IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- 2011

CORAM: ATUGUBA, JSC (PRESIDING)
DR. DATE-BAH, JSC
ANSAH, JSC
BONNIE, JSC
AKOTO-BAMFO, JSC

CIVIL APPEAL
J/4 / 28/ 2011

23RD NOVEMBER, 2011

1. YAW AGYEI
2. AGNES KORANKYE
3. RITA GYAMFUWAA ----- APPELLANTS
4. FRED ANSONG DWAMENA

VRS.

MIKE SIMILAO --- RESPONDENT

J U D G M E N T

ANSAH JSC.

The plaintiffs issued a writ of summons before the High Court, Accra, but the defendant entered a conditional appearance to it; subsequently, the plaintiffs filed an application for an order of interlocutory injunction on 12-7-2007 to be moved on 30-7-2007. As was to be expected, the application was opposed by the defendant who tendered some exhibits.
The application which was put before the court presided over by Ofori-Attah J, was adjourned to 1-11-07 for hearing.
When the application came before the court presided over by Dzakpasu J, he dismissed it on 1-11-2007.

When the plaintiffs appealed against the decision of the High Court to the Court of Appeal it dismissed the appeal resulting in a further appeal to this court. The plaintiffs are the appellants herein and the defendant the respondent.

The grounds of appeal were that:
"i, The judgment is against the judgment weight of evidence.

ii The Court of Appeal erred by holding that the High Court was seized with power to deal with the application for injunction although it conceded that the case was not on the list of the court below on 1-11-07; neither had it been placed before the court.

iii. The court further erred by restraining itself from interfering with the decision of the High Court which obviously was a non-judicial act.

iv. The Honorable Court of Appeal further erred when it said that from the record, the 1st plaintiff was present at the hearing and therefore there could not have been a breach of natural justice.

v. The Court of Appeal grievously erred in failing to find that on the totality of the evidence, even if the High Court had the jurisdiction in the matter, (which is denied), it would have been proper, just and convenient for the court to have granted Plaintiffs' application for injunction instead of dismissing same, without any reason whatsoever.

vi The costs of GH¢300.00 awarded against plaintiff/Appellant/Appellants was excessive and unwarranted."

A consideration of the statement of case by the appellant showed that the crux of the submissions by the appellant in support of grounds one and two of appeal which were argued together, was that the High Court destroyed whatever

jurisdiction it had to hear the motion when it had not been listed before the court, (court 15, *coram*: Dzakpasu J) for hearing as shown on the cause list for the court for that day. This was tendered in evidence as 'A', in support of an application to set aside the order of the court dismissing appellants' notice for injunction. The issue is could that be of any import or effect on the decision by the court?

The appellant submitted that Order 79 rule 2(b) of the High Court Civil Procedure Rules, 1993, CI 47, provided that:

> "Motions shall be taken in the order in which they stand in the motion list."

Counsel construed this rule to mean that as the language used was mandatory, there ought to be a cause list for the day for a particular day before the court would be seized with jurisdiction to hear a motion; but the case was never on the motion list for 1-11-07.

When the appellant raised this issue before Court of Appeal, it did not receive any favorable response from the court. The court said in its unanimous judgment read by Gyaesayor JA,

"Curiously, the matter was heard before Justice Dzakpasu on the 1st November, 2007 when the cause list for the day did not indicate that the matter was to be heard by another judge different from the judge who made the order for adjournment."

Notwithstanding this admission by the Court, it went on to trace the antecedents of the application for injunction and the relevant rules of court and held that:

> "in this case where the parties were present, and the statements of cases filed, the court was seized with power to deal with the application on the basis of papers filed and this cannot be said to have been a breach of rules of natural justice…. Once the parties knew the forum and made themselves available for the hearing its absence from the cause list cannot be the basis for a reversal of the orders made by the court. The plaintiff was aware of the date and forum and this explains why he was present contrary to the submission that they could not locate the court room."

The Court of Appeal could not have been more right for after all, a typical weekly cause list is nothing more than a notice of information on

i) the list of cases for hearing on a particular day,
ii) the particular court where the hearing is going to take place,
iii) the time for the hearing, and
iv) the judge who is going to do the hearing.

A cause list when published is a notice to the all parties of the listing before the court of any cause or matter mentioned in the list.

The dominant issue in this appeal is does the absence from a cause list of a cause or matter for a particular day render the proceedings of the day void? The Court of Appeal did not think so and I agree with it.

As stated by me, the importance of a cause list is to give notice to the parties of the fact that a particular matter was coming on for hearing at a particular court and the time for hearing by a particular judge. Whether or not the appellant knew of these facts notwithstanding the absence of a suit on the cause list for the week, was a matter of fact determined by all the circumstances surrounding the particular case.

A perusal of the record of appeal shows that the second plaintiff, Agnes Korankye, deposed in paragraphs 5 and 6 of an affidavit prepared with the consent and authority of the 1st and 3rd plaintiffs, the other plaintiffs in the suit, and filed on 25-7-2000, (at page 94), that;

"5. That on the next adjourned date of 4/09/07, the vacation judge adjourned hearing until 1st November 2007, as the record was incomplete, per the advice by Counsel.

6. That on 1/11/, the suit was not assigned to nor listed before any court for hearing.

7 That however learnt (sic) from the Registry of the Court that a clerk had sent the docket to court 15, without any lawful authority; we therefore made for the said Court but when we arrived there, His Lordship had purportedly disposed of our application."

The parties herein did not make any capital as a ground of appeal of how the matter left Ofori-Attah J's court and came to be put before Dzakpasu J. The record of proceedings showed that on 1-11-2007, the plaintiff and defendants were present before Dzakpasu J in respect of Suit No. BL472/2007.

