

What then is the difference between the receipt in the Donkor case (supra) and exhibit D in the instant case for the receipts to qualify to be taken out of the ambit of section 24(1) of Act 122 and not exhibit D? In my view, inasmuch as the receipts are not

caught by section 24(1) of Act 122, exhibit D too cannot be caught by that section, and for that alone the appeal must succeed.

However, there are other issues to be considered. For example whether the respondent had prior notice of the appellant's equitable interest in the disputed property and also the fraud perpetrated by the vendor. There is ample evidence on the record that the respondent or his representative or agent or both were aware of the prior purchase of the property in dispute by the appellant, and that the appellant was in occupation of the house at the time the respondent negotiated to buy the property. Yvonne Odoley Sackey, the first plaintiff witness, an agent of the respondent put it clearly in the following dialogue:

"Q Did you ask the vendor to give you the identity of who had made part-payment?

A He told us he was a friend to Dr Oklikah.

Q Did you ask him?

A Yes, but he was reluctant to give us the name. And on hearing that the person who was purchasing the property was [the friend of] the plaintiff [we] told the vendor to try and get him the house next door to buy."

The vendor, the first plaintiff witness, also made the following statement:

"Q In any case it was Mr Dotse who first made a request . . . in respect of the payment of that property and no one else?

A It was Mr Dotse.

Q By Col Amuzu on behalf of Mr Dotse?

A Yes, Amuzu on behalf of Dotse.

The evidence of the appellant before the trial court was to the effect that in response to an advertisement by the appellant that he and one Mr. Yomegbe were looking for landed property to purchase, the vendor, Mr. Clement Quartey-Papafio, took them to the disputed property, and after inspection they came back to Accra to bargain for the purchase of the property. The appellant said, inter alia:

> "We settled on ¢9 million as the purchase price when it was fully completed. Quartey-Papafio was to fix the materials into the building for completion. We agreed to pay ¢4.5 million at the time; and the balance of ¢4.5 million after all these have been fixed. We put them into writing and the lawyer signed it (exhibit D)."

The law is settled that the moment such a valid contract for sale is concluded the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser. However, the vendor has the right to the purchase money (a charge or lien on the estate for the security of that purchase), and also a right to retain possession of the property until the purchase money is paid, of course, provided there is no express contract as to the time of delivering possession: see dictum of Jessel MR in Lysaght v Edwards (1876) 2 Ch D 499 at 506. At 507 of the report the Master of Roles explained what a "valid contract" is. He said:

> "'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser—a contract binding on both parties."

The law is also clear that upon entering into such clear valid contract for sale, the court will not allow the vendor to transfer afterwards the legal estate to a third person, though such third person would be affected by lis pendens. The property is under such situation (in equity) transferred to the purchaser by the contract, and the vendor will not be permitted to deal with the property so as to inconvenience him. See also the dictum of Turner LJ in Hadley v London Bank of Scotland Ltd (1865) 3 De J & Sm 63 at 70 which was cited with approval in Lysaght v Edward (supra).

The learned editors of Snell's Principles of Equity (27th ed) at p 188 also clarified the situation as follows:

> "As soon as a specifically enforceable contract for sale of land is made, the purchaser becomes the owner of the land in equity, and the vendor becomes a constructive trustee of the

> land for the purchaser, subject in each case to their respective rights and duties under the contract."

This has been given statutory authority by primary legislation in section 3(1)(b) of our Conveyancing Decree, 1973 (NRCD 175) which dispenses with the requirement of evidencing such contract for sale in writing signed by the person against whom the contract is to be proved, when it is being enforced in a court of competent jurisdiction.

It is necessary for this court to emphasise that a later instrument can only obtain priority over an earlier one by registration if it was obtained without fraud and without notice of the earlier unregistered instrument. Where a party has actual notice that the property was in some way encumbered, he would be held to have constructive notice of all that he would have discovered. In the instant case, since the

respondent admitted that prior to the sale of the property to him he was aware that the house was being occupied by persons other than the vendor, he was in duty bound to investigate fully the title of the vendor. Failing such investigation before purchasing the property, he must be deemed in equity to have had notice of all that a reasonably prudent purchaser would have discovered. He cannot be said to be an innocent purchaser for value without notice. The property was encumbered by the contract for sale, and since that contract had not been terminated the property could not be deemed to be legally or properly back to tender.

The case of Crayem v Consolidated African Trust Ltd (1949) WACA 443 reviewed a number of cases, including Hochman v Arkhurst (1920) 1 FC '20-'21, 102 which dealt with priority between two leases of the same land by the same grantor to two different persons, and arrived at the conclusion that a later instrument can by registration obtain priority over an earlier one only if it was obtained without fraud and without notice of the earlier unregistered instrument. Lemey JA who delivered the judgment of the court referred with approval the following dictum of Nettleton J relative to the law on the subject, in the Hochman case (supra) at 105:

> "Now it is an elementary principle of law that Nemo dat quod non habet, in other words a vendor of land can give no better title than he possessed himself, and if the Stool had in fact sold to the Plaintiff . . . in 1914 (remaining in law a constructive trustee for him until his legal estate was perfected by conveyance) a subsequent conveyance by the same Stool of the same piece of land to another party, i.e., the Defendant, would clearly not avail the latter. But if the Defendant bought the land . . . from the Stool without notice actual or constructive of the sale to the Plaintiff, and obtained a proper assurance in the shape of a conveyance as a bona fide purchaser for value, and without being a party to any fraud, and without notice registered it in the Lands Registry, the position is altered . . ."

In the Hochman case (supra) Hochman bought a plot of land from the Omanhin of Sekondi in 1914 and paid for it, but he got no deed then, and he went up country leaving the plot lying vacant. In 1918 the Omanhin's deputy sold the same land to Arkhurst and executed a deed in his favour, which deed was registered as No 448/1918. Hochman returned in 1919 to find Arkhurst in possession. He then obtained a deed from the Omanhin which he registered as No 407/1919. Hochman sued Arkhurst in the native tribunal and obtained judgment. Arkhurst appealed to the Provincial Commissioner, who reversed the decision of the tribunal on the ground that the evidence did not justify the tribunal finding that Arkhurst purchased with notice of Hochman's claim to the property. The Full Court agreed with the decision of the Provincial Commissioner and held that, as Arkhurst purchased and registered his deed without notice of Hochman's claim, the prior registration of Arkhurst's deed gave him priority.

I am not unmindful of the dictum of Annan JA who delivered the judgment of the court in Amefinu v Odametey [1977] 2 GLR 135, at 144 CA where he said:

> "The point of significance is that section 24 of Act 122 is a new provision and there was no equivalent enactment in previous legislation and it is this innovation which invali-

> dates the basis of the decision in Crayem v. Consolidated African Selection Trust (supra)." Crayem v. Consolidated.
>
> His dictum ought to be approached with caution. I must point out that the Crayem (supra) judgment was

not based only or simply on priorities of registration of the instruments. There were other issues which were taken into consideration. The case held, inter alia, as stated, in the headnote that:

"(i) the language of the Gold Coast Land Registry Ordinance cannot be construed as giving absolute priority to an instrument by reason only of its registration; . . .

(ii) a later instrument can by registration obtain priority over an earlier one only if it was obtained without fraud and without notice of the earlier unregistered instrument;

(iii) a tenant's occupation or possession is constructive notice of that tenant's right to a purchaser, mortgagee, or lessee of the property;

(iv) where a tenant in possession holds under a lease, a party who proposes to take a lease of the same land is bound to enquire on what terms the lessee is in possession, and the fact that the landlord misinforms him of the contents of the lease does not relieve him of that onus."

Even a causal examination of the provisions of Act 122 and those of its predecessor will show that section 24 of the Act 122 is not a complete innovation. Section 21 of the Lands Registry Ordinance, Cap 133 (1951 Rev) states:

"21. (1) Every instrument executed on or after the 24th day of March, 1883 (except a will, and except a Judge's certificate signed before the commencement of this Ordinance) shall, so far as regards any land affected thereby, take effect as against other instruments affecting the same land from the date of its registration: Provided that every such instrument shall take effect from the date of its

execution, if registered within such of the following periods as shall be applicable to it, that is to say—

(a) In the case of an instrument executed at a place where it is registered, the period of ten days from its date;

(b) In the case of an instrument executed elsewhere in the Gold Coast, the period of sixty days from its date;

(c) In the case of an instrument executed out of the Gold Coast .

(2) Nothing in this Ordinance contained shall operate to prevent any instrument . . . "

And section 24 of Act 122 also stipulates:

"24. (1) Subject to subsection (2) of this section, an instrument other than—

(a) a will, or

(b) a judge's certificate,

first executed after the commencement of this Act shall be of no effect until it is registered.

(2) Nothing in this Act shall operate to prevent any instrument which by virtue of any enactment, takes effect from a particular date from so taking effect."

And as pointed out by Annan JA in his judgment, section 26 of Act 122 (which deals with the effective date of registration of instruments if executed at a place where it was registered elsewhere in Ghana and abroad, and other matters) has not in substance changed the rules of priorities of registered instruments as set out in section 21 of Cap 133.

