IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA A.D. 2023

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

MENSAH BRIGHT (MR) J.A.

JANAPARE A. BARTELS-KODWO (MRS.) J.A.

SUIT NO: H1/84/2018

19th January, 2023

DANIEL IDDRISU HABIB ALIAS

DANIEL NYARKO ……. PLAINTIFF/RESPONDENT

VRS

1. MENSAH LUMORNOR ……. 1ST DEFENDANT

2. ERIC DONALDSON HLORKU …….. 2nd DEFENDANT/APPELLANT

3. JOHN AJORKOR ……. 3rd DEFENDANT

JUDGMENT

BARTELS-KODWO, J.A:

The 2nd Defendant/Appellant filed this Appeal against the Interlocutory Ruling of the High Court dated 4th June, 2019 which granted an order of joinder of himself and two others resulting in an amended Writ of Summons. The Notice of Appeal is on page 101-102 of the Record of Appeal (ROA). The Ruling is also found at page 94-95 of the ROA.

BRIEF FACTS

The Plaintiff/Respondent who is to be referred to in this judgment as the Respondent, filed a Writ of Summons on 7th May, 2018 against a single Defendant, Stephen Agbenyo for a declaration of title to land among other reliefs thereon. This sole defendant entered appearance by his lawyer who is the same lawyer pursuing this Appeal and filed a statement of defence on 17-5-18 and 11-6-18 respectively, see pages 39-41 of the ROA. The Respondent filed his Reply and filed an Application for Directions on 28-6-18. He followed up with an Application for Interlocutory Injunction on 29-5-18 to which the sole Defendant Agbenyo filed an Affidavit in Opposition on 11-6-18, ROA pages 14-38.

Agbenyo then filed a Motion on 6-8-18 to have himself non-suited as the only Defendant in the suit. The Respondent on 16-8-18 filed an affidavit in Opposition to same. The Respondent also on 16-11-18 filed a motion for an order for joinder of Mensah Lumornor and Eric Donaldson, the 1st Defendant and 2nd Defendant/Appellant.

The High Court, however first, took the Application to non-suit Agbenyo and gave its Ruling on 20-11-18 see pages 65-70 of the ROA. Thereafter on 26-11-18 the Respondent filed another motion for joinder adding a third Defendant Ajorkor John to the earlier two he had filed an application to join. The 2nd Defendant/Appellant filed an affidavit in opposition and was now represented by Agbenyo's lawyer. They however withdrew the earlier application in respect of the two persons they were seeking to join filed on 16-11-18, with same struck out as withdrawn they proceeded with the latter application in respect of the three persons filed on 26-11-18 which the Court heard and granted on

4- 6-2019. The said Order was served on the three Defendants. Subsequently an amended Writ of Summons and Statement of Claim pursuant to the joinder order was filed and served on all 3 Defendants. It is against the Court's ruling of 4th June, 2019 which ordered the joining of the three Defendants that the 2nd Defendant/Appellant has brought this Appeal.

From the pleadings it is apparent that the Respondent claims he purchased land from the Akobley family in 2003/04 for Gh¢5,000 and was issued with a Receipt, Site Plan and an Indenture. He was put in possession and he placed some building materials thereon and also erected a dwarf wall and a water tank. He visited the land from the time of acquisition in 2003/04 till 2017 without any hitches. In the year 2018 his immediate neighbours noticed the defendants encroaching on the land and informed him about it. His neighbours told the encroachers to keep away from the land since it belonged to him. They did not yield to this caution.

He the Respondent then met the 1st Defendant working on the land and when he engaged him he said he was a mason and or contractor working for Agbenyo who had given him the job. He thus inquired of him where he could find Agbenyo and the 1st Defendant directed him to Agbenyo's office at Tema General Hospital and also gave him his phone number. He called Agbenyo and spoke to him and also went to see him at his workplace and told him to keep away from his land. He said he also got to know that the 3rd Defendant sold a portion of his land to the 2nd Defendant/Appellant through Agbenyo.

