IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA - GHANA, A.D. 2005

CORAM - GBADEGBE, JA [PRESIDING]
ASARE KORANG, JA
OSEI, JA

CIVIL APPEAL
NO. HI/232/2004
17TH JUNE, 2005

EBUSUAPANYIN KWAME TWI … **PLAINTIFF/RESPONDENT**

V E R S U S

ESI NANA [DECEASED]
SUBSTITUTED BY KOFI DADZIE … **DEFENDANT/APPELLANT**

J U D G M E N T

ASARE KORANG, JA - This is an appeal from a decision of the High Court that upheld the claim of the plaintiff to whom I shall for convenience in this proceedings refer as the respondent and to the defendants in the court below similarly refer as the appellants. In the decision the subject matter of these proceedings the learned trial judge n a considered opinion delivered at the end of a full scale trial upheld the claim of the respondent. It appears from the judgment on which this appeal turns that she took the view that there was a previous decision which the parties before her fought in the same rights and in relation to the same subject matter; therefore the action was caught by the principle of res judicata.

In the ground of the appeal argued before us it is unfortunate that the learned counsel in the matter did not in my thinking appreciate that from the evidence placed before the court below and the cross-examination of the various deponents the action actually raised for the determination of the court the extent of area covered by the previous action between the parties. In my opinion the action was plainly a contest between parties who sought from the court the determination of their exact boundaries.

It is in this respect to be observed that in this appeal the respondents went to great lengths to assert that nowhere in the reliefs sought by the respondents in the court below were they making a claim for a declaration of ownership of any particular configuration of land, that matter, according to the respondents having already been determined in the previous action

It is clear that the whole tenor and content of the respondents plaint was an action for a declaration of title to land dressed in the feudal garb of a claim for the payment of tolls for at page 54 of the record of appeal in an amended statement of claim filed on 15th November 1998 and strangely headed

"AMENDED AMENDED AMENDED STATEMENT OF CLAIM,"

the respondents altered the reliefs claimed by them to include the following:

"(e) An order of perpetual injunction to restrain the defendants and their agents/assigns or any other person or persons lawfully claiming through them from having anything to do with the land.

(e) An order of ejection of the defendants from the disputed land."

Now the question is why was a reference made to a disputed land whilst the respondents claim was ostensibly for the payment of tolls by the appellants?

The respondents gave evidence to the effect that the appellants had refused to attorn tenant to their family and to pay their share of contribution towards litigation and purification costs.

The respondents also relied on the doctrine of estoppel contending, as it were, that ownership of the lands in respect of which they were calling on the appellants to pay customary tributes and tolls, had been adjudged in their favour by the High Court in 1960.

In the said state of affairs it was incumbent upon the respondent who relied on a previous decision to clearly prove the area in respect of which the judgment was recovered particularly so when the other party as was the case in the case before us admitted the judgment but contended that the area covered by it was separate and distinct from that occupied by him. This aside, there was evidence testified to by witnesses that the contending parties were boundary owners although the exact location was in dispute.

In this regard, I think that the order of the trial court directing a survey of the disputed area as appears from the record of proceedings at page 44 was of vital importance in assisting the court to reach a verdict as to whether the exact area covered by the previous judgment between the two parties in the same area in contention in the action and also for the purpose of settling their boundaries.

Now in the course of the trial the order for survey was never carried out and yet the matter proceeded to the reception of evidence and indeed a decision was delivered without the order for the survey being discharged by the court. In my view this default is of a fundamental nature and vitiates the entire proceedings. I pause to ask whether since the parties have not taken this point it is competent for the court suo motu to do so?

My short answer to this is that there is jurisdiction in this court to raise by itself a point of law which arises from the proceedings. As a matter of fact appellate courts have always by themselves done so and I do not think that the power so to do has ever been doubted. The only objection that I see is that which turns on rule 8(8) of the Court of Appeal rules that where the court is to rest its decision in the appeal on such a point then it should afford an opportunity to the respondent to contest the appeal on that ground.

It is significant to mention that a patient examination of the record of proceedings in the court below on which the appeal is based made no mention of the survey in the course of the hearing. Indeed the only time in the proceedings that any reference was made to it beyond the filing by the parties of their respective survey instructions was in the course of the judgment at pages 154 – 155 when the learned trial judge tried to explain why her order regarding the survey was not carried out.

