IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA

AD – 2023

CORAM: *B. ACKAH-YENSU, JSC (PRESIDING)*

AMMA GAISIE, J.A.

R. ADJEI-FRIMPONG, J.A.

CIVIL APPEAL NO.: H1/79/2022

DATED: 16TH FEBRUARY, 2023

CSPC GHAMED PHARMACEUTICAL LTD. - PLAINTIFF/

HOUSE NO. C10/38/3 APPELLANT

COMMUNITY 10, TEMA

VRS

1. OCTOGLOW GHANA LTD. - DEFENDANT/

FREE ZONE ENCLAVE AREA **RESPONDENT**

TEMA

CONCURRING JUDGMENT

ACKAH-YENSU, JSC

INTRODUCTION

I have had the opportunity of reading, in draft, the lead judgment of my learned sister, Amma Gaisie, JA. While I am in agreement with her conclusion, I wish to express my own views on some of the issues arising for determination in this appeal.

BACKGROUND

The background facts of this case have been comprehensively discussed in the lead judgment. As stated therein, this is an appeal against the Interlocutory Ruling of the High Court dated 15th July 2022. The trial Judge having heard arguments in respect of the Respondent's Application to refer the matter to arbitration, held that there was no legal reason to refuse the application and consequently referred the matter to the Arbitrator.

At the court below, the Appellant claimed against the Respondent:

a. *For a declaration that the re-entry of the Plaintiff's land by the Defendant and the resulting forfeiture of the Sublease dated 24th February, 2012 us unlawful contrary to*

Section 29 of the Conveyancing Act, 1973, (NRCD) and therefor, null and void and of no legal effect.

b. *For an order to set aside the re-entry of the Plaintiff's land by the Defendant and the resulting forfeiture of the Sublease dated 24th February, 2012.*

c. *For a declaration that the Defendant is in breach of contract for sub-lease.*

d. *For an order directed at the Defendant to transfer legal title in the said land to the Plaintiff.*

e. *An order of specific performance directed at the Defendant to execute the Deed of Sublease in favour of the Plaintiff.*

f. *Damages for breach of contract by the Defendant.*

g. *For a declaration that any re-sale of the Plaintiff's land by the Defendant is fraudulent and unlawful and therefore null and void.*

h. *Recovery of possession.*

i. *Perpetual injunction restraining the Defendant, its representatives, successors and assigns from peacefully holding and enjoying the land of the Plaintiff.*

Or in the alternative

j. *An order for the refund to the Plaintiff of the amount of USD1, 227,850 paid to the Defendant for the sublease of the land dated 24th February, 2012.*

k. *Interest on the aforementioned amount accrued from 24th February 2012 till date of final payment.*

l. *An order directed at the Defendant to pay the Plaintiff the appreciation in value of the land.*

m. *Costs including solicitor's fees.*

n. *Any other equitable reliefs as this Honourable Court may deem fit".*

THIS APPEAL

The Appellant initially filed an omnibus ground of appeal, and subsequently obtained leave to file four (4) additional grounds of appeal as follows:

"GROUNDS OF APPEAL

i. That the ruling is against the weight of evidence.

ii. Additional grounds will be filed upon receipt of a certified true copy of the ruling.

ADDITIONAL GROUNDS OF APPEAL

(1) That the trial Court erred in law when it failed to consider the application of Sections 57 and 58 of the Land Act, 2020 Act 1036 which maintain the same provisions as Sections 29 and 30 of the Conveyancing Act, 1973 NRCD 175 that power to grant orders for re-entry and forfeiture of land is reserved to the court only and only the court has the power to grant reliefs against re-entry and forfeiture of land.

(2) That in holding that there is no clause contained in Exhibit B that exempt the parties from accessing an Arbitrator when there is an allegation of fraud or forfeiture, the trial Court wrongly exercised its discretion when it omitted to consider Sections 57 and 58 of the Land Act, 2020 Act 1036 that enforcement of right of re-entry or forfeiture is by court action not arbitration.

(3) That in holding that the parties have agreed that 'all disputes' not 'some disputes' should be referred to arbitration, the trial Court wrongly exercised its discretion when it omitted to consider whether or not the issue of re-entry and forfeiture fall under the ambit of Section 1(d) of the Alternative Dispute Resolution Act, 2010 (Act 789).

(4) **That the trial Court erred in the application of the law when on the one hand it held that it is the law that where it has made specific provision for a forum of adjudication, the parties cannot contract out of it, on the other hand it agreed that all disputes should be referred to arbitration"**.

