IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA- GHANA

CORAM: DATE-BAH, J.S.C (PRESIDING)
ANSAH, J.S.C.
ADINYIRA, J.S.C.
DOTSE, J.S.C.
B. BONNIE, J.S.C.

CIVIL APPEAL
NO. J4/26/2007
29TH APRIL, 2009

GEORGINA NAA AHINEY AMARTEY ... PLAINTIFF/APPELLANT/ RESPONDENT

-VRS-

MRS. WINIFRED IDDRISU .. DEFENDANT/RESPONDENT/APPELLANT

J U D G M E N T

DOTSE , J.S.C:

This is an appeal by the Defendant/Respondent /Appellant, hereinafter referred to as the Defendant, against the judgment of the Court of Appeal dated November 26, 2006 wherein judgment was given in favour of the Plaintiff/Appellant/Respondent, hereinafter referred to as the Plaintiff. The Plaintiff instituted action in the High Court, Accra on May 26, 2000 against the Defendant, claiming the following reliefs:-

1. A declaration of her title to a piece of land situate at Tesano in Accra in the Greater Accra, Region of the Republic of Ghana described as parcel *No. 376 Block 1, section 050* as delineated on Land Registry Map No. 004/050/88 in the Land Title Registry Victoriaborg, Accra and edged with pink colour on *plan No. 281/98* annexed to Land Certificate No. GA 13477 issued by the land Title Registry on January 22, 1999.

2. Damages for trespass committed by the defendant, her servants, workmen, agents and or privies on the said land.

3. An order of perpetual injunction restraining the defendant, her servants, workmen, agents and or privies from trespassing on the said land.

After service of the writ of summons and statement of claim on the Defendant, she entered appearance and filed her Defence personally.

Thereafter she engaged the services of Counsel, James Ahenkora Esq. who subsequently filed **NOTICE OF APPOINTMENT** of Solicitor on her behalf and has remained her Solicitor to date.

Learned Counsel for the Plaintiff filed a reply to which Counsel for the Defendant filed objections to the following effect:-

1. That the Plaintiff had used the reply to plead new matters which the Defendant would ordinarily not have the opportunity to react to because of the stage at which it had been introduced in the reply, which is the last pleading before summons for Directions.

2. The Defendant argued that the offending pleadings be removed from the Reply and instead form part of amendment so that the Defendant can also reply to same by filing an amended Defence.

The objections raised by Counsel for Defendant therefore sought to introduce amendments by the Plaintiff to enable the defendant also amend her Statement of Defence. Reference pages 20 and 21 of the appeal record.

From the appeal record, it is clear that both Counsel for the parties briefly argued this case on the objections raised by learned Counsel for the Defendant.

Thereafter, the learned trial Judge at the time Ofoe J as he then was, adjourned the suit to the 9th day of November, 2000 for Ruling. See page 23 of the appeal record.

We have perused the entire record of appeal spanning some 444 pages but there is no record of any such Ruling. We have also requested for the original case docket

from the Registry of the Supreme Court for perusal. We have not been able to get any assistance from that either, as there is a complete blank on what happened on November 9, 2000 the date the Ruling was supposed to have been given.

Despite the absence of this Ruling in the appeal record, there is a process that had been filed on December 18, 2000 by the Defendant titled, "***FURTHER DEFENCE TO REPLY AND COUNTER CLAIM"*** *– Pages 30 – 32 of the appeal record.*

A study of the appeal record indicates that the Plaintiff changed her Counsel shortly after the filing of the above process in rapid succession.

One of the plaintiff's Counsel filed an application to wholly discontinue the Plaintiff's suit. As a result, the court, this time presided over by Georgina Kusi-Appouh J, as she then was, on June 29, 2001 granted the Plaintiffs application in the following terms:-

> ***" The suit is wholly discontinued with liberty to apply, the injunction and counterclaim should proceed, till then, both parties, agents etc. are hereby restrained from dealing in anyway (sic) the property the subject matter suit is adjourned to July 6, 2001."***

After the discontinuance of the Plaintiffs suit, the case proceeded apace in rapid succession as follows:-

1. The Defendants application for interlocutory injunction which was pending at the time of the discontinuance was granted.