Agbenyo however denies any knowledge of the land even though the Respondent states he met him at his work place and told him the land belongs to him. He was eventually non-suited by the trial court which granted the application for joinder of the three Defendants after Agbenyo had been non-suited. The Court gave its reasons stating among others that the affidavit evidence was insufficient to link the Applicant to the

land. See pages 65-70 of the ROA for the Ruling of the Court. It is this which has displeased the Appellant. The Appellant's grounds of Appeal are as follows.

GROUNDS OF APPEAL

The Appeal is against the entire decision/Ruling on grounds that:

i. The entire Ruling is against the weight of arguments advanced by the Appellant.
ii. The Ruling is at variance with the cardinal principles governing the joinder of a party to a suit and therefore the same is bad in law.
iii. Additional grounds may be filed after obtaining a copy of the Ruling.

An Appeal is basically a re-hearing as found in statute, see rule 8 (i) of C.I. 19, Court of Appeal Rules. It is also settled law that when an Appellant takes issue with a Judgment being against the weight of evidence then the Appellant is required to demonstrate those pieces of evidence which had been brought to the fore during trial but the Court in its judgment failed to apply them in support of his case and had it done so the outcome would have been different. See the Court of Appeal case of BAKANA LTD. V. ALBERT OSEI AND THE OFFICIAL LIQUIDATOR OF GHANA AIRWAYS, C. A., Civil Appeal No: H1/28/2014, delivered on 12th June, 2014. As well the following other cases where the court expressed the same appeal mandate: *AGYENIM BOATENG* V *OFORI & YEBOAH* [201 OPPONG KOFI V AWULAE ATTRIBRUKUSU 111 (2011) 1 SCGLR 176; RE ASAMOAH (DECEASED) AGYEIWA & OTHERS V MANU [2013-2014] 2 SCGLR 909. Also in the case of BAKAN LTD VRS OSEI (2014) 17 GMJ 68 (C.A.) it was held at page 76 as follows;

> "An appellate Court as a rehearing Court is to hear an appeal as if the same were the original hearing of the case and hence may comprehensively review the

whole case by analyzing the entire record of appeal taking into evidence the testimonies and all documentary evidence adduced at the trial before arriving at a decision, so as to satisfy itself that, on a preponderance of probabilities, that conclusion of the trial judge are reasonable or amply supported by evidence"

It is pertinent to note that after the sole defendant was non-suited on 20 -11-18, the Respondent filed an Application on 26-11-18 (six days after Agbenyo had been non-suited) for the joinder of the three current Defendants having had an earlier Application to join just two of them struck out as withdrawn. This was opposed on the basis that the suit to which the Applicant intended to join them no longer existed nor was it pending for them to be joined to it since the sole defendant had been non-suited for misjoinder. The Court however granted same in its Ruling now on Appeal.

It is the case of the Appellant that the Court was wrong in granting the joinder application now under attack. Learned counsel for the Appellant argued that same was made in error since the Court could not grant an application joining parties to a non-existent suit when the sole defendant had been non-suited. He was of the view that the joinder was not only irregular but procedurally wrong citing the case of MOSI V BAGYINA (1963) 1 GLR 337 and FYNIBA V SEKYIWA (1989-1990) 1GLR 426 CA. They are therefore within their rights seeking for the order to be set as aside for being void and of no legal effect. Learned Counsel contends strongly that the scenario which played out when the joinder application was granted was at a time when the action had abated hence there was nothing to join the Appellant and two others to. This is simply because the sole defendant had been non-suited. Hence like in the celebrated case of Dening MACFOY VRS UAC (1962) AC 150 "you cannot put something on nothing and expect it to stand". It is his prayer that the Appeal be allowed.

The Respondent on the other hand contends that the presence of the three parties is necessary for the Court to determine common questions of law and fact in dispute so far as the rights and interests of the parties are concerned. Learned Counsel makes the point that at the time the first Application for joinder was filed on 16-11-18 the application for Agbenyo to be non-suited or disjoined had not been determined even though it was pending. He also argued that the presence of the parties is necessary to avoid a multiplicity of suits.

