IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: OWUSU (MS.) JSC (PRESIDING)

LOVELACE-JOHNSON (MS.) JSC

TORKORNOO (MRS.) JSC

AMADU JSC

KULENDI JSC

CIVIL APPEAL

NO. J4/37/2022

1ST MARCH, 2023

OPANIN OSEI AKWASI
(SUBSTITUTED BY BADU DANKWAH
ALIAS JAMES DANQUAH) … **DEFENDANT/APPELLANT/APPELLANT**

VRS

KWADWO DWEMOH
(SUING FOR HIMSELF AND ON BEHALF
OF HIS FAMILY AND IN HIS CAPACITY AS
THE ABUSUAPANIN AND CUSTOMARY SUCCESSOR OF
KWADWO ADDISON & OTHERS) .. **PLAINTIFF/RESPONDENT/RESPONDENT**

JUDGMENT

KULENDI JSC

INTRODUCTION

On Wednesday the 1st of March, 2023, this Court by a unanimous decision upheld the interlocutory appeal of the Defendant/Appellant/Appellant (hereinafter called "the Appellant") and reserved our reasons which are as follows:

The said interlocutory appeal is against the concurrent decision of the Court of Appeal dated 27th May, 2021 whereby the Court of Appeal affirmed the ruling of the High Court, Kumasi dated 5th March, 2018.

BACKGROUND:

The ruling of the High Court, Kumasi of 5th March, 2018, upheld an objection to the admissibility of the evidence of the Appellant's witness, DW1, on the ground that the testimony was hearsay and therefore inadmissible. The context of the testimony and objection is that the Plaintiff/Respondent/Respondent (hereinafter called the Respondent) instituted an action against the Appellant for and on behalf of his family seeking: a declaration that the land in dispute is family property which cannot be sold or gifted without the consent and authority of Respondent and his family members; and an order of perpetual injunction against the Appellant.

The Appellant entered appearance to the Writ of Summons and filed a Statement of Defence and a Counterclaim to the Respondent's claims.

The case proceeded on its normal course resulting in the commencement of a trial on 28th November, 2017. After the Respondent closed his case, the Appellant opened his case on 5th March, 2018 and called his first witness, DW1 out of turn. It is the testimony of DW1 which provoked an objection by the Respondent that resulted in the said ruling, the subject matter of this appeal.

For the purposes of an in-depth analysis, we hereby reproduce the entire testimony of DW1, up to the point of the objection. This can be found at page 135 of the Record of Appeal as follows:

"*My full name is Haruna Musa. I live at James Kumah near Mpasaso No. 2. I live in the disputed farm. My father's name is Malam Musah a.k.a. Agya Musah. I know one Agya Osei Kwasi. My father also knows this Agya Osei Kwasi. My father has become very old and cannot do anything on his own. I know how my father got to know Opanin Osei Kwasi. My father used to trade in cola nuts and through this trade he went to stay with Opanin Osei Kwasi at Mpasaso. He was buying cola nuts and exported same to Burkina Faso. All that I am saying, I was informed by my father; so Opanin Osei Kwasi told my father that he had a parcel of virgin land so my father should search for some labourers to come and work on same. My father speaks with difficulty. My father is 130 years old. There is nobody older than my father in the whole of James Kumah village*"

From the record, counsel for the Respondent took an objection to this testimony of DW1 on grounds that it was hearsay evidence and thus inadmissible. This objection was upheld by the trial Court in the following terms:

> *"By Court: - I do not think that enough grounds have been canvassed for the application of Section. 118 (b) to admit the evidence of DW I which is clearly a hearsay so the objection is upheld"*

It is the Appellant's dissatisfaction with this brief ruling, that provoked the said interlocutory appeal to the Court of Appeal on 20th March, 2018. The Court of Appeal however, by its ruling of 27th May, 2021 dismissed the appeal and affirmed the ruling of the High Court. Again, dissatisfied with this decision of the Court of Appeal, the Appellant has invoked our appellate jurisdiction pursuant to a Notice of Appeal filed on 10th June, 2021.

GROUNDS OF APPEAL

The Appellant premises this Appeal on the following grounds:

(a) The Decision/Ruling/Judgment of the Court of Appeal is against the weight of evidence on record.

(b) The Court of Appeal erred when after finding that the Declarant was unavailable, it held that notice was necessary.

