IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)
ACCRA – GHANA AD 2022

CORAM: *1. SENYO DZAMEFE, J.A (PRESIDING)*
2. MERLEY A. WOOD (MRS), J.A
3 ERIC BAAH, JA

CIVIL APPEAL NO. H1/184/2022
DATE: 15TH DECEMBER, 2022

FAUSTINA TRACHSEL
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KWAME NKRUMAH CIRCLE == **DEFENDANT/RESPONDENT**
ACCRA

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JUDGMENT

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MERLEY A. WOOD

In this interlocutory appeal against the ruling of the High Court, Accra, delivered on 22nd April, 2021, the Plaintiff/Appellant seeks the setting aside of the aforesaid Ruling.

The antecedents of this case are that the Plaintiff/Appellant (hereafter referred to as the Plaintiff or alternately as the Appellant) on 2nd September 2020 sued out a Writ of Summons and a Statement of Claim against the Defendant/Respondent (hereafter referred to as Defendant or alternately as Respondent) in the General Jurisdiction of the High Court for the following reliefs:

i. A declaration that a charge of US$35,000.00 described by the Defendant as development fee, is in breach of the sale and purchase agreement between the two parties.
ii. A further declaration that the said development fee of US$35,000 (or its equivalent) is unconscionable, arbitrary, capricious, unreasonable and same ought to be struck out.
iii. An order that Plaintiff be allowed to develop the two plots of land, Plot Nos. 7 & 9, Block No. 38, Woodfields Estate, Nmai Djor, Accra
iv. A further order for Defendants to execute a transfer of title in Plaintiff's name for the two plots purchased.
v. Cost.

The Plaintiff as per his Statement of Claim, is a Ghanaian ordinarily resident in Switzerland while the Defendant is a real estate development company and a sister company of Comet Properties Limited. According to the Plaintiff, sometime in 2012, she bought two plots of land at a cost of Twenty Six Thousand Dollars (US$ 26,000.00) from the Defendant through lawyer Owusu Agyeman who had been gifted the land by the Defendant for his services to the Defendant Company. She avers that the only other obligation she was made aware of apart from the purchase price, was the ground rent of One Hundred Ghana Cedis (GH¢100.00) per plot for a year. She protested vehemently when she attempted to develop the land and was confronted by staff of the Defendant who demanded a development fee of Thirty Five Thousand Dollars (US$35,000.00) per

plot, making a total of Seventy Thousand Dollars ($70,000.00). The conduct of the Defendant, she avers, amounts to fraudulent misrepresentation, as a material condition of the contract was not disclosed to her at the time of the transaction. All attempts to persuade the Defendant to waive or reduce the development fee has yielded no result.

The Defendant entered appearance through its lawyer on 19th October 2020 but failed to file a Statement of Defence and so the Plaintiff filed an application for leave to enter default judgment on 22nd December 2020 to which the Defendant filed an affidavit in opposition as well as a Statement of Defence on 15th January 2021. The Defendant's case as per its Statement of Defence is that it allocated the land to Lawyer Kwasi Owusu-Agyemang subject to the payment of all levies and charges that run with the land. It further states that the right of entry which granted the possession of the plots by protocol allocations to the lawyer had all terms and conditions including the payment of development levies stipulated in it hence the Appellant was under a duty to regularize her interest in the land by paying the development levies and charges that run with the land, and which she failed to do despite several notices and warnings. The Defendant denies that the Plaintiff has ever taken possession of the land and states that in 2016, the Plaintiff sold the land to Naa Lamiley Bentil without its consent which was in breach of the terms and conditions of the grant made. The Defendant further alleges that the Plaintiff never paid any consideration to it for the grant of the two plots of land which were released to Lawyer Owusu gratis.

In a reply filed by the Plaintiff, she insists that the Defendant is affiliated to Comet Properties Limited and maintains that she was offered two plots of land by the Defendant through Lawyer Owusu together with the site plan.

On 12nd April 2021, the Plaintiff filed a motion for interlocutory injunction as well as a joinder application to join Lawyer Kwasi Owusu-Agyemang as 2nd Defendant to the suit. As per the record of appeal, the Defendant did not file an affidavit in opposition.

