IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA. A. D. 2022

CORAM:

WELBOURNE J. A. (PRESIDING)

GAISIE J.A.

BAFFOUR J.A

SUIT NO: H1/121/2021

26TH MAY, 2022

1. MRS. VIOLET ALLEN PLAINTIFF/APPELLANTS

2. MRS. EMMA HUTTON-WHITAKER

VRS

MADAM MARY ADJANOR DEFENDANTS/RESPONDENT

JUDGMENT

Baffour J.A:

INTRODUCTION

Among some of the legal concepts that are evinced for an examination in this appeal are principles such as jus accrecendi and tenancy in common. For a healthy appreciation of these common law concepts would greatly illume our path to deal with virtually the weightier issues raised by the defendant/appellant in this appeal. As the nature of the devise to the plaintiff/respondent by the Will of their father largely depended on the interest that Thomas Hutton-Whitaker (decd) possessed before his death and same being hinged on whether it was one of jus accrecendi or tenancy in common with two of his

sisters, being Patricia Lilly and Florence Hutton-Whitaker. For this appreciation would also settle the important question of capacity and locus standi that has been raised by the defendant/appellant for the first time in this appeal. For the sake of consistency plaintiffs/ respondents would be referred to as respondents whilst the defendant/appellant would be maintained as appellant throughout the trial.

BACKGROUND

The res litga is H/No C336/1, Manyo Plange Street, Adabraka-Accra stylishly called Primrose Villa. It has a recorded history of about four score and ten years of having been in the ancestral lineage of the respondents' Thomas Joseph Whitaker family since it was purchased from Julietta Louisa Ribeiro in 1933. The respondents are descended from Thomas Joseph Whitaker, through his son Thomas Hutton Whitaker. He it was in 1947 due to natural love and affection which he bore towards three of his children devised to Lily Patricia Whitaker, Florence Whitaker and Thomas Hutton Whitaker, the Primrose Villa as seen in Exh "G" "as Tenants in common". For a number of decades it appears that Violet Afua Maanum Whitaker, who was the mother of the three children and the grandmother of the appellants exercised rights over the house until her death in 1971. The three donees of the property at some point moved to all live in the house. Whilst Thomas Hutton Whitaker and Florence Whitaker and her daughter occupied various sections of the main house, Patricia Lily Whitaker rather occupied the outhouse. The two sisters predeceased the father of the respondents.

In the Will of Thomas Hutton Whitaker made on the 12th of August, 1996, that is on record as Exhibit "D1" he declared his ownership among other properties his "share of House No C. 336/2 Manyo Plange Street, Adabraka, Accra". He proceeded to devise his share of that property to his three daughters, being Mame, Violet and Pearl Hutton Whitaker as well as a grandson by name James all proceeds realized out of the property. Having been granted probate of the Will of their father, they birthed the writ on the 29th of April, 2011 and sought reliefs of ejectment and recovery of possession of the outhouse occupied by the appellant, damages for trespass, cost against the appellant and her husband who had been in occupation since 2008.

In her amended statement of defence and counter claim the Appellant denied having trespassed on the property and stated that she acquired the outhouse lawfully from one Ali Jebeile, who searches at the Lands Commission proved to be the lawful owner of the property. That before she moved to occupation she had to file a writ at the District Court for an order of ejectment to recover possession. Further, that she had proceeded to complete registration of her interest and has title to the property with a title certificate. And having so purchased the property she raised the defence of bona fide purchaser for value without notice. She accordingly counter claimed for a declaration of title to the property, a further declaration that she was the owner of the outhouse of the Primrose Villa property with her husband and perpetual injunction to restrain the Plaintiffs from interfering with her quiet enjoyment of the property.

The court need to recount the contents of the reply of the respondents due to the procedural issue it raised but which was not spotted by the learned trial Judge during trial or in his judgment. For in the reply new facts were alleged which had not been raised in the statement of claim neither was it in response to a defence of confession and avoidance in so far as the respondents alleged fraud against the appellant in the procurement of the land title certificate. The procedural stumble would be addressed by the court in due course.

