IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ACCRA – GHANA

CORAM: MARGARET WELBOURNE JA PRESIDING

P. BRIGHT MENSAH JA

BARTELS-KODWO JA

SUIT NO. H2/209/2022

9TH MARCH 2023

BETWEEN:

SWISS WATCH CO. LTD … PLAINTIFF/RESPONDENT

vs

ANNIE LARNYO ARYITEY (Subst'd)

ELLIOT ARYITEY …

EDWIN ARYITEY … DEFENDANTS

SAMUEL AMO TOBIN … 4TH DEFENDANT/APPELLANT

-and-

DOROTHY QUIST & 6 ORS … PLAINTIFFS/RESPONDENTS

vs

SAMUEL AMO TOBIN … 1ST DEFENDANT/APPELLANT

LAND REGISTRATION DIVISION … 2ND DEFENDANT

(CONSOLIDATED)

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JUDGMENT

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Introduction:

The above cases cited were consolidated and are pending before the High Court [Land Division], Accra since the subject matter of litigation is the same in each case. Thus the same facts and law may apply.

The instant interlocutory appeal has been launched against the Ruling of the court delivered 23/11/2021, refusing an application by the appellant for leave to file a supplementary witness statement. The appellant is the 4th defendant in the first suit numbered BMISC/511/2011 whilst he is sued as the 1st defendant in the second suit, AL/ 13/2015.

In the first suit, Suit No. BMISC/511/2011 the plaintiff therein, Swiss Watch Co. Ltd had sued the 1st, 2nd and 3rd defendants ie Annie Laryo Aryitey, Elliot Aryitey and Edwin Aryitey respectively, for:

1. A declaration that the plaintiffs are sitting tenants H/No. C1/3

   Adabraka Accra of over forty-three (43) years sitting.

2. A declaration that as sitting tenant of such long standing the defendants are obliged by law and conveyancing convention to give the plaintiff the 1st option to purchase or refuse.

3. An order compelling the defendants to offer the plaintiffs the right of 1st refusal or purchase.

4. Damages for aggravation.

5. An order of perpetual injunction restraining the defendant their agents, servants, workmen, proxies, interested purchasers and all assigns from entering upon and or from locking up the plaintiff's shop or locking the plaintiff out.

As the case was pending for trial, the appellant Samuel Amo Tobin, successfully applied to be joined and was so joined in the suit as the 4th defendant.

It is also on record that on the 8th December 2014 the plaintiffs in Suit No. AL/13/2015 issued another writ of summons against the appellant as the 1st defendant and added the Lands Commission as the 2nd defendant. Per the reliefs endorsed on their writ, the plaintiffs therein claimed:

1. Declaration that the land title certificate acquired by the 1st defendant from the deed registry is null and void same having been acquired by fraud.

2. An order setting aside a purported sale of the land including the portion occupied by the 2nd defendant to the 1st defendant.

3. An order directed at the Land Registry Division (Land Title Registry/Lands Commission) to expunge from its record any alleged transfer of title to the 1st defendant same having been done by mistake and or on the basis of fraud perpetrated by the 1st defendant on their division.

It is worth stressing that both suits were eventually consolidated. Trial began. In course of the trial, the appellant sought leave of the trial court to file a supplementary witness which according to the appellant was in order to bring to the court's attention the notice of application for registration of title to the land, the subject matter of the suit. The application did not find favour with the lower court as it was so dismissed on the grounds, inter alia, that the date on the original land title certificate of the appellant in respect of the disputed land preceded that of the certified true copy of the notice of application for registration of title to the said.

It is of interest that after the dismissal of the application by the lower court, the lawyers for the appellant subsequently wrote to write to the Lands Commission seeking an explanation/clarification as regards the irregularities in the dates on the original Land Title Certificate and the certified copy of the notice of the application for registration of title to the disputed land. The Lands Commission responded. Based on the response which the appellant considered as a new evidence, the appellant on 10/11/2021 filed a fresh application for leave to file a supplementary witness statement so as to assist the lower court in settling all matters in dispute.

Now, in the Ruling of the lower court of 23/11/2021 the court dismissed the application on the grounds, inter alia, that the repeat application was a review of the earlier ruling of the court which the court lacked jurisdiction to entertain it. Being dissatisfied, the appellant has filed an appeal against the decision of the lower court. Per a notice of appeal filed with this court, the appellant complains as follows:

1. That the learned trial court judge erred when he ruled that the appellant was applying for a review of the court's earlier ruling when the court does not have a review jurisdiction and neither did the application before the court seek to invoke any review jurisdiction of the trial court.