2. Learned Counsel for the Plaintiff Mr. F. K. Quartey then filed a search to determine the legitimacy of the process titled "Further Defence to Reply and Counterclaim".

3. The search result indicated that ***"there was no evidence on the docket concerning the grant of leave to file the "Further Defence to Reply and Counterclaim".***

4. With this search result, learned Counsel for the Defendant filed a motion before the court seeking to strike out the defendants' pleading i.e." Further

Defence to Reply and Counterclaim. ***The basis of the motion was that the said pleading was alien to the rules of court and leave had not been granted before same was filed.***

5. The application to strike out this offending pleading was opposed by Counsel for Defendant.

6. On December 4, 2001 Kusi-Appouh J, as she then was gave a ruling in the matter in which she decided that, ***"the process filed on December 18 was sanctioned by "court otherwise it could not have been filed or better still the first two Counsels for the Plaintiff would have objected to it".***

The learned trial Judge as she then was further invoked *Order 70 rule 1* of the *High Court Civil Procedure Rules, 1954, LN 140A* (which was then applicable) to cure whatever defect was apparent therein

7. Learned Counsel for the Plaintiff did not appeal against this Ruling but instead participated in the trial, filed a defence to the said offending process. Some proceedings then took place before Ebiasa J, as he then was in respect of the Defendants counterclaim.

8. Further proceedings on the counterclaim were held before Agnes Dordzie J, and yet again Counsel for the Plaintiff changed hands with Mr. Charles Tettey taking over from Mr. Quartey.

9. After PWI and PW2 had all testified, the case went before Cecilia Sowah J, and with the consent of the parties, the proceedings so far held in the matter were adopted. See *page 168* for order of adoption of proceedings. As a result, Cecilia Sowah J, on June 8, 2004 made the following orders:-

> ***"The proceedings are hereby adopted as proceedings in this suit."***

10. The trial then proceeded before Cecilia Sowah J, who delivered judgment on February 3, 2005 and gave judgment in favour of the Defendant upon her counterclaim, the Plaintiffs case having been discontinued.

11. Aggrieved and dissatisfied with the decision of Cecilia Sowah J, in the case, the Plaintiff successfully appealed against it to the Court of Appeal. The Court of Appeal accordingly allowed the appeal on the grounds that the process filed on December 18, 2000 as "FURTHER DEFENCE TO REPLY AND COUNTERCLAIM "was filed without leave.

12. The appeal to this court has been filed by the Defendant against the Court of Appeal decision with the following as the grounds of appeal:

    i. In view of the decision which was given by Justice Kusi Appouh J as she then was on December 4, 2001 to the effect that the process termed "FURTHER DEFENCE TO REPLY AND COUNTERCLAIM was properly before the court because it was filed with leave of the court, the Court of Appeal erred in law in nullifying that process on the ground that it was filed without leave of the court below. When that issue had become res judicata by reason of the decision of Kusi Appouh J.

    ii. In view of the fact that the process was said by counsel who filed it to have been filed in pursuance of the leave granted by Ofoe J, when he ruled on November 9, 2000 on the objection by that Counsel to certain portions of the reply which had been filed by the Plaintiff, the Court of Appeal was wrong in castigating the process as filed without leave **when it did not see or read Ofoe J's ruling.**

    iii. In view of the fact after Kusi-Appouh had held that the process was not filed without (sic) of the court the Plaintiff accepted that decision and filed a defence to the counterclaim contained in the process, a summons for further directions was filed and taken in respect of the counterclaim before the counter claim went to trial. The Court of

Appeal erred in striking out the process and nullifying the entire trial of the counterclaim.

iv. The Court of Appeal in holding that if indeed the process was filed without leave, it created an irregularity by non-compliance with the rules which was cured by the failure of Counsel then acting for the Plaintiff to object when that process was served on him and Counsel who immediately followed him for the Plaintiff also did not object.

v. The Court of Appeal in failing to appreciate the import of what Kusi-Appouh J said when she said that Peter Adjetey with all his experience did not object to that process when it was served on him.

