IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: DOTSE, JSC (PRESIDING)

BENIN, JSC

PWAMANG, JSC

AMEGATCHER, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/04/2019

3RD APRIL, 2019

ATUGUBA & ASSOCIATES …….. PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. SCIPION CAPITAL (UK) LTD ……. 1ST DEFENDANT
2. HOLMAN FENWICK WILLIAN LLP … 2ND DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

AMEGATCHER, JSC:-

This appeal has travelled all the way to the highest court of the land when the substantive matter has been comatose for the past two years at the trial court adding to the backlog of cases awaiting trial. What is before us, therefore, is an interlocutory appeal from a ruling of the High Court to the Court of Appeal and then to this court.

The facts of this appeal do not admit of any controversy. The business operations of the respondent and the 1st defendant are in the United Kingdom. The appellant is a

law firm in Ghana registered by the General Legal Council offering legal services to the public. Sometime in 2014, the respondent, also a limited liability partnership registered in the United Kingdom and offering legal services, engaged the services of the appellant to act for the 1st defendant in civil suits brought against it in the High Court in Ghana. After several correspondence, the appellant agreed to offer the legal services to the 1st defendant at agreed hourly rates. The appellant represented the 1st defendant in the courts in Ghana, but a dispute arose between the appellant and the 1st defendant regarding the invoices sent by the appellant for payment of legal fees. When this could not be resolved, the appellant commenced legal action on 6th October 2016 at the High Court, Accra against the 1st defendant and the respondent for the cost of legal services rendered, interest, general damages for breach of contract and costs.

After service of the writ and statement of claim, the 1st defendant and respondent entered appearance and filed a joint statement of defence through their solicitors in Ghana. The respondent on 6th December 2016 applied to the High Court by motion to strike it out from the suit under Order 4 Rule 5 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47). The parties argued the application before the High Court and in a short ruling delivered on 12th January 2017 the High Court presided over by Novisi Aryene, J ruled as follows:

"BY COURT: I have heard both counsel and read Order 4 rule 5(2). I also note that Plaintiff's claim is for payment of Legal fees. It is not in dispute that Plaintiff rendered Legal services to the 1st Defendant introduced by 2nd Defendant. It is my view that in the absence of a formal contract, and having read Exhibit WAA6, the presence of the 2nd Defendant is relevant for the final and complete determination of the matters in dispute. The Application is refused. No award as to costs."

Dissatisfied with the ruling of Novisi Aryene, J, the respondent appealed to the Court of Appeal. In its ruling dated 7th December, 2017 the Court of Appeal allowed the respondent's appeal and ordered that the respondent be struck out from the suit as a party. It is from the ruling of the Court of Appeal that the present interlocutory appeal has been lodged at this Court.

One ground of appeal was filed in the Notice of Appeal, i.e., the judgment is against the weight of evidence. It is instructive to note also that in the appeal to the Court of Appeal, the same omnibus ground of appeal was filed except that a second ground, to wit, that the High Court judge erred in ruling that the presence of the respondent was relevant for the final determination of the matter in dispute, was added.

It has long been the practice among some legal practitioners to shirk the responsibility imposed on them to formulate specific grounds of appeal stating where trial judges erred for the consideration of the appellate court. The omnibus ground has been a hideout ground. The responsibility in even minor appeals is shifted to the appellate judges to comb through the records of appeal, review the evidence and identify the specific areas the trial judge erred before coming out with the court's opinion on the merits or otherwise of the appeal. The situation is worrying where no viva voce evidence is proffered and a judge is called upon to exercise judicial discretion, such as in applications for injunction, stay of execution, amendment, joinder, judicial review, and consolidation, just to mention a few. In our opinion, though the rules allow the omnibus ground to be formulated as part of the grounds of appeal, it will greatly expedite justice delivery if legal practitioners formulate specific grounds of appeal identifying where the trial judge erred in the exercise of a discretion. A proper ground of appeal should state what should have been considered which was not and what extraneous matters were considered which should not have been. We believe this approach will better serve the ends of justice and lessen the use of the omnibus ground particularly in interlocutory matters and in the exercise of judicial discretion.

