IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2021

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)

PWAMANG, JSC

AMADU, JSC

PROF. MENSA-BONSU, (MRS.) JSC

KULENDI, JSC

CIVIL APPEAL

NO. J4/04/2020

14TH APRIL, 2021

SUNBELTIC COMPANY LIMITED ……

PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. TEMA DEVELOPMENT CORPORATION
2. SETHI BROTHERS DEFENDANTS/APPELLANTS/APPELLANTS
3. SETHI REALTY COMPANY LIMITED

JUDGMENT

KULENDI, JSC:-

INTRODUCTION

We have before us, an appeal from the decision of the Court of Appeal (Civil Division), Accra dated 11th February, 2019 re-listing an appeal filed by the Respondent which was earlier struck out for want of prosecution on 7th November, 2018.

BACKGROUND

Following the judgment of the trial High Court, Tema, presided over by Avril Lovelace Johnson, JA, sitting as an additional High Court Judge, dated 28th May, 2015, the Respondent herein filed an appeal to the Court of Appeal. The Parties filed their written submissions in respect of the Appeal and hearing of the appeal was fixed for 7th November, 2018. On the said date, both the Respondent and his Counsel were absent from Court and the Appeal was consequently struck out for want of prosecution by the Court of Appeal.

Subsequently, the Respondent filed an application to re-list the Appeal and this application was granted on 11th February, 2019. Aggrieved by the decision of the Court of Appeal to re-list the Appeal of the Respondent herein the Appellants herein brought this Appeal on the following grounds which may be found at page 89 of the Record of Proceedings:

1. The Court of Appeal erred when it held that it is their candid opinion that there is a controversy as to whether Counsel for the Applicant was served or not with the hearing notice;

2. That the Court of Appeal erred when it held that the appeal which was struck out on the 7th day of November, 2018, be re-listed on the cause list;

3. That the Court of Appeal erred when it failed to consider Respondent Counsel's second submission that in accordance with law, the Applicant had failed to demonstrate on the face of his affidavit that he has an arguable and not a frivolous case on appeal;

4. That the decision is against the weight of evidence put forth before the Court

It is significant that the 1st Defendant/Respondent< the Tema Development Corporation has not appealed the decision of the Court of Appeal to re-list the Appeal to be heard on the merits.

ARGUMENTS OF THE APPELLANTS

In the Statement of Case of the 2nd and 3rd Defendants/Respondents/Appellants (hereinafter called "the Appellants"), they argue that contrary to the holding of the Court of Appeal at page 88 of the record, that "there is a controversy as to whether counsel for the Applicant was served or not, taking into consideration Exhibit 'C2', the Official Search" the Respondent was served with the hearing notice. Appellants point to the Affidavit of Service on page 57 of the Record of Appeal as proof of service. The Affidavit of Service reads that the Hearing Notice was served "***on Oseawuo Chambers" personally ~~at~~ M.O. Oseawuo at Tema Com. 8***."

Counsel for the Appellants also argue that the evidence that the Respondent was served is "overwhelming" which is why the Court of Appeal concluded in striking out the Appeal that "*Appellant is not in court. There is evidence Appellant has been served with hearing notice for today's proceedings. Service was on 18th October, 2018*."

The Appellant relies on the decision of this Court in the case of **Sappor v. Wigatap Ltd. (2007-2008) SCGLR 676** and reproduces the entirety of this Court's conclusion in holding 2 when it held as follows:

"*The Argument that service on the Appellant's counsel did not constitute proper service is clearly untenable. It is trite learning that the service of court processes, or more specifically, as in this case, of hearing notice in respect of the pending appeal on counsel, does constitute proper service. … The*

well established principle is that the applicant is not without a remedy if her position is that her counsel was entirely blameable for her absence from court and the consequent striking out of her appeal."

The Appellants also contend that paragraph 11 of the Respondent's Affidavit in support of their motion for re-listment, where the Respondent's representative deposes as follows; "*That by the search results, it came to the knowledge of the Applicant that the hearing notice at issue was served on and received by the law firm of the Appellant/Applicant's lawyer*" constitutes an admission of service by the Respondent's lawyers. They submit that because of this purported admission, the Court of Appeal was wrong to have granted the application for re-listment.

