IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: AKOTO-BAMFO (MRS.), JSC (PRESIDING)
BENIN, JSC
APPAU, JSC
MARFUL-SAU, JSC
KOTEY, JSC

CIVIL APPEAL
NO. J4/22/2018

14TH FEBRUARY, 2019

1. KWADWO DANKWA
2. FRANCIS ADOM
3. KWAKU ADDAE
4. YAW BOATENG & 249 OTHERS ……. PLAINTIFFS/APPELLANTS/RESPONDENTS

VRS

ANGLOGOLD ASHANTI LTD …….. DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

AKOTO-BAMFO (MRS.), JSC:-

By a unanimous decision, the Court of Appeal allowed in part an appeal filed by the plaintiffs/appellants/respondents against the decision of the High Court entered in favour of the defendants/respondents/appellants. The latter registered their protest against the said decision by filing a Notice of Appeal consisting of these grounds namely:

Grounds of Appeal

1) The learned judges of the Court of Appeal erred in law when they reversed the decision of the High Court (Coram R.C. Azumah J) made on 21 March 2012 setting aside his own earlier order on 28 March 2011 granting the plaintiffs/appellants/respondents (hereinafter the "plaintiffs") leave to issue the writ herein outside the period of limitation.

2) The learned judges of the Court of Appeal erred in law when they held that the issue raised by the defendant's second motion to set aside the order of Azumah J made on 28 March 2011 granting the plaintiffs leave to issue the writ herein outside the period of limitation had already been determined by His Lordship Mahamadu J in the latter's ruling declining jurisdiction over the defendant's earlier motion to set aside the order made by Azumah J on 28 March 2011 granting the plaintiffs leave to issue the writ herein outside the period of limitation.

3) Other grounds of appeal to be filed upon receipt of a copy of the record of appeal.

Additional Ground of Appeal was subsequently filed. It was formulated thus;

The learned Judges of the Court of Appeal erred when they held that there was no sufficient evidence on which the trial Judge could rely upon to conclude that the plaintiffs' action was statute-barred.

For the ease of reference, the parties, shall hereafter be referred to simply as plaintiffs and defendants.

A brief background of the events leading to these proceedings would be necessary for a better appreciation of the issues raised herein.

The plaintiffs, numbering about 259 worked variously as casual and temporary employees of the defendant, a mining company. It is their case that even though they worked full time, they were paid as casual and temporary workers. Upon the termination of their

respective employments, they were neither paid their end of service benefits nor were they taken through any medical examination as stipulated in their conditions of service. They made several attempts at seeking redress through several fora but none of their efforts yielded fruits.

When all their interventions proved futile, they applied ex-parte to the High Court for an order extending the time within which they could commence an action since on their own reckoning, they were clearly out of the Six-year period stipulated under the Limitation Act, 1972 [NRCD 54]. The motion for the extension of the period within which to issue the writ was assigned Suit No.12/150/2011. Azumah J granted their prayer and ordered them to issue the writ within one calendar month of the date of his order. In pursuance of the said order, the plaintiffs, on the 29th of March 2011, issued the writ of summons with Suit No. C3/4/2011 in which they claimed *inter alia*, damages for wrongful termination of employment and payment of end of service benefits.

Upon service of the writ of summons and the accompanying statement of claim on the defendant, it filed a Notice of Conditional appearance and subsequently filed a motion to dismiss the writ on the ground that it was statute barred. In the affidavit in opposition filed in response to the motion, the plaintiffs disclosed that they had obtained prior leave of the court to issue the writ out of time, whereupon the defendant withdrew the application. The defendant subsequently filed a fresh application to set aside the order granting the plaintiffs leave to issue the writ and for a further order dismissing the plaintiffs' suit numbered C/3/4/2011. The said application was listed before Mahamadu J sitting at the Land, Labour, Human Rights, Economic (Financial) Crimes Division of the High Court held in Kumasi. Mahamadu J declined jurisdiction on grounds that being a court of co-ordinate jurisdiction, he lacked the power to set aside or review the orders made by Azumah J. According to him the defendant could either appeal against the order or pray for a review before the very judge who made the order.

The defendant repeated the application to set aside the order granting the extension of time and the order dismissing the suit before Azumah J. The plaintiffs resisted the application contending that the decision of Mahamadu, J operated as res judicata and

therefore the defendant was estopped from re-litigating the issues settled by Mahamadu J, who presides over a court of co-ordinate jurisdiction. In his ruling, Azumah J reversed his earlier order extending the time and dismissed the suit on grounds of nullity.

