IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ACCRA – GHANA

CORAM: MARGARET WELBOURNE JA PRESIDING

P. BRIGHT MENSAH JA

J. ADJEI FRIMPONG JA

SUIT NO. H1/109/2021

28TH APRIL 2022

BETWEEN:

O'SVAN-BOYE LIMITED ... PLAINTIFF/APPELLANT

vs

DAVID KOJO ANAGBO … DEFENDANT/RESPONDENT

-And-

THE LANDS COMMISSION … DEFENDANT

JUDGMENT

==========

BRIGHT MENSAH JA

The instant appeal arises from the judgment of the Accra High Court [Land Division) delivered 14/03/2018 found on ***pp 334-341 of the record of appeal [roa].*** Being dissatisfied, the plaintiff/appellant has mounted the instant appeal against the said judgment on the following grounds:

a. That the trial High Court Judge erred in law which occasioned a miscarriage of justice to the plaintiff/appellant when she struck out the plaintiff/appellant suit for want of capacity.

b. That the trial High Court Judge erred in law which occasioned a miscarriage of justice to the plaintiff/appellant when she failed to appreciate the position of the law that the 1st defendant/respondent having presented a document for registration he claim to have given to him by the plaintiff/appellant or the 1st defendant/respondent having claimed to have dealt with the plaintiff/appellant is an admission of the existence of the plaintiff/appellant and for that matter the plaintiff/appellant have capacity to institute the instant action before the trial High Court.

See: ***pp 342-343 [roa].***

Now, pursuant to leave of the court on 19/11/2019, the plaintiff/appellant filed an additional ground of appeal that is to say:

c. Judgment is against the weight of evidence.

Writ of summons:

Per the writ issued in the registry of the lower court on 28/11/2016, the appellant claimed against the respondents, as appearing on ***pp 1-2 [roa],*** the following:

1. A declaration of title to all that piece or parcel of land situate, being and lying at Nungua New Town also known as New Batsonaa also known as Cambodia near Accra in the Greater Accra Region of Republic of Ghana and containing an approximate area of 8.466 hectares or or 20.919 areas on survey plan number 25695 and covered by land certificate no. TD0082 Volume 019 Folio 49 dated 9/9/1995.

2. Recovery of possession.

3. Perpetual injunction.

4. An order directed at the 1st defendant to remove therefrom all structures or fence wall illegally constructed on portions of plaintiff's piece of parcel of land without its consent and permission, failure of which plaintiff is to be authorized to remove same and surcharge 1st defendant with expenses involved.

5. An order setting aside or for cancellation of the said purported deed of assignment dated 1/9/2014.

Upon being served with the writ and statement of claim that accompanied it, the respondents entered their respective appearance to the claim.

Counterclaim:

Pursuant to entering appearance, David Kojo Anagbo filed his statement of defence and counterclaimed against the appellant as follows:

1. The sum of Ghc32,000.00 being the cost of rebuilding the fence wall pulled down twice on the instructions of Maria O'Sullivan.

2. As a result of the matter set out above, the 1st defendant had suffered stress and inconvenience.

3. Further, the 1st defendant claims cost of legal fees Ghc20,000. but for Maria O'Sullivan's conduct, he would not have instructed Solicitors in the matter.

4. Plaintiff claims damages.

It is noted that the Lands Commission never filed a defence. So, the battle was dagger-drawn between the plaintiff/appellant and the respondent [David Anagbo]. At the close of pleadings the lower court adopted for trial, the underlisted issues as contained in the application for directions:

a. Whether or not plaintiff is the lawful 99 year leasehold interest owner of the piece or parcel of land.

b. Whether or not 1st defendant obtained 2 deeds of assignment both dated 1/9/2014 by fraud.

c. Whether or not 1st defendant paid any money by way if compensation to plaintiff.

d. Whether or not plaintiff has the capacity to institute the instant action.

e. Whether or not 1st defendant is relying on 2 fraudulent deeds of assignment to register the disputed piece or parcel of land in his name.
f. Whether or not plaintiff is entitled to its claim

g. Whether or not plaintiff is entitled to his counterclaim.