The court however on 22nd April 2021 at page 42 of the record of appeal ruled that "*it is my considered opinion that the presence of Kwesi Owusu Agyemang is not required to enable the Court to do this. The application for an order joining Kwesi Owusu Agyemang to the suit as 2nd Defendant is accordingly dismissed. Suit is adjourned to 21st May 2021 at 9am. The Defendant is ordered to file its affidavit in opposition to the application for Interlocutory Injunction within 14 days of this date. Costs of GH¢1,000 awarded against the Defendant.*"

It is against the said ruling that the instant interlocutory appeal has been brought on the following grounds of appeal found at page 44 of the Record of Appeal:

1. The Learned Judge erred in holding that Kwasi Owusu-Agyemang was not a necessary party to be joined to the suit.
2. The Ruling is against the weight of evidence.

Additional ground(s) will be filed upon receipt of a certified copy of the Ruling.

Relief Sought: To set aside the Ruling dismissing the Application for joinder.

It must be put on record that additional grounds of appeal were not filed. Again, it is noted that the Defendant/Respondent did not file its written submission.

In arguing the first ground, Counsel refers to the case of ***Owusu vrs Owusu-Ansah & Another [2007-2008] 2 SCGLR 870*** at ***877,*** *which* cited the decision in ***Blunt vrs Blunt [1947] AC 817*** which states that an appeal against the court's exercise of discretion "*may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account.*"

Counsel for the Plaintiff/Appellant contends that per Order ***4*** rule 5 sub rule 2(b) of the ***High Court (Civil Procedure) Rules, 2004 C.I 47*** on joinder, the test for joining a party to a suit is whether the presence of the person is necessary for all matters in controversy or

in dispute to be effectively and completely determined. He refers to the cases of ***Appenteng vrs Bank for West Africa (1961) GLR 8*** and ***Zakari Pan American Airways Inc (1982-83) 2GLR 975.*** Counsel argues that it is distilled from the pleadings that while the Appellant alleged that she paid the purchase price prior to receiving the letter from the Respondent confirming the right of entry through Lawyer Kwasi Owusu Agyemang, the Defendant on the other hand as per paragraph 24 of its Statement of Defence pleaded that the Plaintiff never paid any consideration.

Counsel further argues that from the above, it can be surmised that the two key issues germane to be determined by the trial court are whether the Respondent was paid the consideration of $26,000.00 for the purchase of both plots of land through Lawyer Owusu Agyeman prior to Appellant being handed the document indicating Right of Entry to the said plots and whether the conduct of the Respondent in deliberately withholding from the Appellant the true value of the development fee both in the Right of Entry document through Lawyer Kwasi Owusu Agyemang amounts to fraudulent misrepresentation. That being the case, it is therefore his conclusion that to effectively deal with these issues, the presence of the said lawyer is necessary and buttresses it with the case of ***Tsatsu Tsikata vrs The Republic [2007-2008] 2 SCGLR 702.***

Counsel in arguing the second Ground of appeal that the Ruling is against the weight of evidence, refers to the cases of ***Olivia Anim (Suing per her lawful Attorney Diana Mensah Bonsu) vrs William Dzandzi Civil Appeal No. J4/10/2018*** dated 6/12/2019 which quoted with approval the dictum of Pwamang JSC in ***Rowland Kofi Dwamena vrs Richard Nortey Otoo Civil Appeal No J4/47/2018, dated 12/06/2019, Djin vrs Musa Baako [2007-2008] SCGLR 686 and Amoah vrs Lokko & Alfred Quartey [2011] 32 GMJ 27 SC*** where it was held that the said ground of appeal is an invitation to the court to go through the record and ascertain whether on the evidence and the relevant law, the lower court was right in its findings and conclusions. He contends that the learned

judge's findings were not proper inferences drawn from the facts as they excluded matters which were critically necessary for consideration. Thus, Counsel therefore urges this court to go through the record of appeal to ascertain whether there are pieces of evidence that if the court had taken into consideration, it would have arrived at different conclusion.

GROUND I

That the Learned Judge erred in holding that Kwasi Owusu Agyemang was not a necessary party to be joined to the suit.

Order 4 Rule 5 of the High Court (Civil Procedure) Rules, 2004 (CI 47) states:

(1) No proceedings shall be defeated by reason of misjoinder or non-joinder of any party; and the Court may in any proceeding determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the proceedings;

(2) At any stage of proceedings the Court may on such terms as it thinks just either of its own motion or on application;

(a) Order any person who has been improperly or unnecessarily made a party or who for any reason is no longer a party or a necessary party to cease to be a party;

(b) Order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon to be added as a party.

