IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: ATUGUBA, J.S.C. (PRESIDING)
ANSAH, J.S.C.
BONNIE, J.S.C.
GBADEGBE, J.S.C.
AKOTO BAMFO (MRS), J.S.C.

CIVIL APPEAL
NO.J4/1/2013

7TH MAY 2014

NASSIRU ABDULAI BANDA .... PLAINTIFF/APPELLANT/ APPELLANT

VRS

COLONEL AYISI .... DEFENDANT/RESPONDENT/ RESPONDENT

JUDGMENT

GBADEGBE JSC:

On14 July 2008, an entity that goes by the name Khawaja Brothers Co Ltd purchased, so the plaintiff alleged, purchased one thousand bags of sugar from a companyin Accrathat was to be consigned to Kumasi. The purchaser initiallyapproached the plaintiff, an employee of a haulage company to undertake the contract of carriage but as they had no vehicles available, the

plaintiff arranged a vehicle belonging to the defendants to undertake the contract of carriage. According to the plaintiff, the terms of the carriage were agreed upon between the driver of the vehicle and the owner of the goods but unfortunately, the vehicle never discharged the goods at the agreed destination and all efforts to retrieve the goods failed, hence the action herein. The defendants strenuously contested the action by denying that there was any capacity in the plaintiff and also averred on the merits that by the practice prevailing in contract of carriage of goods, they were unanswerable for the loss.

On these facts, the plaintiff obtained judgment in the High Court, Kumasi. An appeal therefrom to the Court of Appeal by the defendants resulted in a reversal of the decision of the trial court from which the plaintiff lodged an appeal to us seeking a judicial correction. Although the submissions contained in the written briefs submitted to us by the parties are considerable, the point for our decision today is an extremely short one and although we have had the assistance of detailed arguments ranging over several pages, we hope we should not be thought disrespectful to those submissions if we find it possible to express our views in comparatively few words.

In our view, a careful consideration of the record of appeal and the submissions filed before us by the parties discloses that the question that we have to decide having regard to the pleadings and the evidence adduced at the trial is whether the plaintiff had the requisite capacity to mount an action that was based on the breach of a contract of carriage to which he was not a party. From the processes, it is quite plain that as the plaintiff did not claim to be either a party to the contract of carriage or had the interest of the owner of the goods assigned to him, he did not have the slightest interest.So stated, the principle on which this case turns, privity of contract being of ancient originhas long been settled without any conflict of authority and requires no reference to decided cases to sustain it.Accordingly on the proven facts,the decision of the learned trial judge that purported on the facts of this case to amend the title of the suit in the course of his judgment to enable the capacity of the plaintiff to

read “Nassiru Abdulai Banda (Agent) suing on behalf of himself and Khawaja Brothers Co Ltd”was without authority and must be avoided.

It is interesting to observe that although the learned trial judge agreed with the principle enunciated by the Court of Appeal in the case of**Ghana Rubber Estates Ltd v Criterion** [1984-86] 2 GLR 56, which was binding on him to the effect that no agent could maintain an action in his own name whether the principal was named or unnamed, he thought that he could go round the settled judicial position by the curiousamendment of the title by the court so motu, but that course of procedure on the facts was not open to him as the case of the plaintiff was thereby changed. In this respect, we observe straightaway that the learned justices of the Court of Appeal were right when they came to the position that on the evidence placed before the trial court, the plaintiff throughout the case was the agent of Zimbabwe Transport Company Limited and never established that he was the agent of the owners such as to have enabled the learned trial judge to purport to amend the title for the purposes of enabling the real issues in controversy between the parties to be determined.The amendment, we hasten to say had the effect of overreaching the defendant in view of the objection that they had taken to the capacity of the plaintiff, which point required to be ruled upon in the judgment. What transpired in the course of the judgment in relation to the amendment by the learned trial judge of the plaintiff’s capacity that was under challenge judge cannot be justified either under Order 1 rule 2 or Order 16 rule 7 of the High Court (Civil Procedure Rules) CI 47. The learned justices of the Court of Appeal in our thinking were on firm ground in observing at page 231 of the record of appeal in regard to the said amendment thus:

> **“But in so doing, the learned trial judge said that he was doing so in order to avoid a multiplicity of suits. This apparently was in reference to the mandate given to trial judges and many decided cases and distilled into a statutory obligation in Order 1 rule (2)**

of the High Court (Civil Procedure) rules, 2004 (CI 47). But as stated earlier, the issue of capacity is so fundamental to justice that it cannot be sacrificed on the altar of expediency or for the sake of avoiding multiplicity of suits. As pointed out by learned counsel for the appellant the issue of capacity was one of the issues on which the case was fought. The appellant maintained all along that the respondent did not have the capacity to institute the action……. Indeed, his counsel maintains that the respondent entered into the contract on his own steam. It was therefore palpably wrong for the learned trial judge to belatedly clothe the respondent with the capacity to sue on the basis that he wanted to avoid a multiplicity of suits. By so doing, the trial judge was unwittingly allowing the respondent to get away with the legal requirement that whoever institutes an action in a representative capacity has the burden to discharge, i.e. prove that at the time when he instituted the action he was clothed with capacity so to do."

If we are right in coming to this conclusion then the issue of capacity raised by the defendants was unanswerableand accordingly the amendment having been made wrongly, the case of the plaintiff was thereby ruptured and there was nothing that could be called in its aid with the result that it failed.

The above reasons are sufficient in our opinion to dispose of the appeal herein and we proceed to dismiss same.

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

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

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)
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