From the foregoing provisions, how can one simply be justified to say that section 24 of Act 122 was so new a provision that there was no equivalent enactment in previous legislations for it to invalidate the

decision in Crayem v Consolidated African Trust (supra) by its innovation. In my view, whatever innovation was introduced by Act 122, s 24 cannot have the effect the learned judge seems to put across. However, to me as far as the other holdings of the Crayem case (supra) are concerned (particularly

on the question of fraud and notice) that case is perfectly good law and I would uphold it. Having said that, I would like to point out that Act 122, like its predecessor Cap 133 did not abolish the equitable doctrines of notice and fraud, neither did it confer on a registered instrument in the nature of exhibit B in the instant case, a state guaranteed title. Consequently, the learned trial judge and their lordships of the Court of Appeal erred in holding that the respondent's title became absolute and impregnable with registration, for the respondent was affected with constructive notice and was bound by the contract for sale between the appellant and the vendor, the second plaintiff witness: see Boateng v Dwinfour [1978] GLR 360, CA. What is more, it is clear from the evidence that the respondent was aware of the fraud being perpetrated by the vendor against the appellant earlier; he became deeply implicated in the fraud and could be charged with conspiracy to defraud under section 34 of Act 122. As Brobbey JA put it, "The position of the plaintiff in the instant case is worse because on the facts, he behaved and acquired the property under perhaps unconscionable circumstances."

Admittedly, by Order 19, rr 6 and 16 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) fraud must be specifically pleaded and particulars given in the pleading. The appellant did not plead it. It was raised by the appellant's counsel in his argument in the Court of Appeal and again in this court, and counsel for the respondent has contended that as the issue of fraud is raised on appeal it must be dismissed. I must say that though the issue was not raised by either counsel in the trial court, this court (as well as the Court of Appeal) has the record and all the evidence at its disposal, and it is entitled to make its own inferences and to make findings on the issue, and interpretation of any legislation relevant to the issue: see the dissenting voice of Adade JSC in Nasali v Addy [1987-88] 1 GLR 143, SC with which I agree.

However, I do not propose to decide this appeal solely on this ground. The main culprit is the vendor of the disputed property, but the respondent cannot just be described as being unconscionable or without scruples (as the Court of Appeal put it). The record clearly shows that by his freely parting with a lower purchase money when he knew that his own friend had already

made part-payment for the same property, he must be deemed to have been aware of the fraud perpetrated by the vendor and as such was a particeps criminis. I do not see how he can be said to have been taken by surprise when the issue was raised, judging from the part he played.

In sum, since the respondent admitted in his evidence prior knowledge of the appellant's purchase of the disputed property, he must be deemed to have had constructive notice of and to have been bound by the contract for sale between the appellant and the vendor, and the terms of the contract including equities which under the contract the appellant had against the vendor.

Secondly, the vendor not having terminated the contract for sale and the appellant's subsisting contractual obligation and interests arising thereunder, could not convey vacant possession to the respondent. In other words, the respondent cannot now be heard to say that he bought the house without notice of the appellant's prior estate or interest in possession. The appellant can take advantage of the nemo dat rule.

Thirdly, Act 122, like its predecessor Cap 133, did not abolish the equitable doctrines of notice and fraud, neither has it conferred on a registered instrument like exhibit B a state-guaranteed title. In other words registration does not create an absolute title.

Fourthly, neither Act 122 nor Cap 133 sought to abolish contracts for sale of land with their consequential equitable reliefs, and for that matter both statutes did not give priority to a registered conveyance or instrument over a prior contract for sale where part-payment has been made or where the purchaser has undertaken development of the property.

In the fifth place, where a party to a contract for sale is in possession of the estate, a later purchaser of the same property is bound to enquire on what terms the party to the contract is in possession or his identity or both, and the fact that the vendor did not disclose these particulars does not relieve him of the onus to investigate.

The Court of Appeal expressed grave concern about the efficacy of the operation of Act 122 and stated that if there is ever a statute that needs very urgent attention and review, it is Act 122, especially section 24(1). Brobbey JA who expressed this view, continued to say:

> "As it stands now, Act 122 clearly facilitates fraud to be perpetrated in connection with the sale and acquisition of lands. The law which will take away a house in respect of which a first buyer has paid as much as 50 per cent of the purchase price to a vendor as deposit, just because the purchaser's friend would move fast to pay even a lesser amount to the vendor and proceed expeditiously to register a document on the second sale, obviously leaves much to be desired."

In my view, if the foregoing is the only reason which should compel the legislature to review section 24 of Act 122, or the concern of the court in Odametey v Clocuh (supra) for innocent purchasers and not fraudulent deals as contained in holding (6) of the court's judgment, then it is incumbent upon this court to so interpret the section to take care of the concerns and not to press for the interference of the legislature. Taking for granted that section 24 of Act 122 is hash and unconscionable as the Court of Appeal seems to hold, it is incumbent upon this court to so interpret it to avoid any absurdity, injustice and hardship, and not so desperately put its hand up and not do a hand's turn but simply to seek consolation in legislative amendment. As the learned authors of Maxwell on Interpretation of Statutes (11th ed) at p 221 rightly put it:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

The court of equity would go to the extent of tackling this issue much more seriously. It would not permit a statute to be used as an instrument of fraud or inequitable conduct, and would strive hard to interpret the statute in a way as would do justice. Equity would further invoke its wide jurisdiction to grant relief against fraud, even though this meant "decorously disregarding an Act of

Parliament": see Megarry & Wade, Law of Real Property (2nd ed) pp 554-555.

Surely, the legislature did not intend that the ordinary meaning of section 24(1) of Act 122 should lead to

a manifest contradiction of the apparent purpose of the Act, or to some inconvenience or absurdity, hardship or injustice as the section seems to produce. In the circumstance, this court may, in duty bound, have to put such construction upon it which modifies the meaning of its words. The section states that an instrument under consideration first executed after the commencement of Act 122 shall be of no effect until registered, and this has been interpreted to mean that where there are two or more purchasers of the same land each having such instrument, priority is given to the one first registered under the Act. It means therefore that Act 122 envisages that each one of them should not have notice of the other having purchased the same land or property. This does away with any contradiction of the purpose of the section or inconvenience or absurdity, hardship or injustice. But where, as in this case, Act 122 facilitates fraud to be perpetrated in connection with the sale and acquisition of lands, especially as the Court of Appeal puts it,

> "the law which will take away a house in respect of which the first buyer has paid as much as 50 percent of the purchase price to a vendor as deposit, just because the purchaser's friend would move fast to pay even lesser amount and proceed expeditiously to register a document on the second sale".

there is clearly injustice and hardship done to the first purchaser. The question seems to me to be whether the legislature intended that to happen. In my view the legislature did not intend such state of affairs to be imported within the meaning of the section. After all we must construe the words of the section according to the ordinary canon of construction, that is to say, by giving them the ordinary meaning in the English language as applied to such a subject matter, unless some gross and manifest absurdity or injustice or hardship would thereby be produced. On looking at the provisions of Act 122 in this respect, it seems to me true to say that the intention is that, as far as possible, where a would be

purchaser has prior knowledge of an earlier purchase by some other person of the same property, or where to his knowledge the vendor has not terminated the contract for sale between him and the first purchaser, or the first purchaser is in possession of the estate, or where fraud is perpetrated, a later instrument cannot by registration obtain priority over an earlier unregistered instrument. In other words, the language of the section, though general, must be interpreted with reference to the doctrines of equity and the well-known equitable principle of nemo dat.

The more literal construction of section 24(1) of Act 122 ought not to prevail, if it is opposed to the intentions of the legislature as apparent by Act 122, and "if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated", or lead to the result that the person who had constructive notice of a prior purchase or is implicated in a fraud, might make an innocent person who had genuinely purchased the same property earlier suffer injustice and hardship. This will lead to startling and absurd results and to an upheaval of constitutional rights: see Clerical Medical & General Life Assurance Society v Carter (1889) 22 QBD 444 at 448, CA; Fanny M Carvill River Wear Commissioners v Adamson (1876) 1 QBD 546 at 549; and Calidonian Rail Co v North British Rail Co (1881) 6 App Cas 114 at 122, HL.

The appeal is therefore allowed, the judgment of the Court of Appeal together with that of the High Court is set aside. The respondent fails in his action. The appellant is entitled to possession and is also entitled to a perpetual injunction restraining the plaintiff and his agents, privies and assigns from interfering in any way with the disputed property.

JUDGMENT OF CHARLES HAYFRON-BENJAMIN JSC.

In the quarter of a century or so since Asare v Brobbey [1971] 2 GLR 331, CA burst upon the judicial firmament, it seems to me that the ratio decidendi in that case has been religiously followed by our courts. Examining the subsequent case law on the point, it is clear that the courts have resisted any arguments which seem to undermine the validity of that ratio and opted for what, for want of a better expression, one may call the maintenance of the status quo in judicial reasoning—the principle of stare decision. Thus, in the instant appeal

Brobbey JA could say with some confidence that he was of the view:

> "That the provisions of section 24(1) are so categorical in rendering ineffective and invalid any instrument which is unregistered that the common law principle of notice and fraud cannot be invoked to create an exception to those statutory provisions, in the absence of clear intendment on the part of the legislature to that effect."