The court's position on the use of the omnibus ground is not new in our jurisprudence. There is a long list of decisions in which this court has decried the misuse of the omnibus ground of appeal. In the case of **Brown v Quashigah [2003-2004] 2 SCGLR 930 at 941** this court held that appellants must invoke the rule of practice for appeals argued by way of re-hearing by filing appropriate grounds of appeal, distinguishing the so-called omnibus ground, namely, that the judgment was against the weight of the evidence at the trial, from misdirection or

errors of law, challenge to jurisdiction or capacity, etc. **In Re: Suhyen Stool; Wiredu & Obenwaa v Agyei & Ors [2005-2006] SCGLR 424**, a chieftaincy matter from the Judicial Committee of the National House of Chiefs, this court disapproved the unhelpful practice of throwing in an omnibus ground of appeal as a backup, even where there had been little difference in the evidence or the facts as submitted by both parties to the suit. Again in the case of **Asamoah v Marfo [2011] 2 SCGLR 832** the judgment that was delivered was a default judgment in which no evidence was taken. This court found it strange for counsel for the appellant to appeal against the judgment for being against the weight of evidence and dismissed that ground as unmeritorious. In the recent decision of this court in the case of **Fenu & Ors v The Attorney-General & Ors [2019] 130 GMJ 179** the court held that the omnibus ground is usually common in cases in which evidence was led and the trial court was enjoined to evaluate the evidence on record and make its findings of fact in appropriate cases. In interlocutory appeals where no evidence was led such ground of appeal is misconceived.

It is worrying that parties and counsel continue to throw the omnibus ground at the court without due regard to the guidelines issued in the cases. These rulings of the court were not delivered for the fun of it. They were meant to be read by all Supreme Court practitioners and be used as a guide in formulating grounds of appeal filed in this court. It is about time counsel and parties alike appearing before this court took decisions, directions and guidelines issued by it seriously and complied strictly with them.

In this appeal, the omnibus ground was the only ground of appeal formulated and filed before us. The rules however provide in Rule 6(6) that the appellant shall not without the leave of the court, argue or be heard in support of any ground of appeal that is not mentioned in the Notice of Appeal. In this appeal, appellant did not seek the leave of this court to argue additional grounds of appeal. After service of Civil Form 6 after which the parties were required to write their written statements of case, the sole ground of appeal before this court was that the judgment was against the weight of evidence.

We have discovered that in the detailed statement of case filed by the appellant on 12th November 2018 under the omnibus ground of appeal, the appellant argued certain points of law. These arguments were made, unmindful of the fact that this Court has ruled in a number of cases that where the sole ground of appeal is that a judgment is against the weight of evidence, the appellant would be limited to making factual arguments and would not be permitted to argue any point of law.

In **Brown v Quashigah (supra)** cited by learned counsel for the respondent herein, the appellant appealed against the judgment of the Court of Appeal to the Supreme Court on the sole ground that the judgment was against the weight of the evidence. The appellant asked the Supreme Court to review the entire judgments of the High Court and Court of Appeal on the basis that an appeal was by way of re-hearing. This Court speaking through Twum JSC at page 942 stated emphatically the legal proposition as follows:

"In my view, a party who only gives notice that he intends to rely on the so-called omnibus ground should not be permitted to argue points of law."

Twum JSC's proposition of the law was restated by this court a decade later in the case of **In Re Asamoah (Decd); Agyeiwaa & Ors v Manu [2013-2014] 2 SCGLR 909;** also cited by learned counsel for the respondent herein. In the Re Asamoah (Decd)'s case, a notice of appeal to the Supreme Court by the appellants in that case stated as the ground of appeal the omnibus ground that the judgment was against the weight of evidence. It further stated that the court erred when it held that in the absence of a counterclaim it could not grant the appellant's relief. Then, finally, that further grounds of appeal would be filed upon receipt of the record of proceedings. The appellants in that case did not apply for leave to argue additional grounds of appeal on receipt of the record of appeal in compliance with Rule 6 of the Supreme Court Rules, 1996, (C.I. 16), and none was filed. However, in their arguments contained in their statement of case, the appellants on their own initiative, abandoned the grounds filed in their notice of appeal and proceeded to argue grounds fashioned as "issues presented".