Aggrieved by the decision of Azumah, J, the plaintiffs lodged an appeal at the Court of Appeal. Their prayer to the Court of Appeal to take a second look at the proceedings was partly answered. In its consideration of the issues raised before it, the Court of Appeal took the view that the application was two-pronged; i.e.

(i) *to set aside the order extending the time to commence the action and*

(ii) ***(ii)*** *for an order of dismissal on grounds that the action was statute barred.*

The Court of Appeal held that Azumah J erred in assuming jurisdiction since Mahamadu J had decided that the defendant's remedy laid in an appeal or review and thus was res judicata between the parties. It further held that since the order granting the extension was made in Suit No. C3/4/2011, Azumah J "was palpably wrong to treat the two cases as merged and apply in suit no C3/4/2011 to strike out the order granted under Court Case No. 12/150/2011". Additionally, the Court of Appeal took the view that Azumah J erred in dismissing the suit on grounds that it was statute barred in the absence of any pleadings to that effect by the defendant. It therefore proceeded to reverse the decision of Azumah J dismissing the action and ordered the defendant to file a statement of defence to the action. The defendant demonstrated its dissatisfaction with the decision of the Court of Appeal by filing the Notice of appeal on the grounds set out supra.

Grounds 1 & 2 were argued together. In sum it was contended on behalf of the defendant that the decision of Mahamadu J did not operate as res judicata since he essentially declined jurisdiction on the basis that being a Court of co-ordinate jurisdiction, he lacked the power to set aside the orders made by Azumah J and could neither review the decisions made by him nor sit on appeal thereon. The plaintiffs, on the other hand, contended that the decision by Mahamadu J was res Judicata since the application was fully heard and determined by him. Additionally, the issues raised in the first application were similar to those raised in the second application considering the affidavits filed in support of

both applications. Furthermore, it was submitted that the defendant could not have properly invoked the court's review jurisdiction since the fourteen-day period within which the defendant was required to apply for same had long elapsed, the ruling of Azumah J having been delivered on the 28th of March 2011.

The question is; did the decision of Mahamadu J operate as res judicata so as to estop the defendants from raising the same issue subsequently before Azumah J?

In the Eighth Edition of Black's Law Dictionary, Res Judicata has been defined as a doctrine barring the same parties from litigating a second suit on the same transaction or any other claim arising from the same transaction or series of transactions or that could have been raised but was not raised in the first suit. For the proper invocation of the doctrine, these elements must exist:

1) There must be an earlier decision on the issue;

2) A final judgment on the merits; and

3) The involvement of the same parties or parties in privity with the original parties.

In Speedline Stevedoring Co Ltd; Rep v High Court, Accra; Ex-parte Brenya (2001-2002) SCGLR 775 and Rep. v Adama-Thompson; Ex-parte Ahinakwa (2013-2014) SC GLR 1395, this Court reiterated that for a judgment to operate as *res judicata*, it must be valid and subsisting. It must be a final judgment delivered by a court of competent jurisdiction on the merits; i.e. the issue must have been raised and pronounced upon. Therefore, a dismissal of a suit or an action by a competent court or tribunal on grounds of lack of jurisdiction does not and cannot operate as *res judicata*.

At pages 52-53 of the Second Edition of their book "ResJudicata", Spencer Bower and Turner, the learned text writers stated; *"where an action has been dismissed on the sole ground that the particular court had no jurisdiction, there is no decision of the question in controversy, such as to estop the plaintiff from suing again in any court which has jurisdiction to entertain the suit; but such a dismissal, while it will allow the disappointed*

party to prosecute his claim in a court having jurisdiction, will preclude him from reviving his claim before the tribunal which has formerly refused jurisdiction."

In Pinnock Bros v Lewis or Peat Ltd (1923) IKB 690, it was held that the award of an arbitrator dismissing a claim on grounds that he had no jurisdiction did not operate as estoppel in a fresh action. Again, in Hines v Birkberk College 1992 Ch. 33 also reported in (1991) 4 AIL ER 450, the plaintiff, a professor, sued for wrongful dismissal. The Court dismissed his action on grounds that it lacked jurisdiction to entertain the claim against the respondent. When jurisdiction was subsequently conferred on the court and the plaintiff issued a new writ for the same cause of action, it was held that the plaintiff was not estopped from commencing the new action.

In the instant case before us, when the application went before Mahamadu J, he essentially declined jurisdiction on grounds that being a court of co-ordinate jurisdiction, he was not vested with authority to determine the application. The application, as a result, was not determined on the merits. It is therefore obvious that the decision cannot operate as res judicata, the principle being that a dismissal by a court or a competent tribunal on grounds of want of jurisdiction is not binding on the grounds of res judicata. Having regard to the fact that Mahamadu J only dismissed the application for want of jurisdiction; the decision did not operate to estop the defendant from filing the application before Azumah J who rightly, in our view assumed jurisdiction.