The ratio decidendi in Asare v Brobbey (supra), upon which great reliance has been placed is per Archer JA (as he then was) at 337 which reads thus:

> "It follows therefore that when section 24(1) of the Land Registry Act, 1962, provides that a document shall be of no effect until it is registered, it means that the document and its contents cannot have any legal effect until registration has been completed. This also means that the document is not valid for all purposes because the formality of registration is necessary to complete its validity. In this respect a clear distinction should be drawn between what is void and what is invalid. What is void or null is always regarded by the law as never having taken place. What is invalid has taken place but something remains to be done to validate it or to give it legal force. If a document is deemed to be valid then it must be valid for all legal purposes but where the law will not give it any effect then clearly the document is invalid."

(The emphasis is mine.) My purpose for making a contribution in this appeal is, so to speak, to lay the ghost of certain attitudes in judicial thinking which since that decision have led to the inflexible application of section 24(1) of the Land Registry Act, 1962 (Act 122). Then also this inflexible attitude towards section 24(1) of Act 122 has led to great trepidation about the application of the rules and principles of equity in respect of conveyances of land by our courts, with the result that it is now recognised that great injustice is being caused to unsuspecting litigants who suddenly are beset in court with the strong arm of the statute.

The common law of this country has from the inception of the court system always included: "the rules generally known as the doctrines of equity": see the Constitutions of independent Ghana. It seems to me therefore odd that instead of the courts applying the principles or doctrines of equity to expound the law and advance the remedy in favour of unsuspecting purchasers, there are rather seasonal calls by our courts for amendments to be made in Act 122.

Thus in his opinion, Brobbey JA was enabled to say of Asare v Brobbey (supra) that: "The then Court of Appeal took pains to spell out the exact meaning and connotation of section 24(1) . . . " In my respectful opinion, it is this "pains to spell out the exact meaning and connotation" of Act 122, s 24(1) that unwittingly denuded Asare v Brobbey (supra) of any efficacy as binding authority. The introduction of expressions such as "void" and "invalid" really confused the intendment of section 24(1) of Act 122. The

confusion becomes marked when one reads the final sentence in the passage quoted from Asare v Brobbey (supra) at 337 which for the sake of regularity will restate hereunder: "If a document is deemed to be valid then it must be valid for all legal purposes but where the law will not give it any effect then clearly the document is invalid."

It must be noted that the expression "valid" or "invalid" does not occur in section 24(1) of Act 122, yet subsequent decisions of our courts relying on that authority appear to have substituted the expression "invalid" for the expression "ineffective." In the result, so rigid has its application been that our courts have either tacitly refused or, seriously neglected to apply the doctrines of equity in those cases where for some reason or other the unsuspecting party in litigation ought to be relieved from the application of the statute. Thus Brobbey JA having discussed most of the authorities since the decision in Asare v Brobbey (supra) concluded that: "On these authorities exhibit D conveyed no valid title in so far as it has not been registered. The only valid document on the disputed property is exhibit B." (The emphasis is mine.)

Exhibit D is the agreement made between Clement Quartey Papafio and Fred Kwashie Dotse per his lawful attorney, Colonel Adreas Kwaku Amuzu (Rtd), dated 30 November 1987 in respect of all that plot of land and the building thereon situate lying and

being at Mpehuasem near Legon, Accra. Exhibit B is the indenture made on 11 July 1988 between Clement Quartey-Papafio and Dr & Mrs K Kwabla Oklikah in respect of all that piece of land together with the building thereon situate and lying and being at Mpehuasem Accra.

It would seem that Brobbey JA took his cue from Taylor JSC in his opinion expressed in Hammond v Odoi [1982-83] GLR 1215 at 1279 where his lordship states:

> "I agree completely with this view. In my opinion, exhibit E as an unregistered document was clearly incapable of confirming any grant or transferring any interest in land. A contrary conclusion will be tantamount to what Archer JA (as he then was) in the concluding passage of his judgment in Asare v. Brobbey (supra) at p. 340 designated as:
>
> > '. . . a judgment contrary to the express provision of section 24(1) of the Land Registry Act, 1962, by conferring rights when the statute provides that no legal rights can arise from an unregistered document affecting land.'

Clearly exhibit E while unregistered is ineffective to create legal rights or liabilities or to have any legal validity whatsoever. I am aware that in Ussher v. Darko [1977] 1 G.L.R. 476 at p 489, C.A., Apaloo J.A (as he then was) held that an unregistered conveyance because it described the premises, stated the price and was signed by the proper vendor satisfied section 4 of the Statute of Frauds, 1677, as presevered4(3)sic by section 19 of the Contracts Act, 1960 (Act 25), and is on that account capable of operating to confer an equitable title to a purchaser. With respect, I think this contradicts the clear and unambiguous provisions of section 24(1) of Act 122 and the interpretation of it in Asare v. Brobbey (supra) where Archer J.A (as he then was) said: 'since November 1962 all documents relating to land must be registered in order to have any legal effect at all.' A conveyance giving an equitable interest is one also giving a legal effect to the document."

The learned judge concludes that: "A conveyance giving an equitable interest is one also giving a legal effect to the document."

With the greatest respect to his lordship, that statement cannot be correct. Nor can the learned judge's castigation of Apaloo JA (as he then was) when he writes that an unregistered document may operate to confer an equitable title to a purchaser be warranted. It is trite learning that where for some technical reason a contract for the sale of land which may otherwise be specifically enforced fails to convey the legal title, it may take effect in equity. Thus in that learned treatise Snell's Principles of Equity at p 188 the learned editor states that:

> "As soon as a specifically enforceable contract or sale of land is made, the purchaser becomes the owner of the land in equity, and the vendor becomes a constructive trustee of the land for the purchaser, subject in each case to their respective rights and duties under the contract."

It is a matter of semantics what the learned judge meant by "legal effect." It is said that a person in possession of land can maintain his title to possession against all persons but the holder of the legal estate. Since the law recognises only two estates, it cannot be denied that there is either a legal estate or an equitable estate and the courts recognise these two estates or interests in litigation before them. In the English case of Hadley v London Bank of Scotland Ltd (1865) 3 De J & Sm 63 at 70 Lord Justice Turner expressed himself on this point thus:

> "I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person . . . I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him."

Therefore with the greatest respect to Taylor JSC, a contention that: "Equity and law have coalesced for so long now that like the husband and wife of the old common law they are now one,"

cannot be correct. Certainly the doctrines of equity have been developed and fused with the law to alleviate the hardships of the application of the law and not as "the better half of the law." I therefore fail to appreciate the kind of support being given to Asare v Brobbey (supra) by condemning the views of Apaloo JA (as he then was). As will soon be observed in Ussher v Darko (1977] 1 G LR 476 at 493, CA the learned judge not only purported to explain what the real intendment of the decision in Asare v Brobbey (supra) should have been, he also provided how the principle upon which the effectiveness of a conveyance, registered or unregistered, is to be determined.

As I have said, in Asare v Brobbey (supra) the error arose when the learned judge substituted the expression "invalid" for "ineffective." But there was ample authority which should have been his guide. I refer to the two cases of Khoury v Azar (1952) 12 WACA 261 and Khoury v Azar (1952) 12 WACA 268, PC. In these cases one of the issues for consideration was section 22 of the Kumasi Lands Ordinance, Cap 145 (1951 Rev) the words of which were in pari materia with section 24(1) of Act 122. The exact point for determination was the meaning of the expression "ineffective." Their lordships at 262 thereof stated:

> "We agreed with the submissions of counsel for the claimants that the provisions of section 22 of the Ordinance do not destroy the equitable mortgage nor render it null or void. They do no more than defer its effect till registration. It was open to the claimants to avail themselves of it as effective security at any time by causing it to be registered."

(The emphasis mine.) At the Privy Council the issues for determination were narrowed. At 276 of the report their lordships wrote:

"There remains only the question whether the appellants had a valid equitable mortgage on PLOT 571 or whether the Undertaking was ineffective at the relevant date, by reason of section 22(1) and (2) of the Kumasi Lands Ordinance 1943. This equitable mortgage was not registered, at any material time, in accordance with section 22 of that

Ordinance. Accordingly, it was of no effect at any material time, by reason of the provisions of the same section."

It must be noted that their lordships in the Privy Council did not reverse their lordships of the West African Court of Appeal. They only varied the judgment of the West African Court of Appeal. Notably among the variations was one in which their lordships of the Privy Council stated at 276: "that the appellants had no effective mortgage or charge on Plot 571, Old Town, Section B, Kumasi on the 24th December, 1946." (The emphasis is mine.)