Respondent Counsel takes issue with the trial Court's choice to take the Agbenyo application to disjoin him earlier in time and had it taken their earlier joinder application they would have amended the Writ and joined the Defendants whereby this present situation would not have arisen. He further posited that the Agbenyo application only asked for a misjoinder and not for the suit to be struck out and so

the trial judge only did that since the application for the joinder of the others was pending.

He relied on Order 5 rule 5 (1) and (2) of C, I. 47, The High Court (Civil Procedure Rules, 2004) as amended to argue that the Court was within its ambit in ruling in the manner in which it did and later granting the application for joinder which is under scrutiny now.

Misjoinder and non-joinder of parties

5. (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. (Counsel emphasized)**

In learned counsel's view therefore the MACFOY and MOSI cases are inapplicable here. It is his view that the pleadings of the parties is read as a whole because the parties are the same and the land the subject matter is the same. Hence the joinder should be allowed to stay else there would be a multiplicity of suits. He cited the apex court case of AMPRATWUM MANUFACTURING CO LTD V DIVESTITURE IMPLEMENTATION COMMITTEE [2009] SCGLR 692 @ 694 and 695 where under similar circumstances the Supreme Court made a decision based on the provisions of order 4 r 5 (1) & (2) and per its holding 2 stated that "The Court of Appeal had erred in allowing that appeal by the Respondent/Appellant and setting aside the judgment of the trial High Court in favour of the Plaintiff/Appellant on grounds that the DIC, the Defendant, was not the proper persons to have been sued…" He submitted also that in the same judgment it was held per incurium that since an appeal was by way of rehearing the Court of Appeal was wrong to have given a judgment that had the effect of defeating the entire proceedings by reason of a misjoinder or non-joinder. Learned Counsel urged this court to be flexible in its interpretation of the rules to afford a

speedy trial and avoid delay, unnecessary expense and multiplicity of suits as encouraged under Order 1 rule 1(2) of C.I. 47. He thus prayed the court to dismiss the action.

There is no doubt at this point that the fulcrum of this appeal is whether the 2nd Defendant Appellant was rightly joined to the suit at the time the order was given. When the suit was instituted it was against the sole defendant Agbenyo. It is also evident that at a point in time when there was an application pending to join the earlier two defendants Agbenyo applied and successfully had himself disjoined from the suit. It was after this that the Respondent came forward to have the earlier application for joinder struck out as withdrawn and filed the application to have this Appellant and two others joined.

The question we seek to answer is at the time the Court non-suited the sole Defendant to the Writ what was the fate of the suit? We are of the considered opinion that at that point the writ was ill-fated and remained an empty egg shell with no life in it since it was not against anyone. It was moribund with no life in it and should have been allowed to rest peacefully there ever after. In other words there was no longer any action. The argument that the application to join the earlier two applicants was pending at the time Agbenyo applied to have himself non-suited is neither here nor there. The references to Order 5 above do not apply to the scenario before us. The point is there was no longer any suit post Agbenyo and sleeping dogs should have just been allowed to lie. The Respondents best bet would have been to institute a fresh action against the three he has had joined. However it chose to resurrect the dead suit by the application for joinder of the three which evidently ought not to have been.

Consequently we allow the Appeal on grounds that the application to join the Appellant and others to a non-existent suit was made in error.

(Sgd.)

JANAPARE A. BARTELS-KODWO (MRS.)

(JUSTICE OF APPEAL)

(Sgd.)

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

(JUSTICE OF APPEAL)

(Sgd.)

Mensah, (J. A.) I also agree **P. BRIGHT MENSAH**

(JUSTICE OF APPEAL)

COUNSEL:

- **C. K. Coka for Defendants/Appellants**
- **Mohammed Attah with Sussana Tettey for Plaintiff/Respondent**