IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)

PWAMANG, JSC

TORKORNOO (MRS.), JSC

HONYENUGA, JSC

PROF. MENSA-BONSU (MRS), JSC

CIVIL APPEAL

NO. J4/48/2019

3RD FEBRUARY, 2021

THE REPUBLIC

VRS

OKYERE DARKO …….. RESPONDENT/APPELLANT/RESPONDENT

EX-PARTE; LUFUS OWUSU ……..

APPLICANT/RESPONDENT/APPELLANT

JUDGMENT

DOTSE JSC:-

This is an appeal by the Applicant/Respondent/Appellant, hereafter referred to as the Applicant against the judgment of the Court of Appeal dated 27th July 2017 which allowed the appeal of the Respondent/Appellant/Respondent, hereafter referred to as the Respondent against the judgment of the High Court dated 30th April 2015.

FACTS OF THE CASE

On the 12th of February 2015, the Applicant applied to the High Court, Accra for leave to commit the Respondent for contempt of court based on depositions in an affidavit deposed to by Kofi Dede, the lawful Attorney of the Applicant herein.

The facts germane to this case are that, the Applicant on the 7th day of March 2013 issued a Writ of Summons in the High Court, Accra against the Respondent claiming the following reliefs:-

a. Declaration of title to the parcel of land described in the writ of summons
b. Recovery of possession
c. General damages for trespass
d. An order directed at the defendant to reconstruct plaintiff's fence wall that he caused to be pulled down or pay cost of same.
e. An order directed at the defendant to remove all structures that he caused to be erected or constructed on the land.
f. An order for perpetual injunction to restrain the defendant, his assigns, agents, workmen, servants and "landguards" from further developing or interfering whatsoever with the land in dispute.

References therein to the Plaintiff refer to the Applicant, whilst those to the Defendant refer to the Respondent.

On the same day the Applicant applied for an order of interlocutory injunction to restrain the respondent either by himself, his assigns, agents, workmen, servants and "landguards" from further developing or interfering whatsoever with the land in dispute pending the final determination of the suit. The said application was opposed, however same was granted in a ruling delivered on the 23rd April 2013.

At the close of pleadings, three consecutive dates were set down for trial. However, on the said dates the Applicant failed to attend and the action was dismissed under Order 36 r 1 (2) b of the High Court (Civil Procedure) Rules 2004 C. I. 47 upon the application of the Respondent. The Applicant applied to the court for the restoration of the suit which application was granted and the said dismissal of the case was set aside. In a ruling dated 24th July 2014 the court restored the Applicants suit onto the cause list and fixed the 19th day of November 2014 for hearing.

It is interesting to observe that, the High Court, Accra, presided over by Mills-Graves J, in a Ruling delivered on 24th July 2014 in Suit No. FAL.438/2013 intitutled ***Lufus Owusu – Plaintiff v Okyere Darko – Defendant*** delivered himself thus:

> *"Even though hearing notice was duly served on the Plaintiff by the Defendant, the Plaintiff was nevertheless absent from court on the 16th June 2014 for the commencement of the hearing of the case."*
>
> *Counsel for the Defendant, then, invoked Order 36 Rule (1) (2) (b) of C.I. 47, and insisted that the Court, should dismiss the Plaintiffs action whereupon this court acceded to the Defendant's counsel* ***request and accordingly dismissed the plaintiff's action as per the relevant quoted Order 36 Rule (1) (2) (b) of C. I. 47." Emphasis***

Order 36 Rule 2 (1) of C. I. 47 provides as follows:-

"A Judge may set aside or vary, on such terms as are just a judgment obtained against a party who fails to attend at the trial."

2 (2) "An application under this rule shall be made within fourteen (14) days after the trial."

In determining whether to set aside the dismissal of the Plaintiffs action or not, the learned trial Judge concluded the matter thus:-

"From the pleadings, the Plaintiff's case against the Defendant cannot be said to be frivolous or vexatious, as the Plaintiff has a cause of action against the Defendant to which claim of the Plaintiff the Defendant has equally responded by filing statement of defence and issues have already been set down for trial.

The court, in dismissing the Plaintiff's action, additionally awarded cost of GH¢1,500.00 against the Plaintiff and ordered the plaintiff to pay the cost to the defendant before the plaintiff attempt's to have anything to do with this matter and the court has learnt that this cost, has been paid.