After trial the learned trial Judge dismissed the counter claim of the Appellant and upheld the claim of the Respondent. Aggrieved by that decision the Appellant launched an appeal against that decision with a notice of appeal and followed that up with notice of additional grounds of appeal. The grounds of appeal contained in the notice of appeal and the additional grounds can be stated as follows:

a. The judgment is against the weight of evidence
b. The trial High Court Judge, with respect, erred when he ordered the ejectment of the appellant and recovery of possession over the disputed property.
c. The trial High Court Judge, with respect, erred when he ordered the cancellation of

the land certificate over the disputed property.

d. The trial High Court, with respect, erred when he entered judgment against the appellant and in favour of the respondents in spite of the fact that the appellant derived her title and interest from a co-owner who had exercise rights of ownership over the disputed property.
e. The High Court Judge, with respect, erred when he gave an order which disregarded mandatory provisions of statute as well as rules of equity relating to laches, acquiescence and unjust enrichment.
f. The plaintiffs/respondents being children of one of the co-owners of the whole property lacked capacity to commence the action which resulted in the judgment of the court below.
g. The learned trial Judge erred when he did not dismiss the action brought by the respondents alone when even though they were not claiming exclusive ownership over the disputed property.
h. The learned trial Judge, with respect, erred when he held or found that the respondents had established their rights to title to and recovery of possession of the whole property in spite of the fact that they came to court as children of one of the co-owners of the property.
i. The learned trial Judge, with respect, erred when he failed to find, on the evidence that Mrs. Lily Patricia Whitaker had divested the disputed or whatever interest she had in the wider property in favour of the appellant
j. The learned trial Judge, with respect, erred when he allowed the respondents to recover possession of the entire property, inclusive of the interest of the divested interest of Lily Patricia Whitaker, thereby enabling unjust enrichment of the respondents at the expense of the appellants.

RESOLUTION

There are two preliminary technical legal matters that I deem must be tackled before dealing with the grounds that raises questions of capacity and locus standi. Grounds (b) and (c) of the original grounds of appeal alleged as errors of law on the part of the trial Judge to the extent that he ordered for the recovery of possession of the disputed property

and also that the Judge further ordered for the cancellation of the title certificate. The particulars of the errors alleged were not provided contrary to the demands of Rule 8(4) (5) and (6) of the Court of Appeal Rules, C. I. 19 as follows:

> "(4) Where the grounds of an appeal allege misdirection or error in law, particulars of the misdirection or error shall be clearly stated".
>
> (5) The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.
>
> (6) No ground which is vague or general in terms or which: discloses no reasonable ground of appeal shall be permitted, except the general ground that the judgment is against the weight of the evidence; and any ground of appeal or any part of the appeal which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent.

Time without number both the final and intermediate appellate courts have decried this method of formulating the grounds of appeal that completely flout Rule 8(4), (5) and (6) of C.I 19. Without any inherent right in a litigant to appeal against a decision and same being a creature of statute, it behoves an Appellant before the court, to abide strictly by the rules laid down to guide a party that intends to avail itself of the window granted by the law and the rules spelt out in filing ones appeal, but not to proceed as if there was an unbridled freedom to convey the grounds of appeal in any manner as an appellant deems fit. In deprecating such a manner of formulating grounds of appeal, when the appellant just stated as a ground of appeal that the judge misdirected himself by giving an erroneous decision, Kpegah JA (as he then was) noted in **Zabrama vs. Segbedzi [1991] 2 GLR 221** at page 226 on as follows:

> "I do not think it meets the requirements of these rules to simply allege

"misdirection" on the part of the Trial Judge. The requirement is that the grounds stated in the notice of appeal must clearly and concisely indicate in what manner the trial Judge misdirected himself either on the law or on the facts. To state in a notice of appeal that "the trial Judge misdirected himself and gave an erroneous decision" without specifying how he misdirected himself is against the rules and renders such a ground of appeal inadmissible. The rationale is that a person who is brought to an Appellate forum to maintain or defend a verdict or decision which he has got in his favour, shall understand on what ground it is impugned".

Again, in the case of **F. K. A Company Ltd v Nii Tackie Okine (Sub By Nii Tackie Amoah** (Unreported) **J4/1/2016** dated 13/4/2016, the Supreme Court in dealing with a similar provision to Rule 8(4) of C. I 19 which can be found in Rule 6(4) and (8) of the Supreme Court Rules, C. I. 16, 1996 when the Appellant had formulated eighteen grounds of appeal, in scolding counsel for the appellant for lack of particularity in the grounds of appeal, Akamba JSC noted as follows as follows:

"Of late the courts are inundated with ill prepared initiatives by counsel whose only motives are to hit newspaper headlines by any means or be seen to be carrying out the mandates of their unsuspecting and/or misinformed clients or simply for undeserved financial gain. The result is the spate of unwarranted actions, writs, motions, petitions and appeals to cite but a few, which are hardly initiated in strict compliance with the procedure rules. It is now time for the courts to wake up from the slumber of despair and strictly apply the rules that regulate the proper conduct of trials in our court system. As Courts of law we administer justice according to law and equity which are strictly guided by laid down rules fashioned over the centuries to guide our conduct. In Ayikai v Okaidja III (2011) SCGLR 205 this court did stress the fact that non-compliance with the rules of court have very fatal consequences for they not only constitute an irregularity but raise issues that go to jurisdiction".