In my opinion, it is quite clear from the record of proceedings that the default to carry out the survey as ordered by the learned trial judge is clearly one that learned counsel for the respondent couldn't answer. I think that the circumstances that flow from what in my view was a serious lapse in the proceedings are plainly unanswerable and it being so I do not think that our failure in calling upon learned counsel for the respondent to answer same is likely to occasion any injustice to the respondent. See **AKUFFO ADDO V. CATHLINE** [1992] 1 GLR 377. In the course of reading his speech in the lead judgment of the court Kpega J.A [as he then was] at page 392 observed of Rule 8(6) which has been reenacted in the current rules of this court, CI 19 as follows:

"Therefore in applying the proviso to Rule 8(6) of LI 218 care must be taken that we do not in the process give an interpretation which will inhibit or stultify the rule that an appeal before the Court of Appeal "shall be by way of rehearing." The proviso cannot in my view, be said to imply an absolute prohibition. In certain special or special circumstances, the proviso will not apply. So it can be said that the Court of Appeal should not decide in favour of an appellant on a ground not put forward by him unless the court is satisfied beyond doubt, first, that it has before it all the facts or materials bearing upon the contention being taken by it suo motu; and secondly, that the point is such that no satisfactory or meaningful explanation or legal contention can be advanced by the party against whom the point is being taken even if an opportunity is given him to present an explanation or legal argument, for example, void matters as in this case."

Applying this statement of the law that is binding upon me to the facts of this case I am of the view that the failure to carry out the survey is clearly in explicable. I venture to say that the reasons provided by the learned trial judge for the failure are so unfortunate that a court of law cannot shut its eyes to the person whose conduct must have brought about the unfortunate state of affairs, for that conduct is plainly contemptuous in that it is obviously prejudicial to the course of justice and likely to jeopardize the fair hearing of the action. The court in my view ought to have firmly and unhesitatingly by resort to its summary powers dealt with it in a manner that will enhance the authority of the court rather than overlooking it and thereby send the wrong signal that its orders could be flouted with impunity by the parties who seek justice from it without any sanctions.

Speaking for myself, I know of no reason that can justify the conduct that prevented the surveyor appointed by order of the court from carrying out his lawful duties. From the moment that he was appointed by the court, the surveyor became an officer of the court and was entitled to be protected by the court from such acts. If I may say so, in my opinion when he went on to the land to carry out the survey he was the representative of the court undertaking an assignment on its behalf and therefore for him to have been knowingly obstructed in the discharge of his duties by a party to the action and in whose presence his appointment was made is to say the least an unfortunate affront to the court.

That conduct in my opinion had the effect of preventing a potential witness from testifying at the trial, a situation that amounts to interference with the course of justice. On this note, I wish to refer to the observation of Lord Langdale, M.R. in the case of **Little V. Thomson** [1839] Beav. 129, 131 as follows:

"If witnesses are……..deterred from coming forward in the aid of legal proceedings it will be impossible that justice can be administered. It would be better that the doors of justice were at once closed." See also: Re Johnson [1887] 20 Q.B.D. 68, 74 per Bowen L.J.

In the circumstances, I am of the view that the failure to carry out the survey was a fundamental and irremediable irregularity that rendered the trial a nullity. I must say that in my thinking the order contained in the judgment that the survey be carried out subsequently cannot cure the defect that I have pointed out although it does emphasize the fact that the survey was necessary to a fair and proper resolution of the dispute before the court below.

What then results is that the instant appeal is allowed and the decision of the court below set aside. In view, however, of the fact that the point on which this decision rests is traceable to the course of procedure adopted by the trial courts, we will order a retrial of the action. Accordingly the case is remitted to the court below for a retrial in a manner that accords with the law.

A. ASARE KORANG
JUSTICE OF APPEAL

I agree.

S. GBADEGBE
JUSTICE OF APPEAL

I also agree.

J.A. OSEI
JUSTICE OF APPEAL

COUNSEL - IVAN QUANSAH FOR APPELLANT.
PETER ABABIO FOR RESPONDENT.

~eb~