

IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA AD 2022

CORAM: 1.M. WELBOURNE (MRS), J. A (PRESIDING)

2. M. WOOD (MRS), J.A

3. E. BAAH J.A

CIVIL APPEAL NO. H1/158/2022

DATE: THURSDAY, 28TH JULY, 2022

NII AKWEI ADOTEY

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DEFENDANT/APPELLANT

VRS

DANIEL GAIKPAH

MONICA KLU GAIKPAH

JOHN KAFUI KWAME

MRS FELICIA KLU

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PLAINTIFFS/RESPONDENTS

JUDGMENT

MERLEY WOOD (MRS), JA

This is an interlocutory appeal by the Defendant/Appellant against the Ruling of the High Court, Land Division delivered on 4th November 2020 for failing to set aside the Writ of Summons directed at a deceased person.

The Plaintiffs/Respondents will be alternately referred to as Plaintiffs or Respondents while the Defendant/Appellant will be alternately referred to as Defendant or Appellant.

The facts leading to the instant appeal are that the Plaintiffs sued out a Writ of Summons with its accompanying Statement of Claim against the Defendant on 6th August 2020 claiming the following reliefs:

- i. A declaration that 1st and 2nd plaintiffs own all that piece or parcel of land situate at Adoteiman, covering an approximate area of 0.65 acre or 0.26 hectare and bounded as follows: on the South East by lessor's land measuring 140.6 feet more or less, on the South West by lessor's land measuring 203.3 feet more or less, on the North East by lessor's land measuring 201.2 feet more or less, on the North West by proposed road measuring 138.50 feet more or less (hereafter called the disputed land), which property is the subject matter of this suit.
- ii. A declaration that 3rd and 4th plaintiffs own all that piece or parcel of land situate at Adoteiman-Accra covering an approximate area of 0.16 acres or 0.06 hectares more or less and bounded as follows; on the North by Lessor's land measuring 104.5 feet more or less, on the East by Lessor's land measuring 67.8 feet more or less on the South by Lessor's land measuring 100.2 feet more or less on the West by proposed road measuring 68.0 feet more or less and lying contiguous with 1st and 2nd plaintiffs grant.

- iii. An order of recovery of possession of the disputed land described in reliefs (i) and (ii) against the defendant.
- iv. An order of perpetual injunction against the defendant, his assigns and privies, agents, servants, workmen, allottees, grantees, and successors in interest, other alienees and relations whatsoever and howsoever described to restrain them from dealing with or having to do with the property in dispute forever.
- v. Damages against defendant for trespass to the plaintiffs referred to above.
- vi. Cost including solicitor's fees.
- vii. Any other relief deemed fit by the Honourable Court.

The name of the Defendant on the writ was given as Nii Akwei Adotey, lawful representative of Nii Moi We Family, Adoteiman-Accra. Underneath his name was that of Nii Adotei Otswi Obuadabang III. It reads as follows:

"To Nii Adotei Otswi Obuadabang III

An Action having been commenced against you by the issue of this writ by the above named Plaintiffs

- 1. Daniel Gaikpa 2. Monica Klu Gaikpah 3. John Kafui Kwame
- 4. Mrs Felicia Klu.

YOU ARE HEREBY COMMANDED that within EIGHT DAYS after service of this writ on you inclusive of the day of service you do cause an appearance to be entered for you NII ADOTEI OTSWI OBUADABANG III."

The Defendant/Appellant filed a conditional appearance to the action on 17th August 2020. However, on 18th August 2020, the Plaintiffs/Respondents filed an Amended Writ of Summons and Amended Statement of Claim which amendment deleted the name of the deceased from the amended processes without leave as permitted under Order 16 rule 1 of CI 47. Again, on 19th August 2020, the Defendant filed a motion on notice to strike out the original Writ of Summons and Statement of Claim. The Plaintiffs/Respondents in response filed a Motion to Strike out the Defendant's motion to strike out the Writ of Summons and Statement of Claim on 24th August 2020 on grounds that they had amended their Writ of Summons on which a conditional appearance had been issued against. (page 109 to 122 of the record of appeal).

The Motion to strike out the Appellant's Motion was heard on 9th September 2020 and in the ruling delivered on 23rd September 2020, the application was dismissed.