Speaking for myself, I prefer the more indigenous version of the West African Court of Appeal. Non-compliance with the provisions of section 24(1) of Act 122 does not render a document null, void or invalid. Its effectiveness at law is deferred until or unless it is so registered. In this respect, I agree with learned counsel for the appellant, Mr. Kwami Tetteh that the legal effect is held in abeyance pending registration. At the risk of repeating myself, I hold that where for one or other reason a document fails to convey the legal title, the acceptor of that document obtains the equitable interest or title and the conveyor of the document becomes the trustee of the legal title which he will be bound to give over to the equitable owner in order to perfect the latter's title. The equitable remedy of specific performance is available to him. Asare v Brobbey (supra) cannot stand since it did not take into consideration any equitable doctrine or rule which could ameliorate the harshness of the statute. In my respectful opinion, that decision must to the extent that it requires the strict application of section 24(1) of Act 122 be overruled. In my respectful opinion, the proper authority for determining such problems as arise in our courts must be the dictum of Apaloo JA (as he then was) in Ussher v Darko (supra) at 493 where his lordship in a definitive statement wrote:

"The decision in Asare v Brobbey (supra) implies that where there is nothing intrinsically invalid about an instrument, section 24(1) of the Land Registry Act, 1962 (Act 122), does no more than deny it legal efficacy until it has been registered. The Land Registry Act, 1962, did not

prescribe a time limit by which an instrument must be registered. This means that the plaintiff can perfect his title by the formality of registration at any time."

(The emphasis is mine.)

In my respectful opinion, therefore, registration of a document which should be so registered is purely evidential in litigation and while a party with an unregistered document may be unable to assert a legal title in court, nevertheless the document will take effect in equity and will defeat all claims except the holder of the legal title. Where, however, both parties hold equitable titles, the maxim in equity is that the first in time will prevail. Nor is this all. Registration does not confer a state guaranteed title. In Nartey v Mechanical Lloyd Plant Ltd [1987-88] 2 GLR 314, SC Amua-Sekyi JSC stated in his dissenting judgment at 369 that:

". . . non-registration being a defect which can be cured, its absence will not deprive a party of the

protection of the courts. In a proper case the courts can order that document which has been registered be removed from the register and one which has been refused registration be registered."

I agree with his lordship.

In respect of the "intrinsic invalidity" referred to in Ussher v Darko (supra), my respectful view is that that expression connotes the existence of some internal evidence which is made available to the court and which conclusively demonstrates that the court should uphold the registration or relieve a party from the operation of the statute—in this case Act 122.

In the present appeal, Brobbey JA succinctly summed up the facts when he wrote that:

"The position of the plaintiff in the instant case is worse because on the facts, he behaved and acquired the property under perhaps unconscionable circumstances. I make these comments for three reasons, namely, that (1) before he bought the house, he had prior knowledge of the sale of the same house to his own friend; (2) that his friend was already in possession of the house; and (3) his agents and representatives acted recklessly."

The evidence on the record showed that the respondent, a close friend of the appellant, had set out with the aid of others to, as it were, do him out of a bargain. The evidence showed further that the respondent had notice of the prior transaction between the appellant and the common vendor, Mr. Clement Quartey-Papafio, and that the respondent's agents were aware that the appellant had placed people in occupation of the premises. Yet, the respondent had proceeded to register his document and, being so armed, proceeded to assert his title to the land against the appellant. It was indeed "the most unkindest cut of all." Afreh JA in his supporting opinion was certain that the "plaintiff is not a bona fide purchaser because he had notice of the equitable title of the defendant and the circumstances in which the plaintiff acquired his title smacks of equitable fraud." (The emphasis is mine.)

Mr. Kwami Tetteh submitted before their lordships in the Court of Appeal that the equitable doctrines of notice and fraud had not been abolished by Act 122, relying on Boateng v Dwinfour [1979] GLR 360, CA and Botchway v Okine [1987-88] 2 GLR 1, CA. Brobbey JA conceded the submission but contended that in the case of the allegation of fraud, that matter had not been pleaded with particulars as was required by the rules of court and therefore could not be countenanced. With the greatest respect to his lordship, he could not be right. After examining the evidence at length his lordship stated: "This is a clear case in which the law and equity conflict." His lordship then returned to his principal theme of asserting the inflexibility of the principle in Asare v Brobbey (supra), section 24(1) of Act 122 and Hammond v Odoi (supra) and concluded that: "The hackneyed principle is that where equity and the law conflict, the law prevails. In any case, as Mr. Kom rightly pointed out, equity follows the law."

I think his lordship confused the equitable maxims which were open to him to apply in view of his own admission that in this appeal the doctrines of equity and the principles of law were in conflict. However, the true maxim of equity is that "whenever the rules of law and equity are at variance on some particular point, the rules of equity shall prevail": see Cheshire's Modern Real Property (9th ed), p 350. At variance, of course, connotes a conflict. In the present appeal, the point in conflict was whether the law (the statute) should be rigidly applied or the "equitable

fraud" as clearly found by Afreh JA should be vindicated by the application of the relevant maxim. It is a well-known principle of equity that equity will not permit a statute to be used as an instrument for fraud. That, in my respectful opinion, was the proper maxim to have been applied to this case to relieve the appellant of the fraud which had been perpetrated on him. Mr. E D Kom, learned counsel for the respondent, could not be right in submitting that in the present appeal equity followed or must follow the law. I know of no equitable maxim or rule which can be applied in aid of fraud. There is none.

There remains the issue of notice. The evidence was clear that the respondent and his agents had notice of the appellant's agreement and occupation of the disputed house and plot. Brobbey JA however tenaciously clung to the Asare v Brobbey (supra) principle that he could say that: "There is no decided case anywhere in which notice has been used as a ground for avoiding the application of Act 122 and the reason for that lies in the way section 24(1) has been couched."

His lordship may well be right that there is no decided case in which the equitable doctrine has been applied in order to avoid the rigours of section 24(1) of Act 122 as heretofore been held out. But that does not mean the doctrine does not exist and may not be applied in appropriate circumstances. True, the principle of registration has blunted the edge of the doctrine of notice with respect to transfers of the legal estate in land. Nevertheless, within our municipality where estate contracts are not registrable, the equitable doctrines of notice cannot be ignored by the courts in circumstances in which the transaction is patently unjust. A court cannot ignore evidence of unconscionable conduct on the part of a subsequent purchaser and decree title in such purchaser even though he has notice—actual, constructive or imputed—of third party rights and interest in the property he seeks to acquire. In other jurisdictions where estate contracts, otherwise equitable interest, are registrable, a purchaser will be affected with such notice and the legal interest which he acquires will be subject to such equitable interest and may be even postponed. However, within our municipality where there is no provision for the registration of estate contracts and other equitable interests the court could decree the cancellation of a registered document or

order the registration of an unregistered document: see per Amua-Sekyi JSC in Nartey v Mechanical Lloyd Plant Ltd (supra).

Taylor JSC in Odametey v Clocuh (supra) recognised the "disgraceful practice" of some "dishonest landowners' who convey the same land to different purchasers and the "glaring hardship" thus suffered by purchasers. His lordship at 41 thought that Apaloo CJ had:

> ". . . invent[ed] the doctrine of constructive registration in the interest of a somewhat extra-judicial concept of justice so as to circumvent and avoid the provisions of section 24(1) of Act 122 in order to protect such innocent purchasers."

In my respectful opinion, Apaloo CJ had invented no such doctrine. If I understand His Lordship the Chief Justice correctly, when he said there should be a "doctrine of constructive registration" he meant that the courts ought not to be unmindful of the doctrines of equity in assessing the rights and interests of contending parties before them and be prepared to give effect to the proper document which the law or equity will support. If as I have said, the court can nullify registration, it must be prepared to permit the rules of equity bear upon the quality of the documents so presented. In this way a "blameless purchaser who has in compliance with the law . . . done all that the law decrees he should [shall] obtain title."

In my respectful opinion, this appeal epitomises the hardships endured by innocent purchasers and the insensitive attitude of the courts to their defences in situations in which the courts discard the doctrines of

equity in favour of the faceless application of statute.

I will allow this appeal and subscribe to the orders to be made.

JUDGMENT OF AMPIAH JSC.

On 5 March 1997 the court unanimously allowed this appeal and reserved its reasons. I now proceed to give reasons for coming to my conclusion.

This is an appeal from the decision of the Court of Appeal dismissing an appeal from a decision of the Circuit Court, Accra. The action relates to a plot of land with an uncompleted building thereon situate at a place called Mpehuasem in Accra. The identity

of the land itself is not in dispute; it is about 0.28 acre in size. In October 1987 or thereabout, one Fred Kwashie Dotse, a man who lives most of his time outside the country obtained through his attorney (the appellant in this action) the land in dispute from one Clement Quartey-Papafio. There was an uncompleted building on the land. The purchase price was agreed at ¢9 million, ¢4.5 million of which was paid leaving a balance of ¢4.5 million to be settled on the completion of the building on the land and the transfer of the property to the purchaser. It was further agreed that the vendor should use the amount paid to him to complete the building. The whole transaction was reduced into writing. This was tendered in evidence as exhibit D by the defendant; it was dated 30 November 1987. After a few months when the vendor was not carrying on with work on the building, the appellant decided to go into possession of the land and complete the building himself on the condition that the vendor would release to him the building materials then on the land. Further inquiries by the appellant however revealed that the vendor had since left the country and had removed the building materials from the land. The appellant however took possession of the land and continued with the construction of the building at his own expense.

