**IN THE HIGH COURT OF JUSTICE KUMASI IN THE ASHANTI REGION, HELD ON THE 31ST DAY OF OCTOBER, 2023 BEFORE HER LADYSHIP JUSTICE HANNAH TAYLOR (MRS) J.**

**SUIT NO.C11/01/2O22**

**YAW KONTOR ……PLAINTIFF/RESPONDENT**

**HWIBAA**

**V.**

**1. ABUU DAUDA ……DFENDANTS/ APPELLANTS**

**2. MR. VICTOR**

**OF HWIABAA**

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**JUDGMENT**

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This appeal is against the judgment of the District Court, Mankranso dated 16th of March, 2021. The plaintiff/respondent hereinafter referred to as plaintiff issued a writ of summons against the defendants/appellants hereinafter called the defendants for the following reliefs; -

1. Declaration of title and possession of palm plantation situate and lying at a place commonly known and called ''Kwaem,'' Hwibaa on Hia Stool Lands bounded by the properties of Afia Mama, Yaw Prince and Abuu Dauda, the 1st defendant herein.
2. An order to compel the defendants to account to plaintiff the proceeds of palm fruits harvested and palm trees fell in the disputed farm.

The trial court ordered pleadings to be filed and same were filed by the parties. The court having taken evidence and evaluated same, concluded that plaintiff has proved his case on the preponderance of probabilities and entered judgment for the plaintiff on his claims together with cost.

**NOTICE OF APPEAL**

The defendants dissatisfied with the court's decision filed an appeal to this court. The grounds of appeal set out in the notice of appeal are as follows;-

a. The judgment is against the principles of law and equity in determining such issues.
b. The judgment is against the weight of evidence.
c. The trial magistrate erred when he applied extraneous factors in the judgment.
d. Additional grounds to be filed upon receipt of the record of appeal.

With the leave of the court, an additional ground of appeal was filed to wit;-

"The trial magistrate court lacked jurisdiction to entertain the case and pronounce judgment when the plaintiff/appellant's case which was struck out was not relisted''.

The defendants in this appeal pray the court to set aside the judgment of the trial court, allow the appeal and enter judgment in favour of the defendants.

**FACTS OF THE CASE**

The plaintiff's pleaded case is that, the land situated at Kwaem, on Hia Stool lands sharing boundaries with the lands of Afia Mama, Yaw Prince and Abuu Dauda (1st defendant) belong to his uncle Kwaku Boateng who gave same to Yaw to cultivate on abunu basis and same was shared between them. The said uncle Kwaku Boateng sold a portion of his share. When Kwaku Boateng died, he was succeeded by his uncle Kofi Fofie, who also sold some portion of Kwaku Boateng's share. Later, when his uncle Kofi Fofie died, he succeeded him. Therefore, he became the head of one matrilineal line of the family. The defendants, he contended are also members of the family, but

belong to another matrilineal line of which the 1st defendant is the head of family, having succeeded his uncle Tutuom. The 1st defendant thus, took over a cocoa farm belonging to the uncle Tutuom without giving a share to his side of the family.

The plaintiff further contended that, the matrilineal family lines have a common head of family with respect to funeral celebrations. Each family line also has its land and one cannot trespass to another's land. However, the 1st defendant has trespassed into the oil plantation cultivated by his uncle Kwaku Boateng and unlawfully sold some of the palm trees to the 2nd defendant to distill the local drink 'akpeteshie'. The defendants, plaintiff pleaded have also harvested palm fruits and efforts to restrain them have proved futile.

The defendants in their statement of defence, denied the claims of the plaintiff and contended that the oil palm plantation is situated at Hiasoaa and not kwaem. Further, the oil palm plantation was cultivated by the deceased mother of the 1st defendant called Afia Konadu who gave the land to Karim to cultivate on 'abunu' basis. Before the farm could mature, Karim died but the farm was divided between Karim's brother Yaw (his successor) and the 1st defendant's mother. After the death of Afia Konadu, the family agreed to sell their share of the farm to distill 'akpeteshie' to cover some losses incurred. Also, Afia Konadu had successfully litigated over the same land with Adwoa Akomea.

