IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- GHANA , A.D.2014

CORAM: ATUGUBA, J.S.C. (PRESIDING)
ANSAH, J.S.C.
ADINYIRA (MRS), J.S.C.
OWUSU (MS), J.S.C.
AKAMBA, J.S.C.

CIVIL APPEAL
NO.J4/27/2011

7TH MAY 2014

KWAMINA SIISI .... **PLAINTIFF/RESPONDENT**
SUING FOR AND ON BEHALF **/APPELLANT**
OF THE PITSIR KWAAT ANONA
FAMILY OF UPPER INCHABAN
H/No. 14A/4 INCHABAN

VRS

PROPHET J. K. BOATENG .... **DEFENDANT**
APEMANYIM VIA SHAMA

JOHN KWESI WILSON
APEMANYIM VIA SHAMA .... **CO-DEFENDANT/APPELLANT RESPONDENT**

JUDGMENT

ATUGUBA J.S.C.

The facts of this case are in a small compass. It is unnecessary to go over the history of this action in its entirety. The only matter for the decision of this court is the appeal before it. The appeal is against the allowance of the co-defendant's counterclaim by the court of Appeal, thereby reversing its dismissal by the trial High Court.

The co-defendant John Kwesi Wilson had counterclaimed as stated at p.289 of the record of appeal as follows:

"a. A declaration that the Co-defendant is the head of the Pitsir Kwaata Anona family of Upper Inchaban.

b. Perpetual Injunction restraining the Plaintiff from acting or holding himself out as the head of the Pitsir Kwaata Anona family of Upper Inchaben."

The grounds of appeal as per the notice of appeal are as follows:

"a) That the judgement is against the weight of evidence.

b) That the Learned Justices of the Court of Appeal erred by holding that the Co-Defendant was the Head of the Pitsir Kwaata Anona Family of Inchaban when as matter of fact the said John Kwesi Wilson was substituted for Kofi Mensah (deceased) for the conduct of the cause or matter.

c) The Learned Justices of the Court of Appeal erred by holding that the Defendant and Co-Defendant's family never seceded from the Plaintiff's Family in the light of overwhelming evidence that the Plaintiff's family and the Defendant and Co-Defendant's family stopped doing things in common as required of 'Family' as a united entity.

d) That the Learned Justices of the Court of Appeal erred by failing to appreciate the legal effects of Exhibits "KS1" and "KS2" being decisions of a Superior Court as against Exhibit "1" a decision of a Lower Court.

e) That the learned Justices of the Court of Appeal erred by holding that Kofi Mensah's successor the Co-defendant was and still remains the head of the Pitsir Kwaata Anona Family.

f) That the Court of Appeal erred by ignoring the overwhelming evidence to the fact that the Co-Defendant seceded from the said Pitsir Kwaata Anoma family.

g) Further grounds of Appeal may be filed."

It must be emphasised that though the appellant's submissions also touch and concern the grant of part of the Pitsir Kwaata family land to the Defendant,the only issue this court can competently deal with is the co-defendant's counterclaim aforesaid since the appeal before this court stems from the allowance of the co-defendant's appeal to the Court of Appeal which was based solely on the dismissal of the said co-defendant's counterclaim by the trial judge, see p. 34 of the record of appeal.

We think that the grounds of appeal can be dealt with compositely.

The trial judge was satisfied on the evidence adduced before him that there had indeed been a split in the Pitsir Kwaata Anona Family of Uper Inchaban . He however felt constrained to decide in favour of the defendants because in the case of Suit No. 180/2001 *Ebusuapanyin Kofi Mensah (Head of the Pitsir Kwata Anona Family of Inchaban) Inchaban. vrs. Kojo Yankson and Kwamena Siisi* the District Court, Sekondi gave judgment in favour of the plaintiff, holding that the plaintiff had neither vacated his office as the head of the Pitsir Kwaata Anona Family nor been removed therefrom.

As aforesaid there is no doubt that there has been a split in the Pitsir Kwaata Anona family of Upper Inchaban. Even in the Sekondi District Court judgment in *Ebusuapanyin Kofi Mensah (Head of the Pitsir Kwata Anona Family of Inchaban)*

Inchaban. Vrs. Kojo Yankson and Kwamena Siisi dated 17/6/2003 the District Magistrate stated thus:

"…. the family, *as agreed to by all parties is split into two factions*."

The trial judge in this case also stated thus: "Plaintiff spent a good deal of energy in this case in his effort to establish that defendant and a minority group of the family including even Abusuapanyin Kofi Mensah (now deceased) dissociated themselves from the family of Pitsir Kwaata Anona family. It appears to me that plaintiff succeeded in his effort. That is to say, *I am inclined to accept as proved that a faction of the family including defendant, co-defendant and their group announced renunciation of the family and the renunciation was accepted by the majority group and that libation was poured as required by customary law and that all these were publicly done thus* satisfying the customary requirement of publication as stated in the case of *Hugo vrs Djangmah* (1997-98) 1 GLR 300. However, this finding is of no significance since it cannot overrule the decision of the District Court.", see p. 226 of the record of appeal.

In the circumstances it is not necessary to refer in this judgment to the copious evidence on record which clearly establishes a split in the Pitsir Kwaata Anona Family as far back as 1999.