On or about 11 July 1988, while the appellant was still in possession of this land, the vendor, unknown to the appellant, granted the same piece of land to the respondent for ¢6.5 million. A conveyance was hurriedly prepared and executed for the respondent who had it duly stamped and registered with the Land Registry, with title No 2757/88. This was tendered in evidence by the respondent as exhibit B. An attempt by the respondent however to enter the land met with resistance from the appellant. This action was therefore instituted by the respondent on 8 February 1989 to assert his title to the property. He claimed jointly with his wife for a declaration of title to the land, damages for trespass, ejectment and an order of perpetual injunction against the appellant. The circuit court gave judgment in the respondent's favour and declared title in him. It also ordered ejectment and perpetual injunction but refused to award damages for trespass. The counterclaim by the appellant claiming title to the same land was dismissed by the trial court. The Court of Appeal dismissed an appeal filed by the appellant against the decision of the lower

court but commented exhaustively on the unsatisfactory conduct of the respondent.

But for the peculiar circumstances of the case, on the statutory position of the law as settled authoritatively by decisions of the superior courts, there would have been no problem in coming to a similar conclusion as the Court of Appeal. Besides, it is now trite learning that concurrent findings of fact by courts of competent jurisdiction, should not be easily overturned, except in special circumstances: see

Mansah v Asamoah [1975] 1 GLR 225, CA; and Akrofi v Wiresi (1959) 2 WALR 257.

Section 24(1) of the Land Registry Act, 1962 (Act 122) provides:

> "24. (1) Subject to subsection 2 of this section an instrument other than—
>
> (a) a will, or
>
> (b) a judge's certificate,
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> first executed after the commencement of this Act shall be of no effect until it is registered."

It provides, however, further in section 24(2) of Act 122 that "nothing in this Act shall operate to prevent any instrument, which by virtue of any enactment, takes effect from a particular date from so taking effect." An "instrument" has been defined under section 36 of the same Act as: ". . . any writing affecting land situate in Ghana, including a judge's certificate and a memorandum of deposit of title deeds."

Although assented to on 4 June 1962, Act 122 became operational on 2 November 1962—vide the State Lands Regulations, 1962 (LI 234). Both the courts below found that both exhibits B and D were instruments within the definition of section 36 of Act 122. I have no strong reasons to dispute this finding. Though counsel for the appellant argued forcibly and persuasively that exhibit D was only an instrument which transferred interest in land in the future, I have no doubt that it was an instrument affecting land and that it sought to transfer the interest of the vendor in the land, albeit in the future. As documents made after 2 November 1962, affecting land, these documents had to be registered to become effective.

When then does a document become effective? In Asare v Brobbey [1971] 2 GLR 331 at 337, CA, the Court of Appeal in its judgment observed:

> "It follows therefore that when section 24(1) of the Land Registry Act, 1962 provides that a document shall be of no effect until it is registered, it means that the document and its contents cannot have any legal effect until registration has been completed. This also means that the document is not valid for all purposes because the formality of registration is necessary to complete its validity. In this respect a clear distinction should be drawn between what is void and what is invalid. What is void or null is always regarded by the law as never having taken place. What is invalid has taken place but something remains to be done to validate it or to give it legal force. If a document is to be valid it must be valid for all legal purposes but where the law will not give it any effect then clearly the document is invalid."

With due respect to the Court of Appeal in the above case, even though I agree that with regard to the effective enforcement of a document, the document need be registered, save for fraud, to take priority over all other unregistered documents, I do not think an unregistered document is "not valid for all purposes . . ." It is required under section 1(1) of the Conveyancing Decree, 1973 (NRCD 175) that a transfer of an interest in land, "shall" save for the exceptions, be in writing, and no contract for the transfer of an interest in land shall be enforceable save for certain exceptions, unless it is evidenced in writing—vide section 2 of NRCD 175. It follows that if a document affecting land is in writing, it could be enforced even if not registered. The document could be used against a vendor who seeks to overreach the interest of the holder of that document, and the holder of that document can also use the unregistered document in evidence in an action for specific performance. However, apart from the observation made herein. I think the proposition or observation is valid for the determination of priority under Act 122.

In the instant case, Brobbey JA delivering the lead judgment in the appeal, in my opinion, dealt exhaustively with the relevant

authorities on the issue of registration of documents and its effect. The legal position has so crystallised in the cases to the extent that it is highly impossible to displace it, save for fraud. That fraud is a defence for avoiding the incidence of registration cannot be denied, but for such a fraud, on the authorities, to have effect, it must be pleaded specifically. It may also be possible to avoid the effect of registration where the conveyance has been registered in priority, if the registration has been done with intent to defeat creditors. In which situation, however, the creditors would have to bring an action to have the said conveyance set aside. See also, the provisions of section 3(1)(b) of NRCD 175 which makes the effect of registration inapplicable to certain oral interests: see Boateng v Dwumfour [1979] GLR 360, CA.

This principle would apply even if the registration was done with actual notice of a prior purchaser: see Asare v Brobbey (supra); and Amefinu v Odametey [1977] 2 GLR 135, CA. In most of these cases, the courts have lamented over the unsatisfactory state of the statutory provision. In Odametey v Clocuh [1989-90] 1 GLR 14 at 41, SC Taylor JSC observed:

> "I cannot, however, end this judgment without responding to the disgraceful practice by which some dishonest land owners convey the same land to different purchasers. It is the glaring hardship the first purchasers suffer that induced Apaloo CJ in an admittedly honourable exercise of his judicial power to invent the doctrine of constructive registration in the interest of a somewhat extra-judicial concept of justice so as to circumvent and avoid the provisions of section 24(1) of Act 122 in order to protect such innocent purchasers. Innocuously conceived as a protective device, it equally inadvertently creates intolerable hardship on an equally blameless purchaser who had in compliance with the law rather done all that the law decrees he should do to obtain title. Surely in such a situation it is obviously inequitable to permit a legal estate to be defeated by an equitable interest."

Holding (6) in the headnote of Odametey v Clocuh (supra) admits:

> "(6) There was need for a reform in the law as to title registration that would meet the hardships encountered by innocent purchasers of land without doing violence to the integrity of the Land Registry regime."

In the case of Crowley v Bergthail [1899] AC 374, PC, an appeal from the Supreme Court of Natal, the judicial committee of the Privy Council had cause to set aside a registered document on grounds of dolus malus; that was a decision on Roman-Dutch law.

Query: if the principle of nemo dat quod non habet could be applied to an earlier customary grant to defeat a subsequent grant registered or not, why would the maxim not apply to two grants by the same vendor to two different persons even though both are registrable but the latter one happens to have been registered earlier? Does the vendor have any more interest in the property after the first grant to make a second grant of the same property? Also, why should an oral grant not be affected by a subsequent grant which is registered earlier in time while an oral grant which has been reduced into writing be so affected?

Our Constitution, 1992, Art 129(3) provides that:

> "(3) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on question of law."

(The emphasis is mine.) The courts are enjoined by law not only to do justice in a case but also to see to it that justice is manifestly seen to be done. Depending on the particular circumstances of a case, the court must not necessarily cling to the strict provisions of a statute but must be able to modify those provisions provided no injustice is caused to any of the parties. It is said that equity follows the law, but equity, would not permit an Act to be used as an instrument of fraud! Any conduct that borders on fraudulent behaviour should be frowned upon; it must not be encouraged.

In the instant case, there is evidence that: (i) not only did the respondent have notice of the sale to the appellant of the disputed plot but he even arranged with the appellant that he be given the

plot next to the disputed one; (ii) the respondent was aware that the appellant had taken possession of the uncompleted building on the land and was carrying on with further construction to complete it; and (iii) the respondent purchased his plot on 11 July 1988. On 25 July 1988 when the appellant who had contracted on 30 November 1987 for the purchase to him of the plot realised that his vendor was delaying in performing his part of the agreement, he took action against him. This action was pending when the respondent purported to register his conveyance; he did so with the connivance of the vendor who was aware of the action pending against him. The respondent's document although dated 11 July 1988, was in fact presented for registration on 13 December 1988! The respondent cannot therefore escape blame for the conduct of his vendor. Instead of the respondent joining in the appellant's action to contest his title, he decided to issue a fresh writ on 8 February 1989 to assert his title. Section 34(c) of Act 122 makes it a criminal offence for any person who knowingly "makes conflicting grants in respect of the same piece of land to more than one person." The evidence shows knowledge also on the part of the respondent; he cannot be allowed to benefit from or take advantage of his tainted conduct.

