- **IN THE SUPERIOR COURT OF JUDICATURE**

IN THE COURT OF APPEAL - ACCRA

CORAM - AKAMBA, JA [PRESIDING]
KUSI-APPIAH, JA
DOTSE, JA

H1/37/2007
13TH JULY, 2007

DAVID ASARE … PLAINTIFF/RESPONDEN

V R S.

MIKE ASOMANI … DEFENDANT/APPELLANT

J U D G M E N T

DOTSE , J.A:- This is an appeal from the judgment of the High Court, Accra dated 16th July, 2004. In that judgment, the learned trial justice of Appeal, sitting with additional responsibility as a High Court Judge, delivered judgment in favour of the Plaintiff/Respondent, hereafter referred to as the Plaintiff and against the Defendant/Appellant hereafter referred to as the Defendant.

In the High Court, the Plaintiff claimed against the Defendant, the following reliefs:-

(a) Payment of the sum of $37,400 or its equivalent in cedis at the current exchange rate.
(b) Interest on the aforesaid sum of money from December 1991 until judgment.

FACTS

Due to the special circumstances of this case, it is necessary to set out in some detail the facts of the case.

The Plaintiff commenced the instant suit against the Defendant on 16th July, 1992. The action arose as a result of an agreement entered into between the

parties in or about September, 1991. By that agreement, the Plaintiff was to transfer an amount of $17,000 to the Defendant's Barclays Bank PLC, 414 Kennington Road, London.

The said amount was duly transferred and was to attract interest at the rate of 120% in favour of the Plaintiff every three months.

By the Plaintiff's calculation, the interest and the principal amount due and owing was this amount of $37,400 at the time of the inception of the writ of summons on 16th July, 1992.

The Defendant resisted the plaintiff's claims and contended that the agreement entered into between them was to be a joint business with the plaintiff providing the capital and the Defendant labour. The Defendant therefore contended that, it was the type of business they decided to enter into which did not move fast enough on the Ghanaian market. This was due to the fact that the particular drugs he the Defendant imported into the country was unknown to the market.

On the 10th day of March, 1993, summons for Directions and the Additional issues were set down for hearing by the learned High Court Judge.

Actual hearing of the suit commenced on 5th day of July, 1993 at the High Court when the plaintiff's Lawful Attorney, Pastor Felix Asare testified.

The Defendant on the other hand testified on 4th November, 1993 and called one witness, DW1 Seth Ofosu Asiamah.

On the 12th day of May, 1994, the Defendant closed his case whereupon the learned trial judge directed both counsel in the matter to file written addresses on or by 30th June, 1994.

We have observed that, whilst learned counsel for the plaintiff, managed to file his written address on the 30th June, 1994 as directed by the Court,

learned Counsel for the Defendant filed his written address on the 18th July, 1994.

Thereafter, the next proceedings filed in the matter as disclosed by the record is a Motion Ex-parte for an order directing costs paid into Court to be paid to Plaintiff or his Attorney on 17thDecember 2003 by the Solicitors of the Plaintiff. Reference page 58 of the appeal record.

Judgment was later delivered by the learned trial judge on the 16th day of July, 2004.

By that judgment, the learned trial judge directed as follows:-

> **"I accordingly enter judgment for the plaintiff for the sum of $17,000 or its equivalent in cedis at the current rate of interest from December 1991 to date of judgment."**

GROUNDS OF APPEAL

It is against this judgment that the instant appeal has been filed with the following grounds of appeal.

(a) The Judge lacked jurisdiction to deliver the judgment.

(b) Alternatively the judgment is a nullity in as much as it took the judge over 9years to deliver judgment after the conclusion of the case in or about 1995.

(c) The judgment is irregular in as much as the plaintiff took judgment for more sum than is due.

ADDITIONAL GROUNDS

In his written statement of case for the Defendant, learned counsel stated the following additional grounds of appeal as having been filed pursuant to Rule 20(1) of the Court of Appeal Rules, C.I. 19 as amended by C.I. 25.

These grounds are

(d) The judgment is irregular in as much as it conferred on plaintiff interest earning which was far in excess of what plaintiff was entitled.

(e) The learned judge erred when she preferred the plaintiff's evidence that the payment of the money to defendant was for the purchase of

goods from Europe and the Far East as against the Defendant's version that the money was meant for the importation of pharmaceuticals.

