IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
A C C R A

CORAM - MRS. AKOTO-BAMFO, PRESIDING
MRS. ABBAN, JA
BAFFOE BONNIE, JA

H1/22/2007
19TH JANUARY, 2007

B.H. INDUSTRIES LIMITED … DEFENDANT/APPELLANT
V E R S U S
(1) SHEIBU ADAMU } … PLAINTIFFS/RESPONDENTS
(2) MADAM HAWA }

J U D G M E N T

AKOTO-BAMFO, JA - This is an appeal by the defendant/appellant hereafter referred to as the defendant against the ruling delivered by Dzakpasu J on the 12th of December 2005 refusing to set aside an order for the appointment of an auditor upon an earlier motion by the plaintiff/respondent who shall hereafter simply be known as the plaintiff.

On the 27th of October 2004, the plaintiffs, administrators of the estate of Alhaji Adamu commenced an action claiming against the defendant Co inter alia

(1) Declaration that the applicants are by law entitled to be registered as the holders of the 40,400 shares in the name of the late Alhaji Adamu.

(2) An order directing the respondents to make available to the applicants its up to date audited accounts and copies of annual returns filed at the Registrar General's Department and an order directing the respondent to declare its profit for the past accounting years and to pay dividends and other monies due and owing to the estate of Alhaji Adamu.

The application was supported by a 23 paragraphed affidavit.

It appears from the record that hearing of the application was fixed for the 21st of April 2005. When on that day, none of the parties and their counsel appeared before the

court; the learned judge directed that the docket be returned to the Registry and adjourned the matter sine die.

Subsequent to this the Plaintiffs appointed a new solicitor who filed a motion for the appointment of an auditor to audit the accounts and publish the final Report. The motion was fixed for the 20th of June 2005. On the return date the defendant failed to appear and so were its legal representatives, it was therefore adjourned to next day i.e. the 21st of June 2005.

When on the next date, the defendant was again absent, the court heard the application and granted the orders prayed.

A motion to set aside the orders made on the 21st of June 2005 was filed on behalf of the defendant; the gist of its case being that it was not notified of the proceedings. The learned judge however refused to accede to the request on grounds that there was a Certificate of Service of the motion on the Secretary of the defendant Company on the 27th of May 2005 before the hearing of the motion on 21/6/05.

Being naturally dissatisfied with the ruling, the defendant lodged an appeal the grounds of which were formulated thus:

(1) The learned trial judge erred in law and fact in holding that the defendant was served with the motion for the appointment of auditor.

(2) The learned judge erred in law and in fact in concluding that the that the defendant was given a hearing of the motion for appointment of auditor.

(3) The Ruling was against the weight of evidence.

It must be noted that even though the written submissions filed on behalf of the defendant; were served on the plaintiff, the latter failed to comply with rule 20(4) of C.I. 19 which required the filing of a reply within 3 weeks, his lawyer did indeed inform the court that no submissions were filed in respect of his client.

It is provided in rule 20(8) of C.I. 19 that "where a respondent does not file a written submission of his case and does not agree to make a joint written submission under the provisions of this rule, he shall not be heard at the hearing of the appeal except as to question of costs."

In arguing the 1st ground of appeal, learned counsel submitted that the learned judge erred in both law and fact in holding that the defendant was served with the motion for the appointment of an auditor, for he relied unduly on the alleged proof of service and in so doing failed to give due consideration of the appellants application before him.

For support, he relied on the case of **Barclays Bank Vrs. Bank of Ghana Vrs. Cable Co. Ltd. & Ors** reported in the **{1998-99} S.C GLR 1.**

It is evident that the originating notice of motion i.e. the substantive suit was fixed for hearing on the 15th of February 2005 and that both parties failed to appear before the court on that day; even though the plaintiffs were represented and the Court therefore adjourned same to the 10th of March 2005. The Court made an order that hearing notices be served on the defendant and further directed that the service be directed by the plaintiffs.

There were no entries with regard to what happened on the 10th of March 2005. The matter however, from the record came up for hearing on the 21st of April 2005. Significantly both parties and their counsel were absent.

I am of the view that since the court fixed the 10th of March 2005 for hearing, if for whatever reason, the application could not be heard on that date; there ought to have been a record thereof and the directions given by the learned judge.

As indicated however, no such record existed.

On the 21st of April 2005, the court sat on the application, again neither the parties nor their legal representatives were in court. No reasons were offered for their absence. The court proceeded and made the following order.

"In view of the absence of the parties and counsel, the docket shall be returned to the registry."

Thereafter the plaintiff appointed a new solicitor who filed the motion which is the genesis of this appeal – for the appointment of an auditor. On the face of the motion the return date was the 8th of June 2005. There is no indication as to what transpired on the 8th of June 2005.