Finally, on this point in the recent decision of the apex court in the case of **Okonti Borley & Okonti Borley v Hausbauer Ltd [2021] DLSC 10078** the apex court came down

strongly against an appellant that had formulated the grounds of appeal alleging errors of law but without any effort to particularize those errors. Tanko JSC commented in striking out the grounds as follows:

> "In formulating grounds of appeal which are intended to comply with the provisions of Rule Rules 6(1) and (5) of C. I. 16, the grounds must contain precise, clear unequivocal and direct statements of the decision attacked. They must in other words give the exact particulars of the mistake, error or misdirection alleged. As such any ground of appeal alleging error of law or misdirection without particulars, except the omnibus ground, is defective and incompetent and they are liable to be struck out".

See also **Susan Bandoh v Dr. Mrs. Maxwell Apeagyei-Gyamfi & Alex Gyimah [2019] DLSC 6502; Faustina Tetteh v T. Chandiram & Others J4/52/2018 dated 24th July, 2019**; **Dahabieh v s. a. Turqui & Brothers [2001-2002] SCGLR 498 @ 504**. Accordingly grounds 2 and 3, for having flouted tis time honoured rule, is struck out as inadmissible grounds of appeal.

ALLEGATION OF MATERIAL FACTS OF FRAUD ALLEGED IN A REPLY

The second technical issue that cannot be glossed over is the nature of the reply filed by the respondent. That matter is raised and discussed infra even though that procedural slip was not identified by the trial Judge neither was it touched on by the appellant in the grounds of appeal or in the written submission. Ordinarily, this court is guided by Rule 8(8) of the Court of Appeal Rules, C. I. 19 to the effect that:

> "[T]he Court in deciding the appeal shall not be confined to the grounds set out by the appellant but the Court shall not rest its decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground".

It may be true that the court did not offer an opportunity to the matter of new allegation of

fraud that was raised for the first time in the reply of the respondents, but where an issue is clearly unanswerable, a court is not deemed to have erred if arguments are not invited on that issue. This position finds ample support in the dictum of Gbadegbe JSC in the case of **Sampson Obeng & Anor v Kwabena Mensah J4/78/2018 delivered on 17th July, 2019** (unreported) that:

> "The complaint made by the defendants which finds favour with us reiterates the need for appellate judges to appreciate that their jurisdiction is one of correction, which requires them to interrogate proceedings beyond the grounds of appeal in order to uphold their onerous duty of deciding cases according to law. We observe the emergence of an unhappy trend in appeals before us of the learned justices of the CA shying away from utilizing the extensive power conferred on them under the Rules to interrogate appeals before them beyond the grounds of appeal raised by the parties".

Standing on such authoritative pronouncement as above, we would not shy away from utilizing our extensive power conferred on us and I think this court is not precluded from raising procedural matters that has escaped the scrutiny of the parties, if we are to avoid the scolding of the Supreme Court of not being astute to our duty as the first appellate court. In the reply to the statement of defence and counterclaim respondent alleged new matters not found in the statement of claim in so far as the respondents alleged new matters of fraud in the reply. Respondent stated in paragraph 3 of the reply that the three children of their progenitor, Thomas Joseph Whitaker acquired the property and gave it out as tenants in common and no transaction had been entered into for a sale of any portion and therefore any alleged sale of the property could have only been by fraudulent means. They proceeded to particularize the fraud. Such allegation of material new facts is clearly contrary to Order 11 Rule 10 of the High Court (Civil Procedure) Rules, C. I. 47 which is to the effect that:

> "10. (1) A party shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading made by the party.

(2) Subrule (1) shall not be taken as limiting the right of a party to amend or apply for leave to amend previous pleading of the party in order to plead allegations or claims in the alternative".

