IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: BAFFOE-BONNIE JSC (PRESIDING)

DORDZIE (MRS.) JSC

PROF. KOTEY JSC

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/48/2020

25TH MAY, 2022

1. **KOFI TSU ASEM (DECEASED)**
   (SUBTITUTED BY SYLVANUS ASEM) } **DEFENDANTS/RESPONDENTS/APPELLANTS/APPELLANTS**
2. **DOGBATSE**

VRS

1. **TOGBE AHOTOR MAKAKU (DECEASED)**
   (SUBSTITUED BY HIOB AHOTOR) } **PLAINTIFFS/APPELLANTS/RESPONDENTS/RESPONDENTS**
2. **W. N. KPORKU(DECEASED)**
   (SUBSTITUTED BY ISRAEL KPORKU)

JUDGMENT

PROF. MENSA-BONSU (MRS.) (JSC):-

This is an appeal from a judgment of the Court of Appeal sitting at Ho, delivered on 3rd October 2018. The case arose over a failed effort at dispute resolution in respect of land situate at Kpetoe in the Volta Region of Ghana, between two families.

Background and Facts

The plaintiffs/appellants/respondents (simply referred to herein as 'plaintiffs') are the head and principal members of the Bedze-Agbedrafor clan, and they claimed that they owned land at Kpetoe, commonly known as Kangakpo. The boundaries of the land supplied by them were the following: On one side, the land was bounded by the Ho-Denu road, on another side by River Kpetoe, on a third side by the Matti Gboya and Dappah families of Kpetoe and on the last side by plaintiff's own land. The 1st defendant/respondent appellant (simply defendant) described the same land as Gbedegugu and denied that the plaintiffs were the owners. The 1stdefendants sold parts of the land to the 2nddefendant, who had commenced building operations thereon. The plaintiffs therefore took action against the defendants in the Circuit Court Ho, seeking damages for trespass and perpetual injunction restraining the 2nd defendants from continuing his building operations, either by himself, his principal workmen, servants, labourers etc. pending the final determination of the suit.

During the trial at the Circuit Court, the plaintiffs had tendered judgments pertaining to the same lands in two previous cases in 1951 and 1963 respectively. Both cases had been won by the plaintiffs' family. They also put in evidence an arbitration that was held between the same parties in 1995. The evidence showed that the two parties had gone to arbitration before Togbi Gagli III Chief of Kpetoe-Agoe. On 23rdAugust 1999, the chief

testified at the Circuit Court that upon a complaint by the plaintiff family, the 1st defendant was approached and that he agreed to appear before a panel constituted by him, for arbitration. He testified further that the 1st defendant paid 2 bottles of gin as demanded by custom.

The matter was gone into by a panel constituted by Togbi Gagli for the purpose. Each party gave evidence and was cross-examined by the other party. The panel itself also examined the parties. The panel even visited the land in dispute. In total, the parties paid the fees demanded by Togbi Gagli and the panel: two bottles of gin, a goat and GH¢50,000.00 each. The process took three months and on 14th June 1995, the panel made an award in favour of the plaintiffs. The 1st defendant expressed displeasure, somewhat violently, at the award made.

Following this arbitration, the dispute continued to rage and so the plaintiff took action in the Circuit Court against the defendants. On 9th July 2008, the Circuit Court gave judgment. Despite the documentary evidence tendered by plaintiffs as well as evidence of the arbitration held, the Circuit Court found for the 1st defendant, and the plaintiffs filed a notice of appeal to the Court of Appeal asking the Court of Appeal to set aside the judgment of the Circuit Court.

The Court of Appeal considered all the evidence put before the trial court and concluded thus:-

> *"In all the evidence before the trial court the plaintiff produced and tendered in evidence about four documents in proof of their title whilst the defendants did not produce any document. (ROA 325).*

The Court of Appeal then stated

> *"Another area of the evidence not properly evaluated by the trial Judge is the arbitration which was held before Togbe Gagli's Traditional Court."*

The Court of Appeal therefore reviewed the evidence pertaining to the customary arbitration on the record and concluded, that in line with the requirements of a valid customary arbitration, Togbe Gali's arbitration met all the requirements and therefore, there was a valid arbitration to which both parties were bound. Even though the defendants had contended that not having accepted the award they were not bound, the Court of Appeal held that acceptance of the award was not a requirement. What was required was that the parties had voluntarily submitted to the arbitration; the arbitration had been held in a judicial manner; and an award had been published. Consequently, the Court of Appeal set aside the judgment of the Circuit Court and awarded GH¢10,000.00 general damages, for trespass and an order of perpetual injunction restraining the defendants from having anything to do with the disputed land.