I note that although the Appellant has set out complaints against specific findings, I find that the additional grounds all complain about the evaluation of the evidence by the learned trial Judge which allegedly culminated in a Ruling that was against the weight of the affidavit evidence on record. For this reason, in my consideration of the matters on appeal, I will subsume Additional Grounds (1), (2), (3), and (4) under the first ground (i); that the Ruling is against the weight of evidence.

As rightly observed by Counsel for the Respondent, even though, in her Ruling, the trial Judge referred to all the reliefs sought by the Appellant to be referred to the Arbitrator, it is important to note that the Appellant's complaint is limited only to the reference of reliefs (a) and (b) to the Arbitrator. Under the circumstances, the lack of complaint about reliefs "c" to "n" implies that the said reliefs are amenable to arbitration. By virtue of Section 7 of the Alternative Dispute Resolution Act, 2010, Act 789 (ADR Act), the trial court was entitled to refer the said reliefs "c" to "n" to an arbitrator. Section 7(5) of the ADR Act states as follows:

> *"Where in any action before a court eh court realizes that the action the subject matter of an arbitration agreement, the court shall stay the proceedings and refer the parties to arbitration".*

I also agree with Counsel for the Respondent's argument in his written submission that, to the extent that the substance of the Appeal hinges on only a reference to a complaint in respect of two reliefs, the Notice of Appeal, which indicates that the Appellant is complaining about the entire Ruling "*is gravely defective and misleading".*

I therefore find that the learned trial Judge exercised her discretion judiciously in referring the reliefs "c" and "n" to arbitration.

Nonetheless, I will proceed to make a determination of the grounds of appeal as argued by Counsel for the Appellant in his written submission.

The critical question which arises for determination in the instant appeal is *"whether or not sections 57 and 58 of the Land Act 2020, Act 1036 does not allow parties who have a dispute under the said sections of the Legislation to compromise their rights or enter into a private settlement of same, either by Negotiation, Mediation or Arbitration".*

The said sections 57 and 58 of the Land Act read as follows:

"57(1) A right of re-entry or forfeiture under a provision in a lease for a breach of a covenant, condition or agreement in the lease is unenforceable by court action or any other means, unless

(a) The lessor has served on the lessee a notice

(i) specifying the particular breach complained of,

(ii) requiring the lessee to remedy the breach, if the breach is capable of remedy, and

(iii) requiring the lessee to make reasonable compensation in money for the breach, except where the breach consists of non-payment of rent;

(b) the lessee has knowledge of the fact that the notice has been served, and

(c) the lessee fails, within a reasonable time after the service of the notice under paragraph (a) to remedy the breach, if that breach is capable of remedy or to pay compensation, to the satisfaction of that lessor, for the breach or in the case of rent, to pay the rent and interest on the rent, at the prevailing bank rate.

(2) Where a notice is

(a) sent by registered mail addressed to a person at the last known address of the person or by electronic mail where that is normal mode of communication between the parties, and

(b) posted on the land which is the subject of re-entry, then, for the purposes of subsection (i), that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the mail would have been delivered in the ordinary course of post of the notice was posted on the land or in the case of electronic mail at the date the mail was sent.

(3) This section applies despite any provision to the contrary in the lease.

58(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any provision in a lease, or for non-payment of rent, the lessee of the property and also a sublessee of the property comprised in the lease or any part of the lease may, either in the lessor's action or in action brought by the lessee or sublessee for that purpose, apply to court for relief.

(2) Subject to section (1), where a lessee applies to court for a relief, the court may grant or refuse the relief having regard to the proceedings and conduct of the parties and to other circumstances.

(3) A relief granted under subsection (2) may be on the terms as to costs, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain a similar breach in the future, that the court, in the circumstances of each case, considers appropriate.

(4) Where a sublessee applies to court for relief, the court may make an order vesting for the whole term of the lease a lesser term of the lease, the property comprised in the

lease or a part of the lease in that sublessee on conditions as to the execution of a deed or any other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise that the court, in the circumstances of each case, considers appropriate.

(5) Despite subsection (4) the court shall not grant to the sublessee a term longer than the term the sublessee had under the original sublease.

(6) The provisions in section 57 and in this section shall, with the necessary modifications apply to an oral grant and any other transfer of an interest in land under customary law".

The Respondent's application for an order referring the matter to arbitration is pursuant to Section 6 of the Alternative Dispute Resolution Act, 2010, Act 798 (ADR Act). Section 6 grants the High Court the power to stay proceedings in court where a party to an arbitration agreement has commenced an action in court in which is at variance with the arbitration agreement.