The above behaviour of the respondent, some aspect of which was commented upon unfavourably by the Court of Appeal in its judgment, if allowed to prevail, would result in injustice to the appellant and innocent purchasers of land. Even if exhibit D was a registrable document which the appellant had failed to register and was therefore ineffective, the appellant was still in possession. Possession is said to be nine-tenth of the law and, in circumstances such as the one in question, I think the possession of the appellant needs to be protected so that justice is not only done, but manifestly seen to be done. In the particular circumstances of the case, I would allow the appeal, and set aside the judgment of the Court of Appeal as well as that of the court below. In its stead, I would dismiss the respondent's claim.

I do admit and appreciate that this is a revolutionary stance against settled authorities, but as stated before, if justice is to prevail in the manner our lands are disposed of, the courts must be bold to avoid too strict an application of the provision of the Act 122 which gives blessing to fraudulent land dealers. In other

words, justice must not be sacrificed on the altar of strict adherence to provisions of laws which at times create hardship and unfairness.

Concerning the appellant's counterclaim, I am not able to grant it. The evidence shows that the appellant has not as yet completed payment for the land although not through any fault of his; it is the breach of the agreement by the vendor which has resulted in all this chaos. The appellant has taken action against the vendor for specific performance. The action is still pending. Until he has obtained that relief, he would be entitled to protection of his possession.

JUDGMENT OF ATUGUBA JSC.

The facts of this case have been stated amply in the judgments that have preceded mine and I need not repeat them, save where necessary.

The legal question arising in this case is whether section 24(1) of the Land Registry Act, 1962 (Act 122) is so rigid that no matter the compelling justice of a situation, it must, like Shakespeare's Merchant of Venice, exact its pound of flesh? In short, is there any protection for a victim of fraud or unjust enrichment under that provision? It must be conceded that on a strict adherence to the case law the answer to this question is plainly in the negative. The principle has been laid down with much consistency from early times to date that an earlier grant, if not registered, is of no effect and therefore a much later grant, if registered, can defeat it, provided the grantor otherwise had title to convey.

But before delving into this question, I would turn to the argument of the appellant that his agreement for sale of the land in this case only concerns but does not affect the land in dispute and therefore is not a registrable instrument within 24(1) of Act 122. The word "instrument" to which that section relates is defined in section 36 of the Act 122 as follows: '''instrument' means any writing affecting land situate in Ghana, including a judge's certificate and a memorandum of deposit of title deeds." That argument is aptly answered by the following passage from Megarry and Wade, The Law of Real Property, (3rd ed) at p 137:

> "(a) Estates contracts. Equity would decree specific performance of certain contracts which were remediable only by

> damages at Common Law. Of these the most important were contracts for the sale or lease of land, now called estate contracts. A purchaser under contract to buy land had therefore at common law only a right to damages if his vendor broke the contract. But in equity he had a right to compel his vendor to convey the land itself. This right to specific performance created a right in the land a species of equitable property right. Therefore, if A agreed to sell land to B, but instead later sold and conveyed it to C, B could recover the land from C if C had notice of B's contract when he obtained the land. B was equitable owner from the time of the contract and could enforce IDs equitable right to the land against anyone except a bona fide purchaser of a legal estate without notice of the contract."

(The emphasis is mine.) The statute talks of an instrument affecting land and not one transferring an interest in land. An agreement for sale of land clogs the land in equity in an estate particular. I therefore hold that the appellant's contract for sale of the land in this case is a writing affecting land, manifestly situate in Ghana and a registrable instrument within section 24(1) of Act 122.

As I said earlier, there is a considerable body of case law establishing the ineffectiveness of an instrument ante registration. These range from Ashanti Construction Corporation v Bossman [1962] 1 GLR 435, SC decided under section 23(1) of the Kumasi Lands Ordinance, Cap 145 as then amended, through Asare v Brobbey [1973] 1 GLR 333, CA, Amefinu v Odametey [1977] 2 GLR 135, CA;. Hammond v Odoi [1982-83] GLR 129 SC; Nartey v Mechanical Lloyd Assembly Plant Ltd [1987-88] GLR 86, SC to Odametey v Clocuh [1989-90] GLR 14 SC. As these decisions have stood for so long they ought to be adhered to by this court, particularly in view of the stare decisis provisions of article 129(3) of the Constitution, 1992 in so far as at least the previous decisions of this court are concerned.

I am however of the view that, with the greatest respect, those decisions too stringently and literally

applied the provisions of section 24(1) of Act 122 and for the reasons that follow, ought to be modified and that this is not a fit situation to apply the maxim

communis error facit jus (universal error amounts to law). The said decisions treated 24(1) of Act 122 as a provision sui generis. To some extent that approach is justifiable. For, as Professor G R Woodman states in his article "The Registration of Instruments Affecting Land" (1975) 7 RGL 46 at p 54 concerning the prior registration statutory law, under the sub-heading "The weakness of the Ordinance":

> "It has been seen that the Ordinance affected the rights of claimants to land in only a small class of cases. Frequently registration or failure to register made no difference to the rights of a grantee. In particular, if a grantee expected to take possession of the land, he might well consider that he had no need to register, because his possession would constitute notice of his interest, and the case-law established that a subsequent purchaser with notice could not gain priority by registration. Consequently many instruments were not registered, and the system did not go far towards its objective of increasing certainty. By 1962 it was decided that a stricter system was necessary."

But as the late distinguished Professor Bentsi-Enchill summed up in his invaluable book, Ghana Land Law, at p 327-328 concerning the effect of Act 122:

> "It is indeed open to construction as a race statute, 'giving absolute priority to an instrument by reason only of its registration.' Redwar, as has been observed above, took such a view even of the repealed enactment. This would be because of the unqualified provision that an instrument shall be of no effect until it is registered, in conjunction with the provision giving priority (after the period of grace) according to the time of registration.
>
> But to take this view would be to ignore (a) the valid comparisons made in Crayem's case with the wording of the Irish, Middlesex and Yorkshire Acts, in the light of which it is reasonable to conclude from the language of both the old and the new enactments that there was, no intention to exclude altogether the application of the doctrine of notice;

> (b) the fact that the new enactment does not significantly depart from the provisions of the repealed enactments as interpreted by the courts and that upon a reasonable construction the two new provisions in this part of the new Act appear to do no more than to articulate the interpretation placed on the old enactment by Brandford Griffith C.J., and followed in subsequent decisions."

(The emphasis is mine.)

This argument of Bentsi-Enchill is fully supported by the Court of Appeal decision in Boateng v Dwinfour [1979] GLR 360, CA wherein the lucid judgment of Anin JA (as he then was) examined the common law and legislative ancestry of Act 122. In the light of that Anin JA (as he then was) stated at 366-367 as follows:

> "The general principle of equity is that a purchaser is deemed to have notice of all that a reasonably prudent purchaser would have discovered. Thus 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 incumbrance.
>
> Again, if the purchaser has whether deliberately or carelessly, abstained from making those inquiries into the title of his vendor that a prudent purchaser would have made, he will be affected with

constructive notice of what appears upon the title.

> '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.'

See Snell's Principles of Equity (26th ed.) at p. 59. . ."

Then at 369 he stated:

> "In the fourth place, the Land Registry Act, 1962 (Act 122} like its predecessor, the Land Registry Ordinance, Cap. 133 (1951 Rev.), did not abolish the equitable doctrines of notice and fraud; neither has it conferred on a registered instrument like exhibit B herein a state-guaranteed title. Registration does not create absolute title; and the learned trial judge erred by virtually holding that the plaintiff's title became absolute and impregnable with registration. Notwithstanding her registered deed of sale, the plaintiff is affected with constructive notice of, and is bound by, the defendant's earlier parol customary tenancy. Her claim for possession and ejectment and other ancillary reliefs must accordingly fail and be dismissed."

But of this a caveat later. Though this dictum on the effect of Act 122 might be considered obiter, yet it has some persuasive force.

It is sometimes said that the predecessor legislation of Act 122 only relates to priority of competing instruments affecting land, but the point to note carefully is that even there, there was no express provision exempting fraud and notice from the purview of the provisions relating to priority of registered instruments. Fraud and notice, were nonetheless, as earlier shown, exempted by the construction placed on them by the courts.

It is a settled rule of the construction of statutes that an enactment is deemed not to alter the general existing law save by express words or necessary implication. Thus in Kuenyehia v Archer [1993-94] 2 GLR 525 at 564, SC Francois JSC said:

> "Tedious though it may appear, one must here repeat the well-known canon of construction that the courts will presume that the law giver would use clear and unmistakable words if the intention were to abrogate a long standing rule of law. See Maxwell on Interpretation of Statutes (12th ed 1969), p 116. This has been expressed by Devlin J in his inimitable way in National Assistance Board v Wilkinson [1952] All ER 255 at 260:
>
> > 'It is a well established principle of construction that a statute is not to be taken as effecting a fundamental

> > alteration in the general law unless it uses words that point unmistakably to that conclusion.'"

Again, it is a settled rule of construction that statutes in pari materia whether expired or not should be taken and construed together as explanatory of each other. To this end, Adade JSC in Kuenyehia v Archer (supra) at 555 referred to the following passage in Halsbury's Laws of England (3rd ed), Vol 36, p 402, para 607:

> "All statutes made in pari materia should be construed together as one system and as explanatory of

each other, so that when there is an ambiguity in one it may be explained by reference to another statute in, the same system. In construing a statute it is therefore legitimate to refer to an earlier statute in pari materia even if it has expired or has been repealed."