Commenting on this rule and its breach in the case of **Senti Michael v Rev. Father Mon Kwame & Anor [2020] GHASC 61;** the Supreme Court speaking through Amegatcher JSC had this to say:

> "The general rule is that a plaintiff is not permitted to set up in his reply a new claim or cause of action which was not raised either in the writ or the statement of claim except by way of amendment. The rule, however, permits the plaintiff to allege new facts in his reply for the sole purpose of supporting the case already pleaded in his statement of claim. On this basis, the authorities are ad idem that the main purpose of a Reply in pleadings is to raise in answer to the Defence any matters which must be pleaded by way of confession and avoidance, or to make any admissions which the plaintiff may consider proper to make … Any new pleading which is filed by a party and which is inconsistent with an original or earlier pleading will be a departure from a party's previous pleadings".

The court accordingly struck out the pleading of the respondent as contained in his reply that alleged new facts of forgery of the Will as well as the evidence led in support of those allegations as having sinned against Order 11 Rule 10. The court found reliance in its earlier decisions such as **Hammond v. Odoi & Anor [1982-83] GLR 1215.** Any material allegation made subsequent to a statement of claim by a plaintiff that would necessitate the opposing party needing to come for leave to respond to such a new material allegations but not as of right is frowned upon under the rules of court. And such is the rule that the respondent flouted at the court below. We do the needful in our decision to strike out paragraphs 3 of the reply of the respondent as raising new matters which they need leave to have amended the statement of claim to plead those material claims but not to have sneaked that allegation under the Trojan horse of a reply to the statement of defence.

CAPACITY

In the first three additional grounds of appeal filed by the appellant issues of capacity of the respondents to have mounted the action have been raised for the first on appeal before the court. For ground (i) in the additional grounds states that the respondent lacked capacity to have commenced the action. And in the ground (ii) the appellant states that the trial Judge should have dismissed the action by virtue of the fact that the respondents alone could not have commenced the action and the ground (iii) in the additional grounds of appeal complains that the respondents claiming their title through only one of the tenants in common had no mandate to claim the entire property. Nowhere in the pleadings and in the evidence before us was the issue of capacity and locus standi raised. However, it need not be over flogged as matters of capacity and locus standi are not limited to pleadings and trials but could be raised for the first time on appeal and even at the final appellate court. See **Adu-Poku v Dufie [2009] SCGLR 310.**

For it is now an aphorism that a writ that is issued without the requisite capacity is void and the voidness operates as a cancerous tumour that affects the entire action. In the case of Leslie **Nartey Marbell v Salamatu Marbell [2020] DLSC 9896**, Dordzie JSC noted on capacity as follows that:

> "A writ that does not meet the requirement of capacity is null and void. The default cannot be cured under Order 81 because capacity cannot be acquired whiles the case was pending"

In the written submission of the appellant he has argued flowing from the first three grounds of appeal in the additional grounds of appeal that the judgment of the trial Judge is void on grounds of capacity as the respondents lacked capacity to have prosecuted the claim. And the pith of the submission was that the respondents were only executrixes of

only one of the three persons that held the Prim Rose Villa as tenant in common and needed to have shown the consent that they had from the administrators or the personal representatives of the two other original beneficiaries to have instituted the action. As such a weightier matter of capacity has been raised we are bound to determine same before this court can be at liberty to proceed beyond that. Writing on capacity, Marful Sau JSC for the apex court in Nii **Kpobi Tettey Tsuru III v Agric Cattle & Others J4/15/2019** delivered on the 18th of March, 2020, had to state:

> "The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter, it can be raised at any time even after judgment on appeal. The issue is so fundamental that when it is raised at an early stage of the proceedings a court mindful of doing justice ought to determine that issue before further proceedings are taken to determine the merits of the case. Thus, a Plaintiff whose capacity is challenged need to adduce credible evidence at the earliest opportunity to satisfy the court that it had the requisite capacity to invoke the jurisdiction of the court. If this is not done, the entire proceedings founded on an action by a Plaintiff without capacity would be nullified should the fact of non-capacity be proved".

We ask did respondents' counsel in its submission point the court to credible evidence on record to show that respondents had capacity to have acted on behalf of the two other sisters of their father, as co-owners to have instituted the action? It was the claim of the respondents that they had the right to take action as executrixes to protect the estate of their father and his siblings. Respondents treated the court to what they claim is the meaning and implication of the gift of the Prim Rose Villa made to the three siblings as tenants in common. To respondents in tenancy in common one of the tenants cannot dispose of his/her interest without the consent of the other tenants in common (see page 5 of the written submission filed on 25th January, 2022). In fact appellant was accused of having misconceived the application and the relevant case law on the matter. What is at stake in the matter of capacity raised by the appellant is an excursion into the incidents of

tenancy in common to determine whether it vindicates the claim of the respondent, whose capacity was challenged to determine whether respondents needed the consent of the personal representatives of the two of the sisters of their late father to have proceeded to court. If the incidents of tenancy in common implies that each passes his/her portion to a beneficiary but not to one of the tenants then the respondents had no capacity at the time the action was instituted. However, if tenancy in common operates jus accrecendi principle then the last survivor and his descendants can mount an action to claim the whole of the property.