Section 6(1) reads as follows: *"Where there is an arbitration agreement and a party commences an action in a court, the other party may on entering appearance, and on notice to the party who commenced the action in court, apply to the court to refer the action or a part of the action to which the arbitration agreement relates, to arbitration".*

The settled position of the law is that a court will order a stay of proceedings even if the matter in dispute involved both questions of fact and of law. In the case of **Khoury v**

Khoury [1962] 1 GLR 98, the Supreme Court, as far back as then, held that both questions of law and of fact can be determined by an arbitrator. This was a case in which the Respondent instituted action in the High Court against the appellant therein in respect of a partnership agreement which contained an arbitration clause. The appellant brought an application for stay of proceedings which was dismissed by the High Court on the ground that since the dispute involved questions of fact as well as law, the court would be the more appropriate forum for settling the dispute. The Supreme Court further held that the governing consideration in every case of this nature must be the precise terms and language in which the arbitration clause is framed. In the said case, the arbitration clause was comprehensive and there was no doubt that each and every question raised by the dispute fell within the ambit of the arbitration clause.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

It is trite knowledge that Alternative Dispute Resolution (ADR) is a collective term for the option that are available to parties to resolve disputes usually with the help of an independent third party, and without the need for a formal court hearing. Essentially, ADR seeks to act as an alternative to the court system while still providing a remedy to disputing individuals where possible. This approach is more informal and considerably less adversarial than litigation. It is aimed at reaching a settlement based on compromise by both parties. Another benefit is that it is profitable to businesses as it promotes the continuity of relationships between parties for future dealings. One other advantage of ADR is that it offers the parties to a dispute an opportunity to avoid the courtroom itself. The ADR format facilitates a more amicable settlement.

ADR is a fast growing area within the justice system internationally. The purpose of our ADR Act, reading from the memorandum accompanying the then Bill, is to bring the law governing arbitration into harmony with international conventions, rules and practices in arbitration, provide the legal and institutional framework that will facilitate and encourage the settlement of disputes through alternative dispute resolution procedures; and provide by legislation, for the subject of customary arbitration which we have been practicing for years. The Act is also expected to help ease congestion in the courts by reducing the number of cases that go to court and to further create a congenial environment for investors. In the words of Torgbor in *"Ghana's Recently Enacted Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal"*, other than the cost-effectiveness, timeliness and non-adversarial nature of arbitral (ADR) proceedings, other essential features are that the proceedings grant parties autonomy over the process, grant authority to the tribunal and have the least intervention by the Courts.

What arbitration entails is well known. It is a private mechanism for the resolution of disputes between parties who have, by the arbitration agreement chosen arbitration as a means to resolve their present or future disputes. It is pertinent that parties who have opted to settle their dispute through arbitration be made to comply with their own agreement. In this regard, Act 798, is similar to the repealed Act 38 and vests the High Court with powers to support the arbitral process. The said Section 6(1) of the ADR Act which grants the High Court the powers to stay proceedings in court where a party to an arbitration agreement has commenced an action in Court in defiance of the arbitration agreement is an example of such support.

The increased preference for arbitration has buttressed the growing disenchantment with the traditional adversarial method of litigation. The aforesaid section 6 of the ADR Act makes provision for a reference back to arbitration where there is an arbitration agreement and a party commences an action in court. The other party is entitled to refer the action or part of the action which the arbitration agreement relates to arbitration. The court is bound, if satisfied that the matter in respect of which the application has been made is a matter in respect of which there is an arbitration agreement, refer the matter to arbitration. This provision together with others, enhance arbitration in the achievement of the objectives of the ADR Act – to provide a speedy, cost-effective, non-adversarial system of dispute resolution.

Contracting parties have the right to freely enter into agreements, and the concomitant right to decide on the acceptable terms of such agreements. This is what is known as the principle of "*Party Autonomy*". Party autonomy is the cornerstone of arbitration (Jamshed Ansam, *Party Autonomy in Arbitration: A Critical Analysis" Researcher* (2014) 6(6), pp.47-53 at 47), whereby parties contract that their disputes would not be litigated. It is the right of the parties to choose their arbitrator or arbitral tribunal, the procedure to adopt, the place/ seat, the language of arbitration, the governing law etc. (Sunday Fagbemi, "*The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Realty?"* Afe Babalola University: Journal of Sustainable Development and Policy, Vol. 6 No. 1 (2015) pp.223-246 at 223). The Courts are enjoined to give effect thereto where an intention to submit to arbitration has been expressed in the agreement.

In the case of **The Owners of the M.V. Lupex v Nigerian Overseas Chartering and Shipping Limited [2003] 15 NWLR (P+ 844), 469 at 491 G-H**, the Supreme Court of

Nigeria held that: *"the mere fact that a dispute is of a nature eminently suitable for trial in a court is not sufficient ground for refusing to give effect to what the parties have, by contract, expressly agreed to. So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them"*. Consequently, the courts usually give effect to the literal and ordinary meaning of the contract.