We are of the view that the decision of Mahamadu J in declining jurisdiction on account that he did not give or deliver the decision complained of, was in error since it was evident from the processes filed that it was not the court's review jurisdiction which was invoked. The defendant’s case simply was that Azumah J made a void order in that he had no power to grant an extension of time within which to issue a writ in circumstances where the plaintiffs were clearly out of time and could not bring themselves under any of the exceptions set out in the Limitation Act. In other words, Azumah J's order was a nullity.

Where a court acts without jurisdiction, that exercise is clearly a nullity. An order made without jurisdiction is a void order and it does not necessarily require the same judge to set it aside. A judge of co-ordinate jurisdiction in the exercise of his inherent power can equally

set it aside if same is brought to his attention. In the celebrated case of Mosi v Bagyina [1963] I GLR 337, it was firmly established that where an order was made without jurisdiction, the same court, not necessarily the same judge who made the void order, has an inherent right to vacate the said void order. At page 342 of the report cited supra, Akuffo-Addo JSC (as he then was), stated 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 it is not warranted by any enactment or rule of procedure, such a judgment or an order is void, 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 a review, to the judge who actually gave the judgment or made the order. The jurisdiction is vested in the court qua court, and may be exercised, but not necessarily, by the judge who gave the judgment or made the order."***

Mahamadu J, ought to have set aside the void order of Azumah, J under the court's inherent jurisdiction. We are therefore of the view that the orders made by Azumah J on the 28th of March 2011 were valid since the dismissal by Mahamadu J was on grounds of want of jurisdiction. The decision was not binding on Azumah J so as to operate as res judicata. For these reasons we hold that Azumah J did rightly set aside the void orders made by him.

The Court of Appeal additionally reversed the ruling of Azumah J on grounds that the application was made in Suit No. 12/150/2011 and not in Suit No. 3/4/2011. We have come to the realization that assigning different numbers to actions arising out of the same transactions definitely contributed to the difficulties encountered by the Court of Appeal in evaluating the evidence before it. The motion ex-parte for an order extending the time for the issuance of the writ was filed as Suit No. 12/150/2011. The purpose for which the ex parte application was made was to enable the plaintiff issue the writ of summons for damages for breach of contract of employment well after the statutory period of limitation as provided for under the Limitation Act. When therefore the writ was subsequently issued, it ought to have either been given the same suit number or, where a different suit number

was assigned, there should have been a merger with the other process; same having risen out of the same transaction. It was however assigned a different Suit No. C3/4/2011 and treated differently and separately from the process which gave "birth" to it as it were. Applications filed in the same suit should be assigned the same suit numbers or be merged therewith so as to ensure proper case management.

Additionally, having regard to the fact that the writ could only be issued after the Limitation period by virtue of the order of the Court, the title of the writ ought to have been reflective of the order. Indeed, the plaintiffs were enjoined by the High Court Civil Procedure Rules to demonstrate that they had filed or commenced the action pursuant to leave granted by the court. The heading should therefore have indicated this fact. If the procedure rules had been complied with, the time lost between the filing of the conditional appearance, the motion to dismiss and the subsequent withdrawal of the processes could have been saved, thus avoiding delays in the justice delivery system. The distinction made on the basis of the two suit numbers was artificial and did not exist in reality. Azumah J, in our view rightly assumed jurisdiction to have set aside the void orders made by him. The appeal therefore succeeds on this ground also.

In reversing Azumah J's decision, the Court of Appeal held that Azumah J was wrong in dismissing the plaintiffs' suit on grounds that it was statute barred without the defence of limitation being first raised by the defendant in a statement of defence. In its submissions on the issue, the defendant argued that the Court of Appeal erred in so holding since under Order 11, rule 18 of the High Court Civil Procedure Rules, 2004 [C. I. 47], the High Court is vested with power, both under the Rules of Court and its inherent jurisdiction, to dismiss summarily actions which are scandalous and vexations or otherwise an abuse of the Courts' processes. It was further contended that in so far as the plaintiffs voluntarily and under oath confessed that their action was caught by the Limitation Act, as per the averments filed in support of the motion and the pleadings, it would be a waste of the Court's time to go through a full trial. The defendant drew a distinction between an allegation of limitation being made by a defendant upon service of a statement of claim and a confession by the plaintiffs that their action was statute barred and urged that in the latter case, the

defendants are permitted under the court's inherent jurisdiction, to apply for a dismissal without the filing of a statement of defence.

The plaintiffs submitted in answer that even though they applied for extension of time, nowhere in the processes filed by them was there a confession that their action was statute barred and that an application for extension of time was not conclusive of the fact that the action was caught by the statute of limitation.