At the end of the trial, the learned trial judge dismissed the plaintiff/ appellant's case on ground of lack of capacity to sue. In its judgment, the lower court held, particularly at ***p. 340 [roa]*** as follows:

> *"A plaintiff faced with a challenge to his capacity must be able to adduce sufficient evidence to establish his capacity. Unfortunately this was not done in the instant suit. The plaintiff company bore the burden of proof, to establish that it does exist as a legal person but this it failed to do. Not a single document of incorporation or registration or any other documentary evidence for that matter, to prove that O'SvanBoye Limited exists and is duly registered as a limited liability company under the Companies Act 1963, Act 176 was produced……."*

Needless to emphasize, it is this decision of the lower court that the plaintiff/appellant takes issue with and has therefore launched the instant appeal. As noted elsewhere in this judgment, the 2nd defendant, Lands Commission being a disinterested party never filed a defence to the claim. Therefore, the instant appeal involves the plaintiff/appellant

and the 1st defendant/respondent. As we proceed along to discuss the appeal in detail, we shall maintain the designations of the parties ie plaintiff/appellant as the appellant, and the 1st defendant/respondent, the respondent.

Facts of case:

It was the case of the appellant that it is a limited liability company duly incorporated under the laws of Ghana and acquired a 99-year leasehold interest in a parcel of land covering an approximate area of 20.919 acres situate at Nungua New Town also known as New Baatsona or Cambodia. According to the appellant, it acquired it from the Sese Borteye family of Amanfa, Nungua acting through its lawful head, Nii Borteye Sese in a transaction dated 05/09/1993. Having obtained a lease to that effect, it subsequently successfully went ahead to acquire a Land Title Certificate No. TD 0822 dated 09/09/1995 in respect of same.

The appellant contended that it went into immediate occupation/possession and remained in possession until it had notice that the respondent had started laying adverse claim to portions of the land, the subject matter of this suit. in the result the appellant confronted the respondent to halt all his activities on the land. The appellant's investigations revealed that the respondent was in the process of applying for a Land Title Certificate based on a deed of assignment that it contended was a forgery. It lodged a complaint with the Lands Commission whilst the respondent also lodged a complaint against the director of the appellant for unlawful damage to his property.

In his statement of defence filed with the lower court as appearing on ***pp 69-74 [roa]*** the respondent admitted the averments contained in paragraphs 1 – 7 of the statement of claim of the appellant. He contended however that he has been in possession of the land, the subject matter for 17 years before the institution of the suit. He averred further that

after acquiring the land, he built a fence wall around it and constructed a 2 bedroom house thereon. However, a director of the appellant company by name Maria O'sullivan caused damage to it, which matter was reported to the Police.

It was the case of the respondent further that the appellant company had 2 directors, John Boye Botchway and Maria O'Sullivan but that there had been a bitter hostile relationship between the directors thus was a complete deadlock in management of the appellant company for over 10 years. He therefore claimed that the Managing Director, Maria O'Sullivan authorizing the institution of the suit had no authority of the appellant company to do so.

Arguments of Counsel for the appellant:

The mainstay of learned Counsel's submissions was that the issue of the appellant's existence as a company duly incorporated under the laws of Ghana with capacity to sue and be sued, did not arise in this matter at all although the issue was set down for trial in the application for directions. To Counsel, issues raised in the application for directions were not binding on the court. Thus, the lower court reserved the power to have struck out the issue of capacity as it did not arise from the pleadings the parties filed. In support, Counsel referred us to ***In re Asere Stool; Nikoi Olai Amontia IV (sub. By Tafo Amon II) v Akotia Oworsika III (sub. By Laryea Ayiku III [2005-2005] SCGLR 637***.

Counsel submitted further that parties are bound by their pleadings and it is only relevant issues joined by the pleadings that are required to be set down for hearing by the court. He relied on ***Hammond v Odoi [1982-83] GLR 1235 SC*** to support the proposal.