The Plaintiffs/Respondents subsequently filed an affidavit in opposition to Defendant/Appellant's Motion to strike out the Writ of Summons on 30th September 2020 and a supplementary affidavit in support on 20th October 2020. The High Court, Land Division on 4th November 2020 heard the application and dismissed same (page 178 to 179 of the Record of Appeal). The learned trial judge stated thus:

"In the present suit however, the Writ as issued was against one Nii Akwei Adotey who per the evidence before me is alive and one Nii Adotei Otswi Obuadabang III who per the evidence before me is deceased. In so far as at the time the Writ was issued one of the named defendants on the Writ was alive, the said Writ cannot be a nullity as it was issued against an identifiable person who was and is still living. The Writ can however not be enforced against the said deceased person. Counsel for the Plaintiffs has recognized the said error and has amended the Writ by taking away the name of the said Nii Adotei Otswi Obuadabang III (deceased). I will therefore respectfully refuse the application to

set aside the Writ and Statement as the same is not a nullity. I make no order as to cost. The suit will take its normal course."

The Appellant being dissatisfied with the Ruling filed a notice of appeal to this court on 12th November 2020 per the following grounds of Appeal found from page 180 to 181 of the record of appeal:

- a. That the trial judge erred in law in failing to set aside the Writ of Summons, directed at a deceased person.
- b. The trial judge had no jurisdiction to declare as proper an Amended Writ of Summons that had been declared by a court of co-ordinate jurisdiction to be improper.
- c. That the judge erred in holding that on the face of the Writ of Summons the plaintiff sued two defendants, one alive, one deceased.
- d. Additional grounds of appeal shall be filed upon receipt of the record of appeal.

It is noted for the record that no additional grounds of Appeal were filed.

The reliefs sought from the Court of Appeal is that the Ruling of the trial court dated 4th November 2020 be set aside and the Writ of Summons and all processes based on same to be also set aside.

In arguing all the grounds of appeal together, Counsel for the Appellant submitted that since Nii Adotei Otswi Obuadabang III who was sued and to whom the Writ of Summons was directed had died two years prior to the issuance of the said writ and it is a cardinal principle that a writ cannot be issued against a deceased person, the writ is a nullity which cannot be amended and he cites the cases of *Ofori vrs Star Assurance Co. Ltd. [2015-2016] SCGLR 339 at 347; National Investment Bank Limited & Others vrs Standard Bank Offshore Trust Company Ltd & Others (suing on behalf of certain Investors in Promissory notes: Sphynx Capital Markets PCC Investors & Tricon Trade*

Management Ltd) Substituted by Dominion Corporate Trustee Ltd (2017) 113 GMJ 174 at 298 and 221.

It is further submitted by Counsel that the trial judge's ruling in which he stated that there were two Defendants one of whom was dead cannot be true since the pleadings and the Statement of Claim refer to one person and not two people. That being the case, he says that the trial judge fabricated a case different from what the respondents themselves made as to the number of Defendants who were being sued and therefore fell into grave error and refers to the cases of *Dam vrs Addo [1962] 2 GLR 200* and *FKA Co. Ltd & Others vrs Nii Tettey Okorh Aryee & Others [2019] DLCA 6340*.

Additionally, Counsel contends that by the dismissal of the Appellant's application and adopting the Amended Writ of Summons and Statement of Claim filed by the Respondents, a court of co-ordinate jurisdiction had in its ruling on 23rd September 2020 on the application by the Respondents seeking to set aside the Appellant's motion to strike out the Writ on the pretext that they had already amended the writ impugned, dismissed the application per a ruling they did not appeal against since a court of co-ordinate jurisdiction lacks the jurisdiction to entertain a matter that had already been adjudicated on by another court particularly where the previous decision was void. The trial court therefore had no jurisdiction to declare as proper the Amended Writ of Summons because one High Court cannot sit as an appellate court over the other. He referred to the cases of *Punjabi Brothers vrs Namih [1962] 2 GLR 46*; *Stanbic Bank Gh. Vrs Osei Yaw Anning [2017] DLCA 5342 at page 6*; *The Republic vrs The Registrar & President of the National House of Chiefs, Kumasi & 4 Others [2019] GLTR 49*.