The principle of party autonomy underpins the ADR Act of Ghana. Indeed, sections 14, 16, 31, 32 and 49 recognize the principle of party autonomy. This principle originated from the *locus classicus* case of **Scott v Avery [1856] 10 ER 1121**. It is a provision by the parties which makes the submission to arbitration and the rendering of an award a condition precedent to instituting an action in court. The foundation of every arbitration proceeding is the arbitration agreement, it is said to be the backbone of arbitration proceedings. Abdulhay Sayed in "**Corruption in International Trade and Commercial Arbitration**" (Walters Kluwer, 2004), p. 159, posits that the arbitration agreement provides the parties with *"the freedom of the parties to construct their contractual relationship in the way they see fit"*. In other words, everything depends on the parties themselves to arrange their arbitration agreement freely without any control.

CONSIDERATION OF APPEAL

The arbitration clause/agreement in the instant case reads as follows (Exh. "B", p.19 of ROA):

> *"7. All disputes emanating from this SUB-LEASE shall be settled by mutual discussion and agreement of the Parties hereto but in the event that the Parties are unable to*

resolve the dispute after diligent efforts, the dispute shall be referred to and settled by an arbitrator appointed under the provisions of the Alternative Dispute Resolution Act 2010 (Act 798) or any statutory modification or enactment thereof for the time being in force. The cost of arbitration shall be borne by the losing party".

The above clause is a tiered dispute resolution clause, which involves a series of steps in the overall dispute resolution process, each designed to handle the dispute if it has not been resolved by the previous step. The objective of ADR is to allow parties to conclude disputes in a more satisfactory and mutually advantageous manner by focusing on their interests and commercial objectives.

A multi-tier arbitration clause provides that when a dispute arises, parties are condition bound to perform certain steps before the commencement of an arbitration proceeding to solve the dispute. Multi-tiered disputed resolution clauses use more than one dispute resolution procedure to handle different levels of cases, which cases proceeding through a number of dispute resolution stages as long as the first stage does solve the issue.

In the instant case, the parties agreed to attempt settlement by Negotiation as a first step. Negotiation is an ADR process whereby the parties and their legal advisors seek to resolve the dispute by reaching an agreement either through written correspondence or a meeting between all concerned to manage and ultimately resolve the dispute between them. Negotiations involve the parties to come together to reach some end goal through compromise or resolution that is agreeable to all those involved.

It is clear from the arbitration agreement between the parties herein that if the attempt at resolving any dispute that arose between them regarding their contract failed, they would resort to arbitration; there is no ambiguity.

Counsel for the Appellant herein however submits that the arbitration clause in their contract cannot be invoked under the circumstances of the instant case as it falls under section 1(d) of the ADR Act. Section 1 of the ADR Act, the Arbitrability provision, excludes from the arbitral process matters that relate to, *"(a) the national or public interest; (b) the environment; the enforcement and interpretation of the Constitution; or (d) any other matter that by law cannot be settled by an alternative dispute resolution method"*. The Act however does not explain what constitutes national or public interest, and that makes it vague.

It is the Appellant's contention that the key issue in this dispute is on the matter of re-entry. That is, whether or not the re-entry into the land of the Appellant by the Respondent is lawful. There is also a secondary issue based on the claim of the Respondent that it had sold the land to a third party/ whether or not the subsequent re-sale of the said land in dispute by the Respondent is fraudulent. I shall, in this report, restrict myself to what I have posited as the key issue for determination.

As aforesaid, Counsel for the Appellant relies on Sections 57 and 58 of the Land Act. In his view, a reading of the said provisions as a whole indicates that an action for relief against re-entry and forfeiture should be by court action, especially as the last phrase in

section 58(1) reads *"apply to court for relief"*. Thus, the instant action is not one which can be resolved by arbitration pursuant to the ADR Act.

According to Counsel, this inference was made in the consolidated case of **John Agyekum & 6 Ors. v Nana Amoateng II & 6 Ors. and Anita Owusu Boateng & Anor v Nana Kwasi Amoateng II & Anor (Consolidated) [2019] 145 GMJ 84**, where it was held that reading of the provisions of both sections as a whole, leaves one in no doubt that the action for re-entry should be by court action. It can therefore be gleaned, he stated further, that a right to apply to court for relief under the circumstances of this suit accrues to the Appellant as a matter of a statutory prescription, which must mandatorily be followed.