2. That the learned trial judge erred when he held that Counsel for the appellant's motion for leave to file a supplementary witness statement which was dismissed by the court on the 14th October

2021 was the same as the subsequent motion moved and dis-

missed on 23rd of November 2021, the subject matter of this appeal.

3. That the learned trial judge erred when he ruled that the appellant's

remedy lies in an appeal when the appellant was not challenging the

Ruling of the trial court dated 14th October 2021.

4. That the learned trial judge erred when he failed to take into consideration the fact that the document sought to be tendered into

evidence through the supplementary witness statement, having emanated from a public entity, was presumed regular.

5. That the learned trial judge erred when in dismissing the application he held that the appellant did not plead joint tenancy in his pleadings.

6. That the learned trial judge erred when he held that the application, the

subject matter of this appeal was fully, totally and wholly incompetent

when same was a fresh application with new evidence to assist the

honourable court to determine all issues in dispute once and for all.

See: ***pp 313A-313B of Vol.1 of the record of appeal [roa].***

By this appeal, the appellant prays that this court sets aside the ruling of the lower court delivered 23/11/2021.

Submissions of Counsel for the appellant:

First, learned Counsel acknowledged that the review power of the High Court as provided for under Order 42 of the High Court [Civil Procedure] Rules, 2004 (C.I 47) has been revoked by the passage of the High Court (Civil Procedure) (Amendment) Rule, 2020 [C.I 133]. That the review jurisdiction of the High Court has been taken out by statute has been put beyond by the decision of the Supreme Court in ***R v Darko; Exparte Lufus Owusu, Suit No. J4/48 of 2019 [2021] GHASC 9 (03 February 2021)*** in which case the apex court ruled:

> *"It is worth noting, however, that the said review jurisdiction previously granted the High Court has been deleted by operation of the provisions of High Court (Civil Procedure) (Amendment Rule), 2020 C.I 133."*

Nevertheless, it is the case of the appellant that the second application was not sought to review the earlier ruling of the lower court. It was based on new evidence introduced by enquiry made at the Lands Commission meant only to assist the trial court to do substantial justice in the matter, Counsel said further.

Explaining himself better, Counsel argued that the fresh application was to throw more light on the seemingly inconsistencies in the dates given by the Lands Commission in the appellant's documents, which inconsistencies, according to Counsel, could be clarified or addressed only by the Lands Commission. Learned Counsel therefore contended that the trial court erred when it refused the fresh application for leave to file supplementary witness statement the court holding that it was a review application. In the result, the lower court failed to deal with the merit of the application, Counsel opined.

In support that the trial court erred in holding it was a review application, Counsel referred this court to the decision of the Supreme Court in ***R v High Court (Commercial Division A); Exparte Dakpem Zobogunaa Henry Kaleem (Civ. App. No. J5/6/2015) (Unreported)*** to argue that the court has the inherent jurisdiction to vary its interim or interlocutory orders.

Additionally, Counsel relied on ***Vanderpuye v Nartey [1977] 1 GLR 428*** in which case this court established the principle that once some fresh material had emerged that could weigh on the court in deciding on the merits of the fresh application the applicant reserved the right to apply even if the initial application was unsuccessful.

On ground 6 of the appeal, Counsel submitted that the document that the appellant sought leave to file as a supplementary evidence emanated from a public institution. Thus, by operation of law as per S. 37 of the Evidence Act, 1975 (NRCD 323) the official duty performed in connection with the procurement of that document, the subject of this appeal was regular, the expression *omnia praesumuntur rite esse acta.*

It was the contention of Counsel, therefore, that the lower court erred to refuse to admit the said document lawfully procured from the Lands Commission.

Furthermore, it was submitted on behalf of the appellant that the lower court held that the appellant did not plead joint tenancy. Counsel referred us to paragraphs 10 and 11 of the statement of defence the appellant filed the import of which was that the property, the subject matter of the dispute was held in joint tenancy.

In conclusion, it was submitted with emphasis that the document that the appellant sought to file and to rely on in the course of the trial was/is very relevant to assist the trial court to do substantial justice in the matter. It was relevant and admissible in terms of S. 51 of NRCD 323.