In paragraph 24 of the Statement of Defence, the Defendant says thus:

> *"The Defendant further states the Plaintiff has never paid any consideration to the Defendant for the grant of the 2 Plots which was released to Lawyer Owusu by gratis."*

Paragraphs 5, 6, 7, 8, 9 and 10 of the Affidavit in Support of the joinder application found at page 40 of the Record of Appeal disclose the following:

"5. *That we are reliably informed that the alleged allocation of both plots to Kwasi Owusu-Agyemang by Defendant covered only the purchase price of the land. Thus, he was fully aware of the fact that he was responsible for the payment of all levies and charges running with the land, particularly the development fees.*

6. That with the intention of avoiding being committed to the payment of the extra charges which came with the development of the land without losing on the purchase price he was entitled to by way of gift from Defendant, Kwasi Owusu-Agyemang with the consent of Defendant, facilitated the sale of both plots, handing over the offer letter from Defendant addressed to Plaintiff, disclosing only the purchase price to Plaintiff at the time of entering into the transaction.

7. That the above mentioned Kwasi Owusu-Agyemang was also the recipient of the purchase price of US$26,000.00 for both plots described herein.

8. That upon receipt of the purchase price for both plots, Kwasi Owusu-Agyemang, acting as the middle man between Plaintiff and Defendant issued out a site plan in the name of Plaintiff for her.

9. That the joinder to the suit of Kwasi Owusu-Agyemang will not delay the hearing of this suit nor prejudice in any way the defence of the Defendant.

10. That we therefore pray that this Honourable Court grants Applicant leave to amend the Writ of Summons and Statement of Claim to include Kwasi Owusu-Agyemang as 2nd Defendant to this suit to ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon".

It is therefore not surprising to us that with the Defendant's lawyer having denied received any money from the said Lawyer Kwasi Owusu-Agyemang on behalf of the Plaintiff, the Plaintiff would want to have him joined to the suit.

His Lordship Marful Sau JSC in his book "*A Practical Guide to Civil Procedure in Ghana*" at page 87 in giving the test to be considered in the joinder of parties refers to the dictum of Denning, MR in the case of ***Gurtner vrs Circuit and Another [1968] 2 QB 587*** at ***595*** thus:

> "*When two parties are in dispute in an action at law and the determination of the dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to be effectually and completely determined and adjudicated upon between all those directly concerned in the outcome*."

His Lordship further stated that our courts have applied this principle in several cases including ***Sai vrs Tsuru III [2010] SCGLR 762*** where the Supreme Court endorsed the test whether the joinder will ensure that all matters in dispute are completely determined and that the courts generally have jurisdiction to join a person whose presence is necessary for the determination of the issues in dispute.

Our courts have adopted two approaches – the narrow and the broad in the determination of joinder. The narrow construction of the rule was applied in the following cases:

In ***Bonsu and Anor. vrs Bonsu (1971) 2 GLR 242***, it was held that: "*to grant an order of joinder was discretionary but the exercise of such discretion is governed by the principle that the Court has no jurisdiction to join a person whose presence is not necessary for that purpose*".

In ***Zakari vrs Pan American Airways Inc & Anor (1982-83) GLR 975***, it was held that: "*in an application for joinder, the most important question was whether the joinder of a party would enable the Court effectually and completely to adjudicate upon and settle all questions involved in the case. If it would, then the application would be granted but not otherwise*".

In the case of ***Apenteng & Others vrs Bank of West Africa & Others (1961) GLR 81,*** Ollenu J (as he then was) stated that:

> "*In an application for joinder, the most important question which the Court has to answer is: would the joinder or the party enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause? If it would, the application should be granted, if it would not, the application should be refused*."

Also, in the case of **Sam (No 1) vrs Attorney-General [200] SCGLR 120**, Ampiah JSC applied the restrictive approach thus:

> "*Generally speaking, the court will make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute. In other words, the court may add all persons whose presence before the court is necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the cause or matters in controversy to be completely and effectually determined once and for all, but this would depend upon the issue before the court, i.e the nature of the claim.*"

In the case of ***Agyei vrs Apraku (1977) 2 GLR 10*** at ***12***, an application for joinder was refused on grounds that there was no issue the court could not settle without the applicants.

In the case of ***Tsatsu Tsikata vrs The Republic [2007-2008] SCGLR 702*** the Supreme Court applied the wider approach and ruled as follows:

> *"It is clear that the law has reached the stage where statute apart, a court has the inherent jurisdiction to join a person to proceedings before it in which such person is interested as a party; or without such joinder, order the proceedings to be served on him to enable him to be heard on the matter, as such interested party or to be served on a person as an*

amicus curiae whether such person be interested in the subject matter or not; and provided his presence can assist the court to resolve the issue at hand, such person can be invited by the court to be heard on the matter. The common test in all these situations is the interest of justice."

