IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL [CIVIL DIVISION]
A C C R A

CIVIL APPEAL
NO. 141/2004
17TH DECEMBER, 2004

CORAM - ANSAH, J.S.C. [PRESIDING]
ANINAKWAH, J.S.C.
DOTSE, JA

E.B. TIMOTHY KWAME BOTCHEY & ANOR … PLAINTIFF
VRS.
JOSEPH BANFUL & 5 ORS. … RESPONDENT

J U D G M E N T

DOTSE, JA - In this case, the Plaintiffs/Appellants. (hereinafter referred to as the Plaintiffs) claimed the following reliefs at the High Court Agona Swedru against the Defendant/Respondents (hereinafter referred to as the Defendants):-

(1) 1st Plaintiff's claim against the defendants, jointly and severally is for 10 million cedis as damages for trespass to 1st Plaintiff's land situate, lying and being at Gomoa Bududuram and measuring 640 acres more or less on mile 20 on the Winneba-Accra Road near Gomoa Bududuram meant for cattle Rearing and known as "Nyame Na Dom."

(2) An order for account of all trips of sand collected from Budubram, the 1st Plaintiff's land as "Nyame Na Dom."

(3) ¢3,000,000.00 (Three Million Cedis) as damages for assault by 1st, 3rd, 5th, 6th defendants jointly and severally against the Plaintiff on the 28th June 1994 at Gomoa Bududuram.

(4) An order for Perpetual Injunction to restrain the defendants jointly and severally from operating sand winning from Bududuram lands where 2nd Plaintiff is the Odikro and 1st Plaintiff is Ebusuapanin, which lands at Bududuram, belong to the Plaintiffs Kona Patu Family of Gomoa Budubram.

The Plaintiffs accompanied the writ of summons with a Statement of claim.

The defendants, per their Solicitors, NKRABEA EFFA-DARTEY on the 15th day of July 1994, entered conditional appearance to the writ which was filed on 7-7-94.

On the 4th of August 1994, the Defendants per their Solicitors, then filed a Motion on Notice to strike out the writ of summons praying for an order to strike out the writ of summons "on the grounds of having no cause of action and lack of capacity as spelt out in the accompanying affidavit."

From the appeal record, the Plaintiffs herein also filed an affidavit in opposition to this application on 29-9-94.

There appeared to have been a lull in this litigation, with the result that, this application filed on 4-8-984 was not taken by the court until 28-11-2000 when the Plaintiffs filed "Notice of Intention to proceed" pursuant to order 64r. 12 of the High Court, Civil Procedure Rules, LN 140A of 1954.

Before this Notice to proceed was filed, the Plaintiffs had their Solicitors changed from Aboagye-da-Costa to Kwesi Cab-Addae who actually filed this Notice to proceed.

The new Solicitors for the Plaintiffs, then filed a Motion on Notice on 19-11-2001 seeking "for an order of interim injunction restraining defendants, their agents, servants etc. from all acts of alienation and wastage with special reference to the disposal of land causing damage to building and sand winning.

From the appeal record, the Defendants also seriously resisted this application for interim injunction filed by the Plaintiffs.

It appears from the appeal record that AGYEMAN-BEMPAH J, (MRS.) was the presiding Judge at the Agona Swedru, High Court, from 12-10-94 up to 26-10-94. The record indicated that, Woanyah J, presided over the same High Court, from 28-11-2000 up to and including 19-6-2002 when he heard arguments and delivered a Ruling in the case. The Ruling delivered by Woanyah J on 19-6-2002 is in respect of the Motion to strike out the writ of summons filed by the Defendant on 4-8-94.

In that Ruling the court granted the application and accordingly struck out the writ of summons.

It is against this Ruling that the Plaintiffs have appealed, urging the following grounds of appeal:-

(i) The Learned High Court Judge erred in holding that just because

Defendants had challenged 1st Plaintiff's capacity as head of family he (1st Plaintiff) ceased to have capacity to sue.

(ii) The Learned High Court Judge erred in law in holding that just because a Registrar of a Traditional Council had written a letter to the Police (without copying it to 2nd Plaintiff) denigrating 2nd Plaintiff's status, 2nd Plaintiff lacked capacity.

(iii) Granted without admitting that 2nd Plaintiff lacked capacity to call himself a chief the Learned High Court Judge erred in dismissing the claim of assault by the stroke of the pen.

(iv) The Ruling cannot be supported having regard to the argument put out at the trial.

(v) Further or in the alternative the costs awarded was excessive in the circumstances.

(vi) Further grounds of appeal will be added on receipt of the full records of proceedings.

A perusal of the appeal record, however, indicates that no further grounds of appeal have been filed in this case.

In their written submissions, Learned Counsel for the Plaintiffs Mr. Kwesi Cab-Addae sought to raise a preliminary legal objection for the first time. This was to the effect that, at the time Woanyah J, purported to receive arguments from both counsel (who were all new in the matter) in respect of the Motion to strike out the Plaintiffs writ of summons, the same High Court, differently constituted, had struck out the Defendants Motion on 20-10-94. We believe this fact was not known to the new counsel in the matter.