Submissions of Counsel for plaintiffs in the 2nd suit:

In the 2nd suit, there are seven (7) plaintiffs. They all described themselves as beneficiaries and administrators of the estate of some of the properties listed on the deed of conveyance concerning the subject matter of the dispute.

In summary, it was argued on behalf of the plaintiffs that after the 14th October 2021 ruling that refused the 1st application the appellant ought to have filed an appeal within 21 days or could have applied for leave to adduce fresh evidence in accordance with **rule 26 of C.I 19.** In support, Counsel referred us to ***Poku v Poku [2007-2008] 996 @ 1009.***

Counsel submitted further that the fresh application the appellant filed was a review application. That was a wrong forum since that power of review has been revoked by the High Court (Civil Procedure) (Amendment Rules) [C.I 133], Counsel insisted.

Counsel maintained that there has been no change in circumstance of the appellant's case. Thus to him, ***Vanderpuye v Nartey [1977] 1 GLR 438 C/A*** never applied. In

support, we were referred to the dictum of Wood JSC (as she then was) in ***R v High Court, Accra [Commercial Division]; Exparte Hesse (Investcom Consortium Holdings SA & Scancom Ltd – Interested Parties [2007-08] SCGLR 1230 @ 1244.***

Counsel further submitted that the appellant never pleaded joint tenancy neither was any evidence led in his witness statement on the issue of joint tenancy. Rather the appellant pleaded that he purchased the property, the subject matter from a sole surviving administratrix.

Submissions of Counsel for plaintiffs in the 1st suit:

Learned Counsel for the plaintiff/respondent in his written submissions did state that the 2nd application was an attempt by the appellant to explain away the discrepancies. The 2 motions were linked so the 2nd application was an attempt to cause the judge to review his decision dismissing the 1st application. In his view, the trial judge was right in dismissing the application. This court's attention was drawn to principles Azu Crabbe CJ laid down in ***Adzametsi & ors v R [1974] 1 GLR 228 @ 229*** by which fresh evidence may be allowed to be adduced on appeal. These are stated as follows:

1. The evidence must be evidence which was not available at the trial.
2. It must be relevant to the issues.
3. It must be credible evidence ie well capable of belief.
4. If the evidence was admitted the court could after considering it to go on to consider whether there might be a reasonable doubt

as to the guilt of the accused if that evidence had been given together

with other evidence at the trial.

His view is that the document appellant sought to tender was not credible.

On construction of adduction of fresh evidence in accordance with ***Rule 26(2) of C.I 19,*** Counsel also relied on ***Poku v Poku [2007-2008] 996.***

Counsel next argued in response to the submissions that the document the appellant sought to be tendered having come from a public entity presumed regular per S. 37 of NRCD 323 was rebuttable.

In conclusion, Counsel urged on the court to dismiss the appeal.

The appeal:

My Lords, the fundamental issues this appeal raises are: a) whether the 2nd application put before the lower court was an application for review of the earlier order; and b) whether the lower court lacked the jurisdiction to entertain the 2nd application.

The law is certain that an appeal is by way of re-hearing the case. The Court of Appeal Rules, **C.I 19** per **rule 8(1)** provides that any appeal to the court shall be by way of re-hearing. The rule has received ample judicial interpretation in many cases to mean that the appellate court is enjoined by law to review the whole evidence on record and come to its own conclusion as to whether the findings of the lower court both on the law and facts, were properly made and supportable. In ***R v High Court (General Jurisdiction 6); Exparte Attorney-General (Exton Cubic – Interested Party) (2020) DLSC 8755*** the

Supreme Court speaking through Anin-Yeboah JSC (as he then was) restated the principle as follows:

> *"Appeal is an application to a higher (appellate) court to correct an error which may be legal or factual. In Ghana, all civil appeals are by way of rehearing and the appellate court may subject the whole record to review and may even make new findings of facts in deciding the appeal.''*

This court in ***Kofi v Kumansah (1984-86) 1 GLR 116 @ 121*** having considered and adopted the principle as espoused by Webber CJ in Codjoe v Kwatchey (1935) 2 W.A.C.A 371, stated the law as follows:

> *"The Appeal Court is not debarred however from coming to its own conclusion on the facts and where a judgment has been appealed from on the ground of the weight of evidence the Appeal Court can make up its own mind on the evidence; not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from over-ruling it if on full consideration it comes to the conclusion that the judgment is wrong……."*

The settled rule, therefore, is that the appellate court is enjoined by law to scrutinize the evidence led on record and make its own assessment of the case and the evidence led on record just like a trial court. Where the court below comes to the right conclusion based

on the evidence and the law, its judgment is not disturbed. The opposite is equally true and the judgment is upset on appeal where it is unsupportable by the facts and or the evidence. See: ***Nkrumah v Attaa (1972) 2 GLR 13 C/A***.