"Accordingly, the court hereby sets aside the dismissal of the Plaintiff's action against the defendant on 16th June 2014. The Plaintiff's case is therefore restored unto the cause list and same shall be heard on 19th November 2014. No costs is awarded to either side." Emphasis

The Respondent however continued to develop the land in dispute even after the restoration of same. His actions provoked an application for contempt of court at the instance of the Applicant which was dismissed on a purely technical ground by the court. Subsequently, due to the continued development of the land in dispute by the

Respondent, a fresh application for contempt of court was made and granted by the learned High Court Judge who heard the application and found the Respondent guilty of contempt. The learned Judge convicted the Respondent and punished him by imposing a custodial sentence of 10 days in imprisonment and a fine of 800 penalty units on him.

REASONS GIVEN BY THE HIGH COURT FOR CONVICTING THE RESPONDENT FOR CONTEMPT

It is considered worthwhile to reiterate and refer to in extenso the reasons proffered by the learned trial Judge when he convicted the Respondent for contempt of court on the 30th day of April 2015.

This is what he said:-

> *"The restoration of the substantive case to the cause list was effected on 24th July 2014. It connotes that the injunction order, which was granted on 23rd April 2013 which ceased to exist on 16th June 2014 by virtue of the order dismissing the suit, was revived on 24th July 2014. Nevertheless, the photographs the applicant exhibited demonstrably show that between the months of July 2014 to November 2014 respondent steadily kept on with the development of the building on the disputed land as if there was no injunction restraining him from so developing. That was nothing but lawlessness. Perhaps, his erroneous contention that the injunction had ceased to bite following the dismissal of the suit, the restoration notwithstanding goaded him on to be that lawless and defiant of the court injunctive order.*
>
> *There is nothing more pernicious on the very essence of the existence of the court than having a litigant who chooses to disrespect or defy court order. Any defiance of a court order by a litigant ought not to be taken lightly because such a conduct casts ominous dark clouds on due administration of justice." Emphasis*

FINAL ORDERS OF THE HIGH COURT

The High Court Judge concluded his decision by convicting the Respondent in the following terms:-

> ***"Accordingly, the respondent is hereby convicted of contempt and sentenced to a fine of 800 penalty units and in addition he must serve 10 days imprisonment.*** *In default of paying the fine, he is to serve 10 additional days imprisonment. Applicant is awarded costs of GH¢3000.00." Emphasis*

APPLICATION FOR REVIEW AND ITS DISMISSAL

The Respondent applied for a review of the decision of the High Court dated 30th April 2015 on the 4th of May 2015. From the record of appeal, it is apparent that learned counsel for the Respondent F. K. Quartey, Esq, Counsel for and on behalf of the Respondent/Contemnor/Applicant prayed the court for an order to review the sentence meted out to the Applicant in the Ruling of the High Court delivered on 30th April 2015.

It is also apparent from the depositions in the supporting affidavit that the Respondent did not contest the conviction for contempt of court, but took issue with the severity of the sentence which was ***"serve a term of ten (10) days in prison and also pay a fine of Eight Hundred (800) penalty units in default of which the Respondent was to serve another ten (10) days of incarceration***." Emphasis

On the 6th day of May 2015, the learned trial Judge dismissed the application for review of his decision. In dismissing the application for review, the learned trial Judge stated as follows:-

> *"The Applicant has developed a structure to virtual completion inspite of a court order restraining him from doing that. So far the applicant has not shown the least remorse of that conduct.*

I have not read or heard any word of apology from the applicant for doing what he had been restrained by the court not to do. Such an applicant does not deserve the sympathy of the court….

I will refuse the application" Emphasis

APPEAL TO COURT OF APPEAL

The Respondent thereafter appealed to the Court of Appeal. From the record of appeal, **it is clear that the Respondent's appeal to the Court of Appeal was in respect of the substantive ruling dated 30th April 2015 and not the review application dated the 6th of May** 2015.

