aIN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)

BAFFOE-BONNIE, JSC

MARFUL-SAU, JSC

AMEGATCHER, JSC

TORKORNOO (MRS.), JSC

CIVIL APPEAL

NO. J4/45/2019

4TH NOVEMBER, 2020

JIBRIL MAHAMA …… PLAINTIFF/APPELLANT/APPELLANT

VRS

AKWASI MENSAH …….

DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

TORKORNOO, (MRS.) JSC:-

The Plaintiff/Appellant/Appellant (Plaintiff) is contesting the leave granted by the High Court to the Defendant/Respondent/Respondent (Defendant) to amend his defence to the Plaintiff's action. In his Statement of Claim, the Plaintiff had averred in his paragraph 4 that

4. **Plaintiff avers that it was a term of the sale and purchase agreement he entered into with defendant that he was to pay GH₵40,000 to the defendant whilst the remaining balance of GH₵30,000 'shall be paid after the transfer' of the necessary land documents'**

In his original defence to the Plaintiff's claims, the Defendant had denied all averments in the Statement of Claim and pleaded in Paragraph 4 of his Statement of Defence that

4. **In further denial, the defendant will contend that the said plot of land was to be sold to the plaintiff for Gh₵70,000 and the plaintiff paid GH₵40,000 leaving a balance of 30,000 to be paid after the transfer of the document thereof**'

The Plaintiff applied for judgment on admissions pursuant to **Order 23 rule 6(1) and Order 11 rule 18 (1) (a) of the High Court (Civil Procedure) Rules, 2004 CI 47** on the basis of this Paragraph 4. Before the Plaintiff's application for judgment could be heard, the Defendant filed an Amended Defence and opposed the application for judgment on admissions. This amended Defence was struck out on account of failure to seek leave prior to filing same.

Thereafter, the Defendant applied to the High Court for leave to amend his Defence. The Plaintiff opposed the hearing of this application for leave to amend the Defence before the hearing of his application for judgment on admissions on the principal ground that the application was incompetent on account of seeking to defeat his prior application for judgment on admissions..

The court heard the Defendant's application for leave to amend his Defence first, granted same, and the Plaintiff appealed to the Court of Appeal to set aside the order granting Defendant leave to amend his defence. The appeal to the Court of Appeal was dismissed, leading to the present appeal on the following grounds:

1. The judgment is against weight of evidence
2. The court of appeal erred in law by affirming the ruling of the high court granting leave to defendant to amend his pleading, even though the court agreed with plaintiff about the defendant's motion on notice to amend was 'well-founded', thereby rendering moot, plaintiff's first in time application for judgment on admission

Rule 6(4) of the **Supreme Court Rules 1996 CI 16** reads:

> '*The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal, <u>without any argument or narrative</u> and shall be numbered seriatim: and where a ground of appeal is one of law the appellant shall indicate the stage of the proceedings at which it was first raised*' (emphasis mine)

A cursery look at the second ground of appeal shows that it offends against Rule 6(4) of the Supreme Court Rules 1996 CI 16 by being both narrative and argumentative. We will therefore strike it out under Rule 6 (5).

Was the ruling of the court of appeal against the weight of evidence? We do not think so. Although the court of appeal expended considerable evaluation in its' twenty page ruling, we find the central kernels of their ruling to be that:

a. The trial judge exercised his discretion properly when he heard the defendant's motion to amend his statement of defence first, though the

plaintiff's application for judgment on admission was filed first in time. This is because basically, the purpose of an amendment of pleadings is to enable the court to determine the real question(s) in controversy between the parties and as much as possible, to avoid multiplicity of suits. Citing the case of **Tildesley v Harper 1878 10 Chan Div 393 at 396,** the judgment set out that as a general practice, an amendment will be allowed unless

i. it will entail injustice to the respondent
ii. the applicant is acting mala fides,
iii. by his blunder, the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise

The Judgment also cited the cases of **Copper v Smith 1884 26 Chan. Div 700, Clarapede & Co v. Commercial Unions Association 1883 32 WR 262** as articulating the correct principle that guides consideration of amendment. This is the principle that the object of the courts is to decide the rights of the parties, so if an error is not fraudulent or intended to overreach the court, and will not occasion injustice to the other side, then the court ought to allow amendment to correct it so that the real matters in controversy between the parties can be decided by the courts.

b. The Plaintiff's whole protest to the grant of amendment was that his motion for judgment was first in time to the application for leave to amend and so should have been heard first. This rendered the application for amendment an application brought in bad faith and incompetent. The Court of appeal disagreed with this position and pointed out that the application for leave to amend, though filed later in time, was fixed for the same date that the plaintiff's application for judgment so both applications were part of the business of the day for the court. One did not take precedence over the other, and there was no basis to fault the exercise of

discretion by the trial judge to hear the application for amendment first. The trial judge violated no rule of practice or procedure. The ground of appeal that because the court decided not to hear the plaintiff's motion filed earlier in time resulted in a patent miscarriage of justice is not tenable as it is misconceived.