**DETERMINATION OF APPEAL**

Black's Law Dictionary 10th edition at page 980 defines jurisdiction with reference to a court to be ''power to decide a case or issue decree''. On the subject of jurisdiction, Amua Sakyi, JSC, in **REPUBLIC V. HIGH COURT, ACCRA, EX-PARTE LARYEA [1989-1990] 2 GLR 99** at 101 stated "By jurisdiction of course, the power or authority of a court or judge to give a decision on the issue before it.''

Also, Anin Yeboah, JSC, (as he then was) in the case of **OWUSU-MENSAH & ANOTHER V. NATIONAL BOARD FOR PROFESSIONAL & TECHNICAL EXAMINATION (NAPTEX) & OTHERS [2017-2020] 2 SCGLR 708** at **715** said as follows; -

"It is trite learning that jurisdiction is fundamental to every proceedings and therefore if a court of law or tribunal lacks jurisdiction to hear or determine a matter, the decision or order from the court or tribunal is a nullity. See the case of **TIMITIMI V. AMUABEBE [1953] 14 WACA 374**. In our respective view, it behoves every court hearing a matter to address the issue of jurisdiction first if it is raised as an issue. If the court upon embarking on the enquiry finds that its jurisdiction has been put in issue later on in the proceedings, it must address it as it is fundamental to every proceeding. In this appeal, the Court of appeal ought to have addressed the jurisdictional issue first before dealing with the merits of the appeal in its entirety. It was, indeed, at the conclusion stage of the judgment that the Court of Appeal stated that it had no jurisdiction given the procedure the appellant adopted at the High court.''

Relating the foregoing to this appeal, the additional ground of appeal bordering on jurisdiction will be considered first, as it is fundamental to the proceedings that took place before the District Court, Mankraso. It is submitted by the learned counsel for the appellants that the plaintiff's case was struck out for want of prosecution on the 1st of December 2020. However, though an application for re-listment was filed, same was not considered. Yet, the court set off to take evidence and delivered a judgment. The learned counsel for the plaintiff admits that the plaintiff's case was struck out for want of prosecution and an application for re-listment filed. With the application before the court, learned counsel for the plaintiff submitted that it is not possible that the court over looked same and set a date for hearing. He further submitted that where the trial court made a mistake by its failure to record the consideration of the application and the grant of the prayer, that party must not suffer the effect of its failure.

Per the record of appeal, at page 17, it is disclosed that on the 1st December 2020, the plaintiff was absent and the defendants present.

The court stated as follows; -

**"BY COURT:** Suit is hereby struck out for want of prosecution with liberty to reapply.''

To strike out a case for want of prosecution is suggestive that the order was made on the basis of inordinate and inexcusable delay caused by the plaintiff who has initiated the suit. The meaning ascribed to the phrase "struck out'' has been explained in the case of **ABENA GYABEA & 2ORS V KWAKU YEBOAH & 3ORS,** dated **25th June, 2019, Civil Appeal No. H1/84/18** by the Court of Appeal to mean "the suit was not heard on its merits because of some procedural flaw or some stated reasons. The suit was not gone into because of a stated reason. Whenever a suit is so struck out, the effect is that, that stated reason could always be remedied and the party seeks leave and when granted, the case is relisted. …. No rights are determined by the Court when the plaintiff's case is struck out for want of prosecution…. An action struck out can always be restored. The party prejudiced thereby can always apply for restoration - **DANKWA V KWABI IV [1992-93] GBR 380 SC**.''

On the part of the Court, when a case is struck out, the case has been removed from its cause list. Therefore, the court cannot go into the merits of the case until the suit is restored on its cause list by an application for the re-listment of the case.

