IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL - ACCRA

CORAM - TWENEBOA-KODUA, JA[PRESIDING]
ADDO, JA
QUAYE, JA

H1/325/05
23RD JUNE, 2006

GHANA POST COMPANY LTD. … PLAINTIFF/JUDGMENT-CREDITOR/ APPELLANT

V E R S U S

JAMES SUALAH BOSSMAN … DEFENDANT/JUDGMENT-DEBTOR

A N D

MS. CECILIA FOLY … CLAIMANT/RESPONDENT

J U D G M E N T

TWENEBOA-KODUA, JA - This is an interlocutory appeal from the ruling of the High Court, Tamale. The said ruling delivered on 29 April 2004 was occasioned by an objection taken by the plaintiff/appellant {simply called plaintiff hereinafter} to the admissibility of a supplementary affidavit in an interpleader claim.

The plaintiff had successfully sued the defendant and had embarked on the process of execution of the said judgment. In that process the plaintiff had caused property in the nature of a plot of land with an uncompleted building thereon and described as Number 294, Block "B" Chogu Tepalsi at Tamale to be attached. To the victorious plaintiff, the property belonged to the vanquished defendant.

As next friend of Prince Naamah Bossman {a minor} the claimant soon filed a notice of interpleader claim. In the supporting affidavit, the Claimant swore that the afore-mentioned minor is the issue of the marriage between the claimant and the defendant.

The claimant, who is the respondent on appeal, also disclosed on oath the steps she took to acquire the attached property for the minor. She supported her claim with numerous exhibits: {'A' to '1'}.

On 17 February 2004, a supplementary affidavit in support of the claim in the interpleader proceedings was filed. It had been sworn to by one Tahiru Dagimma who identified himself as the "law clerk/interpreter to Halaali Chambers, Tamale who are Solicitors for the claimant……."

This deponent went on to swear, inter alia, as follows:

> "3. That I have the authority of both my employers and client to depose to this affidavit on their joint behalf, the matters deposed to having come to my knowledge in the course of discharging my lawful duties.
>
> "5. That throughout that affidavit {ie an earlier affidavit}, she described herself as 'CECILIA FOLI.'
>
> "6. That even though she is married to one James Suala Bossman and now bears the name 'Mrs Cecilia Bossman' she nevertheless also has 'Cecilia Foli' on some of her official and private documents.
>
> "7. That in her supporting affidavit of 16 June 2003, she inadvertently omitted to depose to the fact that she is also known as 'Mrs Cecilia Bossman.'
>
> "8. That the claimant now says that 'Cecilia Foli' and 'Mrs Cecilia Bossman' both refer to one and the same person."

The plaintiff raised an objection to the foregoing depositions as being inadmissible hearsay and founded the objection on grounds as follows:-

> "i. That the deponent to the supplementary affidavit filed on 17 February 2004 lacked capacity to swear the affidavit.
>
> ii. That the affidavit contained facts which the deponent is not able of his own knowledge to prove as required by Order 36 {sic}rule 3, High Court {Civil Procedure} Rules, 1954 {L.N.140A}
>
> iii. That the deponent could not be in a position to give the ground and sources of information regarding the issue at stake i.e. whether or not Ms Cecilia Foli is the same as Mrs Cecilia Bossman as contained in paragraphs 6 and 7 of the supplementary affidavit

filed on 17/2/04 as could be found at page 27 of the Record of Appeal.

iv. That the authority to swear the affidavit must emanate from parties who have interest in the case like the plaintiff, the defendant or the claimant.

v. That the affidavit should ordinarily be in the first person but in this particular case, the supplementary affidavit is in the third person making the facts deposed to hearsay."

After very exhaustive argument by counsel on both sides, the Learned High Court Judge delivered himself in a brief ruling quoted in extenso thus:

> **"By Court:-** having listened to the submission made by respective Counsel for the plaintiff and the claimant, it is my view that in the greatest interest of justice, legal objections raised by counsel for the plaintiff Judgment-Creditor and the reply thereto by counsel for the claimant such objections by nature cannot prevent the court from going ahead or to here {sic} the testimony of the claimant, or going ahead with the case, the objections are to be set side and cannot be upheld."