The rule is also that where the appellate court was obliged to set aside a judgment of a lower court, it must clearly show it in its judgment where the lower court went wrong. Reiterating the principle, Ollenu JSC delivered himself, an opinion in ***Prakwa v Ketewa (1964) GLR 423*** as follows:

> *''…….[a]n appeal is by way of rehearing and so an appellate court is entitled to make up its own mind on the facts and to draw inferences from them to the extent that the trial court could …….*
>
> *Therefore, if in the exercise of its powers, an appeal court feels itself obliged to reverse findings of fact made by the trial court, it is incumbent upon it to show clearly in its judg-ment where it thinks the trial court went wrong."*

It is idle, therefore, to stress the rule that it is not the function of an appellate court to disturb a finding of fact except in the circumstances so stated supra.

Now, to the merits of the instant appeal.

We have decided to combine all the grounds of appeal save the 5th ground of appeal. This is because those grounds are dovetailed in the questions/ issues we have raised supra, capable of disposing of the appeal. Fundamentally, the issue the appeal raises is

whether the fresh application put before the lower court sought to invoke the review jurisdiction of the court that has been taken away by law and by extension, whether the court could entertain that application.

Before proceeding further, we want put it on record that the "new" evidence the appellant sought to adduce by leave to file a supplementary affidavit was available at the time of the trial and which he wanted to bring it to the attention of the trial court to assist it. It bears emphasis that it was not a fresh evidence that was sought to be adduced on appeal after the case has gone full gamut of trial. Therefore, in our considered opinion, although ***APoku v Poku [supra]*** and ***Adzametsi & ors v R [supra]*** are good law, they are distinguishable from the instant case given that the evidence the appellant sought to tender in the instant case is within trial and not on appeal. The cases both Counsel relied on, therefore, are a poor guide.

Needless to emphasize, we have extensively and critically evaluated the affidavit evidence filed in the case, the impugned ruling, the subject of the instant appeal, written submissions of the lawyers for the parties. It cannot be over-emphasized that the basis for the dismissal of the application, as appearing on ***pp 233-237 of Vol.3 [roa]*** was that the motion filed by the appellant was a review application and that the appellant ought to have appealed against the court's earlier decision rather than filing a fresh application.

For purposes of clarity, we set out here below that portion of the Ruling relevant to our discourse, particularly as appearing on ***p. 236 of Vol. 3 [roa]:***

> *"The question however is, if a court rules on an application and*
>
> *you go to fish for 'new' evidence and file a similar application*

hoping for a different outcome from the court, are you not in effect praying the court to review the earlier ruling? This is my understanding and I know I am not mistaken in my understanding. Thus this application, in so far as it is seeking this court to change in earlier ruling, is in the nature of a review application and it is totally incompetent as the court is bereft of jurisdiction. What the applicant had to do was to have appealed against my decision and not to seek to file a repeat application."

The lower court went further to hold:

"Furthermore, Counsel for applicant has argued that their enquiries at the Lands Commission has revealed new evidence which makes my earlier decision unsustainable. If that is the case, their right lay in appeal and not in this present application. In any case, per the applicant's own showing, the said new evidence has always been available and if they had exercised some diligence they would have brought it to the court's attention when they filed the earlier application. This is more so because the said inconsistencies in the dates of the documents were so glaring that it would not have

escaped any diligent eye." See: ***pp 236-237 of Vol.3 [roa].***

We also reproduce below, the reason the lower court canvassed in support of dismissing the earlier application per its Ruling of 14/10/2021:

> *"Exhibit DQ1 is also dated 20th August 1993, about nine months before exhibit SAT was authored. So at the time exhibit SAT was supposedly authored on 14th May 1994, the Registrar of Lands had already issued Land Title Certificate Number GA 4068 to the said proprietors on 20th August 1993 as registered proprietors of a freehold estate. I therefore agree with Counsel for plaintiffs that the said exhibit SAT which the applicant is seeking to rely on is a suspicious document."*