These averments of the plaintiffs/appellants lent ample support to the view of the Court of Appeal that:

> "Once the parties knew the forum and made themselves available for the hearing, its absence from the cause list cannot be the basis for a reversal of the orders made by the court. The plaintiff was aware of the date and forum and this explains why he was present contrary to the submission that they could not locate the court room….The main ground on which the appeal is built in our view is untenable and should not be supported by this court. Other grounds of appeal flow from this ground and do not contain any merit and must also be dismissed."

It was made abundantly clear that Ofori-Attah J was only a vacation judge when he sat to adjourn the matter to 1- 11-07 for hearing; which would be in term time.
The Court held further that besides that the parties were present, the respective statements of case had been filed and were before the court and thus, the court was seized of the matter and could hear it in the absence of counsel.
The Court guided itself by considering Order 25 rule 1, dealing with and prescribing the procedure for an application for an order of injunction. Sub rule 3 required an applicant to "attach to the Motion paper and supporting affidavit, a Statement of Case setting out fully arguments, including all relevant authorities to be relied on…..".

A respondent who desires to oppose the application shall file an affidavit in opposition as well as a Statement of Case containing full arguments and the legal authorities to be relied on. The rules of court provided that:

> "(6) The application may be considered on the basis of the papers filed, and the court may direct, *where necessary,* the lawyer address it on specific points of law and facts" (e.s)

The above provisions of Order 25 having been complied with, the trial court was in a position to deal with the motion for injunction as it did. The application may be heard or considered upon viva voce evidence or simply by considering the merits upon the strength or otherwise of the respective affidavits or papers of the parties as filed on the record, with the court directing addresses by counsel but then on specific points of law or, and facts; the court could do this and still be held to have heard the motion.

To clinch the deal and hit the nail right on the head, whether or not to hear and decide the motion, whether or not it was on the cause list published for the day and as appearing in Exhibit 'A', was a matter of discretion by the court. Upon scrutiny, that was the cause list from Monday the 29th day of October 2007, to the 2nd day of November, 2007, but did not state *'inter alia'* that the hearing was to be before Dzapkasu J. The first and second plaintiffs and counsel for the plaintiff applicants were present in court on 4th September 2007 when Ofori-Attah J adjourned the application to 1-11-07, for hearing; according to the notes in the record of appeal. On that day, the plaintiff was present but without their counsel. In the circumstances, that the motion was not listed in Exhibit 'A' was not fatal for the parties knew well beforehand and as far back as 4 September 2007, that it would come up for hearing that day. Listing a motion for hearing for a particular day was the duty of the Registrar and the absence from the cause list of a motion could not reasonably preclude a court from hearing it, provided the parties or their counsel had prior notice of hearing of the motion that day.

In other words a cause list containing a suit for hearing on a particular day by a court is desirable but not a sine qua non so that its absence or non compliance should render the proceedings null and void. That was especially so where the parties were made aware of when the hearing would come on. In similar circumstances where there had been no publication in the Gazette so as to amount to an appeal having been entered and as required by the rules, the Court of Appeal held as per the head-note (2) of the report that:
"The publication of the cause list in the Gazette is not a *sine qua non* for the assumption of jurisdiction by Court of Appeal in considering applications pending the hearing of the substantive appeals. The publication of the cause list in the Gazette imposes a mandatory statutory duty on the registrar, but the absence of the publication does not operate as a hindrance in the path of the court. The court has a discretionary power to dispense with the Gazette notice'",
see Shardey v Adamtey and Shardey v Adamtey and another (Consolidated) [1972] 2 GLR 380, CA cited by counsel for the respondent herein.
Judicial notice may be taken of the fact that the cause list in Exhibit 'A' was notice for the hearing of cases from Monday to Friday, in this case, from Monday, the 29th day of October 2007 to Friday the 2nd day of November, 2007, before Dzakpasu J, sitting at court 15. It was reasonable to hold that an applicant who had foreknowledge of the hearing of his motion that day should be proactive enough to search from the Registrar where his motion would be heard if he found it was not listed on the day it had been adjourned to earlier. If he did not, then he exhibited a high degree of inexcusable indolence and should be ready to absorb all consequences flowing therefrom.

At any rate, the record has it that on 1-11-07, the plaintiff was present in court 15 before Dzapkasu J. That fact and the record, having not been falsified by the appellants, constituted an admission which bound the appellants herein.

This being an interlocutory application, its grant or refusal, is entirely within the discretion of the court, and in the absence of a strong showing that the judge overlooked or allowed his discretion to be interfered with by irrelevant considerations whilst ignoring substantial ones, an appellate court will be loath to interfere with the exercise of the discretion. In Ballmoos v Mensah [1984-86] 1 GLR 724, CA, the court held as per Osei Hwere JA, that:
"It was observed by the predecessor of this court in Crentsil v Crentsil [1962] 2 GLR 171 at 175, SC that:
'as to appeals from the exercise of the courts discretion, it is a rule of law deep rooted and well established that the Court of Appeal will not interfere with the exercise of the courts discretion save in exceptional circumstances.' "

Some of the exceptional circumstances were cited in Blunt v Blunt [1943] AC 517 at 518; 2 All ER 76 to be that:

"An appeal against the exercise of the courts discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of facts in that it did in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account, but the appeal is not from the discretion of the court to the discretion of the appellate tribunal."

The appellants did not succeed in our view, in showing the trial judge committed any of these errors or that the Court of Appeal wrongly affirmed the judgment of the trial court.
It is for these reasons that we agree with and affirm the judgment of the Court of Appeal and dismiss the appeal.

J. ANSAH
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

DR. S. K. DATE BAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

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