His Lordship shortly added:

> "The objections are not cogent enough to ground the hearing of the case; we will go ahead and hear it."

Dissatisfied with the ruling above, the plaintiff appealed against it on grounds formulated as follows:-

"i. The ruling is against the weight of facts before the court.

ii. The learned judge erred in law by inadequate and inappropriate evaluation of the facts presented before the court and thus coming to erroneous findings and conclusion of law."

In his submission, counsel for the plaintiff rehashed the events in the run-up to the objection taken by the plaintiff during the interpleader proceedings as set out above.

Counsel turned close attention to about 9 Exhibits {Exhibits "A" to "I"} the claimant tendered in support of her claim. Counsel sought to draw inferences from the Exhibits for purposes of establishing the identity of Cecilia Foli or Cecilia Bossman.

Counsel pointed out that Exhibits D, F, H had a common feature, namely, the name "Foly Cecilia", of course Exhibit H had a different spelling of "Foli." According to counsel, Exhibit d had an exclusive peculiarity.

It was an official document from a State institution copied to another State institution lending credence to the claim that Cecilia Foly was or is a professional teacher.

Counsel significantly observed that Cecilia Foli "never used different names for her official transaction with her employers, the Ghana Education Service and in that station in life as "educated lady and……teacher," Cecilia Foli would know or ought to know that one could not use two names at the same time.

Counsel submitted against the backdrop of the foregoing that it was only the claimant who could properly swear to an affidavit to offer an acceptable explanation for "the discrepancy in her name and any other circumstance about the different names" on the numerous Exhibits offered to prove her identity.

Counsel next took a swipe at the His Lordship's assertion that the objections were not cogent enough to ground the hearing of the case and described it as "a serious misdirection." To counsel the admission of the receipts exhibited in the supplementary affidavit {Exhibit "G" in particular} and bearing different names would do irreparable injustice, if not resisted or challenged at the threshold.

Counsel for the plaintiff submitted that a reasonable and acceptable explanation for the use of Cecilia Foli and Cecilia Bossman interchangeably was extremely necessary and that it was not enough to say both names refer to the same person. Counsel stated that a married woman, that the claimant claimed to be, might use her maiden name or properly do a change of surname to qualify her use of the husband's surname.

In counsel's view the production of a marriage certificate as Exhibit could have armed the deponent to the supplementary affidavit to swear to the fact that the two names, to wit, Cecilia Foli and Cecilia Bossman refer to the same person.

In the light of the submission, counsel concluded that the ruling went against the facts presented to the court below.

In his reaction on the 1st ground of appeal counsel for the claimant sought to know the facts of the case whose weight had, as he put it, been ignored. Counsel conceded however that the ruling of the court below "did not advert to any specific points" of the objection raised against the supplementary affidavit.

Counsel next turned to the facts contained in the affidavit in support of the Interpleader summons itself at pages 3 and 4 of the Record of appeal and dismissed them as wholly irrelevant to the proceedings with regard to the objection raised. As counsel rightly pointed out, they were not germane to the crux of the objection which turned on the competency of the supplementary affidavit. He concluded therefore that the judge was not bound to give weight to the facts.

Counsel for the claimant also submitted that the Exhibits, particularly Exhibits D, F and H, referred to in the submission on behalf of the plaintiff had nothing to do with the objection. In counsel's view the Exhibits did not form part of averments in the supplementary affidavit; they contributed nothing to subvert "the competency of the supplementary affidavit" which came under attack in the objection.

Counsel for the claimant therefore found no fault with the court below when it gave no weight to the facts on the face of the Exhibits too.

Counsel accordingly submitted that the entire first ground of appeal must be dismissed for want of merit.

It is in my respectful view difficult to accept the submission that the Exhibits presented by the claimant have no relevance for the objection. Of course questions have been raised about the use of two different names by the claimant and the deponent in the supplementary affidavit made a bid to offer answers to the questions raised. The deponent, in my respect view, failed to offer direct and independent facts or affidavit evidence, it is reasonable to think, for those answers for proof.

The supplementary affidavit gave its deponent away as lacking the facts or depositions for purposes of proof in the matter. What he swore tended to be hearsay harking back to the claimant: he swore what she {the claimant} was saying {See paragraphs 6, 7 and 8 of the supplementary affidavit quoted in extenso hereinabove}.