(c) There are errors of fact and law on the face of the record which has resulted in miscarriage of justice against the Defendant/Appellant/ Appellant and same has to be set aside

PARTICULARS OF ERROR OF FACT AND LAW

i. The Honourable Court found that the Declarant is unavailable as a witness.
ii. The Honourable Court held that the Defendant/Appellant/Appellant should have given notice.
iii. The issue of notice is necessary where the Declarant is available as a witness.
iv. The issue of notice is unnecessary where the Declarant is unavailable as a witness.
v. The Honourable Court with great respect confused the distinction between where the declarant is available as a witness and there was the need for notice and where the declarant is unavailable as a witness and there was no need for notice.

d) Other Grounds of Appeal would be filed upon receipt of a certified true copy of the Ruling/Judgment/Decision of the Honourable Court."

In our respective opinion, the pertinent issue that the above grounds of appeal raise, is whether or not the testimony of DW1 is inadmissible as hearsay evidence. A

resolution of this issue would dispose of the entire appeal. We shall therefore revolve this appeal by addressing the pertinent issue supra.

LAW AND ANALYSIS:

The principal enactment that governs the admissibility of evidence is the Evidence Act, 1975 (Act 323). The said Act defines evidence as "testimony, writings, material objects or any other things presented to the senses that are offered to prove the existence or non-existence of a fact."

Although as a general rule all relevant evidence is admissible, Act 323 specifically provides for categories of evidence that may be inadmissible. One of such categories is hearsay evidence. Hearsay evidence is defined by Section 116(c) of Act 323 as follows:

> *"Evidence of a statement other than a statement made by a witness while testifying in the action at the trial, offered to prove the truth of the matter stated*".

Hearsay evidence is not wholly inadmissible. There are statutory qualifications to the admissibility of hearsay evidence which are later discussed in this judgement.

In NASSER VRS. MCVROOM [1996-97] GLR 467, this Court, speaking through Acquah JSC (as he then was) noted the statutory qualification for the admissibility of hearsay evidence when he said as follows:

> "The Evidence Decree, NRCD 323 has made major inroads into the law of hearsay and consequently hearsay evidence cannot under the Evidence Decree, 1975 (NRCD 323) be said to be inadmissible per se..."

When an objection is raised to the admissibility of evidence on grounds of same being hearsay, a court of law must go through the checklist of exceptions created to the hearsay evidence rule under Act 323 to satisfy itself that the said testimony cannot be

saved under any of the exceptions. This is because to disallow evidence which is otherwise admissible per statute may have the dire consequence of occasioning a party injustice especially so where such decisions are not contested by means of appeal.

Sections 118 to 134 provide the various exceptions to the hearsay rule, and section 118 specifically states as follows,

> *"(1) For the purpose of section 117, evidence of a hearsay statement is admissible if*
>
> *a the statement made by the declarant would be admissible had it been made while testifying in the action and would not itself be hearsay evidence* ***and***
>
> *b the declarant is*
>
> *(i) unavailable as a witness or*
>
> *(ii) a witness or will be witness subject to cross examination*
>
> *concerning the hearsay statement.*
>
> *(iii) available as a witness and the party offering the evidence has given reasonable notice to the court and to every other party of the intention to offer the hearsay statement at the trial and the notice gave sufficient particulars (including the contents of the statement to whom it was made and if known when and where to afford a reasonable opportunity to estimate the value of the statement in the action*".

Section 118 provides for the admission of first hand hearsay evidence subject to conditions set out in the said section. In this regard, Pwamang JSC in a judgement of this Court dated 28th July, 2021 in Suit No.: J5/58/21 entitled: REPUBLIC VRS. HIGH COURT (CRIMINAL DIVISION), ACCRA, EX PARTE STEPHEN K. OPUNI (ATTORNEY GENERAL INTERESTED PARTY) said concerning first hand hearsays as follows:

> "First-hand hearsay evidence is a statement or representation made outside the trial in which it is sought to be introduced which if it had been made by the declarant herself while testifying in the case, would have been admissible … A close reading of section 118 would reveal that it makes first-hand hearsay evidence admissible under three different situations; (i) where the hearsay declarant is not available as a witness, or (ii) where the hearsay declarant is already a witness in the case or an intended witness, or (iii) where the hearsay declarant is available as a witness in that she is available to be called to be examined on the statement."