These rules of construction buttress the argument of Professor Bentsi-Enchill referred to earlier in this judgment to the effect that Act 122 cannot be construed without regard to the construction placed on its predecessor statutes relating to registration in this country. Furthermore, the long title to Act 122 is as follows: "An Act to consolidate with amendments the law relating to the registration of instruments affecting land." (The emphasis is mine.) In Odgers' Construction of Deeds and Statutes (5th ed) by Gerald Dworkin, it is stated as follows at p 349:

"A consolidating statute . . . will almost certainly adopt language which has already received judicial interpretation; the case law, therefore, on this language will be most valuable.

As Chitty J. said [in Re Budgett [1894] 2Ch 557 at 561] in considering a section of a consolidating Act, viz., the Bankruptcy Act 1883:

> 'I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature.'"

Then later at this same page the learned author states:

"Again . . . where a particular judicial construction has been put upon the words of a statute, the legislature, being assumed to know the law, will be taken to have used those words in subsequent legislation in the sense judicially determined."

It is conceded that section 24(1) of Act 122 is a new provision in our registration legislation. Nonetheless, it must be stressed that the case law that preceded its insertion dealt with cognate provisions of the English and Irish statutes and taught beforehand how the doctrines of fraud and notice can be legislatively excluded, if that is the intendment of the legislature. As most of these previous decisions were extensively reviewed, as Bentsi-Enchill demonstrated (supra), in the case of Crayem v Consolidated African Trust Ltd (1949) 12 WACA 443, a few excerpts therefrom will bear out the point in issue here. At 445 of the report, Lewey JA who delivered the judgment of the court said:

"It is not necessary to deal at any length with the Irish Act. Its provisions were more extensive than those of the English Acts, and its language clearly excluded the application of the doctrine of constructive notice . . . The Act provided that every deed registered under the Act was to be deemed and taken as good and effectual 'both in law and equity' according to the priority of time of registration and that unregistered deeds were to be 'adjudged fraudulent and void' not only against registered deeds but also against judgment creditors. It would not appear, therefore, that any useful purpose would be served in making a detailed comparison of such far-reaching provisions with those of Cap. 112."

The message from this is very clear, that is to say, when the legislature uses such radically clear language, equitable notions of fraud and notice cannot stand in its way. By contrast when Ghana's legislature in section 24(1) of Act 122 mildly provides that "an instrument . . . shall be of no effect until it is registered", it patently lacks the requisite clarity of language with which to exclude the equitable doctrines of fraud and notice, especially as it

has retained almost all the other provisions of the earlier Ordinances which like Cap 112 were judicially construed as accommodative of the doctrines of fraud and notice. But of this, a caveat later.

Furthermore, there is a fairly well-settled principle of law that a person may, having regard to certain inequitable circumstances, be precluded from relying on the provisions of a statute. In Ahumah v Akorli (No 2) [1975] 1 GLR 473, Amissah JA sitting as an additional judge of the High Court held that to prevent the defendant from committing a fraud he would not in equity be allowed to rely on section 4 of the Statute of Frauds, 1677 to defeat his oral agreement to sell the land to the plaintiff whereunder, the plaintiff, in reliance on an expectation that the defendant would also fulfil his part of the bargain, had partly performed his part thereof. In Adu v Kyereme [1984-86] 1 GLR 1, CA it was held that the mortgagor could not in equity rely on the lack of the requisite statutory consent under the State Councils (Ashanti) Ordinance, 1952 to defeat his own mortgage. See also In re Markham v Afeku IV [1987-88] 1 GLR 34, CA, and Djomoa v Amargyei [1961] GLR 170, SC where the Supreme Court disallowed the defendant from using the Concessions Ordinance, Cap 136 (1951 Rev) to defeat the plaintiff's grant though its provisions had been breached.

The position is fully covered by Megarry and Wade, The Law of Real Property (3rd ed), p 569 as follows:

The Statute of Frauds, 1677, was intended to prevent the fraud and perjury which were possible when contracts for the transfer of land could be alleged upon merely oral testimony. This it did, but it opened new and different possibilities of deception; a person who had made a genuine contract might repudiate it on the ground that there was no proper memorandum as required by the Statute. In some cases of this kind equity would invoke its wide jurisdiction to grant relief against fraud, even though this meant 'decorously disregarding an Act of Parliament. It must be remembered that the Court of Chancery always regarded itself as competent to prevent a Statute passed for the prevention of fraud from being used as an instrument of fraud. 'In cases of fraud,

equity should relieve, even against the words of a statute.' The commonest and most important example of this principle is found in the doctrine of part performance."

(The emphasis is mine.) This applies mutatis mutandis to section 24(1) of Act 122.

This position has recently been clinched by the decision of this court in Okofoh Estates Ltd v Modern Signs Ltd [1995-96] 1 GLR 310, SC in which Aikins JSC, Edward Wiredu JSC (as he then was) and Charles Hayfron-Benjamin JSC held that the trial judge was wrong in summarily dismissing the plaintiff's action even though he pleaded fraud in answer to the defendant's reliance on a certificate of title issued by the Land Title Registry. As Edward Wiredu JSC (as he then was) said at 344:

> "An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document or a document obtained by fraud does not pass any right."

In this case, fraud has not distinctly been pleaded as the practice requires. But in view, especially of the provisions of sections 5, 6 and of the Evidence Decree, 1975 (NRCD 323) regarding the reception of unobjected evidence, it can be said that where there is clear but unpleaded evidence of fraud, like any other unobjected evidence, the court cannot ignore the same, the myth surrounding the pleading of fraud notwithstanding: see generally Asomah v Servordzie [1987-88] 1 GLR 67, SC and Atta v Adu [1987-88] 1 GLR 233, SC. In the context of equity it can even be said that fraud relates to any colourable transaction and not necessarily fraud in its strict legal sense.

In compelling circumstances, the courts have not allowed the rules of pleading to stand in the way of justice. Thus in Samarasinghe v Sbaiti [1977] 2 GLR 442, CA the plaintiff clearly based his action on a written memorandum which did not contain all the essentials of an enforceable contract. It was the oral evidence led without objection which saved the plaintiff's case. At 447 Apaloo CJ in whose judgment the other members of the court concurred, said:

> "It is true that the respondent pleaded his case in a manner which suggests that he was going to found his case only on the note exhibit A but the evidence read as a whole did not so limit the case and as I said, no objection was taken to oral evidence led in amplification of the note . . . I cannot accept that a court of equity would deny its remedy to a deserving suppliant because his case was not pleaded as expertly as one could wish or that there was some apparent discrepancy between the pleading and the evidence which caused no surprise to the other party."

And in Schandorf v Zeini [1976] 2 GLR 418 at 440, CA Amissah JA in whose judgment the others concurred said:

> "Mr. Reindorf has stated that under Order 19, r. 16 of the High Court (Civil Procedure) Rules, 1954 (LN 140A), which requires the parties to an action to raise by their pleadings all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable at law, this point cannot be raised now. I think Mr. Reindorf must be right. But having indulged the appellants this far, it would almost appear churlish of me if I were to dismiss their final submission on a technical rule of pleading."

The appellants had been allowed to canvass issues such as the lack of ministerial concurrence to a disposition of stool land, though unpleaded by them.

Again in fitting situations the courts have given protection under the Land Development (Protection of Purchasers) Act, 1960 (Act 2) though unpleaded: see Ntem v Ankwandah [1977] 2 GLR 450 at 461 CA; Abdilmasih v Amarh [1972] 2 GLR 414 at 426, CA; and Odoi v Hammond [1971] 1 GLR 375, CA even though it has been held that a fair opportunity should be given to the other side to meet that course by evidence or otherwise. In this case, the fraudulent conduct of the appellant's vendor and that of the respondent per his agent in Ghana, on the evidence, stinks. It will be piteous that equity which can relieve even against the plain words of a substantive statute can fail to do so by the rules of form

(which it avowedly says must yield to substance) contained in subsidiary legislation. Rules which the courts have said are handmaids to the administration of justice and not masters.

In any case, it is a settled rule of construction of statutes that there is a presumption against absurdity and unless the words are absolutely incapable of any other construction, one that leads to absurdity must be avoided: see Surakatu v Dende (1941) 7 WACA 50. There is no doubt that in this case where it is clear that the respondent and his vendor, with malice aforethought, concerted to unjustly enrich themselves at the expense of the appellant, it would be absurd to allow their enterprise to go through. The modern purposive rule of construction of statutes which looks to the apparent purpose of the statute instead of its literal meaning also militates against the respondent's case. It is manifestly clear that the purpose of Act 122 is to provide certainty of information about land transactions so as to avoid fraud and the like. It is contrary to this policy objective to allow fraud rather to flourish.

