IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

PROF. KOTEY JSC

TORKORNOO (MRS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/59/2022

10TH MAY, 2023

SAM QUARSHIE ….. PLAINTIFF/RESPONDENT/RESPONDENT

VS

EDDIE KUSI ANKOMAH ….. DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

PWAMANG JSC:-

My Lords, this appeal emanates from a land suit the plaintiff/respondent/respondent (the plaintiff) filed in the High Court, Accra and claimed for declaration of title, damages and injunction in respect of a piece of land at Shiashie, Accra that the defendant/appellant/appellant (the defendant) was in the process of developing.

By his statement of claim, the plaintiff averred that he acquired the land by a lease dated 1st September, 1999 from the Appantse We Family of Shiashe, got it registered at the Land Title Registry and he was issued with a Land Certificate dated 23rd March, 2002. On acquisition he placed some persons on the land and they sold pavement and other blocks on it. He averred that he was in peaceful possession until sometime in June, 2017 when the defendant forcibly entered the land and started to develop it. He reported a case against the defendant to the police but they could not resolve his complaint hence the suit in court.

The defendant filed a statement of defence and stated that the piece of land he was developing did not form part of the land that was granted to the plaintiff and that it was the same Appantse We Family of Shiashie who granted the land he defendant was developing to him by a lease dated 1st August, 2014. He pleaded that before acquiring his land he conducted searches which showed the land to be vacant. According to him, when he entered the land and the plaintiff challenged him and reported a case to the police, the police after listening to him caused the government surveyors to conduct two surveys of the disputed land using the documents given to the plaintiff and himself and the result of the two surveys showed that his land only shares a boundary with the plaintiff's land but that the two grants cover different lands. The defendant stated that as the survey reports established that his building operations were on his land and did not extend to the plaintiff's land, the police permitted him to continue with his works.

According to the record before us, no reply to the statement of defence was filed by the plaintiff but at the trial the plaintiff under cross-examination admitted that before the case was filed the police caused the survey of the land and that two survey reports were produced. He however countered by saying that those surveys were not valid. The defendant tendered the two composite plans that were produced by the government surveyors on the request of the police. We notice that the two composite plans depict the lands differently and that no explanatory legends are attached to

them as is the usual practice in these matters. The defendant called a representative of their common grantor as DW1 and his evidence was that the land they granted to the defendant does not form part of what they gave to the plaintiff.

From the above, a crucial fact in issue that has to be determined before a just decision can be given in this case is; whether the land in dispute falls within the plaintiff's site plan contained in his lease or it lies outside it? This issue was not distinctly set down for determination in this manner at the application for directions, but it constitutes the crux of the dispute since the parties have a common grantor and the lands of the parties are said to share a common boundary. Unfortunately, both the lower court and the trial court failed to identify this issue and to address it. The talk about a road passing through the land of the plaintiff which reduced the size of land he was granted was diversionary and not germane on the facts here. In the case of **Fattal v Wolley [2013-2014] 2SCGLR 1070** at p. 1076, Georgina Wood, C J said as follows;

"Admittedly, it is, indeed, sound basic learning that courts are not tired down to only the issues identified and agreed upon by the parties at pre-trial. Thus, if in the course of the hearing, an agreed issue is clearly found to be irrelevant, moot, or even not germane to the action under trial, there is no duty cast upon the court to receive evidence and adjudicate upon it. The converse is equally true. If a crucial issue is left out, but emanates at the trial from the pleadings or the evidence, the court cannot refuse to address it on the ground that it is not included in the agreed issues."

In his judgment the trial judge bemoaned the fact that the surveyors who conducted the surveys in respect of the lands in this case were not called by the defendant to testify and to be cross-examined. The Court of Appeal in their judgment also agreed with the trial Judge on this matter but, a court seized of a dispute also has a duty to make the necessary orders required to ensure the determination of the real question in controversy before it. That is the reason the rules on application for directions provide under Order 33 Rule 3 of the **High Court (Civil Procedure) Rules, 2004 (C.I.47)** as follows;

3. The Court may order any question or issue arising in any cause or matter whether of fact or law, or partly of fact and partly of law, and raised by the pleadings to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated.

From the pleadings and the evidence, this case clearly called for an identification and the making of a plan of the land being claimed by the defendant on the ground. Then the plan of that land would be superimposed on a composite plan on which the plaintiff's site plan and that of the defendant are plotted to show whether the disputed land falls within the plaintiff's land as he claimed. Such an exercise can only be undertaken by an expert in surveying so the lower court ought to have adverted its mind to its powers under **section 114 of the Evidence Act, 1975 (NRCD 323)** and **Rule 1 of Order 26** of **C.I.47. Section 114 of NRCD 323** is as follows;

114. Court experts

(1) In an action the Court may, at any time, on its own motion or at the request of a party, appoint a court expert to inquire into and report upon a matter on which an expert opinion or inference would be admissible under section 112.