The Appellants further contend that per the decision in **Sappor v. Wigatap Ltd. (supra)**, an applicant for re-listment must demonstrate to the Court on the face of the Affidavit in Support of that motion, that they have an arguable and not a frivolous case on appeal. The Appellant argues that in their Affidavit in Support, the Respondent never gave a good and sufficient reason for their absence from court, and that saying that "the hearing notice was not brought to his attention" is "most frivolous, absurd". The Appellants then state that the the Respondent failed to demonstrate on the face of its Affidavit that there existed an arguable and not frivolous case pending on appeal. They maintain that the Respondent merely pointed to the fact that an appeal was pending, but stated nothing about the chances of success of the pending appeal.

The Appellants urge that the Court of Appeal did not properly exercise its discretion because it failed to take into consideration relevant matters and took irrelevant material into consideration. They claim that the Court of Appeal failed to take into consideration the Ruling striking out the appeal, or the purported admission they reference above in paragraph 11 of the Respondent's Affidavit in Support of the motion for re-listment.

Finally, the Appellants submit that the Court of Appeal's decision to allow the re-listing of the appeal is against the weight of the evidence presented before the Court. On this ground, the Appellants simply submit that "*the Ruling of 11th day of February 2019, is not support by the overwhelming evidence in favour of striking out the substantial appeal on the 7th day of November 2019. For instance, there is the evidence of the 7th day of November 2019 Ruling where the judges indicated that there was evidence the Respondent had been served with the hearing notice, there is the evidence of proof of service and the Respondent's lawyer's admission that her firm was served with the hearing notice in her affidavit in support of her motion on notice for re-listment.*" [sic]

ARGUMENTS OF THE RESPONDENT

Counsel for the Respondent on his part, chose to respond to these grounds of appeal under "one umbrella". The Respondent attacks the Affidavit of Service referenced above which states that the Hearing Notice was served "***on Oseawuo Chambers" personally ~~at~~ M.O. Oseawuo at Tema Com. 8***." [sic]. The Respondent says that there is neither an individual named "Oseawuo Chambers", nor an "M.O. Oseawuo". The Respondent thus argues that the failure of the process server to list the name of an individual on the Affidavit of Service renders it at least controversial, the question of whether or not Counsel for the Respondent was served with the Hearing Notice.

The Respondent in their Statement of Case also argues that an individual who receives a process from a process server or bailiff, by practice signs his name in a book provided by the bailiff or process server. They reference the Affidavit in support deposed to by Petrina Defia, a solicitor at Oseawuo Chambers who deposed as follows:

" *11. That by the search results, it came to the knowledge of the Applicant, that the hearing notice at issue was served on and received by the law firm of the Appellant/Applicant's lawyer.*

12. That although the aforesaid search conducted by the representative of the Applicant indicates that the hearing notice in question was served on the law firm, it does not name the specific person or staff of the law firm the hearing notice was served on."

The Respondent states that according to the search report, the Hearing Notice was served on "Oseawuo Chambers and received by Oseawuo Chambers". The Respondent argues that this vagueness justifies the decision of the Justices of the Court of Appeal to reinstate the appeal.

The Respondent also contends that the Parties' written submissions are on record as same were filed before the failure of the Respondent and his counsel to attend court on the day it came up for hearing. Respondent argues that a cursory look at the written submissions for both parties show that the pending appeal is one in which real issues for determination are raised, and therefore not a frivolous or vexatious appeal.

The Respondent then concludes by saying that the decision by the Court of Appeal to re-list the Respondent's appeal amounted to a proper exercise of its discretionary powers.

THE LAW AND ANALYSIS

Rule 23 of C.I. 19, Court of Appeal Rules, 1997 governs the power of the Court of Appeal to strike out an Appeal for non-appearance of the appellant, as well as the power to re-list an appeal struck out for non-appearance. **Rule 23 of C.I. 19 provides:**

Rule 23—Non-appearance of Appellant.