GROUNDS OF APPEAL

i. The ruling was not supported by the weight of affidavit evidence before the court.
ii. The Judge erred when he held that the restoration of the substantive suit automatically restored the order for interlocutory injunction.
iii. The Judge erred in finding the Respondent guilty of contempt when there was no mens rea.
iv. The sentence by the Judge was extremely harsh and excessive in the circumstances of the case.
v. The court erred in assuming jurisdiction when an earlier application for contempt of court on the same facts had been dismissed. Emphasis

DECISION OF THE COURT OF APPEAL

By a unanimous decision of the Court of Appeal, rendered on 27th July 2017, the Court set aside the orders of the High Court in the following terms:-

"On the totality of evidence before this court, aside the fact that the trial Judge erred in restoring a dismissed case, which is a nullity and therefore of no legal effect, there is no (sic) much evidence to satisfy us that the charge of contempt has been established beyond reasonable doubt against the appellant. He was not in disobedience of the law when he continued his development in the interregnum. This appeal succeeds and the High Court's conviction is hereby quashed. The appellant is hereby acquitted and discharged of the offence of contempt of court."

APPEAL BY THE APPLICANT TO SUPREME COURT

Dissatisfied with this decision of the Court of Appeal, the Applicant on the 28th day of May 2015 appealed against the said decision with the following as the grounds of appeal:-

i. That the judgment is against the weight of evidence

ii. That the Court of Appeal misapprehended the facts of the case and arrived at a wrong decision

iii. That the Court of Appeal erred in holding that when a suit is dimissed pursuant to Order 36 Rule 1 (2) b of C. I. 47 same cannot be restored or relisted and therefore the restoration of the suit by the High Court Judge was a nullity and of no effect.

iv. That the Court of Appeal erred when it held that the Respondent/Appellant/Respondent cannot be said to have willfully disobeyed the order of the court because he acted on the advice of his lawyer.

v. That the Court of Appeal erred when it ruled that the Respondent/Appellant/Respondent was not in contempt of court and consequently quashed the High Court's decision.

vi. That the Court of Appeal erred by resting its decision on a ground not set out by the Respondent/Appellant/Respondent, that is "whether a case dismissed can be restored onto the cause list by the same court or for that matter any other

court" ***without giving the Applicant/Respondent/Applicant an opportunity to contest the appeal on that ground." Emphasis***

Learned counsel for the Applicant and Respondent all filed their Statements of case in respect of the appeal filed by the Applicant to this court.

However, this court on the reception of arguments in this appeal on 11th November 2020 requested both counsel to address the court in respect of a principle of law laid down by this court in the ca

se of ***Nii Kojo Danso II v The Executive Secretary, Lands Commission, Executive Secretary, Land Valuation Board, Attorney-General and Joshua Attoh Quarshie Suit No. CA.J4/35/2017 dated 28th November 2018 reported in (2018) DLSC 4135*** at page 4, where our illustrious brother, Benin JSC, speaking on behalf of the court laid down the principle thus:-

> "*Under order 42 of C. I. 47, a party is only debarred from appealing against a decision when he has applied for review of the same decision. After the court has ruled on the review application, the aggrieved person may exercise his undoubted right of appeal requiring no leave of the Court of Appeal,* ***not against the original decision which was the subject matter of the review, but against the ruling in the review application." Emphasis***

Both counsel have responded to the orders of this court, and we now proceed to examine the arguments of learned counsel in respect of the said principle.

ARGUMENTS OF LEARNED COUNSEL FOR THE APPLICANT

Learned counsel for the Applicant Farouck Seidu in his brief but incisive submissions on the above principle, stated as follows:-

1. That the respondent instead of appealing against the Ruling of 30th April 2015, rather sought a Review of the said ruling.

2. When the review application was refused on 6th April 2015, the Respondent then appealed against the substantive ruling of 30th April 2015, but not the review decision.
3. That even though at the time the Court of Appeal rendered its decision on the 27th July 2017, the decision in the Nii Kojo Danso II case referred to supra, had not been delivered by the Supreme Court. However, since the said principle had been laid down by the Supreme Court on the 28th November 2018 at a time the appeal was being considered, this court has to consider the effect of the said decision on the fate of the appeal.