Thus, the essence of the joinder of parties is to ensure the presence of necessary parties or to ensure that all matters in dispute are effectively and completely determine and adjudicated upon.

In the instant suit the Plaintiff/Appellant sought to join Lawyer Kwasi Owusu Agyemang to resolve the issues relating to the role he played in the transaction as per paragraphs 6, 7, 8, 9 and 10 of the affidavit in support of the joinder application. We have scrutinized the document relating to the Right of Entry to Block No.38 Plot Nos. 7 and 9 of the Woodfields Estates found at pages 25, 26 and 27 of the Record of Appeal. This document was received by the said Kwasi Owusu-Agyemang and not the Plaintiff. It is clear that there are certain pertinent questions which need to be asked and these can only be answered by the said Kwasi Owusu-Agyemang.

We are mindful of the fact that the Court of Appeal should not interfere with the exercise of discretion save in exceptional circumstances. As stated by Dotse JSC in the case of ***Arthur (NO.2) vrs Arthur (No 2) [2013-2014] 1 SCGLR 569*** at ***579*** *"It is not a very easy task to attack lack or improper exercise of a judge's discretion. Whenever such an attack is made, the onus is on the person attacking the exercise of discretion to show how the judge was wrong in the exercise of discretion."* See the case of ***Castro Daniel Yao Ahiamo vrs The Attorney General & 2 Others (Civil Appeal No. J4/38/2016*** dated ***22nd November 2017***.

Also it was stated in the case of ***Ballmoos vrs Mensah [1984-86] 1 GLR 724*** CA that "*the Court of Appeal would not interfere with the exercise of the trial court's discretion save in exceptional circumstances. An appeal against the exercise of the court's discretion might succeed*

on the ground that the discretion was exercised on wrong or inadequate materials if it could be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account; but the appeal was not from the discretion of the court to the discretion of the appellate tribunal". See the cases of ***Nkrumah vrs Serwaa*** supra and ***Crentsil vrs Crentsil [1962] 2 GLR 171 at 175, SC***.

Unless the Appellant can show that the judge ignored the law or acted under a misapprehension of fact and took into consideration irrelevant matters then her exercise of discretion will not be disturbed. The onus is on him to show how the judge was wrong in the exercise of her discretion.

It is our opinion that the Appellant's Counsel has been able to show that the learned judge erred in holding that the lawyer was not a necessary party to be joined to the suit and has succeeded in impugning the discretion exercised by the trial judge.

We therefore agree with Appellant's Counsel that Kwasi Owusu-Agyemang is a necessary party whose presence will enable the Court to effectually adjudicate over the matters in controversy. This ground of appeal therefore succeeds.

GROUND II

The Ruling is Against the Weight of Evidence.

This ground as stated in ***Djin vrs Musa Baako [2007-2008] SCGLR 686*** is that when such a complaint is made, it means that there are pieces of evidence on record which if applied in his favour could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him.

In the instant case the Plaintiff has filed a Statement of Claim and a Reply while the Defendant has filed a Statement of Defence. No evidence has been led.

In the case of ***Zikpuitor Akpatus Fenu & Others vrs Attorney General [2018] DLS C2489*** the Supreme Court speaking through His Lordship Anin Yeboah JSC stated thus:

> *"The omnibus ground is usually common in cases in which evidence was led and the trial court was enjoined to evaluate the evidence on record and make its findings of facts in appropriate cases. In cases in which no evidence was led but the order which has been appealed against is interlocutory, such grounds of appeal are not canvased at all. This has been settled long ago by this court in three notable cases:* ***Asamoah vrs Marfo [2011] 2 SCGLR 832, Republic vrs Conduah; Ex Parte Aaba substituted by Asmah [2013–2014] SSCLR 1032 and Re: Suhyen Stool; Wiredu & Obenewaa vrs Agyei & ors [2005–2006] SCGLR.*** *We think this ground is clearly misconceived and same is hereby struck out as there were no disputed factual matters which called for findings by the lower court which merely determined the application for stay of proceedings on affidavit evidence which was not in controversy".*

It is our opinion that this ground of appeal is superfluous and otiose in view of our holding in Ground 1.

Accordingly, the appeal succeeds in its entirety.

(SGD)
MERLEY A. WOOD (MRS.)
(JUSTICE OF APPEAL)

(SGD)
I AGREE **SENYO DZAMEFE**
(JUSTICE OF APPEAL)

I ALSO AGREE *(SGD)*

ERIC BAAH

(JUSTICE OF APPEAL)

COUNSEL:

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