This Court speaking through Akamba JSC at pages 917-918 citing with approval Brown v Quashigah (supra) held as follows:

"This court has clarified the position as to what is entailed when an appellant places reliance upon the omnibus ground of appeal, namely: the judgment is against the weight of evidence...In the view of the court, a party who only gives notice that he intends to rely on the so-called omnibus ground should not be permitted to argue points of law. In short, an appeal based on the omnibus ground, allows the party to argue solely issues or points of fact; it does not permit reliance on arguments on points of law. The rules make specific provisions for invoking arguments on points of law, which must be adhered to. We would in this context, barring any exceptional reasons, limit discussions on this ground to any dissatisfaction on findings of fact, if any."

The court, then, proceeded to strike out the so-called "issues presented" which argued points of law. See also Tuakwa v Bosom [2001-2002] SCGLR 61.

The cases of Tuakwa v Bosom (supra), Brown v Quashigah (supra) and Re Asamoah (Decd) (supra) recently, have been clarified by this court and exceptions rightfully made to the general rule. Thus in **Owusu-Domena v Amoah [2015-2016] 1 SCGLR 790,** Benin JSC delivering the unanimous judgment of this court at page 799 clarified the legal position as follows:

"**The sole ground of appeal that the judgment is against the weight of evidence, throws up the case for fresh consideration of all the facts and law by the appellate court. We are aware of this court's decision in Tuakwa v Bosom [2001-2002] SCGLR 61 on what the court is expected to do when the ground of appeal is that the judgment is against the weight of evidence. The decision in Tuakwa v Bosom, has erroneously been cited as laying down the law that, when an appeal is based on the ground that the judgment is against the weight of evidence, then, only matters of fact may be addressed upon. Sometimes, a decision on facts depends on what the law is on the point or issue. And even the process of finding out**

whether a party has discharged the burden of persuasion or producing evidence is a matter of law. Thus where the appeal is based on the omnibus ground that the judgment is against the weight of evidence, both factual and legal arguments could be made where the legal arguments would help advance or facilitate a determination of the factual matters."

Based on the exception given by this court in the Owusu-Domena v Amoah case (supra) the current position of the law may be stated that where the only ground of appeal filed is that the judgment is against the weight of evidence, parties would not be permitted to argue legal issues if the factual issues do not admit of any. However, if the weight of evidence is substantially influenced by points of law, such as the rules of evidence and practice or the discharge of the burden of persuasion or of producing evidence, then points of law may be advanced to help facilitate a determination of the factual matters. The formulation of this exception is not an invitation for parties to smuggle points of law into their factual arguments under the omnibus ground. The court would, in all cases, scrutinise such points so argued within the narrow window provided.

In this appeal, learned counsel for the respondent has strongly submitted that the appellant is not permitted by law to present legal arguments on the points of law it purported to make under the sole ground of appeal filed, to wit, that the judgment was against the weight of evidence. Counsel for the respondent further submitted that since those legal grounds were not stated in the appellant's grounds of appeal and the appellant has not sought for nor been granted leave by this Court to argue same, this court should strike out the legal grounds and arguments for being unwarranted.

Extracts of arguments from appellant's statement of case described as "summary of arguments" which the respondent finds offensive and contrary to law and therefore invites this court to strike out are as follows:

1. At pages 4 and 16 to 22, the appellant argues that the Learned Justices of the Court of Appeal failed to consider the appellant's statement of claim and reply on record when it held that no cause of action arises against the

appellant/respondent. Under this heading, the appellant criticises the Court of Appeal for ignoring a crucial point of law that a cause of action arose against the respondent by the doctrine of promissory estoppel. That where a party has by his representations induced another to act in a certain manner to his detriment, the inducing party cannot escape liability for the detriment caused to the induced party. The appellant then cites the cases of **Spokesman (Publication) Limited v Attorney-General [1974] 1 GLR 88,** and **Sam Jonah v Yoni Kulendi & Anor [2013-2014] SCGLR 272** to demonstrate how the Court of Appeal ignored the elementary principle of the law of evidence.