(1) *Where the appellant fails to appear when his appeal is called for hearing and he has not taken action under rule 22, the appeal may be struck out or dismissed with or without costs.*

(2) *When an appeal has been struck out or dismissed owing to the non-appearance of the appellant the Court may, direct the appeal to be re-entered for hearing on such terms as to costs or otherwise as it may think just.*

The use of the word 'may' in **Rule 23 (2) of C.I. 19** demonstrates the discretionary nature of the Court's power to grant or refuse a motion to re-list/re-enter an appeal for hearing. The use of discretionary power under this rule is guided by the content of the rule itself, as well as the myriad of decisions regarding the nature of discretionary power of the Courts.

The remainder of **Rule 23 (2) of C.I. 19** says that a Court may grant the re-listing or re-entering of a case "***on such terms as*** *to costs or* ***otherwise as it may think just.***" (emphasis added). This is another way of saying that the Court should use its discretion. When it comes to the exercise of such discretion, the authorities are as manifold as they are unified on the principles governing the manner in which a Court ought to exercise its discretion. Once a Court exercises it discretion, an appellate court cannot simply substitute its discretion for the discretion of the lower court. The Appellate Court may only interfere with the ruling of the lower Court if it concludes that the lower Court did not act judicially in arriving at the decision under challenge.

In the case of **Charles Osenton & Co. v. Johnston [1942] A.C. 130 at 138, H.L**, Viscount Simon LC said:

"*The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no*

weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

In the oft-referenced case of **Sappor v. Wigatap (supra)**, this Court held that "*It bears emphasis that the application to have the appeal restored was an invitation to the Court to exercise a discretionary jurisdiction. The well known and time honoured legal principle is that an appeal against a decision based on the exercise of a Court's discretionary jurisdiction would succeed in only those clearly exceptional cases where, in sum, the judge failed to act judicially.*"

In the case of **Ballmoos v Mensah, [1984-86] 1 GLR 724-733** it was held as follows:

"*An appeal against the exercise of the court's discretion might succeed on the ground that the discretion was exercised on wrong or inadequate materials if it could be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account; but the appeal was not from the discretion of the court to the discretion of the appellate tribunal*."

We will now turn to the ruling of the Court of Appeal. The Court of the Appeal found in its Ruling that it is their "Candid opinion" that there is a controversy as to whether counsel for the Applicant was served or not, taking into consideration Exhibit 'C2'. The court concluded that Counsel for the Respondent has successfully and convincingly argued that when a document is served on a company or an institution, it is critical that a court is able to tell from the documents evidencing the service, who exactly the document was served upon.

We cannot but agree with the Respondent. After all, it is trite that legal persons or entities such as law firms and law chambers, not being natural persons can only act through duly constituted natural persons who are eligible to act for and on their behalf. Therefore, to constitute proper service on a law firm or chambers, the proof or affidavit of service ought to name the person personally served for and on behalf of the law firm or chambers. This Court takes judicial notice of the fact that in practice, this may be a front-desk executive or

secretary at the law firm, a law clerk, an administrator, or a lawyer who is a member of the law firm at which the lawyer of record works. The law firm per se, not being a natural person cannot be served in the manner that the affidavit of service in issue (Exhibit "C2") appears to suggest. This is because the document could be received by a security man, a gardener, or a well-dressed individual who is unconnected to the intended recipient and that document may never reach the Counsel it was intended to reach.

For this reason alone, there is a basis for the conclusion of the Court of Appeal that there is a controversy as to whether or not, the Hearing Notice was duly served and/or brought to the attention of Mr. O.K. Osafo Buabeng Esq., the lawyer on record for the Respondent.

The contention of the Appellants that the explanation of the Respondent is "most frivolous and absurd" is unfounded and unjustified having regard to the practice and the circumstances of this case.

In any event, not withstanding proper service, the Court of Appeal and for that matter, any Court, is entitled to exercise its discretion one way or the other, always having regard to the particular circumstances of each case in order to reach a conclusion as to whether or not it is proper to permit a re-listment or waiver of an omission or failure by any applicant in proceedings before it.