The defendants promptly filed a notice of appeal on 22nd December 2018. The grounds of appeal were

1. *"The learned Court of Appeal Judges failed to evaluate the defendants/ respondents/appellants case as against the plaintiffs/ appellants /respondents case.*

2. That "*The judgment was against the weight of evidence on record*."

A week later, on 29thDecember, 2018, the appellant filed an amended notice of appeal. However, save for the correction of the heading, there was no difference between that one and the original notice of appeal filed a week earlier on 22nd December 2018.

Grounds of appeal

The appellant filed two grounds of appeal. However, an examination of both grounds suggests that the same evidence would be required to support either ground. However, as the second ground was the omnibus ground of appeal, ie that the judgment was

against the weight of evidence on record, the obligation that such pleading casts upon the appellate court will be first discussed.

Ground 2

2. *"The judgment was against the weight of evidence on record."*

It is trite law that such pleadings cast a duty on the appellate court to re-hear the case and evaluate the evidence on record. In the oft-cited cases of *Tuakwa* v *Bosom*[2001-2002] SCGLR 61; *Djin* v *Musah Baako* [2007-2008] SCGLR 686; *Oppong* v *Anarfi* [2010-2012] GLR 159 etc. the courts have held that once the omnibus ground is pleaded, an obligation rests on an appellate court to rehear the case and apply pieces of evidence that could have changed the decision had the trial court not overlooked such evidence. In *Tuakwa* v *Bosom*, supra, the Supreme Court held per Akuffo JSC (as she then was), at p.65 that,

> *"an appeal is by way of a re-hearing particularly where the appellant, is the plaintiff in the trial in the instant case, alleges in his notice of appeal that, the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testaments and all the documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that on a preponderance of the probabilities the conclusions of the trial judge are reasonably or amply supported by the evidence".*

This was reiterated and clarified in *Djin* v *Musah Baako*, supra, when the Supreme Court, per Aninakwah JSC at p 691 clarified that

> *"It has been held in several decided cases that where an (as in the instant case) appellant complains that a judgment is against the weight of evidence, he is implying that there are certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against".*

In the same vein, *Oppong* v *Anarfi*, supra, restated the principle per Akoto-Bamfo JSC at p 167 as follows:

> *"There is a wealth of authorities on the burden allocated to an appellant who alleges in his notice of appeal that the decision is against the weight of evidence led. Even though it is ordinarily within the province of the trial court to evaluate the veracity or otherwise of a witness, it is incumbent upon an appellate court in such a case, to analyse the entire record, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on the preponderance of probabilities, the conclusions of the trial judge are reasonable or amply supported by the evidence."*

Having pleaded this ground, the Court of Appeal was under an obligation to re-hear the case and re-evaluate all the evidence on record to see whether the plaint of the appellant was, indeed, backed by the record. The Court of Appeal did so review the record and come to some conclusions. Since the discussion of Ground 1 below would do ample justice to the substance of Ground 2, a discussion on Ground 1 is now discussed to serve the purposes of both grounds of appeal.

Ground 1

1. *"The learned Court of Appeal Judges failed to evaluate the defendants/ respondents/appellants case as against the plaintiffs/ appellants /respondents case.*

The appellants' first ground of appeal contends that the Court of Appeal failed to evaluate the evidence of the case of the defendant. This is a strange ground to plead considering that all the documentary evidence in the case at the trial court was produced by the plaintiffs, and none by the defendants. In addition to the obvious facts found by the Court of Appeal as being supported by the record, there was also the issue of the customary arbitration which the Circuit Court had overlooked.

Was there a valid customary arbitration?