2. At pages 22 to 25, the appellant formulates the argument that the learned Justices of the Court of Appeal failed to consider Exhibit WAA6 in holding that the appellant/respondent is not a necessary party to the action. The appellant then refers to Order 4 Rule 5 of C.I. 47, and cites the case of **Akufo-Addo & Ors v Mahama & 2 Ors [2013] SCGLR Special Edition 1** and concludes that the Court of Appeal erred in holding that the presence of the respondent was not necessary in the action.
3. At pages 5 and 25 to 32, even though the appellant formulates the argument that the learned Justices of the Court of Appeal failed to apply the purport and effect of Exhibit WAA6 in favour of the appellant, counsel strayed into the cases of **Yonge v Toynbee [1910] 1 KB 215 at 227**, **Arhin v Kisiwaa [1979] GLR 311**, and **Sika Contracts v BL Gill and Closegate [1978] 9 BLR 11**, and castigated the Court of Appeal for holding that the pre-conditions in Yonge vrs Toynbee do not apply to the circumstances of this case.
4. At pages 5 and 32 to 34, appellant formulates the arguments that the learned Justices of the Court of Appeal wrongly applied Exhibit WAA6 against the appellant in coming to the conclusion that the basis of the trial Judge's decision was the absence of a formal contract. In the view of the appellant, the trial Judge was right in relying on the absence of a formal contract between the parties to dismiss the respondent's application for misjoinder.

We have observed that the "summary of arguments" 1 and 3 identified above from the statement of case of the appellant were not formulated as grounds of appeal in the notice of appeal. They were legal arguments smuggled into the statement of case under the omnibus ground - the judgment is against the weight of evidence. This is not permitted by law as held in the cases of Tuakwa v Bosom**, (supra),** Brown v Quashigah (supra) and In re Asamoah (Decd) (supra). The submission by the respondent that the appellant had committed a fundamental breach arguing those two grounds is unassailable. Accordingly, legal arguments 1 and 3 referred to above at pages 16-22 and 5, 25-32 of appellant's statement of case having failed to meet the stringent requirements of the law, are hereby struck out.

We, however, decline the invitation by respondent to strike out "summary of arguments" 2 and 4. These are legal issues emanating from the exhibits attached to the application presented to the High Court and fall, therefore, under the exceptions provided in Owusu-Domena v Amoah case (supra). We shall permit and consider them as arguments emanating under the omnibus ground.

Delving now into the merits of the appeal, the application that the learned High Court Judge was called upon to decide was filed under Order 4 Rule 5 of C.I. 47, which provides as follows:

"5. (1) No proceedings shall be defeated by reason of misjoinder or non-joinder of any party; and the Court may in any proceeding determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the proceedings.

(2) At any stage of proceedings the Court may on such terms as it thinks just either of its own motion or on application

> ***(a)*** **order any person who has been improperly or unnecessarily made a party or who for any reason is no longer a party or a necessary party to cease to be a party;**
>
> ***(b)*** **order any person who ought to have been joined as a party or whose presence before the Court is necessary to**

ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon to be added as a party. "

Whether the application should be granted or not, was a matter for the exercise of the trial Judge's discretion. There are no fixed rules on how discretion is to be exercised. Each case must be considered on its peculiar facts and circumstances against the backdrop that such discretion is exercised judicially and in the interest of justice.

We have reviewed the detailed arguments submitted by the parties. We have decided to resolve this appeal in two main areas. First, the exercise of discretion by the learned trial Judge, and secondly, the legal status of the respondent in this whole drama.

As pointed out earlier, the application was a call upon the learned trial judge to exercise her discretion. Did she exercise her discretion properly according to law and was the Court of Appeal justified in interfering with that exercise of discretion?