By Exh "G" being the deed of gift of Thomas Joseph Whitaker the Prime Rose Villa was granted or conveyed to the three children, being Lily Patricia Whitaker, Florence Whitaker and Thomas Hutton Whitaker "as Tenants in common". A well-known incident of joint tenancy which is unknown in tenancy in common is jus accrecendi, which is defined by the **Black's Law dictionary, 8th Ed.** as "a right of survivorship that a joint tenant enjoys". That is in joint tenancy under jus accrecendi, the last surviving member of the tenants takes the property as his absolute property and can alienate the whole of it without any reference whatsoever to the beneficiaries of the fellow tenants that predeceased him. Therefore, in joint tenancy, a joint tenant cannot pass on his interest in the property when the tenancy has not been severed. The right of survivorship can however be rebutted when there is evidence to show that the property was severed by the parties.

However, this is completely different from a property that is held as tenants in common as seen in Exh "G" of the gift to the three children of Thomas Joseph Whitaker. What is implied by tenancy in common has been explained by the venerable Justice Sir Dennis Adjei in his work **"Land Law, Practice and Conveyancing in Ghana, 3rd Ed**" at page 236 as follows that "a tenant can severe the tenancy through his Will by devising only his interest or selling his interest during his lifetime with or without the consent of the other tenants and that would constitute severance …". The claim therefore made by the respondents that in tenancy in common, one of the tenants need the consent of the other tenants to dispose of a portion of his interest is incorrect. The learned author further opines at page 237 as follows regarding tenancy in common that:

> "[T]he tenants who are two or more persons hold the same property. There is unity of possession but each tenant has a distinct and quantifiable share in the land. Each tenant has an equal right to possess the whole property but there is no right of survivorship as the interest of a person who dies passes on to his beneficiaries and not to the other tenants. In any case each tenant has a fixed share in the property except that it has not been shared and where one of the tenants die, his fixed portion of the undivided property shall pass unto his beneficiaries under testate or intestacy".

Need one say more? What it means therefore is that the Primrose Villa having been held as tenants in common, the undivided portion of Florence Whitaker can only be claimed by her personal representative or beneficiaries under a Will or under PNDCL 111. Similarly, the undivided portion of Lily Patricia Whitaker, under tenancy in common passed onto her personal representative or beneficiary under a Will or under PNDCL 111. The respondents who are not the beneficiaries of Lily Patricia Whitaker had no interest in the undivided portion of their Auntie, Lily Patricia Whitaker. What could have clothed the respondents with the necessary capacity was for the personal representatives or beneficiaries of Lily Patricia Whitaker to have joined forces with the respondents to come to court. Or alternatively the respondents could have endorsed on their writ that in addition to being the executrixes of their father Thomas Hutton Whitaker, they were also the personal representative of Lily Patricia Whitaker and led evidence to prove that. See **Republic v. High Court, Accra; Exparte Aryeetey (Ankrah Interested Party) (2003-2004) SCGLR 398.**

CONCLUSION

It stands therefore for one to conclude that the nature of the incidents of tenancy in common under which the three siblings had Primrose Villa conveyed to them in 1947 did not permit the respondents to have mounted the action for the recovery of the portion of Lily Patricia Whitaker. An action that is the preserve of her personal representatives or beneficiaries. And as capacity goes to the validity of the writ, proceedings founded on it

would also be a nullity. And without requisite capacity to mount the action, the counter claim of the appellant would also be against the wrong parties and same is also a nullity. Where an appeal is sustained on ground of capacity, it is needless for an examination of the merits of the appeal as the proper parties were not before the court for a determination of their rights. We accordingly declare that the writ issued by the respondents was a nullity for want of capacity and same set aside. The writ, the pleadings, the proceedings and the judgment founded on it were built on stubble that has collapsed. The appeal succeeds solely on ground of capacity.

Eric K. Baffour, Esq.
(Justice of Appeal)