The effect of this submission is that, at the time Woanyah J, heard arguments and delivered a Ruling of 19-6-02, Agyemang Bempah J, (Mrs) had in a terse order struck out the defendants Motion seeking to strike out the writ of summons. There was therefore in effect, no Motion before the court upon which the court could have heard arguments and delivered a Ruling.

This is what transpired before the court on 20-10-94. Out of abundance of caution, let me reproduce the court notes on page 32, lines 29 to 35 in full,

"Plaintiffs present.

Mr. Aboagye Da Costa for Plaintiffs.

Defendants absent.

By Court - On 12-10-94 the court did not sit and ie. Defendants and their Counsel did not attend court. This is motion on notice filed by the Defendants is struck out for want of prosecution subject to ¢30,000.00 costs in favour of the plaintiffs. The suit is to take its normal course." (Sgd.) B. Agyeman Bempah (Mrs)

The effect of the order of 26-10-94 is that, the Motion on Notice to strike out the Plaintiff's writ of summons upon which Woanyah J, allowed arguments and delivered a Ruling had been struck out by the same court on 26-10-94. There was therefore no Motion before the court upon which arguments could have been received and a decision given.

So far as this court is concerned, this issue is a very fundamental one which is germane to the success or otherwise of this appeal. Learned Counsel for the appellants should have taken this as a preliminary legal issue, or filed a specific ground of appeal to deal with this matter as is provided under the Court of Appeal Rules, 1997, C.I. 19. See Rule 8(7) & (8), especially sub-rule (8) which states.

"notwithstanding sub rules (4) to (7) of this rule, the court in deciding the appeal shall not be confined to the grounds set out by the appellant but court shall not rest its decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

In this Appeal, it appears the case would be decided solely on the issue raised by Learned Counsel for the Plaintiff in the statement of case as a preliminary point. However, since Mr. Kwaku Baah, learned counsel for the Defendant has conceded the point, it is certain that he must be deemed to have had adequate notice of contesting the issue but chose to concede the point in the best interests of the profession.

However, since we consider the issue raised in this preliminary point as very basic and fundamental, it is worthwhile to give it the necessary examination.

Before us in this court as stated supra, Learned Counsel for the defendants, Mr. Kwaku Baah on the 28-7-04, conceded before this court that he had nothing useful to say to rebutt the submissions of learned counsel for the Plaintiff. Perhaps, that explains why learned counsel for the defendant did not file any written submission of case for the defendant to rebutt this matter.

One very important lesson has emerged from our analysis of this appeal. That is, in all cases that are part heard proceedings and before a Judge takes over the conduct of a case at a new station, it is incumbent and indeed desirable that all proceedings must be prepared and perused by both Counsel as well as the presiding Judge before they are adopted or the case is continued.

If however, such as in the instant case, there are no formal proceedings previously in the matter, the new Judge must apprize himself by reference to all the court notes or diary of movement of action to really get acquainted with the steps that had been taken in the past before he commences any work on the case.

We believe that, by this process, presiding Judges would become duly apprized of previous decisions and orders given in cases inherited by them. This is the only way by which consistency can be ensured in the judicial process. This will also prevent decisions which as it were, seeks to reverse previous decisions.

The issue raised by Learned Counsel for the Plaintiff that there was no motion upon which the court heard and delivered a Ruling has been found to be legitimate, and is therefore sustained.

Since there is nothing upon which the Ruling can be referable to, it must be seen to collapse, and it has accordingly collapsed since it has no foundation whatsoever.

The Ruling of Woanyah J, delivered on 19-6-02 is therefore a nullity and is void ab initio, and I cannot but agree more than to illustrate this point by reference to the Judgment of the Supreme Court in the case of MOSI V. BAGYINA [1963] 1 GLR 337 at 346-347 per AKUFO-ADDO J.S.C. [as he then was] wherein he quoted at length from Privy Council case of MAC FOY V. U.A.C. LTD [1961] 3 A.E.R. 1169 P.C. where the Privy Council, per Lord Denning stated thus:

> "The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity

and not mere irregularity. This is the same as saying that it was void and not merely avoidable. The distinction between the two has been repeatedly drawn; if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.

And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expected it to stay there. It will collapse" emphasis mine.

The above quotation is very apt in this appeal, because there was nothing upon which the Ruling of 19-6-02 can stand, it has therefore collapsed, and its final obsequies must be performed immediately.

Since the above issue is very basic and determines the entire appeal, there is no need to consider the other grounds of appeal.

We will therefore allow the appeal on this point alone. The Ruling of the High Court, Agona Swedru delivered in this case on 19-6-02 is hereby set aside as null and void.

Costs of ¢3 million to Plaintiffs/Appellants.

J. DOTSE
JUSTICE OF APPEAL

I agree.

J. ANSAH
JUSTICE OF SUPREME COURT

R.T. ANINAKWAH
JUSTICE OF SUPREME COURT

I also agree.

COUNSEL - **CAB ADDAE FOR APPELLANTS.**
KWAKU BAAH FOR RESPONDENTS.

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