Generally, an appellate court should be slow in interfering with the exercise of discretion by a trial court in so far as the Judge has not misdirected himself by taking into consideration irrelevant or unproved matters, or omitting to consider relevant matters. Thus, in this Court's case of **Prince William Tagoe v Albert Acquah; Civil Appeal No. J4/24/2008, dated 11th March, 2009 (Supreme Court) (unreported)**, Anin-Yeboah JSC, delivering the unanimous verdict of the Court cited with approval the English case of **Blunt v Blunt [1943] 1 A.C. 517** and held as follows**:**

"**This court as an appellate court can only intervene with the exercise of the discretion if it could be shown that the discretion was exercised on wrong or inadequate material placed before the court which exercised the discretion or if it could also be demonstrated that the court gave no weight to the relevant matters and ignored relevant material in arriving at its decision. If the lower court's decision was also based on a misunderstanding of the law or on inferences that particular facts existed**

or did not exist when in fact evidence shows to be wrong, this court can interfere."

In exercising her discretion in the application brought before her, the learned trial judge in our view rightfully identified the subject matter of the claim, i.e. the payment of legal fees and the parties to the contract i.e. legal services rendered by the appellant to the 1st defendant introduced by the respondent. The learned trial judge, then, went ahead and drew the following conclusion:

"**It is my view that in the absence of a formal contract, and having regard to Exhibit WAA6, the presence of the 2nd Defendant is relevant for the final and complete determination of the matters in dispute. The Application is refused**."

This conclusion by the trial judge prompted the Court of Appeal during the hearing of the appeal before it to review the case law on the exercise of her discretion and to conclude its opinion as follows:

"**From all the factual circumstances of this appeal, such exceptional situation prevails for this court to interfere. Not only did the court below erroneously construe Exhibit WAA6 as authorising the joinder of the appellant, the major premise of the absence of a written contract as the basis of having the appellant's presence as a party before the issue of payment of the 1st defendant's legal fees for services rendered can be resolved, ought to be reversed**."

The appellant disagrees with the Court of Appeal and submits before us that the learned trial judge, in the exercise of her discretion and based on the evidence before her, held that the presence of the respondent was necessary for an effective and final adjudication of the dispute. The appellant, then, invites us to overturn the decision of the Court of Appeal because the court was not able to demonstrate how the exercise of the trial judge's discretion in dismissing the application for misjoinder was exercised on wrong or inadequate material or will work manifest injustice.

The pleadings filed before the learned trial judge in our view has all the information necessary for her to exercise her discretion properly and according to law. The statement of claim speaks for itself especially paragraphs 4, 5, 6, 7, 12, 13 14 and 16. We have decided to reproduce the relevant paragraphs to support our opinion.

"4. On February 6, 2014, an associate of the 2nd defendant firm, Tunde Adesokan, contacted the plaintiff through one of its lawyers, Clement Akapame to **engage the services of the plaintiff on behalf of their client, the 1st defendant in respect of a legal suit instituted against it in High Court of the Republic of Ghana by Navig8 Chemical Ltd**.

5. The plaintiff says that following several e-mail and telephone correspondence, **it agreed to offer the needed legal services to the 1st defendant.**

6. The plaintiff says at all material times, **the 2nd defendant through its agents represented to the plaintiff that they were dealing with the plaintiff on behalf of the 1st defendant.**

7. The plaintiff says further that the **2nd defendant by an e-mail dated February 6, 2014 indicated to the plaintiff that although it is dealing with it on behalf of the 1st defendant, the 1st defendant will be directly responsible for the payment of legal fees to the plaintiff**.

12. The plaintiff says that further to the **1st defendant's instructions received through the 2nd defendant, it was agreed to engage to represent the 1st defendant in a legal suit instituted against it in the High Court of the Republic of Ghana by Lemla Oil Ltd**.

13. The plaintiff says that pursuant to the said instructions **it represented the 1st defendant in the said suit throughout the proceedings until the case was disposed of.**

14. The plaintiff says that the **total work done for the 1st defendant in both cases amounted to a total of One Hundred and Four Thousand, One Hundred and Ninety-Three United States Dollars and Fifty-Two Cents (US$104,193.52)** being the cost of legal fees, administrative fees and Valued Added Tax (VAT).