It is significant to observe that counsel for the claimant has conceded in his submission that the ruling on appeal did not address the points or matters in the objection,

and that is a delicate confirmation that the decision of the court below was ill-balanced against the said matters agitated in the objection.

The second ground of appeal which is closely related to the first is quoted here once again for ease of reference thus:

> "The learned judge erred in law by inadequate and inappropriate evaluation of the facts presented before the court and thus coming to erroneous findings and conclusion of law."

In his submission, the plaintiff's counsel found fault with the judge in the court below to have failed to appreciate the main purpose of the objection raised, which was the wrong admission of the supplementary affidavit. In counsel's view, the said affidavit was a hearsay absolutely and therefore was inadmissible within the meaning of section 117 of the Evidence Decree, 1975 {N.R.C.D. 323}. The section reads:

> "117. Hearsay evidence is not admissible except as otherwise provided by this Decree or any other enactment or by agreement of the parties."

It was submitted that the claimant set out to describe or call herself Ms Foli, a teacher by profession. It was so amply demonstrated on many occasions or in many circumstances even official such as in Exhibit D at page 11 of the Record of appeal. A change of her name somewhere as a fact would entirely be within her exclusive knowledge, all things being equal, and so she alone could competently swear to that fact.

Counsel submitted it was false to say the objection aimed at stopping or grounding the hearing of the claim. The basis of it rather was that the deponent in the supplementary affidavit lacked the requisite capacity to swear to it. Counsel relied on Order 38 rule 3 of the High Court {Civil Procedure} Rules, 1954 {L.N. 140A}{now revoked}. It did provide:

> "3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same. Provided that on interlocutory proceedings, or with leave

> under Order 30, Rule 2, or Order 37, Rule 1, an affidavit may contain statements of information and belief, with the sources and grounds thereof."

For avoidance of doubt, the proviso in terms of Order 30 rule 2 {Summons for directions} and Order 37 rule 1 {Evidence generally at a trial in the substantive case) was not applicable in the present case in the court below. It was also not applicable since no costs were shown to have been paid in the proceedings of the court below for purposes of the use of hearsay. Besides, the supplementary affidavit in question did not offer the grounds of the information, or belief if at all, in the depositions, particularly in paragraphs 6, 7 and 8 of the said affidavit to exempt it or take it from or take it out of inadmissibility.

Counsel submitted with vigour that the usual features by which, the averments of the nature of hearsay were introduced by such expression as: "I have been informed or advised by……..and I verily believe same to be true" and/or sworn to in the first person were conspicuously missing in the Dagima's supplementary affidavit under attack. So that in counsel's view, the said affidavit was inadmissible for containing awesome hearsay.

Counsel founded himself on the authority of General Cold Industry Vrs. Standard Bank {1982 – 83} GLR 360 Holding 1 that reads:

> "By Order 38 rule 3 of the High Court {Civil Procedure} Rules, 1954 {L.N. 140A} hearsay matter should not be included in an affidavit, i.e. affidavit evidence containing hearsay matters would be inadmissible. The relevant sworn affidavits of the law clerk and the army officer were hearsay matters not within their own knowledge and they would therefore be expunged from the instant proceedings. The proviso to Order 38 did not also apply in the instant case but even if it did, the deponents would be obliged to disclose their sources of information which had not been done."

Counsel also raised the authority that the deponent in the supplementary affidavit purported to have received to swear to the affidavit. According to counsel, if indeed it was an authority delivered by the deponent's employers, the "Halaali Chambers {of Tamale} and client" then it did stand to reason that the deponent/employee received the authority from the claimant/client of Halaadi Chambers through the employer chambers, that would in the view of counsel for the plaintiff, be false and no authority to clothe the deponent with any capacity to swear to the supplementary affidavit which was thereby rendered incompetent and invalid.

Counsel therefore took the view that the judge's conclusion for overruling the objection did not show that he evaluated the facts and the law with regard to the supplementary affidavit as presented to the court below adequately and appropriately. Accordingly, he invited the court to set aside the ruling of the High Court, Tamale and expunge the said discredited supplementary affidavit.