Furthermore, learned Counsel referred this court to paragraphs 22-23 of the statement of defence by which the respondent admitted the appellant as a limited liability company duly incorporated except that there are wrangling among the 2 directors of the company

as a result of which there was no board resolution authorizing the initiation of the suit. To him, there was no rule of law that supports the proposition.

Finally, Counsel argued that a review of the evidence at the trial shows that the appellant was able to prove its title to the land in dispute and was entitled to the all reliefs endorsed on both the writ and the statement of claim.

Reply by Counsel for the respondent:

Learned Counsel supports the judgment of the lower court and this is not uncommon. He submitted that a non-existing juristic person cannot maintain an action since it cannot sue as it has no rights to protect and cannot also be sued as it owes no obligations. A non-existing company cannot maintain an action in court therefore whenever there is a challenge as to existence or otherwise of a company, it was imperative that the question was decided before the merits of the case was considered. In support of the legal proposition, Counsel referred us to a plethera of cases notably, ***Standard Bank Offshore Trust Co. Ltd v National Investment Bank Ltd & 2 ors [2017-2018] 1 SCGLR (Adaare) 707***; ***Tamakloe & Partners Unltd v Gihoc Distilleries Co. Ltd (J4/70/2018) [2013-2014] 2 SCGLR 1970***.

It was Counsel's case that the burden was on the appellant to adduce evidence to establish its legal existence. In support, Counsel referred to us to the law the Supreme Court stated in ***Naos Holdings Inc. v Ghana Commercial Bank [2005-2006] SCGLR 407*** that runs as follows:

> *"Once its legal status was challenged and its corporate capacity was placed in issue, it was incumbent upon the appellant to produce more cogent evidence of its existence (such as its registered office address or a copy of its certificate of*

incorporation), to satisfy the trial court that it has the requisite legal capacity to sue. Since it failed to do so, the trial court was justified in arriving at the conclusion that the appellant did not exist."

Assailing the power of the court to deal with matters at the pre-trial directions stage of the trial based on **Order of the High Court [Civil Procedure] Rules, 2004 (C.I 47),** Counsel submitted that it was only when the court did not exercise its discretion judicially that may call for interference in the court's exercise of discretion. He submitted on page 14 of his written submissions that contrary to the assertion by the appellant's, the trial judge duly exercised her discretion to adopt the issue of capacity filed by the appellant, having regard to the respondent's averments challenging the appellant's capacity. According to Counsel, the lower court did not rubberstamp the issues the parties filed. The appellant has not demonstrated that the decision of the trial judge to adopt the issues was unreasonable or perverse, Counsel added.

Premising his arguments further on the principle espoused in the oft-quoted ***Tuakwa v Bosom [2001-2002] SCGLR 61*** Counsel correctly stated the law that an appeal is by way of rehearing. He contended, however, that the appellant has been unable to demonstrate that the judgment was against weight of evidence.

Opinion of this court:

To begin with, a judge is vested with power to determine what relevant issues that emerge from pleadings that parties have filed in a case, are. Indeed, this court has settled the principle in a number of cases including ***Fidelity Investment Advisors v Aboagye-***

Atta [2003-2005] 2 GLR 188 that what issues were relevant and essential in a trial was a matter of law entirely for the judge to determine.

As a general rule, the court was not bound to make findings of fact in respect of irrelevant matters on which parties had led evidence when such findings would not assist the court in the determination of the crucial issues in controversy. See: ***Domfe v Adu [1984-86] 1 GLR 653 C/A***.

Reiterating the power of the judge to determine what material issues in a case were, the Supreme Court has held that the courts are not tied down to only the issues identified and agreed upon by the parties at pre-trial. Thus, if a crucial issue was left out but emanates at the trial from either the pleadings or the evidence, the court cannot refuse to address it on the ground that it was not included in the agreed issues. See: ***Fatal v Wolley [2013-14] SCGLR 1070 holding 2.***

Having stated the general position of the law, we need to articulate, however, that what were relevant issues depend largely on the pleadings the parties have filed in a case.