16. The plaintiff says that the **1st defendant neglected or refused to pay but rather offered to pay a paltry sum of Nineteen Thousand Five Hundred and Forty-Three Pounds Sixty Pence (GBP19,543.60).”** (our emphasis)

Reviewing the relevant paragraphs of the statement of claim reproduced above, it is clear from appellant's own narration of the facts that the transaction parties were the appellant and 1st defendant. The purpose of the transaction was for the appellant to represent the 1st defendant in the courts in Ghana in a legal suit that had been brought against it by Navig8 Chemical Ltd and Lemla Oil Ltd. The person responsible for paying the legal fees is stated as the 1st defendant. The Invoice for legal fees was sent to the 1st defendant and the response on how much it intended paying also came from the 1st defendant. The respondent was clearly out of the equation in this transaction for it to be sued together with the 1st defendant.

In our opinion, the statement of claim contained all the facts for the resolution of the application that was placed before the learned trial judge. Regrettably, instead of focusing on the pleadings, the trial judge chose to dwell on Exhibit WAA6, misapplied the exhibit and in the process exercised her discretion wrongly.

One example of misapplication of Exhibit WAA6 is the trial judge's misapprehension of the threat issued by the 1st defendant that it had not contracted with the appellant and that there was no legal contract, engagement letter or retainer between them. In our opinion, that threat was a red herring issued after legal services had been provided by the appellant. This was ostensibly to compel the appellant to accept the "paltry" sum offered it by the 1st defendant. In the same exhibit, the 1st defendant admits that the appellant had performed legal services for its benefit, except that it was not satisfied with the service. Additionally, in the same exhibit, the 1st defendant, who claimed not to have a legal contract with the appellant, proposed the following to the appellant:

"**We have agreed to pay GBP19,000 for the provision of services. We feel that this amount is fair amount, given the time spent on the matter and level of diligence and care exercised by Atuguba & Associates on this**

matter. We hereby request you, in the light of the above to reconsider such offer."

There was yet another threat. The 1st defendant concluded Exhibit WAA6 by stating that if they were unable to settle the matter with the appellant amicably, they would have no option but to escalate the matter with the Ghana Bar Association, the UK Law Society and the British High Commission in Ghana.

Another example of misapplication of Exhibit WAA6 is the legal relationship that was established between the appellant and the 1st defendant on one hand and between the 1st defendant and respondent on the other hand. Again, the statement of claim provides the answer. Paragraphs 8 and 9 of the statement of claim states as follows:

"**8. The plaintiff says that due to the urgency of the matter for which the plaintiff's services were needed, no formal contract was signed between the parties.**

9. The plaintiff says further that although no formal contract was executed between the parties, the terms of engagement including legal fees and hourly rates were agreed between the parties through e-mails and telephone correspondences."

In response to these averments, the 1st defendant and respondent in a joint statement of defence admitted paragraphs 8 and 9 in the following words:

"**6. The defendants admit paragraphs 8, 9 and 10 of the statement of claim and add that no other terms of engagement were agreed upon apart from the applicable hourly rates**."

In an internet age, email communication has been the order for expeditious business transactions such as the one before us. The appellant law firm had just under 24 hours to finalise a deal and represent the 1st defendant, who is resident abroad, in the courts in Ghana. Without prejudice to the pending matter before the High Court, we hold that email communication sent by one party making an offer, which said offer is accepted, by the other party also by email constitutes a binding contract enforceable at law.

Section 5 of the Electronic Transactions Act, 2008 (Act 772) provides that where a law provides that information or any other matter shall be in writing, typewritten or in printed form, the requirement shall be deemed to have been satisfied if the information or matter is rendered or made available in an electronic form. On formation of agreements, section 23 further provides that an agreement is valid even if it was concluded partly or in whole through an electronic medium. Further, section 144 defines email communication as electronic mail, an electronic record used or intended to be used as a mail message between the originator and addressee in an electronic communication.

Following Act 772, Parliament gave further boost to the modern means of business transaction by the passage of the Alternative Dispute Resolution Act, 2010 (Act 798). Section 2(3) of the Act provides as follows:

"(3) An arbitration agreement shall be in writing and may be in the form provided in the Fifth Schedule to this Act.

(4) For the purpose of this Act an arbitration agreement is in writing if

(a) it is made by exchange of communications in writing including exchange of letters, telex, fax, e-mail or other means of communication which provide a record of the agreement; or

(b) there is an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other."