4. Learned counsel for the Applicant therefore concluded that, having applied for review of the decision of 30th April 2015, the Respondent was debarred from appealing against the said decision by virtue of the provisions of Order 42 r. 2 of the High Court, (Civil Procedure) Rules 2004, C. I. 47. The Notice of Appeal, which is the originating process against the High Court decision was therefore a nullity, and therefore void. That being the case, the judgment of the Court of Appeal is therefore void and of no effect.

Learned counsel referred to the following cases to buttress his submissions

i. ***Ghassoub v Dizengoff (W.A) [1962] 2 GLR 133***

ii. ***Macfoy v United Africa Company Limited (1961) 3 A.E.R, 1169 per Lord Denning at 1172 where he stated thus:-***

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad."

iii. Republic v High Court (Fast Track Division Accra, Ex-parte; Sian Goldfields Limited (Aurex Management and Investment AG/SA Limited – Interested Party 2009 SCGLR 204 at 211.

LEGAL ARGUMENTS BY LEARNED COUNSEL FOR THE RESPONDENT

Learned Counsel for the Respondent F. K. Quartey whilst admitting the full force and effect of the decision in the Nii Kojo Danso II case supra in his written submissions, however advocated a departure from the principle because the review of the decision of 30th April, 2015 was against the imposition of the sentence and not the actual decision.

Secondly, learned counsel after referring copiously to the decision of the Supreme Court in the case referred to supra, drew the distinction that, it being a contempt case, there exists differences between what constitutes civil and or criminal contempt.

Thirdly learned counsel for the Respondent in a veiled attempt sought to draw conclusions that, even though the case emanated out of a civil case, the nature of the contempt application took it out of the civil realm and thus the provisions of Order 42 r. 2 of C. I. 47 did not apply. Learned counsel also referred to the fact that, in the arguments before the High Court in the review application, reference was also made to Order 50 rule 5 of C. I. 47 and that meant it was in substance not an application for review but discharge of a person committed for contempt.

In this respect therefore, learned counsel argued that the effect of the decision in Nii Kojo Danso II principle had been taken out of the remit of the instant case.

Finally, learned counsel also argued that, since the Court of Appeal anchored their decision on the principle of nullity, the effect of the principle of law decided in the Nii Kojo Danso II case is inapplicable, and even if it does, it is of no effect.

Learned counsel also referred to the decision in the case of ***Macfoy v United Africa Company Limited (West Africa)*** supra as well as the following decided cases:- ***Ackah v Acheampong & Anr. [2005-2006] SCGLR 1***, where contempt of court has been judicially described in varying terminologies as quasi-criminal, see ***Republic v Numapau, Ex-parte Ameyaw II [1998-99] SCGLR 639***; as a criminal offence, see ***Asumadu-Sakyi v Owusu [1981] GLR 201, CA*** and as an offfence, see ***British Airways v Attorney General [1996-97] SCGLR 547 and others***.

The essence of the reference to all the above cases and others was to establish basically that there being two types of contempt namely, civil and criminal, the principle of law being applied in the Nii Kojo Danso II case is one dealing with civil contempt, and not the criminal one as it is in the instant case.

Learned counsel therefore urged this court not to apply the said principle but to dismiss the appeal.

ANALYSIS AND DECISION OF THIS COURT

What then is the scope of the principle in the Nii Kojo Danso II case as decided by the Supreme Court and referred to supra?

The case firmly established the principle, in respect of Order 42 that, once you elect for any of the options stated therein, either for ***a review or an appeal,*** you cannot abandon that process and it's applicable procedural rules in pursuit of another option. Benin JSC formulated the principle in the Nii Kojo Danso II case with clarity as follows:-

> *"any casual reading of order 42 of C. I. 47 reveals that a party who elects after a judgment or ruling to Appeal the decision cannot at the same time also apply for review of the same decision. Similary, where a party opts to apply for review it is not open to him at the same time to Appeal against the same decision."*

In the same decision, Benin JSC, put the matter beyond peradventure when he authoritatively decided thus:-

> *"Under Order 42 of C.I. 47,* ***a party is only debarred from appealing against a decision when he has applied for a review of the same decision. After the court has ruled on the review application, the aggrieved person may exercise his undoubted right to Appeal requiring no leave of court to Appeal, not against the original decision which was the subject matter of the review, but against the ruling in the review application****." Emphasis*

It is worth reiterating the fact that, the contention by learned counsel for the Respondent that the review in this case was only in respect of the sentence and therefore the principle is not applicable is wishy washy and we refuse to accept it. Fact of the matter is that, review is review, and the words of the procedural rules are clear on the subject.