(f) The cost awarded is too excessive.

The Defendant therefore prayed that the judgment entered on 16th July, 2004 in favour of the Plaintiff be set aside on the above grounds of appeal and trial de novo ordered.

We have observed that the Defendant indicated in his written statement of case that he filed the additional grounds of appeal on 25th September, 2006.

We have perused the entire appeal record and there is no indication that the said additional grounds of appeal had been filed on the said 25th September, 2006 and with the leave of the Court as is provided for under rule 8(7) of the Court of Appeal Rules, 1997 C.I. 19.

This rule 8(7) actually provides that an appellant shall not without the leave of this court be heard in argument in respect of any ground of appeal not contained in the Notice of Appeal for or for which leave to argue same was not obtained by order of the Court.

This rule has been given different interpretations by various panels of this court. Some have taken it to mean that prior leave must be obtained before an appellant can be heard in support of any ground of objection or of appeal can be argued if it was not contained in the original grounds of appeal or filed before the appeal record is transmitted to the appeal court.

However, in the instant appeal, learned counsel for the appellant has made reference to rule 20(1) of the Court of Appeal Rules, 1997 C.I. 19 as amended by the Court of Appeal (Amendment) Rules, 1999 (C.I. 25). Out of abundance of caution let us quote in full the said rule:-

Rule 20(1) "An appellant shall within 21 days of being notified in Form 6 set out in Part 1 of the Schedule that the record is ready, or within such

time as the court may upon terms direct, file with the Registrar a written submission of his case based on the grounds of appeal set out in the notice of appeal <u>and such other grounds of appeal as he may file".</u>

The words "such other grounds of appeal as he may file" have been interpreted to mean the abolition of the regime of obtaining leave before the additional grounds can be filed and argued.

Is that really the case? It appears learned counsel for the appellant; is also one of the apostles of the abolition of the "grant of leave" regime.

In our quest to understand the proper legislative regime, we have looked critically at the Court of Appeal (Amendment) Rules, 1998 C.I. 21 and the Court of Appeal (Amendment) Rules 1999 C.I. 25 but there is no specific mention of the deletion or amendment of rule 8(7) of the Court of Appeal Rules, 1997, C.I. 19 already referred to supra. What then is the effect of the said rule 8(7) of C.I.19 in view of the provisions of rule 20(1) of C.I. 25.

It should be understood in no uncertain terms, that the legislature must be deemed to have indirectly amended rule 8(7) of C.I. 19 by the provisions contained in rule 20(1) of C.I. 25 since it is later in point of time.

We are fortified in what we have said by what COCKBURN C.J stated in the case of R. v. PRICE (1897) LR6QB. 411at p.416 as follows:-

> **"The legislature, in legislating in pari material and substituting certain provisions for those which existed in an earlier statute, has entirely changed, the language of the enactment, it must be taken to have done so with some intention and motive".**

With the above analysis, it must be taken that, the effect of the provisions of rule 20(1) of the Court of Appeal (Amendment) Rules, 1999, C.I. 25 is that parties and or counsel no longer require prior leave of the court before filing

additional grounds of appeal. To that extent therefore, rule 8(7) of C.I. 19 would be deemed to have been amended.

This therefore means that appellants can file additional grounds of appeal as of right. However, it must be noted that this right must be exercised reasonably and within acceptable time limits. For example, it should be understood that, this right to file additional grounds of appeal without leave of the court must however be filed contemporaneously with the filing of the written statement of case.

Since it would be presumed that the written statement of case would be based on the additional grounds of appeal, and this statement of case ought to be filed within the acceptable time limits set under the court of Appeal Rules, it follows that the provisions of rules 20(1) of the Court of Appeal (Amendment) Rules, 1999, C.I. 25 is not a blanket licence to file additional grounds of appeal as and when the need arises.

NOTICE OF INTENTION TO PROCEED AFTER LAPSE OF MORE THAN ONE YEAR.

We have observed that both counsel have complied with the request from this court to address it on a procedural matter that was raised pursuant to Order 64 r.12 of the High Court, Civil Procedure Rules, 1954, LN 140A but now repealed; which provided thus,

> **"In any cause or matter in which there has been no proceedings for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed…"**

In this appeal, the last proceeding before addresses were filed pursuant to orders made by the Court can be found on page 49, and that was on 12th May, 1994.