We roundly disagree with the reasons the learned trial judge offered for dismissing both applications. Having regard to the facts of the case and affidavit evidence it cannot be put to any serious doubt that the prime issue before the lower court at that crucial time of the case was about relevancy and admissibility of documents that the appellant sought to rely on in support of his case at the trial. Whether or not the document was suspicious as the lower court claimed, was a matter for evidence. By operation of law, the appellant carried that burden as specified for in Ss 11 & 14 of the Evidence Act, 1975 [NRCD 323] to produce evidence to avoid any ruling being held against him. The lower

court therefore lacked the jurisdiction at that stage to pronounce on its weight *albeit* being allegedly suspicious. Put differently, it was premature for the lower court to have held at that stage of the proceedings that the document was suspicious. It will have been appropriate if it was being tendered in evidence or if put in evidence and the trial court was considering the weight to attach to it at the conclusion of the evidence.

As a matter of emphasis, upon careful reading of the processes the parties filed and arguments of Counsel, the clear thinking of this court is that the learned trial judge seriously misdirected himself on the nature of the application and the issues put before him that has resulted in the instant appeal. With utmost respect to the learned trial judge, he was wrong both in the first instance and in the subsequent application for the reasons he proffered for dismissing both applications. Clearly, both rulings are fraught with errors of law, occasioning a gross miscarriage of justice to the appellant.

First, the fresh application was not premised on Order 42 of CI that has been repealed by C.I 133. The application that appears on ***pp 14-15 of Vol. 2 [roa]*** speaks for itself. It reads:

> *"Motion on Notice*
>
> *Application for Leave to file supplementary witness*
>
> *statement for the 4th defendant/applicant."*

The grounds for the application as contained in the accompanying affidavit never suggested that the lower court was being moved under its review jurisdiction. Rather, it was that having regard to the seemingly inconsistencies in the date contained in the land title certificate that seems to conflict with the dates in the documents annexed to the certificate, it was better served if those discrepancies were clarified to the court.

And that it was the Lands Commission from whose office those documents emanated was by law the proper entity to do that clarification. The answers from the Lands Commission given in response to the search/inquiry the appellant made to that office obviously had brought about changes in circumstance of the case of the appellant. Thus, it was a wrong assumption by the learned trial judge to hold that the application before him was a review application brought under Order 42 of CI 47.

Next, on general principle, the court is clothed with that inherent jurisdiction to control its proceedings and interlocutory orders made whilst the case was still pending for final determination. In appropriate circumstances, the court can revisit its interim orders; to vary or discharge the interlocutory orders as the case may be, as circumstances warrant it. It has been said inherent jurisdiction applies to an almost limitless set of circumstances.

In his contribution to the proposition as to the scope of inherent jurisdiction, Baron Alderson in ***Cocker v Tempest (1841) 7 M & W 502, 503–4*** **(Court of Exchequer)** defined inherent jurisdiction as:

> *"The power of each court over its own process which is unlimited;*
>
> *it is a power incident to all courts, inferior as well as superior; were*
>
> *it not so, the Court would be obliged to sit still and see its own*
>
> *process abused for the purpose of injustice".*

The principle that the court is clothed with that inherent jurisdiction to control its proceedings and interlocutory orders with the power to vary them where necessary, was well articulated by Benin JSC Benin JSC in ***R v High Court (Commercial Division A); Exparte Dakpem Zobogunaa Henry Kaleem (Civ. App. No. J5/6/2015) (Unreported)***

when the learned jurist after reviewing both local and foreign authorities on the subject, stated the law as follows:

> *"…….we have come to this decision because upon a critical examination of the application before the High Court, we have come to the conclusion that what was before the court was not for review per se but just an application to vary the court's earlier order of interlocutory injunction due to change in circumstances since the earlier order was made. The inherent jurisdiction to vary its interim or interlocutory orders is vested in every court during the pendency of the substantive case. It can do so in order to make the meaning and intention clear; it may also do so if the circumstances that led to the order being made have since changed and is having a negative effect; or if it is working un-expected or unintended hardship or injustice. The only limitation is that the order must not be the subject of a pending appeal."*
>
> **[emphasis supplied]**

It will be recalled that in the ***Exparte Dakpem Zobogunaa Henry Kaleem Exparte Dakpem Zobogunaa Henry Kaleem Exparte Dakpem Zobogunaa Henry Kaleem case [supra],*** the Tamale High Court has heard and granted an application for an order of interlocutory injunction. Subsequently the parties who were affected by the court's

order applied to the court for review as they claimed the order was working serious hardship on them. The application read:

"MOTION ON NOTICE FOR REVIEW OF AN ORDER OF INTERIM

INJUNCTION"

The supporting affidavit stated the facts of the case and also recounted the change in circumstances since the grant of the injunction order. It is noted that the application was put before another judge because the one who initially granted the injunction application was out of the jurisdiction at the time. The High Court now differently constituted granted the motion and consequently vacated the earlier order. The respondents being aggrieved by the decision of the court differently constituted then applied to the Supreme Court invoking its supervisory jurisdiction by certiorari to quash the order by the 2nd judge vacating the earlier interlocutory injunction order. The Supreme Court found no merit in the application and dismissed it accordingly.

It is important to stress that at the time the decision in ***R v High Court (Commercial Division A); Exparte Dakpem Zobogunaa Henry Kaleem [supra]*** was handed down, the review jurisdiction granted to the High Court by the Rules of Court Committee as spelt out in Order 42 of CI was still in force and operational. Indeed, per motion filed in that case the applicant was seeking a review of the interim injunction order the Tamale High Court has earlier in time granted. Yet, the Supreme Court held that both the review jurisdiction and the inherent jurisdiction exist side by side and may be invoked cumulatively or in the alternative as the case may be.

In propounding that theory of law, Benin JSC quoted with approval, the following cases: ***Re Wickam, Marony v Taylor [1887] 35 Ch. D 272 C/A; Blair v Cordner (No.2) [1887] 36 WR 64; Davey v Bentick [1893] 1 QB 185, C/A***.

Explaining the law better, the Supreme Court stated that the review jurisdiction of the High Court was not by the conferment of either the 1992 Constitution or the Courts Act, 1993 [Act 459] or any substantive legislation. The apex court unanimously held the Rules of the Court Committee lacked that power to grant High Court the review jurisdiction. Justifying it, it was held that jurisdiction of a court could only be granted by substantive legislation and not by a body charged with the duty to make rules to regulate the conduct of cases before the courts. See: ***pp 5-6 of the manuscript judgment.***

The effect of the law as established by the Supreme Court is that regardless of review jurisdiction of the High Court taken away by C.I 133, the court has that residue of power, the inherent jurisdiction it exercises to control its proceedings and to vary or discharge its interim orders in appropriate circumstances or cases.

In our present appeal, the paramount consideration that ought to have weighed on the exercise of the lower court's judicial discretion was whether the evidence that the appellant sought to introduce was relevant to his cause. It is no denying the fact that the issue was about admissibility and relevancy in terms of S. 51 of the Evidence Act, 1975 [NRCD 323]. At that stage, the issue was not concerned with whether there were inconsistencies in the dates as appearing on the land title certificate or the documents the appellant sought to rely on or whether it was suspicious. It was about weight to be attached to the document if it was relevant. Whether or not weight has to be given to a document obviously comes in at the conclusion of the trial and the court sits in judgment to evaluate the evidence both oral and documentary.

From the available evidence on record, the documents the appellant sought with leave of the court to file and rely on it relates to the property, the subject matter of the dispute. And was therefore relevant in terms of S. 51 of the Evidence Act, 1975 [NRCD 323].

What evidence is relevant in law, has been defined by Lord Simon in ***DPP v Kilbourne [1973] AC 729*** as:

> *"……Evidence is relevant if it is logical, probative or disprobative*
>
> *or evidence which make the matter which requires p-roof more*
>
> *or less probable."*

Under **Rule 401 of the Federal Rules of Evidence, United States**, "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

According to the interpretation section of our Evidence Act, 1975 [NRCD 323] "relevant evidence" means evidence including evidence relevant to the credibility of a witness or hearsay declaration, which makes the existence of a fact which is of consequence to the determination of the action more or less probable than it would be without the evidence.

As a matter of emphasis, the documents the appellant sought to file by supplementary witness statement and rely on same in the course of the trial in support of his cause were relevant in law given the facts of the case. And they ought to have been admitted in evidence by the lower court. After all, the courts have a duty to do substantial justice to parties in every case and therefore are required to consider the substance of the case presented through the processes the parties filed. So, where the court alludes to a legal right that can avail a party, it is legally mandated to determine the matter involved on its merit. See: ***Okofoh Estates Ltd v Modern Signs Ltd [1996-97] SCGLR 224*** as adopted and applied by Pwamang JSC in ***R v High Court, Accra (Commercial Division);***

Exparte: Environ Solutions & Ors (Dannex Ltd & ors – Interested Parties) [Civil Motion No. J5/20/2019] dated 29/04/2020.