Counsel submits that in his statement of case filed on 17th August 2020 titled "Written submission filed for and on behalf of Appellants that

> *"It is quite clear that the presiding member of the panel did not or could not show evidence of arbitration properly so called. He confirmed the dissatisfaction of the 1st Defendant and the confusion at the proceedings indicative of an award not acceptable to all."*

Counsel for appellant thus submits that there was no publication of the award, and at the same time, that what was published was not acceptable to all.

With respect, the evidence provided of the elements of a valid customary arbitration provided by the plaintiff was not challenged. That there was voluntary submission to the proposed arbitration was as plain as day. Where a party as in the instant case, voluntarily pays the fee required at both the inception of the hearing and before the publication of the Award, the person can hardly be heard to say that there was no voluntary submission. The uncontested evidence of Togbe Gagli in the Circuit Court as

to how the arbitration proceeded and the judicial mode adopted by the panel, including a visit to the contested land was not challenged. He did in fact testify that when the arbitrators found for the plaintiffs, the defendants expressed dissatisfaction, to the extent that the 1st defendant's children "*wanted to beat*" him up.

As to Counsel's submission that the arbitration was not valid because the award was not made and that even if it was, what was made was not an award because it was not acceptable to all, makes strange reading. When has the acceptance of both parties been a measure of whether or not a judgment had been handed down? In counsel's own experience, when has a losing party to a suit happily accepted the verdict, even of a superior court? Clearly, from counsel's own submission, an award was published and it was the publication of the award that sparked the "*confusion at the proceedings*". The Court of Appeal was thus not wrong in coming to the conclusion that the defendant was bound by the arbitration and could not resile from it after the publication of the award. In the High Court case of *Suka* v *Glavee* [1991] 1 GLR 194, the defendant therein initiated arbitration proceedings against plaintiff following a dispute over a piece of land, before the elders of the town. After obtaining the consent of the plaintiff, the elders took evidence from the parties, visited the locus in quo and declared the plaintiff's family as owners of the land. Subsequently, the defendant began building on the land and plaintiff took action in the District Court to enforce the arbitral award. The defendant contended that he did not accept the award of the arbitrators and so he was not bound by it. On appeal, it was held, per Acquah J (as he then was) that having participated in a valid arbitration, the defendant was bound and that it was not the acceptance of the award that made it valid but the consent to submit to arbitration, as well as the conduct of the arbitration in a judicial manner. The same point is made in the Court of Appeal case of *Akunor* v. *Okan* [1977] 1 GLR 173, CA. The facts of that case were that following a dispute over land between the plaintiff and the defendant, an

arbitration was held before the La Mantse and his elders. The panel found for the defendant therein, but the plaintiff initiated action in court for a declaration of title to the same land. The trial court found for the defendant and the plaintiff appealed, contending that there had been no prior agreement to accept the award, and that the case had not been held in a "judicial manner". The Court of Appeal dismissed the appeal, with Amissah J.A. stating at p. 176 thus:

> *"I find the suggestion that the plaintiff, after having had the nature of the proceedings explained to her, agreed that there should be an arbitration without agreeing also to accept the award which would come out of it wholly unacceptable. To allow her now to resile from the position she took at the arbitration would mean that with the full knowledge and appreciation of the impact of the proceedings she agreed to submit to an arbitration on condition that the decision must be in her favour. Such a proposition, if countenanced, would effectively put an end to arbitration as a medium for the settlement of disputes… The important point to remember, however is that the ingredient of the customary arbitration under consideration is satisfied not at the time of the award when an adverse decision may cause one of the parties to reconsider his participation in the proceedings, but at the opening of the proceedings."*

Clearly, whether one accepts the outcome or not, the voluntary submission is both to the initiation of the arbitration and also the outcome of it, and not merely to an outcome of which one approves.

In the instant appeal, the evidence on record as to how the arbitration was conducted, showed clearly that there was a valid customary arbitration. The Court of Appeal

cannot be faulted in any way for coming to the conclusion that it did. The defendant voluntarily submitted to a customary arbitration; the proceedings were conducted in a judicial manner and an award was published. Consequently, both parties were bound by the outcome of the customary arbitration. We accordingly affirm the decision of the Court of Appeal.

The appeal is without merit and is hereby dismissed.

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

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

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