> "Order 42—Review
>
> Rule 1—Application for Review
>
> (1) A person who is aggrieved
>
> (a) by a judgment or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a judgment or order from which no appeal is allowed,
>
> may upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within that person's knowledge or could not be produced by that person at the time when the judgment was given or the order

made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, apply for a review of the judgment or order.

(2) A party who is not appealing against a judgment or order may apply for a review of that judgment or order notwithstanding the pendency of an appeal by any other party, except where the ground of the appeal is common to the applicant and the appellant, or where, being the respondent, he can present to the Court of Appeal the case on which he applies for the review."

From the above Rules of procedure, it is abundantly clear that it is only under the following conditions that a review is allowed:-

(d) where a person is aggrieved against a decision of a court from which an appeal is allowed but no appeal has been filed.

(2) Where no appeal is allowed but where upon the discovery of new and important matter or evidence which after due diligence was not within the knowledge or reach of the person at the time the judgment or order was delivered.

These are the only two conditions under which a review could have been entertained under Order 42. 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.

Having analysed the conduct of the Respondent and his legal advisers, it is clear that they must be deemed to be aware of the provisions of Order 42 when they opted for the review of the decision of 30th April 2015 instead of appealing against the substantive decision. We therefore reject the invitation being made to us by learned counsel for the Respondent to distinguish the Nii Kojo Danso II case from the instant appeal because from the records,

the distinction between civil and criminal contempt are inapplicable to the circumstances of the remit and scope of the principle.

The Respondent must be deemed to be aware of the provisions of Order 42 of C.I. 47 when he opted for the review. Rules of procedure are made to be complied with, and once the scope of these Rules have been interpreted by the Supreme Court, the best we can do is to ensure strict compliance.

In the case of ***Doku v Presbyterian Church of Ghana [2005-2006] SCGLR 700 at 704*** the Supreme Court, speaking through Sophia Akuffo JSC (as she then was) held whilst emphasizing the importance of Rules of procedure as follows:-

> *"It is not for nothing that rules of court procedure stipulate time limits. As has already been pointed out above, the 1992 Constitution gives dissatisfied litigants the right of appeal to this court. However, because it is also in the public interest that there should be an end to litigation, the Rules of the Supreme Court (as well as Rules of the Court of Appeal) have set these time limits to guide litigants with a view to achieving certainty and procedural integrity." Emphasis*

With parity of reasoning, we formulate the principle in this case as follows:-

> *"It is not for nothing that the rules of court procedure stipulate different procedural originating processes at the end of a determination of a matter, either you file a review or appeal. Where therefore an originating process like a review had been embarked upon in contra distinction to an appeal, then in the case of dissatisfaction with the determination therein, it is the procedure rules that are provided for in cases where the person is desirous of testing the said decision in an appellate court that must be complied with. This is the only way the integrity and sanctity of the rules of procedure can be legitimised and honored by all stakeholders."*

Furthermore, since the decision in the Nii Kojo Danso II case was a unanimous decision of this court based on sound principles of law, we are constrained by the provisions of Article 129 (2) and (3) of the Constitution 1992 to follow it and treat it as normally binding. There is thus no reason to depart from following it.

With this understanding, it bears emphasis that, the appeal by the Respondent against the High Court decision of 30th April 2015 should rather have been against the review decision of the High Court dated 6th May 2015.

Once the Respondent had applied for review, the option of appealing against the substantive decision of 30th April 2015 is foreclosed. That being the case, it means there was infact no valid appeal pending before the Court of Appeal.

What should be noted is that, it is the Notice of Appeal by an appellant that initiates the process to challenge the decision complained of. In this case, it was the Respondent that filed the originating process to overturn the High Court decision. Once that originating process, the Notice of Appeal is invalid, null and void, then by operation of law, it means there was no valid appeal pending before the Court of Appeal for them to have made the decision they rendered.

Flowing from the above, it bears emphasis that, the Court of Appeal's decision was a nullity and it is for that reason that it has been set aside.

The effect therefore is that, the High Court decision of 30th April 2015 is thus restored.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

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