Megarry and Wade (supra), state at p 1026:

> "There are three types of registration in force in England.
>
> These are:
>
> (i) Registration of incumbrances;
>
> (ii) Registration of deeds; and
>
> (iii) Registration of Title.
>
> The first two types of registration are designed to strengthen the traditional system of conveyancing by enabling a purchaser to discover incumbrances and transactions affecting title. "

Prof G R Woodman in his article, "The Registration of Instruments Affecting Land" (1975) 7 RGL 46 states:

> "The primary object of a system of registration is to promote certainty. A register is essentially a written record which, since it is relatively permanent and unalterable, is a reliable means of ensuring accurate knowledge of facts after they have occurred."

It is plain that this ascertained purpose of registration does not include a purpose to encourage and protect inequitable adventurers

and they ought not to have their way. Inspiration again is found in the Crayem case, (supra) at 445, where it is stated, concerning the Middlesex Registries Act, 1708 (7 Anne 20) as follows:

> "Of that Act, it is sufficient to say that its provisions established a prima facie rule that, as between purchasers for valuable consideration, instruments registered under the Act had priority according to the date of registration, and not according to the date of execution. An unregistered instrument, while not invalidated, was to be adjudged fraudulent and void against a later instrument which was duly registered. But the real purpose of the Act, was to prevent fraud and to afford protection from deceit. And it is of interest to note that, in practice, the prima facie rule was, therefore, subject to the qualification that a subsequent purchaser could not by registration obtain priority over an earlier unregistered instrument if he had notice of it, for in such a case, he was not deceived . . ."

(The emphasis is mine.)

However, the crusading spirit of equity has not escaped criticism and must be held within permissible bounds. Thus in Greaves v Tofield (1880) 14 ChD 563 at 578 Bramwell LJ said:

> "I doubt very much whether the principle of Courts of Equity ought to be extended to cases where registration is provided for by statute. I do not know whether I have grasped the doctrines of Equity correctly in this matter, but if I have they seem to me to be like a good many other doctrines of Courts of Equity, the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases."

And in Wyatt v Barwell (1815) 19 Yes 435 at 439 Sir W Grant MR stated:

> "A registered deed stands on a different footing from an ordinary conveyance. It has been much doubted whether the courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his

> conveyance, but they have said, 'we cannot permit fraud to prevail; and it shall only be in cases, where notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title to another that we will suffer the registered deed to be affected."

And A St J Hannigan in his article "The Question of Notice Under the Ghanaian System of Registration of Deeds" (1966) 3 UGLJ 27 states:

> "The effect of registration is important as registration of deeds can be used as an alternative to registration of title in giving security to a purchaser of land . . . The purpose of a system of registration of title is to give a state guarantee of title, whereas a system of registration of deeds is merely concerned with priorities, giving priority to the instrument first registered. Within its limits therefore a system of registration of deeds can serve a useful purpose as it may protect a purchaser from prior unregistered instruments. This purpose of a system of registration of deeds cannot, however, be fully achieved, if as Dr Bentsi-Enchill appears to consider, both actual and constructive notice will defeat registration, a proposition supported by the West African Court of Appeal in the case of Crayem v. Consolidated African Trust Ltd. [1949] 12 W.A.C.A. 443. If this is the case, a person who registers his instrument will be in no better position than a bona fide purchaser for value without notice in a 'non-register' country, save that he will gain priority over instruments registered subsequently. The efficacy of a registry of deeds would therefore be enhanced if a person who registered were to feel secure from prior unregistered instruments save where he had actual notice thereof which amounted to fraud; and this, it is suggested with the greatest respect to the West African Court of Appeal is the interpretation that should have been placed upon the Ghanaian statute."

In this connection he says that section 24(1) of Act 122 of Ghana is similar to section 12 of the English Judgment Registration Act

whereunder it was held that nothing short of fraud alone could defeat a registered instrument.

Our Act 122 has operated so far, amidst attempts now and again to navigate judicially off its rigours. Thus in Samarasinghe v Sbaiti (supra) at 466 CA, Mahama v Soli [1977] 1 GLR 205 at 237, CA and Maclean v Akwei II [1991] 1 GLR 54 at 60, CA, it was said that Act 122 cannot be used as an engine for fraud to defeat a clear transaction from which the protesting party has benefitted. In Bannerman v Fretete Odomankoma Jewellery Ltd [1989-90] 1 GLR 534, CA it was held that once section 2 of the Conveyancing Decree 1973 (NRCD 75) regarding writing was satisfied then the question of registration is irrelevant. Certainly in a situation like this, the maxim stare decisis et non quieta movere cannot be applied without mitigation.

For all the foregoing reasons, I concurred in the allowance of this appeal. But for the same reasons, the operation of sections 24(1) and 25 of Act 122 ought not to be hindered unless there is compelling evidence, whether from constructive or actual notice of a prior unregistered instrument, in such circumstances that a party ought not to benefit from conduct arising from digniori detur.

JUDGMENT AKUFFO JSC.

I am in full agreement with the judgment read by my learned brother Ampiah JSC. I only wish to add a

brief observation of my own, in support of the decision we have given.

One of the banes of our current society is the frequency with which vendors of land, motivated by greed and venality, purport to sell the same property over and over again to multiple purchasers. Frequently, it is only the vendor who comes out smiling, having collected his moneys from his victims. Sometimes, as in this case, such a vendor, with his loot in hand, vanishes from the scene leaving his victims to spend vast amounts of valuable time and money fighting over the property. This menace has reached such proportions that there are numerous locations in our metropolitan areas where purchasers feel compelled to resort to self help in various forms, including the unlawful employment of armed personnel, to guard their land developments against competing purchasers.

To a significant extent, this descent into mayhem has been aided by a misapprehension of section 24 of the Land Registry Act, 1960 (Act 122) which, being a race statute by nature, has been construed as giving absolute statutory backing to the first person to secure the registration of his instrument of title, regardless of the time he obtained his conveyance or the number of previous unregistered purchasers who might have purchased the same land from the same vendor, and regardless of any prior notice the subsequent purchaser might have had of the previous transactions. As I see it, the object of Act 122 is to afford an effective remedy against the mischief suffered by purchasers for valuable consideration, arising from the subsequent discovery of secret or concealed dealings, by requiring that an instrument affecting land be registered, under the peril that if it is not found on a register, a subsequent purchaser for valuable consideration will obtain priority over it by the earlier registration of his instrument. Thus, the purpose of registration is to give notice to the whole world of an existing interest. However, although the need to be a bona fide purchaser without notice is not expressly stipulated in Act 122, once it is accepted that the object of the Act is to afford and facilitate notice to the public of pre-existing interest in any piece of land, then it can be validly argued that the objective is achieved when the purchaser has prior notice of such interest even if the instrument covering the interest is unregistered.

Both the trial and appellate courts, in this case, found that at the time the respondent purchased the land he did, indeed, have notice of the appellant's prior interest. Not only that, but he was already aware, when he was dealing with the vendor, Clement Quartey-Papafio, that the said vendor had already sold or agreed to sell the land to his friend, the appellant's principal, and that the appellant had already entered into possession. Indeed, the respondent came to know the vendor through the appellant who had already purchased the property. It was the very fact of that purchase which prompted the respondent to seek property in the same locality.

Admittedly, equity is supposed to follow the law. However, it is also a well established rule that no law or statute must be permitted to become an instrument of fraud. As was observed by Brobbey JA in his judgment in this case at the Court of Appeal:

> "The law which will away a house in respect of which a first buyer has paid as much as 50 per cent of the purchase price to a vendor as a deposit, just because the purchaser's friend will move fast to pay even a lesser amount to the vendor and proceed expeditiously to register a document on the second sale, obviously leaves much to be desired."

I would also add that no law can be applied so as to yield such an absurd result. The law has frequently

been called an ass. However, it is my respectful view that, for this court to promote and foster, in the light of the facts of this case, an asinine result, would be so grossly unjust as to put the law into disrepute and further encourage the rapacity of vendors such as the one in this case. It is worthy of note that in section 34(c) of Act 122, any person who knowingly "makes conflicting grants in respect of the same piece of land to more than one person" is guilty of a second degree felony. That being so, to my mind, it follows that a person, who with prior notice of a prior sale purchases property from the same vendor, makes his purchase with knowledge that the vendor is committing a felony, and his transaction is vitiated by that criminality.

Given the facts of this case, where a blind application of section 24 of Act 122 would lead to our condoning Quartey Papafio's reprehensible and felonious conduct and the part played by the plaintiff with full knowledge of the situation, it is only just and proper that equity should have a role to play in restoring the balance of justice. In my opinion, section 24 of Act 122 can only apply to protect a bona fide purchaser without notice of a prior unregistered transaction. Therefore, where a purchaser has prior notice of a previous purchase transaction on the same land, the mere fact that he is the first in time to register his instrument cannot give his instrument priority over that of the first purchaser; his transaction is tainted by his knowledge. In such a case, an unregistered instrument which creates an interest in the land must take priority over the later purchaser's instrument.

DECISION

Appeal allowed.

LSNA.

Endnotes

1 (Popup - Footnote)

1 same in content.

2 (Popup - Footnote)

3 same in document

3 (Popup - Footnote)

4 same in document