We have critically studied the pleadings each side filed in the instant case. In the light of the pleadings, and applying the principles so stated in the cases supra, we do roundly agree with the arguments of learned Counsel for the appellant that the issue of capacity did not arise in the matter. It is peculiarly important to stress that the respondent per his statement of defence admitted the existence of the appellant company. Therefore, it was needless for the then lawyer for the plaintiff to have raised that issue in his application for directions. Apparently, raising that needless issue misled the learned trial judge in coming to the conclusion she did, holding that the appellant has no capacity to have mounted the action. For purpose of clarity, we reproduce here below, the averments contained in the statement of claim regarding the status of the appellant company and the respondent's repose to same in his statement of defence.

Per paragraphs 1 - 7 of its statement of claim, the appellant had averred:

1. Plaintiff is a limited liability company incorporated under the laws of the Republic of Ghana with its registered office situate at East Airport, Accra and whose line of business include acquisition of tracts or parcels of land for construction of residential premises for sale and management, acquisition of lands for resale and developing tracts of land into service plots for sale to prospective buyers.

2. 1st defendant whose station in life is unknown to the plaintiff claims to be a Ghanaian businessman who is ordinarily resident at East Legon, Accra.

3. Plaintiff says that 2nd defendant is a statutory institution or body established under the laws of the Republic of Ghana and mandated with the administration and management of parcel of lands acquired by the State for and on behalf of the people of the Republic of Ghana and with the further mandate to register and manage issues relating to or affecting registration of documents and interest affecting lands throughout the Republic of Ghana.

4. Plaintiff says further that it is the lawful owner of 99 year leasehold interest and in possession of piece or parcel of land to the extent or covering an approximate area of 8.466 hectares or 20.919 acres situate, lying or being at an area known officially as Nungua New Town also known as New Batsonaa also known as Cambodia near Accra in the Greater Accra Region of the Republic of Ghana.

5. Plaintiff says it acquired from the Nii Bortey Sese and Sese Borteye of Amonfa Nungua the said 99 year leasehold interest in the said piece or parcel of land covering the said approximate area of 8.466 hectares or 20.919 acres and has become the lawful owner of the said 99 year leasehold interest and in possession of the said residential piece or parcel of land situate, lying and being at Nungua New Town also known as New Batsoona known as Cambodia near Accra in the Greater Accra Region of the Republic of Ghana since 5/12/1993.

6. Plaintiff says further that it became the said lawful owner of the said 99 year leasehold interest in the said piece or parcel of land situate, lying and being at Nungua New Town also known as New Batsonaa also known as Cambodia near Accra in the Greater Accra Region of Republic of Ghana by virtue of having been granted the said 99 year leasehold interest in the said land by the said Nii Bortey Sese and Sese Bortey Family of Amanfa Nungua acting per its lawful heads and representatives in the persons of Nii Bortey Sese and Sese Borteye which lease is documented per deed of lease dated 5/12/1993.

7. Plaintiff avers further that it subsequently had its 99 year leasehold interest in the said piece or parcel of land registered at the Lands Title Registry of the Republic of Ghana and had been issued with Land Certificate No. TD 0082 Volume 019 Folio 49 dated 9/9/1995 after the said acquisition and intention of registration of the said interest was published in the National Weekly and no one raised any objection to the said intention to register the said interest.

See: ***pp 3 – 4 [roa].***

It is worth repeating that the respondent per his statement of defence had categorically admitted all those averments in paragraphs 1 – 8 of the statement of claim of recited supra. In particular, the respondent averred:

1. **The 1st defendant admits that the plaintiff is a limited liability company as stated in paragraph 1.** [emphasis ours]

2. Paragraphs 2, 3, 4, 5 and 6 of the statement of claim are admitted.

In paragraph 4 of the defence, the respondent further averred:

> Paragraph 7 of the statement of claim is admitted to the extent that the plaintiff has a 99 years leasehold interest in the parcel of land with Land Certificate No. TD 0082 Volume 019 Folio 49.