From these grounds of appeal, only one issue stands out clear for determination, and that is:

Whether the process filed by the Defendant on December 18, 2000 termed as "FURTHER DEFENCE TO REPLY AND COUNTERCLAIM" is a process allowed by and under the Rules of Procedure prevailing at the material time and should be countenanced by the Court.

The formulation of the above issue is critical because, so far as we are concerned, whether or not leave was granted by the Court before the process was filed is immaterial. If the process is not warranted by the rules of procedure of the High Court, grant of leave cannot validate it.

The position is further worsened by the fact that there is no record of the said Ruling purported to have been delivered or was to be delivered by the Court on November 9, 2000. What must be noted is that, the High Court, just like all the other Superior Courts is a Court of record. What this means is that there must be a record of everything that is done and or directed by the Court. This will therefore encompass not only all processes filed before the court, but also a record of arguments, submissions, evidence led by the parties and witnesses and the decisions, or orders and judgments of the Courts. Whenever the record of any such process or event

that is deemed to have taken place in the court is not available to be referred to, then the record of such an event cannot be accepted as having taken place.

We are therefore surprised that learned Counsel for the Defendant is inviting this court to draw inferences from certain acts of omission and commission of Counsel, the parties and of the Court itself to conclude that leave was infact granted by the court before the process was filed.

At *page 105* of the appeal record, the learned trial Judge Kusi Appouh J as she then was, delivered herself thus in the ruling when an objection was taken to the offending process of court termed "FURTHER DEFENCE TO REPLY AND COUNTERCLAIM" as follows:-

> ***"It is not disputed that the present Counsel is the 3rd Counsel for the Plaintiff herein. It seems a bit strange to me that Mr. Ala Adjetey would have kept quiet for a process to be filed without a leave of the court."***

Continuing further, the learned Judge held that,

> ***"I therefore hold that the process filed on December 18 was sanctioned by the Court otherwise it could not have been filed or better still the first two Counsel for the Plaintiff would have objected to it"***

The fact that Counsel for the Plaintiff at the material time, Mr. Peter Ala Adjetey is a competent and seasoned Legal Practitioner does not mean that whatever he does or condones in the court is the correct practice that must be followed and accepted.

A Court of law cannot, and must not be seen to have abdicated its role in adjudicating disputes according to well established rules of civil procedure by making references to experience and competence of Counsel as a guide. This is unacceptable.

Another point raised by learned Counsel for the Defendant, subsumed under the issue formulated above is the submission that having failed to appeal against the

interlocutory Ruling on the validity of the offending court process, the Plaintiff is estopped from re-opening the matter being a decision on a question of fact.

The law is certain that, appellate courts are slow in setting aside or departing from the findings of fact made by trial courts.

As a matter of fact, an appellate court will depart from a finding of fact if the said finding is perverse or is not warranted or supported by the record of appeal. See cases like ***Achoro vrs. Akanfela [1996-97] SCGLR 207*** where the Supreme Court per Acquah JSC stated the principle in part as follows:-

> ***"In an appeal against findings of facts to a second appellate court.... this court would not interfere with the concurrent findings of the two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice was apparent in the way in which the lower tribunals had dealt with the facts"***

See also cases like ***Thomas vrs. Thomas [1947]A.E.R. 582., Akufo Addo vrs. Cathline [1992] IGLR 377per Osei Hwere JSC*** and ***Ntiri & ANR v. Essien & ANR [2001-2002] SCGLR 451.***

In the instant appeal, we are of the considered opinion that there is sufficient evidence on record which the first appellate Court, the Court of Appeal could have used to come to the conclusion they came to. That is by setting aside the decision of the trial courts in this case.

What must be noted is that, an appellate court must feel emboldened to interfere whenever a finding of fact by the trial court is so perverse that it cannot be supported having regard to the evidence on record.

In the instant appeal, care must be taken to ensure that the Court does not condone a nullity. The question which one has to ask and answer is whether the process filed on December 18, 2000 termed "FURTHER DEFENCE TO REPLY AND COUNTERCLAIM" is warranted by the prevailing rules of civil procedure at the time?

If the answer is NO then it means that any process embarked upon after that void process is itself a nullity and cannot stand the test of time.