In response, counsel for the claimant set out placing reliance on Order 38 rule 3 of L.N. 140A quoted above, particularly the second part of the rule and submitted that the exclusion of hearsay was not automatic. According to learned counsel, the court or judge reserved the right to admit or exclude it.

Counsel also adverted to Order 38 rule 1 of L.N. 140A which in brief makes it possible for the deponent to attend proceedings and be cross-examined. He therefore suggested that the plaintiff could have availed himself of that opportunity to apply for such cross-examination in the proceedings.

The proposition foregoing, to my mind, is a red herring. It is, in my humble view, not every deposition in an affidavit that passes for such procedure: an averment in a sworn affidavit which is not hearsay but deserves a clarification calls for it or a hearsay averment that satisfies all conditions of its admissibility is allowed under such procedure. Counsel for the claimant also submitted that in interlocutory proceedings hearsay depositions were or are admissible. That, to my mind, is also a dangerous generalization. The Rules of Court under which the proceedings in the court below were taken took care of hearsay evidence in the proviso to Order 38 rule 3 thus: "…….Provided that on

interlocutory proceedings……an affidavit may contain statements of information and belief, with the sources or grounds thereof."

In the affidavit in issue, the deponent averred in paragraph 5 that the claimant swore describing herself as Cecilia Foli. The deponent went ahead to swear in paragraph 6 that even though the claimant was married to one James Bossman and bore the name Mrs. Bossman{at the time of the deposition} she nevertheless had Cecilia Foli on some of her official and private documents and that {in paragraph 7} she omitted to depose to the fact that she was then also known as Mrs. Cecilia Bossman. The deponent added to what the claimant was saying through his {the deponent's} lips that Cecilia Foli and Cecilia Bossman referred to "one and the same person." The foregoing averments by the deponent required some proof and he was "obliged to disclose his sources of information or grounds of belief which had not been done" when the objection was taken.

As counsel for the plaintiff suggested, the exhibition of a Marriage Certificate for the alleged union between the couple would have been a convincing ground of his belief or source of his information beyond question. That would for example have sustained the change of name from Ms. Cecilia Foli to Cecilia Bossman {Mrs.} and given some credibility and acceptability to the supplementary affidavit in question.

It is my humble view that the Exhibits referred to by the counsel for the plaintiff were relevant. They did emphasize, in my view, the discrepancy between the use by the claimant of the names Ms Cecilia Foli and Mrs. Cecilia Bossman and did make the supplementary affidavit inadmissible process with discredited depositions.

Above all the court overruled the plaintiff's objection and offered hardly any tangible reasons for the ruling. It simply said the plaintiff's objection was of the nature that could not prevent the court proceedings: the grounds of it were "not cogent enough to ground {i.e. to stop} the hearing of the case."

It is fair to say His Lordship misapprehended the basis of the objection or misdirected himself as to the basis of it. It is clearly aimed at getting the supplementary affidavit that offended the Rules expunged rather than preventing the proceedings.

Having sufficiently shown that, under our Court Rules {Order 38 rule 3 in particular}, the supplementary affidavit complained against was not admissible, even in an interlocutory proceeding in the circumstances it was presented, I consider that the

submission based on Order 41 rule 5{2} of the English Supreme Court Rules offers no succour or advantage to the court in the determination of this appeal. No account shall be taken of it and English decision founded thereon.

Let it be reiterated here that the evaluation of the facts and the law presented to the court in the course of the objection was "inadequate and inappropriate. The explains the strange findings and erroneous conclusion by the court below. Accordingly this appeal succeeds on the second ground.

On balance the appeal, is allowed. The objection of the plaintiff is therefore sustained and the discredited supplementary affidavit expunged.

[SGD.] K. TWENEBOA-KODUA
JUSTICE OF APPEAL

I agree.

[SGD.] E.A. ADDO
JUSTICE OF APPEAL

I also agree.

[SGD.] G.M. QUAYE
JUSTICE OF APPEAL

COUNSEL - MR. PETER DEI OFEI FOR THE PLAINTIFF/J-CREDITOR/ APPELLANT.

MR. BEN BALURI SAIBU FOR THE DEFENDANT/J-DEBTOR/ RESPONDENT.

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