The whole of Order 26 of C.I. 47 is dedicated to Court Expert and states that the Court may make such orders as it may deem just to facilitate the experiments and tests to be carried out to form the basis of the expert opinion of the Court expert. Interference with the work of a Court appointed expert would amount to contempt of Court and she works under the supervision of the court. In view of these elaborate provisions on expert witnesses, the best practice is that where there is a need for expert evidence in civil proceedings, any party to the proceedings may apply for the appointment of a court expert, and if none of the parties applies, the court itself ought to make an order for the appointment of one. The rules direct how the court expert's report shall be handled by the court. If the court expert produces a report that any party to the proceedings disagrees with, then that party may, pursuant to Rule 6 of Or 26, call her

own preferred expert to testify and contradict the report of the court's expert, and leave it to the trier of facts to decide which expert evidence to accept and assign reasons for the choice. Unless the court trying a case takes the view, that on the pleadings and the evidence there is no need for expert evidence, we do not see why a court will fail to exercise its power under section 114 of NRCD 323 and Or 26 of C.I. 47 for the reason that the party who alleged that an expert opinion was in his favour nevertheless failed to call evidence on the expert opinion or apply for the appointment of a court expert.

Of course, there is no express rule of procedure or evidence that prohibits a party to civil proceedings, in the absence of a court appointed expert, from adducing evidence in support of her case through her self-appointed expert. However, such expert evidence may not have been produced under the right conditions and certainly not under the supervision of the court, so its probative value would not be as compared with that given within the context of Or 26 of C.I.47. If a party calls her own expert to contradict a court expert's evidence under Rule 6 of Or 26 of C.I. 47, such expert would have to take into account and react to the report of the court expert. That way, there would be a basis for comparison of the two expert opinions by the trier of facts and that is preferable to ignoring the option made available by the rules of evidence and procedure and using your self-appointed expert to start with.

In this case, the surveyors engaged by the police did not qualify as court experts neither were they self-appointed by the defendant. In the circumstances, the trial judge's description of them as material witnesses of the defendant was not accurate. If the court felt that their evidence was material to arriving at the correct facts in dispute, it ought to have made the necessary orders on its own motion, which it is empowered by the rules of evidence and procedure to make.

Where an appellate court on hearing an appeal discovers that the court below failed to determine a crucial fact in accordance with the dictates of the law, it has a number

of options. The appellate court may exercise its powers under section 32 of the **Courts Act, 1993 (Act 459)** which provide as follows;

32. Subject to article 135 of the Constitution, in the exercise of its jurisdiction the appellate court may if it thinks it necessary or expedient in the interest of justice—

(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;

(b) order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order the examination of the witnesses to be conducted in a manner provided by rules of court, or in the absence of rules of court, in such manner as the Court may direct, before any Justice of the Court or before any officer of the Court or other person appointed by the court for the purpose, and allow the admission of any depositions taken as evidence before the court.

Rule 31(a)(d)&(f) of the **Court of Appeal Rules, 1997 (C.I.19),** though stated in very broad language, are to similar effect as section 32 of Act 459. They state that;

31. General powers of the Court

The Court may-

(a) make any order necessary for determining the real question in controversy;

(d) direct the court below to enquire into and certify its finding on any question which the Court considers fit to determine before final judgment; and

(f) direct any necessary enquiries or accounts to be made or taken and shall generally have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a court of first instance.

In these proceedings, we are a second appellate court but the law is that we have the powers of the court which judgment is on appeal to us. Besides that, Rule 23 (3) of the **Supreme Court Rules, 1996 (C.I16)** provides that;

23(3). The Court may in hearing any civil appeal make any order necessary for determining the real issue or question in controversy between the parties.

Pursuant to the above powers, this court may make an order for any matter that arises in the case to be enquired into, either by the court itself or any other court and the report submitted to us to become part of the record for the final determination of the appeal. The court has done so on numerous occasions.

However, an appellate court may, after hearing an appeal, order a retrial of the case where it is of the view that, in the interest of justice, there is a need for a retrial. The power to order a retrial has been expressly provided for in relation to criminal appeals under section 30 (a)(i) of Act 459 as follows;

30—Orders available to Superior Courts over appeals.

Subject to the provisions of this Sub-Part, an appellate court may in a criminal case—

(a) on an appeal from a conviction or acquittal—

(i) reverse the finding and sentence and acquit and discharge or convict the accused as the case may be *or order him to be retried by a court of competent jurisdiction,* or commit him for trial; or… (Emphasis supplied).

The power to order a retrial on an appeal in a civil case though not expressly stated in the rules of court can be located within the provisions of Rule 32(1) of C.I.19, which is as follows;.

32. Power of Court to give judgment and make an order

(1) The Court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs.