The courts always lean towards receiving evidence for whatever it is worth. The weight to give to it is another matter altogether. In ***Subramaniam v Public Prosecutor [1956] 1 WLR 965 (PC)*** the accused was convicted of being in possession of 20 rounds of ammunition contrary to reg. 4(1)(b) of the Emergency Regulations, 1951 of the Federation of Malaya and was sentenced to death. The trial court excluded some evidence that the terrorist who captured him, two of whom had knives like sickles told him he was being taken to their leader on the ground that it was a hearsay evidence and therefore inadmissible.

On appeal to the Privy Council the exclusion of the evidence prevented the accused from advancing his defence of duress, and that the result of the trial might have been different if the evidence had been admitted. The appeal was therefore allowed.

The courts exist to do substantial justice and would not gag or prevent parties from prosecuting their case as best as they can provided they do so in accordance with due process of law and procedure. See: ***Obeng & ors v Assemblies of God Church, Ghana [2010] SCGLR 300 Holding 5***. See also: ***GPHA v Issoufou [1993-94] 1 GLR 24 Holding 1***.

In ***Amoah v R [1966] GLR 373 @*** 739 Ollenu JA propounded that it was the duty of a court to do justice and not to shut its eyes at obvious injustice.

We find in the instant appeal that the appellant properly invoked the jurisdiction of the High Court but the lower court grievously erred when it dismissed the fresh application on account that it was a review jurisdiction application.

Another reason the lower court gave for dismissing the application was that the appellant never pleaded joint tenancy. However, we think the lower court was in error on that point. Admittedly, joint tenancy was not specifically pleaded. Nevertheless, the appellant did plead it by implication as per paragraphs 10 and 11 of his statement of defence. In any event, that was a matter for evidence and therefore could not be a good ground to refuse the application.

Overall, we think the lower court did not duly and properly exercise its discretion when it refused both applications for reasons it gave, which exercise of judicial discretion is liable to be set aside. As a general rule, an appellate court cannot or would not ordinarily substitute its own discretion for the court exercising a discretion. However, there may be exceptional circumstances justifying questioning the exercise of judicial discretion. The principles governing exercising judicial discretion and the power of an appellate court to interfere in the exercise of a court's discretion were considered extensively in ***Sappor v Wigatap (2007-2008) SCGLR 676*** in which case the Supreme Court set the perimeters of the rules as follows:

> *"……. [A]n appellate court would [only] interfere with the exercise of a court's discretion where the court below applied wrong principles or the conclusions reached would work manifest injustice or that the discretion was exercised on wrong inadequate material. Arbitrary, capricious and uninformed conclusions stand in danger of being reversed on appeal."*

For reasons stated herein, the appeal succeeds and we hereby allow it in its entirety. The ruling of the lower court refusing the application of the appellant to file a

supplementary witness statement is hereby set aside. This court exercising its powers under **rule 32(1) of the Court of Appeal Rules, CI 19** grants the application for leave to file a supplementary witness statement. The appellant reserves the right to rely on the documents attached to the application in support of his case.

Having regard to the manner in which both applications were handled by the lower court, to ensure fairness we do recommend to the Honourable Chief Justice to cause the case to be transferred from that court to be handled by another judge.

Costs of Ghc5,000.00 assessed in favour of the appellant against the plaintiff/ respondent in each case. So the cost is assessed at Gh¢10,000.00 in favour of the appellant.

(Sgd.)

P. BRIGHT MENSAH

(JUSTICE OF APPEAL)

(Sgd.)

Welbourne, (J. A.) *I agree* **MARGARET WELBOURNE**

(JUSTICE OF APPEAL)

(Sgd.)

Bartels-Kodwo, (J. A.) *I also agree* **JANAPARE A. BARTELS-KODWO**

(JUSTICE OF APPEAL)

COUNSEL:

- **Emmanuel K. Barku for 4th Defendant in 1st Suit and 1st Defendand in 2nd Suit**

- **Tetteh Josiah for Plaintiff/Respondent in 1st Suit**
- **Festus Adams for Plaintiff/Respondent in 2nd Suit**