For an appeal that was struck out for want of prosecution due to non-attendance that resulted from an alleged non-service of the Hearing Notice, we do not think that it would be fair or proper to impose a requirement that the party applying to re-list the appeal must demonstrate that their appeal is not frivolous or unmeritorious. This is will be duly evaluated and considered when the appeal is relisted for consideration on the merits. Moreso because the parties have already filed their respective written submissions, wherein the Respondent may have demonstrated the frivolity or otherwise of its appeal. Whether or not the appeal is frivolous or raises arguable points was immaterial at this stage and rightly ought not to have been the focus of the Court of Appeal in considering an application for

re-listment under the specific circumstances of this case. The burden of an applicant seeking a re-listment is primarily to advance a reasonable explanation for their failure to attend the hearing of the appeal as scheduled.

The issue in this Appeal is not whether or not service on a lawyer constitutes proper service on a party which is part of the ratio in **Sappor v. Wigatap (supra).** In this Appeal, the proper question is whether purported service on an unnamed or unidentified individual at a lawyer's office or chambers constitutes service on the lawyer and for that matter, the party such lawyer represents. This issue is borne out by a comparison of the Affidavit of Service (Exhibit "C2") at page 57 of the Record of Appeal which fails to name the person personally served, at Oseawuo Chambers and the Affidavit in Support of the Application for Re-listment which does not deny service at Oseawuo Chambers but explains that the Hearing Notice in issue was never brought to the attention of O.K. Osafo Buabeng Esq. The ratio in **Sappor v. Wigatap (supra)** on proper service is therefore distinguishable from the instant case.

We are of the considered opinion that for service of non-originating processes of Court to constitute proper service on the lawyer and for that matter the party such lawyer represents, the service ought to be on the lawyer personally, or if served at his law firm or chambers, it must be served on a named and identifiable person such as any other lawyer who is a member of the law firm or chambers concerned, a secretary or front desk executive of the law firm, an administrator or a law clerk of the law firm. To hold otherwise would be retrogressive and will undermine the smooth administration of justice and create a pretence for needless objections and/or denials of service by lawyers and/or parties.

The Court of Appeal therefore acted judicially in focusing on the reasonableness or otherwise of the explanation for the non-appearance of the Respondent and its lawyers when the Appeal came up for hearing. The Affidavit of Service fails to name the person who was supposed to have been personally served. From the conclusion reached by the the Court

of Appeal it had no reason to doubt the veracity of deposition of Petrina Defia Esq. at pages 61-64 of the Record and the reasonableness of the explanation offered for the non-appearance of the Respondent and its counsel. Consequently, the Court of Appeal was within its remit in concluding that there was a controversy as to whether or not Counsel for the Respondent had been served and electing to accept the Respondent's explanations for their non-appearance. In line with settled practice, we find that this is a proper exercise of the Court of Appeal's discretion and **Rule 23(2) of C.I. 19** and we find no reason to interfere with same. We are satisfied that sufficient weight was given to all the relevant considerations and the Court of Appeal acted judicially and with justification. No wrong or inadequate material was relied upon and there was no misapprehension of the facts before the Court neither was weight given to any irrelevant or unproved matters in reaching its conclusions.

In any event, the Appellant sought compensation by way of damages and/or costs in the sum of eight thousand United States Dollars (US$ 8,000.00) or its Cedi equivalent, being a sum of Forty Thousand Ghana Cedis (GH¢ 40,000.00) for the inconvenience and costs that the grant of the re-listment of the appeal would occasion the Appellant. It is therefore untenable for the Appellant after having been duly compensated by way of costs in the sum of Five Thousand Ghana Cedis (GH¢ 5,000.00), to turn around to protest the very re-listment for which they had sought and been awarded costs.

We therefore hold that the Court of Appeal acted judicially when it allowed the Application for Re-listment in order that the Appeal can be considered on its merits and substantive justice done to the parties. This Appeal therefore fails and is accordingly dismissed and the decision of the Court of Appeal is hereby affirmed.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

I.O. AMADU TANKO

(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)

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