In an age of dynamism of knowledge in society, businesses and virtually almost everything around us; this court will (again without prejudice to the substantive matter pending before the trial court) not gloss over an offer made and accepted in an email or other electronic means of communication or an assertion made in a statement of claim which is not denied by the other party to form the basis of the existence of a valid contract between them.

Again, a cursory reading of the pleadings filed by the parties, especially the statement of claim will leave no one in doubt concerning the principal-agent

relationship established between the 1st defendant and the respondent. The Court of Appeal found that the respondent, who merely acted as the nexus between the 1st defendant and the appellant, could at best be described as a disclosed principal.

The underlying principle of the concept of agency is the power of a person known as an agent to alter his principal's legal relations with third parties. The scope of an agent's liability for the default of his principal under a contract with a third party is considerably determined by the disclosure or otherwise of the principal to such third parties. According to Markesinis and Munday, in their write-up titled: An Outline of the Law of Agency, London Butterworths, at page 120:

"Where an agent, acting within the scope of his authority, contracts with a third party on behalf of a disclosed principal, direct contractual relations are established between the principal and the third party. The principal can therefore sue and be sued by the third party on the contract which the agent has made on his behalf. This principle is fundamental to the law of agency and, indeed, the basic purpose of agency always was to bring the principal and third party into direct contractual relations with one another."

One can safely conclude, therefore, that the moment direct contractual relationship is created between a disclosed principal and the third party by the acts of the agent; the agent legally drops out of the transaction and ceases to exert any influence at law over their relationship. The agent in law is not classified a party to the relationship created, and subject to some exceptions, which are not relevant for our purposes in this opinion, cannot be sued by the third party on such contract. There is only one obligation, and the remedy of a third party is to hold either the principal or the agent liable on the contract but never the two.

We are satisfied that there is plethora of evidence from the pleadings and exhibits made available to the learned trial Judge for her to exercise her discretion according to law to strike out the respondent from the suit. It is our opinion that if the trial Judge had focused on the pleadings before her and adverted her mind to the

relevant law governing the relationship between the 1st defendant and the respondent, she would not have been misled in the exercise of her discretion.

Our opinion is further fortified by the case of **Amidu (No 2) v Attorney-General, Isofoton S.A & Forson [2013-2014] 1 SCGLR 167** where the 3rd defendant, an attorney or agent for the 2nd defendant was added to the suit. He contended that there was no cause of action against him personally for being an agent and, therefore, he had been improperly joined to the action. He pleaded with the court to strike him out as a party. Date-Bah JSC at 188 held that:

"...the principle of the common law relied upon by him is not in conflict with the provisions of the Constitution. Embedded in the common law principle that an agent is not liable for acts done on behalf of his or her principal is the notion that the act or omission in question is that of the principal and not of the agent. This notion holds good, even in the constitutional context, unless there is an express overriding of it...We are inclined to accept this argument and hold that the 3rd defendant be struck out as a defendant. There is no cause of action against him on the plaintiff's pleadings."

The Court further held, that to the extent that the lawful attorney is only a conduit through which the principal acts, and to the extent that the acts complained of by the plaintiff were all acts performed by the 3rd defendant in his capacity as lawful attorney, the joinder of the 3rd defendant to the action on the sole basis of the latter's capacity as the 2nd defendant's attorney, was improper.

Further in **Morkor v Kuma (NO 1) [1999-2000] I GLR 721** where the appellant, the Chief Executive Officer of a limited liability company, was sued jointly with the company over a sale agreement the company entered into with the respondent, and argued that since the transaction was with a limited liability company and not with her personally, she had been wrongly made a party to the suit; the Supreme Court per Sophia Akuffo JSC (as she then was) at page 738 granting her relief stated as follows:

"**Where, in fact or in law, a person is not a proper party to a suit, then, no matter how actively she participated in the suit, the fact would remain that she was never a proper party. Admittedly, if judgment were entered against her, it would remain effective unless and until she takes steps to have the same set aside. However, it is open to her, at anytime, however belatedly, to dispute the propriety of her having been made a party to the suit, and if she is able to establish that the same is improper, then justice would demand that she be struck out as defendant**."