On the 20th of June 2005, the motion came up for hearing. Even though the plaintiff and the counsel were in court, the defendant Company and its counsel were

absent. The court therefore fixed the next day; the 21st of June 2005 for hearing, notably in the absence of the defendant.

What does excite my curiosity is why the next day; could the absentee defendant have been notified within that short time?

I am of the view that since the substantive action i.e. the summons was adjourned sine die and the docket returned to the Registry and particularly having regard to the fact that there was a change of solicitor and a subsequent motion which was called in the absence of the defendant, the court ought to have directed that the hearing notices be served on the defendant when it fixed the matter for hearing on the 21st of June 2005. There was no direction to that effect and it was not surprising that on the 21st of June 2005; the defendant and counsel were absent and the orders granted in their absence.

When the defendant applied to have the order set aside, it was urged that the Company had no notice of the proceedings indeed a copy of the Search conducted was exhibited.

It was clearly indicated thereon that the motion was not served on the defendant Company.

The learned judge however stated in his ruling that there was a Certificate of Service and that service was effected on the defendant on the 15th of June 2005.

In support of the contention that the defendant was not served, a copy of the Search was exhibited and therefore one is left in no doubt that no such service was effected.

Since the plaintiffs contended otherwise, I am of the view they ought to have exhibited the certificate. More importantly, if indeed there was a certificate of service, having regard to the conflict; i.e. the search result as against the certificate; the learned judge ought not to have simply elected to accept one position as against the other, he ought to have embarked upon an enquiry, examined the circumstances and made definitive findings thereon since both processes emanated from the Registry of the Court.

I am fortified in this view by the holding in **Barclays Bank Company Limited Vrs. Ghana Cable Company Limited [1998-99] S.C. GLR 1** in which the Supreme Court held that a court has no jurisdiction to proceed against a party who has not been served and that when a party complained that he had not been served; the court was duty

bound to examine that complaint thoroughly and make a definitive findings irrespective of whether there is a certificate of service or entry of appearance on behalf of the defendant.

See also **Brakowa Vrs. Awuakyewaah [1956] 2 WALR 164.**

In the matter under consideration, since the adjournment was granted in the absence of the defendant, it was incumbent upon the learned judge to have given directions as to the service of fresh hearing notices.

When the issues were raised he ought to have conducted an enquiry and resolved the matter.

The failure to direct that hearing notices be served on the defendant prior to the hearing on the 21st of June 2005, in my view amounted to a breach of the audi alteram partem rule.

In **Rex Vrs. Appeal Committee of London Quarters Sessions Ex-parte Rossi [1956]1 AER 670 at 674** Denning LJ as he then was observed:

"It is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him appear and defend them. The Common Law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes an order against him."

It is my considered view that in the absence of any examination of the complaint of non service the Court lacked jurisdiction to proceed against the defendant and would therefore allow the appeal on that limb.

With regard to the 2nd ground – i.e. that the learned judge erred in law and in fact in concluding that the defendant was given a hearing on the motion for appointment of an auditor, I must say that I have, in this judgment, attempted to demonstrate that the learned judge did indeed err in the preceding paragraphs in concluding that the defendant was given a hearing.

It is evident that the motion was fixed for hearing on the 8th of June 2005; since on the face of the record no hearing took place on the 8th June 2005; but rather on the 20th of June 2005 when both the defendant and his their counsel were absent with no notice to them of the adjournment, it cannot be said that the defendant and his counsel were aware

that proceedings originally fixed for the 8th of June 2005 had been adjourned to the 20th of June 2005. If there was no evidence on record that they were made aware of the adjournment; they cannot be said to have deliberately stayed away from court.

Accordingly the appeal succeeds on this ground as well.

As to whether the ruling was against the weight of evidence it is settled as per **Boateng Vrs. Boateng [1987-88] 2 GLR 91** and a host of other authorities that when an appellant contends that a judgment is against the weight of evidence, he assumes the burden of showing from the evidence that its is so. Indeed in **Tuakwa Vrs. Bosom [2001-2002] SC GLR 61**, it was held that in such a case, it was incumbent upon the appellate court to analyse the entire record and satisfy itself upon the preponderance of the probabilities, that the conclusion were amply supported.

In the instant appeal, the record does not disclose that there was proof of service on the defendant; on the other hand there was ample proof that the defendant was not notified of the proceedings and therefore the evidence does not support the findings made by the learned judge on the issue.

I unhesitantly allow the appeal on the ground as well.

in conclusion, I would allow the appeal; set aside the orders made by the learned judge for the appointment of an auditor.

V. AKOTO-BAMFO [MRS.]
JUSTICE OF APPEAL

I agree.

H. ABBAN [MRS.]
JUSTICE OF APPEAL

I also agree.

P. BAFFOE BONNIE
JUSTICE OF APPEAL

COUNSEL - MR. ADJEI LARTEY FOR THE RESPONDENT.

MR. S.K. AMOAH FOR THE APPELLANT.

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