The court of appeal supported their decision with the dictum of the Supreme Court per Francois JSC in P**omaa & Ors v Fosuhene 1987/88 1 GLR 244 at 260** which determined that '*where there are two applications one for judgment and one for an amendment, the amendment must be dealt with first. If the application for judgment is taken first and it succeeds, the application for amendment would be rendered useless, and that is the reason why an amendment should have prior consideration*'.

Citing P**omaa & Ors v Fosuhene** again, the court drew attention to the fact that the admission Plaintiff sought to rely on was not clear and unequivocal. After the first paragraph 4, the defendant's pleadings in paragraph 5, 8, 9 and 10 negatived an intention to admit plaintiff's paragraph 4. These paragraphs watered down the admission and rendered it ambiguous.

Though the Plaintiff continues to decry this reasoning of the Court of Appeal in his Statement of Case, we agree with it, and find that neither the high court nor the court of appeal decisions are against the weight of evidence. We also note the citation of **Fabrina Oil v Shell 2011 1 SCGLR 429** and **Armah v Addoquaye 1972 1 GLR** 109 by Appellant counsel as authority that disallows a party from changing the nature of their case through amendment. We do not see this to be the situation in contention before us.

The said paragraphs 5, 8, and 10 of the original defence read:

5. **The defendant says the plaintiff did not pay the said balance, nor did he apply and obtain building permit before embarking on the development of the land**

8. The defendant says since August 2014 that the plaintiff paid the initial deposit, he has failed and refused to pay the balance of 30,000 Ghc even as at January 2016.

10. The defendant will contend therefore that the plaintiff's conduct and behavior did not demonstrate that he was ready to purchase the said land as alleged

Thus immediately after admitting that the consideration for the transaction was GH₵70,000, and part payment of GH₵40,000 was made, with the balance due on transfer of title, the defendant raised a protest about an alleged intervening misstep from Plaintiff prior to completion of payment. From the paragraph 5 therefore, there was not an unequivocal admission of completion of the sale transaction that arises from the Plaintiff's claim for declaration and specific performance of the sale of the land.

We therefore do not think that it is an act of mala fides calculated to over reach an application for judgment on admissions for the defendant to apply to amend his defence within the terms he applied for. And especially so when the Amended Defence only reflects an expansion of the tenor of matters raised in the original Statement of Defence, with various embellishments. As to whether or not the defendant's version of events constitutes a tenable defence, this is a matter that the court has exercised discretion to allow the parties to ventilate and this is in line with the directions of **Order 1 Rule 1 (2) of CI 47** which enjoins the rules of court to be interpreted and applied so as to ensure effective resolution of all matters in controversy between the parties. We agree with the court of appeal that

the learned trial judge cannot be faulted in the exercise of his discretion when he allowed the amendment. The appeal fails.

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC: -

I have had the privilege of reading beforehand the well-reasoned opinion of my sister Torkornoo, JSC and I entirely agree that this appeal which is interlocutory in nature be dismissed. I however want to express some thoughts on the procedure adopted by learned counsel of the Appellant that has culminated in this appeal. In this concurrent opinion, I intend to address the issue whether by the nature of the pleadings the Appellant was entitled in law to even apply for

Judgment on Admissions under Order 23 of the High Court (Civil Procedure) Rules, 2004, CI 47, as he did.

The Appellant who commenced this action as plaintiff endorsed his writ of summons with the following reliefs:

''1. A declaration that all that piece or parcel of land situate lying and being at Dome Pillar 2 Transformer Junction near Al Huda Hotel measuring 100 feet by 100 feet and sharing boundaries with property Nos 1 and 3 on the Lom Nava Herbal road and the property of another was sold to Plaintiff by Defendant on 12th August, 2014, per contract document signed by the parties.

2. An order for specific performance against the Defendant, his assigns and agents whatsoever.

3. Perpetual injunction

4. Recovery of possession

5. Cost."

Now, from the above reliefs endorsed on the writ of summons, it is very clear that the Appellant's cause of action was mainly one of declaration of title to land, recovery of possession and specific performance of a contract of sale of land. Appellant's action was not one for a liquidated claim or for the recovery of money.

At paragraphs 4 and 5 of the Statement of Claim, the Appellant pleaded the contract as follows:-

''4. Plaintiff avers that it was a term of the sale and purchase agreement he entered into with defendant that he was to pay GHC 40,000.00 whilst the remaining GHC 30,000.00 '' shall be paid after the transfer'' of the necessary land documents.