In our view, the Court of Appeal could not be faulted for its conclusion that the type of agency relationship between the 1st defendant and the respondent was that of a disclosed principal.

We cannot end this judgment without commenting on two issues bordering on ethics that emerged in the course of hearing this appeal. We observed the issue of representation of multiple persons suing or sued together by the same law firm. We note that this is permitted by the rules of court. There are cases where the interests and positions of several plaintiffs or defendants sometimes referred to as co-plaintiffs or co-defendants are at par. In other cases, one or more of the parties may have positions different from others. Therefore, representation by one firm or the filing of joint pleadings for the co-parties risks conflating their assertions and interests. This lumping of the factual position of the parties, if not clearly and meticulously set out by counsel, invariably creates difficulties for this court in its examination of the pleadings. For example, in the appeal before us, one law firm represented the defendants. The firm entered appearance and filed a joint defence on their behalf. However, the averments in the statement of claim were matters, which did not affect the two defendants jointly and severally, and therefore made the filing of a joint defence clumsy and difficult to appreciate. In paragraphs 8, 12 and 13 of the statement of defence, the facts denied were applicable only to the 1st defendant. Counsel for the two defendants found herself in a predicament pleading the factual position of the two in the joint statement of defence. To appreciate fully this concern, the paragraphs referred to above states as follows:

8. The defendants state that in any event it has subsequently discovered that the plaintiff's hourly rates were over and above the scale of fees approved by the Ghana Bar Association for the period that its services were engaged.

12. The defendants deny paragraph 13 of the statement of claim and add that the 1st defendant had to dispense with the plaintiff's services before the conclusion of the matter due to the plaintiff's unsatisfactory performance.

13. The defendants state further that the plaintiff's services were unsatisfactory right from the outset of its engagement and that some of the issues the 1st defendant encountered with the plaintiff included its late attendances to court leading to adjournments of the case on some occasion.

The averments above could not appropriately apply to the respondent in this appeal. This court will direct that in situations such as this where several co-parties' defence are at variance, lawyers should either file separate defences for each of the parties or advise those parties to seek representation elsewhere, especially where representing all of them becomes clumsy and untidy.

The other ethical issue is at Page 3 of the email communication Exhibit RB1. This email, dated 6th February 2014, was sent by a representative of the respondent conveying the 1st defendant's instructions to the appellant. The last paragraph of the instructions directing the appellant firm was couched as follows:

"**Appear at the Accra Commercial Court D, before Justice Asiedu tomorrow morning. We understand that the hearing is listed for 9am although the court opens at 8am. If possible (I know this is possible in Nigeria), it may be helpful to see the judge in chambers before the hearing to explain to him the nature of our application and explain the fact that Scipion have not been formally notified of the hearing and also that you were instructed only today**."

The instruction from the respondent to the appellant is to request the appellant to engage in an ex-parte communication with the Judge. We find this request unfortunate especially coming from a firm of solicitors in the United Kingdom. We condemn the directive in no uncertain terms and reiterate that Ghana is not one of the countries where ex-parte communication with judges is permitted. The rules of judicial conduct in Ghana prohibit judges from engaging in ex parte communications. Lawyers are also prohibited by the rules of legal ethics from communicating with a judge in the absence of the opposing counsel. Ex-parte communication is an attempt to overreach the opposing party and influence the judge to decide in favour of the party making the contact. An ex-parte communication undermines the fairness of the justice delivery system and an ongoing judicial proceeding, and creates a dent in public trust in the legal and court system. We wish to state that the justice delivery system is the last hope of the citizenry in a democracy. When everything else fails them, the justice delivery system should not fail them. It is, therefore, important that rules put in place for the justice system to thrive and serve the citizenry without fear or favour are respected by all, Ghanaians and foreigners alike.

In the result, the appellant fails in this appeal. There is no need to interfere with the judgment of the Court of Appeal. The appeal is hereby dismissed.

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

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

BENIN, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

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

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

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

COUNSEL

HAROLD ATUGUBA FOR THE PLAINTIFF/RESPONDENT/APPELLANT.

GOLDA DENYO FOR THE 2ND DEFENDANT/APPELLANT/RESPONDENT.