Therefore, plaintiff filed his address on 30th June 1994 whilst Defendant filed his on 18th July 1994. No proceeding took place thereon until on or about 18th December, 2003 when an Ex-parte motion was filed by the plaintiff

followed by delivery of judgment on 16th July, 2004, a lapse of more than one year indeed a lapse of more than 8(eight) years.

We have noted with some concerns, the submission of both learned counsel on this matter of procedure. There is no indication on the appeal record that the plaintiff gave this one month's notice to the Defendant before it filed the Ex-parte Motion. It does not really matter whether the process that was filed is one that notice should have been given to the Defendant or not.

What is of importance is that, it is a process that had been filed by the plaintiff who was desirous of proceeding with the case after lapse of more than a year from the last proceeding had.

It our understanding of order 64 r.12, that procedural requirement is a fundamental one, breach or non compliance of which took away the jurisdiction of the trial court from proceeding with the case. See the unreported unanimous judgment of this Court in Suit No. H1/50/06 intitutled

Paul Ankomah – Plaintiff/Appellant

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City Investment Co. Ltd. – Defendant/Respondent

Dated 1st June, 2007.

DELAY IN THE DELIVERY OF JUDGMENT

Another serious irregularity which we wish to deal with and which has also been dealt with at length by the counsel in the statement of case is the delay of the trial court in delivering judgment after the case was concluded.

We have taken note of the invitation of learned counsel for the plaintiff to this court to disregard the failure or inability of the learned trial judge to deliver judgment within the six weeks prescribed time after the close of the case. That invitation had been premised upon the decision of the Supreme Court in the case of

Republic Vrs High Court, Accra, Ex-parte Expandable Polystyrene Products Limited [2001-2002] SCGLR 749 which decided that the failure of

a judge to deliver judgment within the time limit allowed under the rules of court at the time to wit, rule 2A of Order 63 did not make the said judge functus officio or render him incompetent as not to have jurisdiction in the matter and any judgment delivered by him was not a nullity.

The Supreme Court judgment was contrary to an earlier decision of the same court given in the case of

Republic

Vs

Judicial Committee of the Central Region House of Chiefs, Ex-parte Aaba, [2001-2002] SCGLR 545.

We consider ourselves bound by the later decision of the Supreme Court. However, there is nothing on the appeal record to give any indication that the conditions given in the judgment which as it were would confer validity on the judgment given after such lapse of time had been done. For example, there is no indication that the Chief Justice had granted an extension or fixed the date for the delivery of judgment after more than a lapse of 9 (nine) years.

A perusal of the appeal record further indicates that no permission was sought for and granted before the judgment in the instant appeal was delivered after lapse of more than 9 (nine) years.

If our understanding of the Supreme Court decision in the Ex-parte Expandable Polystrene Products Limited referred to supra is right, then it is that, the failure of a trial judge to deliver judgment under the rules does not

(i) make the said judge functus officio

(ii) does not take away the jurisdiction of the court.

However, if the said judgment cannot be delivered within the said time limits, then the same rules of court stipulate that permission for extension of time be sought form the Lord Chief Justice.

If is for the compliance of these time limits set in our rules of court that the supreme court in the case of DOKU vrs Presbyterian Church of Ghana [2005-

2006] SCGLR 700 held that “it is not for nothing that rules of Court Procedure stipulate time limits.”

We consider this irregularity also as a fundamental error which goes to the root of this appeal. Once the provisions which could have validated the judgment had not been done, the judgment so delivered is void and is accordingly set aside.
See Mosi v Bagyina [1963] 1 GLR 337.

The combined effect of these two fundamental errors committed at the trial court is such that the entire proceedings culminating into the judgment under appeal is void.

The result is that the appeal succeeds on the reasons stated herein.
Accordingly, the judgment of the High Court, Accra, dated 16th July, 2004 is set aside.

The case is remitted to the Court below for trial de novo to be conducted in an expeditious manner devoid of the delay that bogged down the first trial.

No order as to costs.

J. DOTSE
JUSTICE OF APPEAL

I agree**.**

J.B. AKAMBA
JUSTICE OF APPEAL

I also agree.

F. KUSI-APPIAH
JUSTICE OF APPEAL

COUNSEL - K.A. OWUSU-ANSAH FOR RESPONDENT.
DESMOND QUAYNOR FOR APPELLANT. **~eb~**