5. Plaintiff says he duly paid the GHC 40,000.00 to Defendant and this was acknowledged in writing on 12th August 2014 aforesaid.''

In response to the above pleadings the Defendant stated at paragraph 4 of the original Statement of Defence as follows:-

''4. In further denial, the Defendant will contend that the said plot of land was to be sold to the plaintiff for GHC 70,000.00 and the plaintiff paid GHC 40,000.00 leaving a balance of GHC 30,000.00 to be paid after the transfer of the document thereof.''

Against this response, counsel for the Appellant contended that the Defendant had admitted that Appellant was entitled to GHC 40,000.00 from the Defendant hence his application for judgment on admissions for the GHC 40,000.00. It is clear from the above pleadings that there was no contention about the GHC 40,000.00 to warrant an admission as claimed by Counsel for Appellant. Both parties were pleading to the terms in the contract for the sale of the land. Appellant was therefore not making an admission to a fact or issue in controversy.

From the pleadings above, Appellant knew at the time he issued the writ of summons that he had paid the amount of GHC 40,000.00 to the Defendant as part-payment of the cost of the land, which amount the Defendant had receipted. However, the Appellant did not deem it necessary to sue for the GHC 40,000.00, he paid to the Defendant. Instead, the Appellant sued for declaration of title, recovery of possession and specific performance. Indeed, by applying to enter judgment on admissions, the Appellant was substituting a new cause of action in place of those settled by the pleadings, a procedure frown upon by the rules of court. To put it simply, appellant had no relief of recovery of money before the court and as such he could not apply to enter judgment to recovery money.

A cardinal principle in procedural law is that parties in an action are bound by their pleadings and such parties may only depart from their pleadings through amendments allowed by the law.

This principle has been given statutory backing in Order 11 r 9 & 10 of the High Court (Civil Procedure) Rules, 2004, CI 47 which provides as follows:-

'' 11 r. (9) Subject to rules 7 (1), (10) & (15), a party may in any pleading plead any matter which has arisen at any time, whether before or after the issue of the writ;

(10) A party shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with previous pleading made by the party.''

The effect of this rule is that since pleadings form the factual basis upon which each party's case is built, parties in an action are bound by their pleadings, as such in the course of the proceedings parties are not allowed to allege new facts or make new claims outside or inconsistent with the original pleading. This is to avoid surprises in civil litigation, hence the opportunity to amend pleadings to correct genuine errors in pleadings under Order 16 of CI 47. See:

Hammond v. Odoi [1982-83[2 GLR 1215

Adehyeman Industrial Complex v. Ofosu Mensah [2010- 2012]2 GLR 3

Klah v. Phoenix Insurance Co. Ltd. [2012] 2 SCGLR II39

The Appellant could not have taken judgment on admissions while his claim for declaration of title, recovery of possession and specific performance were still pending. The point is how could the Appellant recover the part payment of GHC 40,000.00 and still had his relief of specific performance pending? The Appellant on the pleadings could not have applied for judgment on admissions without first amending the reliefs so endorsed on his writ of summons. The simple reason is that Appellant had no claim for recovery of money endorsed on his writ of summons.

Beside the fact that the procedural law would not allow Appellant, the right to enter judgment on admissions, having endorsed the writ of summons with the relief of declaration of title, it is trite that a plaintiff who endorses such a claim

cannot avoid a trial. By the relief of declaration of title, the Appellant was required by law to lead evidence in a trial to proof title; and for that reason the application for judgment on admissions by the Appellant was incompetent.

In Republic v. High Court Accra; Exparte Osafo [2011] 2 SCGLR 966. This Court held that by the settled practice of the courts, for declaratory orders to be good, such orders must be made only after hearing all the parties to the action or at least offering them an opportunity to be heard. Therefore since the Appellant had endorsed his writ with declaration of title, the court had to take evidence from the parties before an order could be made. That being the case the Appellant could not have taken the judgment on admissions, since by the practice of the courts, evidence ought to be taken before any declaratory order would be made.

In the Exparte Osafo, this Court relied on the case of Metzger v Department of Health & Social Security [1977] 3 All ER 444 at 451 where Megarry VC delivered as follows:

> **''The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument, not merely after admission by the parties. There are no declarations without argument; that is quite plain.''**

It is thus quite clear that because the Appellant had endorsed his writ with the relief of declaration of title to land, the subject matter of the suit, he could not take judgment on admissions, so the application by the Appellant was wrong in law in the first place. The entire proceedings concerning the application for judgment on admissions was incompetent and for that matter the appeal ought to fail. I will therefore dismiss the appeal for the reasons above.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT

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