Under the circumstances, the answer must be No. this is because, civil Procedure in the High Court at all times material to the cause of this action was regulated by the High Court, Civil Procedure Rules, (1954) LN 140A.

As we have earlier on stated in this judgment, there is no process known by the term "FURTHER DEFENCE TO REPLY AND COUNTERCLAIM" under the Civil Procedure Rules.

A perusal of the High Court, Civil Procedure Rules (1954) LN 140 A reveals that, whilst the following processes have been adequately provided for under the then prevailing rules there is absolutely no provision for the process "FURTHER DEFENCE TO REPLY AND COUNTERCLAIM":

1. **Order 2 for Writ of Summons**
2. **Order 12 Entry of Appearance**
3. **Order 20 Statement of claim**
4. **Order 21 Defence & Counterclaim**
5. **Order 23 Reply**
6. **Order 30 Summons for Directions**

We are therefore of the view that once the Civil Procedure Rules in operation at the time of the instant suit in the High Court do not permit and authorize the filing of the above process, our understanding is that, no Court could have validly granted leave to legitimize the filing of the said process. Since the process is alien and unknown to our rules of Civil Procedure, our conclusion is that even if the ruling purporting to have granted leave to file the process had been on record, this Court would still

have struck out the said process as a nullity and not warranted by the rules of Court.

The processes a Court can grant leave to file are those processes that are legitimately provided for under the prevailing rules of Civil Procedure. It is when a party is unable for one reason or the other to file the said legitimate process within time provided under the rules that leave is granted extending time.

A Court may also grant leave to a party to file a process in order to do substantial justice depending upon the circumstances of each case.

There is absolutely no justification to grant leave for the filing of the said process in this case. The Rules do not permit Courts to invent new Rules of Procedure to take care of situations like happened in this case.

Since the procedure adopted in the trial Court is not warranted by any rule of Civil Procedure and is definitely unknown in our civil procedure nomenclature, no Court can give legitimacy by granting leave to validate it. Under the principle of law enunciated by the Supreme Court in *Mosi vrs BAGYIHA [1963] 1 GLR 337* the said conduct amounts to a nullity and must be set aside.

This brings to the fore the often cited decision of ***Lord Denning in Macfoy vrs. UAC [1961]3 A. E. R. 11 69PC*** wherein he stated in unequivocal language that ***"you cannot put something on nothing and expect it to stay there. It will collapse"***

See also ***Mosi vrs BAGYIHA, [1963] I GLR 337*** where *Akuffo –Addo JSC* expanded this principle by stating as follows:-

> ***"The law as I have always understood it is that where a court or a Judge gives a judgment or makes an order which it has no jurisdiction to give or make or which is irregular because <u>it is not warranted by any enactment or rule of procedure, such a judgment or order is void</u> and the court has an inherent jurisdiction, either suo***

motu or on the application of the party affected, to set aside the judgment or the order. The law does not limit the exercise of this inherent jurisdiction, as it does in the case of review to the Judge who actually gave the Judgment or made the order"

Once it has been settled that under the *High Court, Civil Procedure Rules 1954 LN 140A*, which was the applicable Civil Procedure Rules in application at the time, the process filed on December 18, 2000 headed "Further Defence to Reply and Counterclaim" is unknown to the Rules of Civil Procedure, it means the said process is void ab initio and all processes emanating thereafter or based upon the said process are a nullity.

Similarly, we cannot but agree with the Court of Appeal that *Order 70* of the repealed rules of Civil Procedure cannot be used to cure any voidness therein contained. This is because once the entire process is void, it lacks legitimacy and no rule of practice can bring it back to life.

Once the procedural lapses are so fundamental, they go to the root of the case and for those reasons, the appeal must fail.

For the above reasons, we will dismiss the appeal herein filed against the judgment of the Court of Appeal dated November 24, 2006. By this judgment, the Court of Appeal judgment of even date is hereby affirmed .

The appeal is accordingly dismissed

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

I agree

S. K. DATE-BAH (DR)
(JUSTICE OF THE SUPREME COURT)

I agree

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

I agree

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

I agree

P. BAFFOE-BONNIE
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