In the case of **EMMANUEL KATERE AND BACHAWEY V THE MUNICIPAL CHIEF EXECUTIVE AND THE KINTAMPO MUNICIPAL ASSEMBLY, CIVIL Suit No. H1/69/2021 dated 26th January, 2023,** the Court of Appeal, Kumasi, held when it concluded that the motion for re-lisment was still pending at the time the trial judge purported to exercise jurisdiction over the case stated as follows; -

"It is our humble view that the trial judge seriously erred when he failed to hear the motion for re-lisment on the return date or any subsequent date, and more importantly,

not formally restoring the plaintiff's suit before going into the merits of the case. The error goes to jurisdiction. The law is settled that, apart from jurisdiction any wrong step taken in a legal suit should not have the effect of nullifying the proceedings.

See the cases **BOAKYE V. TUTUYEHENE [2007-2008] 2 SCGLR 970**; **REPUBLIC V. HIGH COURT, ACCRA, EX-PARTE ALLGATE CO. LTD [2007-2008] 2 SCGLR 1041.** Consequently, the jurisdictional error which occurred at the court below cannot be glossed over by this court. This is not an error which can be cured under order 81 rule 1(1) of the High Court (Civil Procedure) Rules, 2004 (CI47). On the ground ''B'' alone, this appeal succeeds. Under the circumstance, ground ''A'' is otiose and does not deserve our attention.''

Once again, relating the foregoing case laws with the present case, an application for re-listment filed on the 3rd of December 2020 with a return date being 10th December 2020, is found at pages 18-20 of the

record of appeal. On the 10th of December, 2020 per the record of appeal as found at page 21, it is recorded as follows; -

"Parties present.

**BY COURT:** Suit is hereby adjourned to 12th January, 2021 for hearing'' Hearing then, commenced in earnest till the impugned judgment was delivered. Nowhere in the proceedings of 10th December, 2020 was it stated that the application for re-listment has been considered and the suit restored unto the cause list of the trial court. There is also no record of the application for relistment having been considered and granted on a later date. It is trite law that the court and the parties are bound by the record of appeal and no assumptions can be made to the effect that, the application was considered and granted but the trial court failed to record the proceeding as impressed upon the court by the learned counsel for the plaintiff. The absence of the record on the consideration of the application for re-listment and grant of same, leads to a conclusion that the suit as

struck out was not relisted. This seriously erodes the jurisdiction of the lower court. To infer that once the parties were present, the court considered the application, granted same before fixing the hearing date was set will amount to speculation. The mere presence of the parties cannot support an inference that the application was considered and the case relisted. This case is unlike the case of **SASU V AMUA-SEKYI [987-88] 2 GLR 221, CA** where the court found good reason to infer that an order for re-listment was granted though, the record did not disclose same. In the Sasu case supra, the case was struck out after several adjournments and on a day when only the defendant was present. Subsequently, the parties agreed that the case be restored. The plaintiff thus applied for re-listment of the case and same was granted on a later date subject to cost. The cost was paid by the plaintiff on the 9th of August 1977 and counsel for the defendant collected same on the 11th of August, 1977.

The court of appeal dismissed the appeal and held per the holding 1 as follows; -

"the oral order made by the court once made became an order or decision of the court even though it was not reduced into writing, and had to be obeyed. In the instant case, the defendant was in court with his counsel and was aware of the order and his counsel even collected the ¢100.00 cost. The order to relist was a consent order and the defendant was bound by it and could not be heard to say that because the was verbal the suit was not or never relisted.''

See the Emmanuel Katere case supra.

I make a finding that the application for re-lisment not considered to restore the case before the trial court, it resulted in a jurisdictional error.

**CONCLUSION**

The absence of jurisdiction means the decision of the lower court which is the subject of this appeal, cannot stand nor be allowed to stand. With this conclusion, the rest of the grounds of appeal deserve no determination. On this additional ground of appeal alone,

the appeal is allowed. The judgment of the District Court, Mankranso dated 16th March, 2021 is hereby set aside. The entire proceedings from the 10th of December, 2020 to the date of judgment are equally set aside. The application for relistment to be considered by the Court.

……[SGD]……

**JUSTICE HANNAH TAYLOR (MRS)**

**JUSTICE OF THE HIGH COURT**

**LAWYERS**

STEPHEN OSEI KOFI ……..…..FOR PLAINTIFF/RESPONDENT

KWADWO OWUSU-ANSAH ……..FOR DEFENDANTS/APPELLANTS