Order 11 Rule 18 of [C. I. 47] provides:

1. ***The court may at any stage of the proceedings, order any pleading or anything in any pleading to be struck out on grounds that*** *(and for the purposes of this case)*

   a) it is scandalous, frivolous or vexatious; and

   b) it is otherwise an abuse of the process of the court."

Under Order 11rule 18 therefore, the court may order an action to be dismissed on grounds that the action is frivolous, vexatious or an abuse of the processes of the court.

Even though the application could be made at any stage of the proceedings, where the statement of claim is the subject of the attack, it must be made promptly and without the filing of a statement of defence. The application may be made under the above cited rule or the inherent jurisdiction of the court or both. Harlley v Ejura Farms [1977] 2 GLR 179. Either procedure enables the court to pronounce finally, albeit summarily upon the claim. Affidavit evidence is admissible in an application brought under the inherent Jurisdiction of the court whereas an application under Order 11 r 18(1)(a) of CI 47 must be solely on the pleading under attack.

In the matter under consideration, the plaintiffs, in their application for leave filed on the 24th of May 2011, deposed to the fact that they worked for the defendant company between the years 1994 to 2001. Their cause of action therefore was lost after six years of the date set out. Their feeble attempt at denying that they confessed that their action was

statute barred consequently cannot be taken seriously. There was sufficient evidence per paragraphs 2, 3 and 7 of the affidavits accompanying the application to support their admission that the action was statute barred. Furthermore, it is clear from the statement of claim that they were employed between the years 1994 & 2001, whereas the suit was commenced in 2011 (almost a decade after the termination). More importantly, it was obvious from the reasons assigned for the delay that they could not bring themselves under any of the exceptions under the Act.

It is significant that the plaintiffs applied for an order extending the time within which to issue the writ. They took that route because they knew they were clearly out of time. If they were within the statutory period of six years, they would undoubtedly not have applied for the leave. If the plaintiffs unequivocally and on oath admitted that they were out of time, is there any need for any further evidence on the issue? Where a party makes an admission of a certain state of facts, the defendant is relieved from his/her duty to provide evidence on the admitted facts.

In the face of the admission made by the plaintiff, it would be a waste of the Courts' time to insist that the defendant files a statement of defence to plead the same fact. Under its inherent jurisdiction, the court has a duty to terminate claims which are not sustainable. In the case of In re Sekyedumase Stool; Nyame v Kesse alias Konto [1998-99] SCGLR 476, the Supreme Court held, per Wiredu JSC (as he then was) that an application might be made under the rules to strike out a statement of claim on grounds of estoppel. The learned justice opined: ***"The principle of res judicata is now a well-established and acceptable principle in judicial proceedings. Its objective is to prevent an abuse of the court's process by estopping a party to a litigation against whom a court of competent jurisdiction has already determined the issue now being raised, by reopening the same subject-matter for further litigation.....Since its objective is to prevent an abuse of the court process, there is no need to go into the exercise of hearing the whole evidence on the matter again, otherwise its purpose would be defeated. It can legitimately be determined on affidavit evidence in appropriate circumstances".***

In the light of the admissions, the Court of Appeal's determination that the confession be ignored and the matter set down for hearing after the filing of a statement of defence cannot be the correct procedure. One of the objectives of the enactment of the Rules of court is to ensure the delivery of justice with minimum dispatch as set out under Order 1 rule 1(2) of C.I. 47 which provides: ***"These Rules shall be interpreted and applied so as to achieve speedy and effective Justice, avoid delays and unnecessary expense and ensure that as far possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided."***

In the matter under consideration, the affidavit filed in support of the motion for extension of time was emphatic per the averments in the supporting affidavit that their action was statute barred. The Court rightly, we firmly hold, relied on the admissions. There was therefore no need for the defendant to plead the Limitation Act for it to be set down for trial.

We would conclude with the apposite dictum of Lawton LJ in Riches v DPP [1973] 1 WLR 1019, a case decided under the English Rules of the Supreme Court which has identical provisions with our Order 11 rule 18 of C147. It was held that a statute barred claim could be struck out as frivolous, vexatious and an abuse of the courts process even before a statement of defence is filed. He delivered himself thus: ***"One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute-barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defense. The delivery of the defence occupies time and wastes money; and even more useless and time-consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained"***

For the foregoing reasons we would allow the appeal under that ground as well.

In conclusion therefore, the appeal succeeds in its entirety and is accordingly allowed.

V. AKOTO-BAMFO (MRS.)
(JUSTICE OF THE SUPREME COURT)

BENIN, JSC:-
I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-
I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-
I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-
I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

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