The Issue of Res Judicata

As already stated the trial judge was constrained to grant the co-defendant respondent's counterclaim because of the aforementioned Sekondi District Court judgment. However the courts apply precedents in a manner that advances the ends of justice where possible. The courts had earlier established the principle that where estoppel *per rem judicatam* has not been expressly pleaded the judgment in question operates as part

of the pieces of evidence to be considered in determining the case under trial, see *Nyan v Amihere* (1964) GLR 162 S.C. This principle is therein stated in holding (1) of the Headnote thus:

> "(1) the evidence adduced at the trial showed that (a) the series of litigation between the appellant's stool and the respondents' stool established the appellant's stool as the owner of the land in dispute and (b) that the caretaker of the respondents' stool admitted, during the 1956 litigation, the stool of the appellant's claim to the boundary of the land in dispute. *If estoppels had been pleaded, these pieces of evidence would have operated against the respondents. In the absence of such a plea, however, they became available as pieces of evidence in support of the appellant's case*. *Akoto III v. Agyeman I* [1962] 1 G.L.R. 524, S.C., *Okai II v. Ayikai II* (1946) 12 W.A.C.A. 31 and *Vooght v. Winch* (1819) 2 B. & Ald. 662; 106 E.R. 507 cited."

However in a drive to ensure substantial justice the rigour of this principle has been watered down by this court in *Sasu v. Amua-Sekyi and Another* [2003-2004] 2 SCGLR 742 as per holding (1) of the Headnote therein, thus:

> "(1) it *was settled rule of pleading that the defence of estoppel per rem judicatam should be specifically pleaded where there were pleadings; and where there were no pleadings, it must be raised by word of mouth at the earliest possible stage of the proceedings*. And *the failure to plead estoppel per rem judicatam* as required under Order 19, r 16 of the High Court (Civil Procedure) Rules, 1954 (LN 140A), *could be cured by evidence on record such as would make the plea obvious. Where on the facts of the case, the plea of res judicata was obvious, the court would take notice of it since the party raising the objection would beheld to have had knowledge of it and would not be surprised by it*. Thus in the instant case, where the appellant had sued both the first and second respondents together in the same matter, the fact that the second respondent, unlike the first respondent, had pleaded *res judicata* in respect of the 1995 action, had direct impact and affected the whole case. And the appellant had been well aware of the existence of *res judicata* as held by the High Court (per Apaloo J) in his judgement in respect of the 1995 action because the appellant, had himself, tendered in the instant case, that judgment in evidence. Furthermore, the Court of Appeal had, in the 1987 judgement, affirmed that fraud, as alleged by the then defendant (the appellant in the instant case), had never been proved. And *even thought the appellant had taken number of actions based on the same facts rather than resorting to an*

appeal, that did not prevent the respondents from relying on res judicata Dedeke v Williams (1944) 10 WACA 164 per Brooke J at 166 and *Agyako v Nazir Zok* (1944) 10 WACA 277 per Kingdom CJ at 280 cited."

It must never be forgotten that the principle of estoppel ***per rem judicatam*** has never been stated in absolute terms, for its formulation has often been made subject to the requirements of justice. And every rule, statutory or at common law has an object to be attained thereby, which should never be lost sight of.

The object of the principle of *res judicata* is *interest reipublicae ut sit finis litium.* But where the party who could curtail the *litium* by insisting on estoppel *per rem judicatam,*` either by failing to have that issue set down and determined distinctly ahead of the trial on the merits or to object to the adduction of further evidence on the issue, suffers contrary and fuller evidence to be led thereon and thereby allowing a relitigation of the *res judicata,* the trial court cannot discount the further evidence and restrict itself to the *res judicata*, see by analogy *Scanship (Gh) Ltd v. Effasco Ltd* (2001-2002) SCGLR 70. At p. 79 Atuguba JSC delivering the judgment of this court held as follows:

"It was also submitted that the courts below erred in awarding to the plaintiffs damages higher than warranted by the contractual limitation as to liability as per the Hague Rules. In any event, *the evidence of the higher damages for breach of contract awarded in favour of the plaintiffs which might have been inadmissible as irrelevant under section 5(1) of the Evidence Decree, 1975 was let in without objection and was rightly considered by the courts below*: see *Edward Nassar Co Ltd v. McVroom* [1996-97] SCLR 468, holding (1) of the headnote which states as follows:

"...if a party failed (as required by the Evidence Decree, 1975 (NRCD 323) to object to the admission of evidence which in his view, ought not to be led, he would be precluded by section 5(1) of the Decree to complain on appeal or review about the admission of that evidence unless the admission had occasioned a substantial miscarriage of justice. Factors helping to

> determine whether or not a substantial miscarriage of justice had occurred have been set out in section 5(2). Consequently, *where evidence in respect of an unpleaded fact had been led without objection, the trial court was bound to consider that evidence in the overall assessment of the merits of the case, unless that evidence was inadmissible per se.* An appeal or a review against the judgment might succeed only where it was established that the admission had occasioned a substantial miscarriage of justice. *In the instant case, the evidence* on the building permit, certificate of occupancy and the age of the house *did not constitute inadmissible evidence per se. Since no objection to them was taken at the trial, the trial judge and the Court of Appeal had rightly considered them as part of the evidence in the overall assessment of the case;* and the appellant had failed in establishing that the admission of that evidence had occasioned a substantial miscarriage of justice.""

For the foregoing reasons the courts below erred in law in feeling hardbound by the judgment of the Sekondi District Court in the face of the further and unobjected evidence to the contrary. All the relevant evidence led in the action caught to have been considered and if that were done the co-defendant's counterclaim was unsustainable. The fact of secession by the defendants from the Pitsir Kwaata Anona family as opposed to a mere split by way of disagreement on an issue, has clearly been established on the evidence in this case. Having seceded from the Pitsir Akwaata Anona family, neither he nor his predecessor Kofi Mensah could thereafter claim headship of that same family,as if no secession had occured.

We accordingly allow the appeal and dismiss the co-defendant's counterclaim.

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

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

(SGD) R. C. OWUSU (MS)
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