In responding to the arguments of Counsel for the Appellant, Counsel for the Respondent contends that the Plaintiffs Writ of Summons and Statement of Claim was not against Nii Adotei Otswi Obuadabang III but rather there is ample evidence on the face of the writ that the Defendant is Nii Akwei Adotey while other parts of the writ

had the deceased name. Furthermore, he submits that several paragraphs in the Statement of Claim show that Nii Akwei Adotey is the Defendant and not the deceased whose name mistakenly appeared at two places on the writ and it should be regarded as a mere irregularity and as such does not render the action void.

Counsel relies on the principle of reading the writ and statement of claim together so that the defects in the writ can be cured by the Statement of Claim. He refers to the case of *Nana Yaw Owusu and Others vrs Hydraform Estates Ltd, Civil Appeal No. J4/62/2013 dated 26th March 2014*.

He further submits that the title of the suit indorsed on the original Writ of Summons and Statement of Claim clearly designates Nii Akwei Adotey as the sole Defendant. He additionally submits that the identity of the Defendant is clear from the Writ of Summons and the Statement of Claim as the bailiff went and served him and no other and executed an affidavit of service stating that Nii Akwei Adotey was the Defendant.(see page 131 of the record of appeal.)

On the principles of errors of nomenclature (misspelling of names, incomplete names, not knowing the name) vis-à-vis principles of identification, Counsel submits this is a case of nomenclature and not a problem of identity and refers to the following case and book in proof thereof: *Adelson vrs Associated Newspaper Ltd [2007] EWCA Civ 701, [2007] 4 All ER 330; Civil Procedure (The White Book Service 2018) volume 1 page 614, paragraph 3; The Supreme Court Practice 1997 para 20/5-8/18*. Therefore he submits that having correctly identified the attributes of the Defendant throughout their processes, in all proceedings in court, and having met him, any errors with regards the name of the Defendant should be regarded as mere errors of nomenclature and not of identification and therefore remediable.

It is the submission of Counsel that per paragraph 3 of the original Statement of Claim, it is amply clear that the Defendant was not Nii Adotei Otswi Obuadabang III because the said Obuadabang cannot be his own predecessor-in-title. Also, that the Plaintiffs pleaded in paragraph 16 of their Statement of Claim that *“the defendant trespassed unto plaintiffs land and demolished the fence wall and graded the land for his personal use without notice to Plaintiffs.”* This therefore means that they could not have been referring to Nii Adotei Otswi Obuadabang III.

Regarding the effect of amendment of pleadings by one party without leave before a motion is filed by an opposing party, Counsel for the Respondent contends as per holding 2 of the case of *Kai vrs Amarkye [1982-83] GLR 817* that *“the whole object of pleadings was to bring the parties to an issue. Once pleadings were amended, what stood before the amendment was no longer material before the court...”* He further contended that in view of the fact that the Plaintiff effected the amendment before the Defendant mounted his motion, there was no error to complain about. He distinguished the case of *Ahinakwa II vrs Okaidja III* by arguing that the case did not amend Order 16 rule 1 of CI 47 and that a conditional appearance is not a motion as in the case of *Ahinakwa vrs Okaidja III*.

It is Counsel’s submission that the Plaintiffs corrected their error because they knew the error and that a conditional appearance by itself does not disclose the error the party intends to raise let alone prompt the Plaintiffs.

Should the appeal be allowed?

Can it be said that the writ is directed at a dead person? There is no gainsaying that a writ against a deceased is a nullity.

Now, the original Statement of Claim filed on 6th August 2020 per paragraphs 3, 4, 10 and 18 state thus:

- “3. The defendant is only known to the 1st to 4th Plaintiffs (hereinafter “the plaintiffs”) to the extent that plaintiffs grantor (Mr Benjamin Ashitey Quarshie) acquired a bigger parcel of land from the defendant’s predecessor-in-title (Nii Adotei Otswi Obuadabang III) part of which land was leased to plaintiffs herein. Plaintiffs have also met defendant a few times in respect of this dispute.*
- 4. The defendant asserts that he is the head of family and Shikitele of Adoteiman and lawful representative of Nii Moi We family of Adoteiman.*
- 10. The Plaintiffs further state that by a conveyance dated 28th September, 2009 and made between Nii Adotei Otswi Obuadabang III, Shikitele of Adoteiman and lawful representative of Nii Moi We family of Adoteiman as vendor therein and Mr Benjamin Ashitey Quarshie as purchaser therein, Mr Benjamin Ashitey Quarshie (plaintiffs grantor) acquired the larger piece or parcel of land from the defendant to hold and to use for a term of 99 years commencing from the 28th day of September 2009.*
- 17. Plaintiffs state that after the demolition, an attempt was made to settle the matter amicably. It was during one of those settlement meetings that defendant, who is the grantor of Mr. Benjamin Ashitey Quarshie claimed that Mr. Benjamin Ashitey Quarshie (plaintiffs grantor) did not fully pay for the land described in paragraph 9 above.*
- 18. Defendant further claimed during those settlement meetings that some demands have been made on Plaintiffs grantor to pay the outstanding balance since 2012 but plaintiffs grantor failed to do so.*

It is also clear from the above pleadings and on the face of the Writ of Summons and the Statement of Claim that Nii Akwei Adotey is the only Defendant and that he is not dead. It is also clear that the Plaintiffs also knew the Defendant as disclosed by paragraphs 17 and 18 of the statement of claim above. Furthermore, we note that the affidavit of service found at page 131 of the record of appeal indicated that the Writ of

Summons, Statement of Claim and the application for an order of interlocutory injunction were served on the Defendant on 10th August 2020 at 2:24.

Reading the Writ of Summons together with the Statement of Claim, it is our view that the Statement of Claim cured the Writ of Summons. In the case of *Nana Yaw Owusu and Others vrs Hydrafoam Estates Ltd Civil Appeal No. J4/62/2013 dated 26th March 2014* the Court speaking through Anin Yeboah JSC (as he then was) referred to the case of *Opoku [No 2] vrs Axes Co Ltd [No 2] [2012] 2 SCGLR 1214* where Gbadegbe JSC stated as follows: *“The writ of summons ought to be read together with the statement of claim in order to determine if there was any cause of action before the court.”*

Our opinion is further buttressed by the book *Civil Procedure (The White Book Service 2018) (Sweet and Maxwell) Vol. 1 page 614*, paragraph 3 referred to by Counsel for the Plaintiffs/Respondents as follows:

“Where an action is mistakenly commenced in the name of a claimant company which had ceased to exist as a result of a merger, the Court has power, to correct the name of the claimant company, since the mistake had gone to the name rather than the identity of the claimant, and such amendment would relate back to the date of the commencement of proceedings so that there never was a non-existent claimant.”

And in paragraph 4 of page 614 (Civil Procedure), the editors continue as follows:

“In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued.”

It is therefore our opinion that the name of Nii Adotei Otswi Obuadabang III was mistakenly or inadvertently put on the processes filed and that the writ is not directed

at a dead person. That being the case therefore, it is our view that the writ is not a nullity but an irregularity.

As already been mentioned, the Plaintiffs amended their Writ of Summons and Statement of Claim before they were served with the application to strike out the said processes. Order 16 rule 1 of the High Court (Civil Procedure) Rules, 2004 CI 47 stipulates thus:

(1) The plaintiff may, without leave of the Court, amend the plaintiff's writ once at any time before the pleadings are closed.

(2) Where a writ is amended under this rule after it has been served, the amended writ shall be served on each defendant to the action unless on an application made ex parte the Court otherwise directs.

Per this provision therefore, a plaintiff may amend the writ once at any time without leave of court so long as the pleadings are not closed. Where the writ is amended, Order 16 rule 2 provides that the said amended writ shall be served on each defendant. In this case, the Plaintiffs made the effort to serve the Defendant's Counsel. The said processes were given to the bailiff on 18th August 2020 but both on 18th and 19th August 2020, he was unable to serve same because "*the said lawyer's office was closed upon my attempts*" as revealed by the affidavit of non-service found at page 129 of the record of appeal. By the time the Motion on Notice to Strike out the Writ of Summons and Statement of Claim was filed on 19th August 2020, the Plaintiffs had amended the original Writ of Summons and Statement of Claim.