As aforesaid, the Appellant has relied on Section 1(d) of the ADR Act to argue the subject matter of their dispute was not arbitrable. He was therefore under a duty and burden to prove that the said reliefs are indeed excluded from the ambit of arbitration. The Appellant has however not pointed to any law which ousts the jurisdiction of an arbitrator in so far as the said reliefs are concerned. As already stated, under Section 7 of the ADR Act, the Court may, with the agreement of the parties refer a matter that is within its jurisdiction to an arbitrator, even in the absence of an arbitration agreement. Hence, matters which ordinarily fall within the jurisdiction of the court can be referred to arbitration, and in accordance with the policies underpinning the Courts Act, Act 459, (as amended) with respect to reconciliation and the opportunities for parties to settle matters via private modes. In any case, an Arbitrator's award is only enforceable by resort to the courts. See Section 57 of the ADR Act.

In this appeal, the Court has been invited to make a determination that the only mode by which a party may plead the application of Sections 57 and 58 of the Lands Act is by resort to a court of law. From my reading of the said Sections 57 and 58 of the Land Act, I do not see anything that precludes the matter from being referred to arbitration as agreed between the parties. The mere fact that the law states that a party should apply for relief from court does not mean that the courts have exclusive jurisdiction over the instant matter. The suggestion that if a lessor and a lessee agreed to settle a dispute as to re-entry between them, the fact that same was done outside the court system would make such an agreement unenforceable, is preposterous.

I totally agree with the submission by Counsel for the Respondent that *"the Appellant's case is not based on any rule or law or practice for all legislation ordinarily requires parties to apply to Court for relief and if the appellant's submissions were to be followed to its logical conclusion, the ADR Act will become redundant. This is because parties will not be able to agree to refer matters ordinarily reserved for the Courts' jurisdiction. It cannot be the case that because a matter is ordinarily within the jurisdiction of the Court, same cannot be referred to an Arbitrator".*

The authority of an arbitrator to hear disputes with respect to re-entry or relief against forfeiture has not been ousted by the law. I am not aware of any law, and the Appellant has not referred us to any law which forbids an arbitrator from resolving such a dispute. As a matter of fact, Section 7 of the ADR Act which allows the courts to refer a dispute to arbitration upon obtaining the consent of the parties does not exclude disputes under sections 57 and 58 of the Lands Act. It sets out the authority of the courts in a broad manner.

In my view, the trial Judge exercised her discretion on the basis of the pleadings and processes filed. In any case, the Appellant did not even make out a case in support of the reliefs he is seeking. The Appellant from its own pleadings has shown that it had abandoned its interest in the land that was re-entered by the Respondent. According to the Appellant, the Respondent in reliance upon breaches of covenant re-entered the land in question. That, at all times material, they were informed by the Respondent that the land in dispute had been sold by the Respondent to a third party after the re-entry. The Respondent does not in its pleadings allege a protest of the sale of the land to a third party when the sale was brought to its notice.

Be that as it may, the Appellant agreed with the state of affairs and proceeded to consider an offer by the Respondent in respect of a new parcel of land. The Appellant states that in the course of negotiations over this new parcel of land, it made a counter offer to the Respondent which was rejected. It was the rejection of this counter offer which led the Appellant to file the claim in the court below for reliefs concerning the land which had been sold to a third party, and which sale the Appellant did not initially protest against. In my view, by proceeding to negotiate with the Respondent in respect of the new parcel of land, the Appellant waived its rights in respect of the land in dispute and is therefore estopped from raising any complaint about the re-entry and forfeiture.

As rightly stated by Counsel for the Respondent, a court can only refer live issues to an arbitrator. The Appellant from its pleadings confirm that the land in question has been sold to a third party. The Appellant does not contend that the third party had bought the

land in bad faith. In my view therefore, the issue between the parties does not devolve onto a relief against forfeiture because the land is no longer available to both parties.

CONCLUSION

For all the reasons set forth, the grounds of appeal settled and argued by the Appellant are dismissed. The appeal fails and is accordingly refused. The Ruling of the trial High Court is hereby affirmed.

BARBARA ACKAH-YENSU

(JUSTICE OF THE SUPREME COURT

ADDITIONAL JUDGE OF THE COURT OF APPEAL)

AMMA GAISIE (MRS.), J.A., I agree ***(SGD.)***

AMMA GAISIE

(JUSTICE OF APPEAL)

R. ADJEI-FRIMPONG, J.A., I also agree *(SGD.)*

R. ADJEI-FRIMPONG

(JUSTICE OF APPEAL)

COUNSEL:

……. PLAINITFF/APPELLANT LED BY SEAN POKU

……. FOR DEFENDANT/RESPONDENT