First hand hearsay testimony is admissible if it can be demonstrated that the statement made by the declarant would have been admissible had it been made by the declarant while testifying and the said testimony would itself not have been hearsay evidence. This requirement is set out in Section 118(1)(a) of Act 323

In addition to the above condition, a court must further satisfy itself that any one or more of the following conditions set out in Section 118(1)(b) of Act 323 are met:

1. The declarant is unavailable as a witness or;
2. The declarant is a witness or will be a witness in the case and therefore would be subject to cross-examination concerning the hearsay statement or
3. The declarant is available as a witness and reasonable notice with sufficient particulars has been given to the court and to every other party of the intention to offer the hearsay evidence at trial.

The Court of Appeal, though holding that the declarant (DW1's father) was an unavailable witness nonetheless held that the testimony of DW1 was inadmissible as hearsay evidence because the said testimony was given in breach of Section 118(1)(b)(ii). For emphasis, the court held in part as follows:

"We are persuaded by the submissions of Counsel for the Plaintiff/Respondent and for that matter, the Ruling of the trial judge that the evidence of DW1 as to what his father told him is inadmissible as it does not fulfil any of the conditions of first hand hearsay indicated in this judgement. This is because even though the Declarant (DW1's father) was an unavailable witness by virtue of the fact that he was unable to attend or testify at the trial because of a then existing physical or mental condition (old age) within the meaning of Section 116(e) (i) of NRCD 323, yet the precondition to make that evidence admissible was not complied with which is that the party offering the evidence, should have given reasonable notice to the court and every other party of his intention to offer the hearsay statement at the trial and that notice should give sufficient particulars (including the contents of the statement, to whom it was made, and, if known, when and where to afford a reasonable opportunity to estimate the value of the statement in the action.

For the above reasons the appeal is dismissed and the Ruling of the trial High Court dated 5th March, 2018 is affirmed."

The above exposition of the law by the Court of Appeal is, with the greatest of respect, erroneous in our view. The Court of Appeal in its decision had held that there are five conditions that must be complied with in order for a first hand hearsay statement to be admissible under Section 118. These conditions which are set out at page 165 of the Record of Appeal are that:

"i. The hearsay evidence should be such that if it had been offered by the declarant during the trial, it would not itself have been hearsay evidence, i.e., the statement from the declarant should come from his personal knowledge. He/she should not have come by that statement from or through another person or source;

ii. The declarant should not be available to be called as a witness, or where he is available, his position should not be such that he cannot possibly or legally be cross-examined if he desires, for example diplomatic immunity;

iii. Where the party offering the current statement has given reasonable notice to the court that he intends to rely on hearsay evidence at the trial

The last two conditions are applicable to criminal trials where the hearsay evidence will not be admissible if the accused objects to it and where the statement is offered by the accused, it will not be admissible unless the accused is subject to cross-examination."

The use of the word "OR" in the itemisation of the conditions under Section 118(1)(b) of Act 323 shows that the conditions listed therein are disjunctive and not conjunctive. Therefore, any, and not necessarily all, of the three conditions set out in Section 118(1)(b) must be present together with the conditions stated in Section 118(1)(a) to qualify the first hand hearsay to be admissible. Whilst Section 118(1)(b) uses the word "OR" to distinguish the three items of conditions from each other, the word "AND" is used conjunctively in Section 118(1)(a) to show the nexus the said section has with Section 118(1)(b).

Having found that the Declarant was unavailable to testify by reason of Section 116I(iii), the Court of Appeal thus erred when it held that the failure to give notice pursuant to Section 118(1)(b)(iii) made the testimony of the declarant inadmissible. This is especially so when from the record before us and from the Court of Appeal's own finding, the declarant was unavailable to testify and thus fulfilling Section 118(1)(b)(i) as follows: *"the declarant is unavailable as a witness"*

CONCLUSION:

Having carefully considered the submissions of the parties and perused the record of Appeal, we have come to the conclusion that the appeal has merit. Accordingly, the appeal succeeds and the ruling of the Court of Appeal which affirmed the decision of the High Court, which held the evidence of DW1 to be inadmissible as hearsay is hereby set aside.

The suit is consequently remitted to the High Court for a resumption of the trial. Cost of Ten Thousand (GH ¢10,000.00) against the Respondents in favour of the Appellant.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

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