In his book "*Civil Procedure A Practical Approach*" at page 443 the learned author S. Kwame Tetteh has this to say on amending without leave of court: "*For the expeditious progress of the action, a self-correcting procedure enables the parties, from the commencement of the action, to rectify errors in the writ of summons and pleadings without the leave of the court.*"

The procedure is predicated on the assumption that such amendments usually cause little or no inconvenience to either party at such early stages of litigation but any party aggrieved by an amendment may apply subsequently for the court to disallow the amendment."

As succinctly explained by S Kwame Tetteh, the rationale is to rectify errors in this self-correcting procedure.

Order 9 rule 7 of CI 47 which deals with conditional appearance states thus:

"(1) A defendant may file a conditional appearance.

(1) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as unconditional appearance unless the defendant applies to the Court within the time limited for the purpose, for an order under rule 8 and the court makes an order under that rule."

Order 9 rule 8 of CI 47 on application to set aside writ provides that:

"A defendant may at any time before filing appearance, or, if the defendant has filed a conditional appearance, within fourteen days after filing appearance, apply to the Court for an order to:

- (a) Set aside the writ or service of the writ;*
- (b) Declare that the writ or notice of it has not been served on the Defendant; or*
- (c) Discharge any order that gives leave to serve the notice on the defendant outside the country.*
- (d) Declare that the writ or notice of it has not been served on the defendant; or*
- (e) Discharge any order that gives leave to serve the notice on the defendant outside the country."*

Conditional appearance therefore may be entered for any of the varied reasons stated above. The reason for the entry of conditional appearance is not disclosed on the face of

the process and therefore the Plaintiff may not know exactly why the Defendant has entered conditional appearance.

Counsel for the Plaintiffs submitted that when they discovered the error, they amended the processes. It is instructive to note that the Plaintiffs amended the writ of summons and the statement of claim before the Defendant filed the application to set aside the said processes.

The effect of an amendment is that once there is an amendment of pleadings or writ, what stood before the amendment is no longer material before the court and no longer defines the issues to be tried. See the case of *Kai vrs Amarkye* [1982-83] 2GLR 817. As stated by Marful-Sau JSC (of blessed memory) at page 80 of his book *"A Practical Guide to Civil Procedure in Ghana"* *"The principle is that an amended writ or pleading relates back to the date the writ or pleading amended was filed. For example amended writ becomes the origin of the action and the reliefs claimed therein are substituted for those on the original writ. When a writ or a pleading is amended, the original writ or pleading ceases to be part of the record and the court cannot rely on such a writ or pleading."*

Having amended the processes on 18th August 2020 before the filing of the motion to strike out was filed by the Defendant, it is our opinion that the original writ ceased to be part of the record and no longer exists.

Meanwhile, the Appellant's application to strike out the original Writ of Summons and Statement of Claim was still pending. It was moved by the Appellant/Applicant on 4th November 2020 and the Respondent's response was that the name of the deceased was inadvertently put in there and that it is a clerical error which is amenable to amendment. The trial judge in his ruling refused to set aside the Writ of Summons and Statement of Claim. We agree with the Appellant's third ground of appeal which states that the trial judge erred in holding that *"on the face of the Writ of Summons the Plaintiff*

sued two defendants, one alive, and one deceased." Our analysis shows that there has always been one Defendant.

Even though we are in agreement with Counsel for the Appellant that a court of coordinate jurisdiction lacks jurisdiction to entertain a matter that had already been adjudicated on by another court of co-ordinate jurisdiction, that is not the case in this instance. We say so because that situation did not arise. The trial judge considered the application which was before him. We find that the learned trial judge did not review the case of his brother.

We are therefore of the opinion that the appeal lacks merit and is hereby dismissed.

Cost of Ten Thousand Ghana Cedis (GH¢10,000.00) awarded in favour of the Plaintiff/Respondent against the Defendants/ Appellants.

(Sgd)

Merley A. Wood (Mrs.)

(Justice of Appeal)

(Sgd)

I agree

Margaret Welbourne (Mrs.)

(Justice of Appeal)

(Sgd)

I agree

Eric Baah

(Justice of Appeal)

- Martin Kpebu for Plaintiff/Respondent
- Fosu Gyeabour for Defendants/Applicants