Thus, the power of an appellate court to give judgment as it deem fit is wide and includes the power to order for retrial, which it may make if it is in the interest of justice. With civil appeals, it is not a regular practice to order retrials, but where an appellate court finds that a court below had no jurisdiction so its determination of the dispute between the parties is no a valid determination and that the dispute rages on unresolved, or that a court below failed to make a determination of crucial facts in issue in the case in a manner dictated by law, or for other justifiable reason, then if it is in the interest of justice, the appellate court may order a retrial of the case by a court of competent jurisdiction or by the same court differently constituted. In the English case of **Simetra Global Assets Ltd & Ano v Ikon Finance Ltd & Ors [2019] EWCA Civ 1413,** when the Court of Appeal came to the conclusion that the judgment of the trial court did not take into account evidence that needed to be taken into account, the court set aside the judgment and ordered for a retrial. Then in **Townsend v Persistence Holdings Ltd[2008] UKPC 15,** the Privy Council ordered a retrial of an appeal by the Court of Appeal of British Virgin Islands on the ground that the appeal was determined on solely the point of illegality of a contract for sale of land but that issue was not raised in the grounds of appeal and the Court of Appeal failed to raise it at the hearing for the comments of Counsel before deciding the case on that point alone.

But, a retrial is not to be ordered lightly and will not be ordered to enable a party to fill in gaps in the case she presented during the original trial. See; **Jass Co. Ltd & Anor v Appau & Anor [2009] SCGLR 265.** A retrial entails repeat expenses and may encounter other challenges. At para 187-188 of judgment in **Simetra Global Assets Ltd v Ikon Finance Ltd (supra),** Lord Justice Males observed as follows;

"I am acutely conscious that for this court to order a retrial when there has already been a three-week trial in the Commercial Court at which the claim against Ikon failed comprehensively is a serious step which must be regarded as a last resort. Even if it were possible to put to one side the heavy burden of costs which will be involved in a retrial, the additional stress on the Ikon defendants, including individual defendants whose reputations are at stake as well as their assets, will inevitably be considerable. That is a factor which has caused me to think long and hard about whether a retrial is necessary. For the reasons which I have given, I have concluded that it is. Unfortunately this judgment plainly does not take into account the evidence which needed to be taken into account."

In the circumstances of this case, we think that the interest of justice will be better served by ordering a retrial than by we receiving evidence and making the determination of the issue of where the disputed land falls, as between the plaintiff's site plan and the defendant's. Nevertheless, we shall order for the appointment of a surveyor as a court expert to survey the land, prepare a report and to testify before the court of first instance.

We are mindful of the fact that the plaintiff argued his case partly on adverse possession. However, it must be noted that if it were a proven fact that the disputed land was not part of the land granted by the common grantor of the parties to the plaintiff, then in view of the evidence of Nii Adam Sorsey, DW1, which was accepted by the trial judge, to the effect that the plaintiff was aware that the road cut through the land granted him and he nevertheless accepted it, then his arguments based on the statute of limitations would have to be looked at again. It would mean that the grantors made the plaintiff aware that his land did not extend to the vacant land that was later granted to the defendant, such that the grantors are not likely to have considered any occupation of the vacant land by the plaintiff's agents as adverse to their ownership.

Section 10 of the **Limitations Act, 1972 (NRCD 54)** is premised on adverse possession, which is also based on knowledge of the true owner that a person in occupation is

claiming ownership against the true owner. In the circumstances, the determination of whether the land in dispute fell in the land granted to the plaintiff or not is critical to the fair and just resolution of the whole dispute between the parties.

Consequently, we shall allow the appeal but we shall not dismiss the suit outright as prayed for by the defendant under paragraph 4 of his Notice of Appeal. Accordingly, the appeal against the judgment of the Court of Appeal dated 29th April, 2021, which affirmed the judgment of the High Court dated 5th June, 2018 succeeds and the said judgments are hereby set aside. We however, order a retrial of the case by the High Court to be differently constituted. We make the following consequential order as part of the retrial of the case;

The Regional Head of the Survey and Mapping Division of the Lands Commission, Greater Accra Region, is hereby ordered to survey the land in dispute, superimpose the site plans of the parties and to prepare a composite plan to show where the land the defendant claims on the ground lies in relation to the site plans contained in the respective leases of the parties. The site plan of plaintiff/respondent/respondent to be used for this exercise shall be the one referred to in his lease dated 1st September, 1999 and the site plan of the defendant/appellant/appellant shall be that contained in his lease dated 1st August, 2014. The parties shall accompany the Court appointed surveyor to show him/her the land they claim on the ground. The surveyor shall prepare a report and submit it to the Registrar of the High Court, Accra and it shall be used for purposes of the retrial. The cost of the survey is to be shared equally and paid by the parties.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

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