Indeed, given the respondent's own admission stated supra it is worth reiterating that it was pointless for the lawyer for the appellant to have raised the issue of capacity of the appellant in his application for directions and for the learned trial judge to have run with it. Once the respondent admitted the status of the appellant as a limited liability company as an existing company for the matter, no issue was joined. For, the settled position of the law is that where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish the fact than by relying on such admission, which is an example of estoppel by conduct. It is a rule whereby a party is precluded from denying the existence of some state of facts which he had formally asserted. That type of proof is a salutary rule of evidence based on common sense and expediency. See: ***In re: Asere Stool; Nikoi Olai Amontia IV (subt'd by Tafo Amon II) v Akotia Oworsika III (subst'd by Laryea Ayiku III) [2005-2006] SCGLR 637 @ 651*** per Seth Twum JSC.

Guided by the principle stated supra, we have no doubt in our minds whatsoever that no issue of capacity emerged from the pleadings. Therefore, the learned trial judge clearly erred when she dismissed the appellant's case for want of capacity, thereby occasioning a grave miscarriage of justice to the appellant.

Consequently, we allow this ground of appeal.

Proceeding further, we need to point out that the appellant per **paragraphs 4 and 5 of its statement of claim** has averred that it was the lawful owner of a 99 year leasehold interest and in possession of the disputed property covering an approximate area of 8.466 hectare or 20.919 acres of land. It described the land as being or lying at Nungua New Town or New Baatsona or Cambodia and pleaded further that it acquired same from Nii Bortey Sese and Sese Borteye family of Nungua as the lawful owners.

Significantly, as appearing on ***p. 69 Vol.1 [roa]*** the respondent in response admitted all those material averments in his defence. In the light of the admission we do hold the appellant to be the lawful lessee of the demised property. It is pertinent to observe that the respondent traces his root of title to the appellant company but claims that it took the grant of the land from one of the directors, John Boye Botchway. He claims further the company has not been functional for a very long as a result of complete deadlock in its management and rivalry between the directors whose names he gave as Maria O'Sullivan, the Managing Director, and John Boye Botchway, a director.

On how he acquired the land, the respondent further pleaded in **paragraphs 14 – 18 of his defence** that he paid a valuable consideration to the other director of the company. See: ***pp 69-74, particularly p. 71 [roa].***

The appellant however, denied those averments contained in the respondent's statement of defence in its Reply and demanded strict proof of those averments. See: ***pp 78-80, particularly p. 79.***

We have critically evaluated the evidence led on record and we think that the respondent was unable to prove his counterclaim against the appellant. Per contra, we think the appellant made a good case and that if the learned trial judge has not been misled into thinking that the appellant lacked the capacity to mount the action and had proceeded further to determine the case on its merits she would have definitely come to a different conclusion than she did.

In the final analysis, we think that having regard to the evidence led at the trial, the evidence preponderate heavily in favour of the appellant and the appellant was entitled to judgment. We do therefore enter judgment for the appellant per all the reliefs endorsed on its writ of summons. We dismiss the counterclaim of the respondent as not proven. Consequently, the appeal succeeds and is hereby allowed. We set aside the judgment of the lower court together with consequential orders. Title to the land, the subject matter of this appeal is decreed in the appellant. The appellant shall recover possession of the land whilst perpetual injunction is granted against the respondent, his agents, workmen, assigns and or any one claiming through him from interfering with the appellant's lawful ownership and quiet enjoyment of the land.

Appellant's costs assessed at Ghc15,000.00.

Sgd.

P. BRIGHT MENSAH

(JUSTICE OF THE APPEAL)

Sgd.

I agree MARGARET WELBOURNE

(JUSTICE OF THE APPEAL)

Sgd.

I also agree RICHARD ADJEI FRIMPONG

(JUSTICE OF THE APPEAL)

COUNSEL

AGYENIM AGYEI-BOATENG FOR PLAINTIFF/APPELLANT

JAINIE AGROVIE JAINE FOR 1ST DEFENDANT/RESPONDENT