IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2020

CORAM: DOTSE, JSC (PRESIDING)
GBADEGBE, JSC
PWAMANG, JSC
DORDZIE (MRS), JSC
PROF. KOTEY JSC

CIVIL APPEAL
NO: J4/68/2019

DATE: 5TH FEBRUARY, 2020

AHMED MUDDY ADAM ……. PLAINTIFF/RESPONDENT/APPELLANT

VRS

FRANK NUAMAH ……. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

GBADEGBE JSC read the following judgment of the Court:
The question for our determination in the exercise of our ultimate appellate jurisdiction is whether the decision of the learned justices of the intermediate

appellate court which reversed the decision of the trial court in the matter herein which turns upon the practice and procedure relating to the summary disposal of actions under the Rules of Court was a correct exercise of their discretion. This is a point of procedural importance related to the authority of courts to summarily dispose of actions before them without going through a full-scale trial. In our opinion, having regard to the increasing number of appeals emanating from decisions rendered by trial judges and the intermediate appellate court which unfortunately reveal a misunderstanding of the scope of the rules and the practice relating to it, we would like to reiterate the exceptional nature of the power conferred on courts to summarily dispose of actions founded on objections taken to pleading. Having given anxious consideration to the issues raised in the matter herein, we are of the opinion that the appeal should be allowed. Examining the record of appeal in the matter herein, we think that it was without precedent and as we desire not to encourage it, we straightaway express our disapproval of what was an unusual attempt by the learned justices of the Court of Appeal to engage in a preliminary hearing of an action based on affidavits. Turning to the parties before us, we would like for reasons of convenience in this delivery to refer to them simply as plaintiff and defendant.

The action herein was initiated before the High Court when the plaintiff issued the writ of summons herein to set aside a prior judgment of the High Court on grounds of fraud, misrepresentation and breach of the right of hearing. After service of the processes initiating the action on the defendant, he entered appearance conditionally. Moments after filing the said appearance, the defendant filed a statement of defence and an application to strike out the statement of claim and dismiss the action. Having filed a defence to the action and taken an objection to the offending pleading by the filing of the application on which these proceedings are founded, the conditional appearance lost its efficacy and was dissolved into an absolute appearance such that the considerable submissions urged on us related hereto is of no moment to the determination of the matter herein. The grounds on which the defendant's said application was based were said to be "for disclosing no reasonable cause of action, frivolous and vexatious; and for being an abuse of the processes of the court." After hearing the parties on the objection, the learned trial judge in a ruling contained at pages 260-265 of the record of appeal dismissed the

application. An appeal to the Court of Appeal was allowed resulting in the plaintiff appealing to us.

The grounds of appeal filed in the matter are set out at pages 451 to 453 of the record of appeal and referred to in the respective written briefs of the parties. As the decision of the learned trial judge was overturned by the leaned justices of the Court of Appeal, our determination of the question set out above necessarily means that in our view the learned trial judge approached his determination in accordance with the settled practice of the Court whiles the Court of Appeal applied the wrong principles. Having answered the question posed for our determination in the opening paragraph of this delivery, we now proceed to provide our reasons therefor.

In the first place, under the Rules of Court, a party who applies to dismiss an action on the ground that the pleading discloses no reasonable cause of action is deemed to admit the truth of the averments contained in the statement of claim. See: Ghana Muslim Representative Council v Salifu [1975] 2 GLR, 246. Although the said decision was based on order 25r 4 of the old rules contained in LN 140A, we are of the opinion that the new rules expressed in Order 11 rule 18 (1) (a) and that contained in the repealed legislation are expressed in substantially the same words and as such as a rule of construction, the same meaning must be given to them as indeed, has been pronouncements of our courts on the point. See: Jonah v Kulendi & Kulendi [2013-2014] 1 SCGLR 272. So strict is the rule construed that Order 11 rule 18 (2) expressly precludes affidavit evidence from being resorted to in applications made under sub-rule 1(a).

In our considered opinion, as sub-rule 1(a) of Order 11 rule 18 precludes controverting the factual averments contained in the offending pleading on which an objection is based such as was the case before the trial court in the action herein, it is difficult to accept that the defendant by his application, the subject matter of the proceedings herein was enabled to approbate and reprobate the truth of the facts contained in the plaintiff's statement of claim. It is for this reason that we have before now in this delivery said that it was an unusual practice for the applicant to require the court in one vein to consider his invitation based on the truth of the averments contained in the statement of claim and in another vein to assert their untruth. A party who seeks an action to be dismissed for disclosing no

reasonable cause of action cannot be engaged in a traverse and an admission. We think that such a course of procedure is clearly unwarranted as was determined in the case of Wenlock v Maloney [1965] 2 All ER 871, in which it was held that where the application basically is made under Order 18 sub-rule 1(a) but grounds are added under the other sub-rules of Order 18 rule 1, evidence should not be admitted, the purpose of the rule being to prevent a trial on affidavits in order to determine whether there is a cause of action. We think that the effect of the approbation and reprobation of the truth of the averments contained in the statement of claim by the defendant was to sow seeds of destruction of his own case that left the learned trial judge with no option than to dismiss the application. Further, the considerable length of the application and exhibits attached thereto which appear from pages 18 to 256 of the record of appeal should have put the learned justices of the Court of Appeal on the inquiry as its mere length and the contentious facts that were deposed to related to the presumptive admission by the defendant of the truth of the averments contained in the statement of claim rendered it one that was not fit to be dealt with under the summary jurisdiction of the Court. Also, considering the fact that the statement of defence filed to the action herein was a resolute denial of the averments contained in the statement of claim, it is clear that the application was not made in good faith as the essential pre-requisite to an application being made under Order 11 rule 18 sub-rule 1 (a) of CI 47 namely an admission of the facts contained in the offending pleading was absent. It is important to observe that as applications made under sub-rule 1 (a) of Order 18 of the High Court Rules, CI 47 are deemed to admit the truth of the facts set out in the statement of claim, making the application also on the grounds provided in sub-rule 1(b) and (c) of Order 18 which when properly made seek to prove the contrary of the facts contained in the statement of claim may be likened to a building being founded upon a structurally incompetent foundation that was bound to crumble. The application was, to say the least, unmeritorious and so procedurally flawed that it ought to have been dismissed in limine.

As the defendant's application also raised issues concerning the allegation of, for example fraud contained in the plaintiff's statement of claim, the proper procedure as was determined by the learned trial judge was for the matter to go to full scale trial. At page 264 of his ruling, the learned trial judge said:

"In sum I hold that it is the duty of this court to go into the merits of the allegation of fraud via-a-vis the issue canvassed. in this application after evidence has been taken and not to dismiss the action……."

The learned trial judge was right when he refused to yield to the defendant's application. In so doing, he must have taken into account the caution that the summary power conferred on courts both under the Rules and the inherent jurisdiction of the Court was never intended to be exercised in a manner that would have the effect of driving parties away from the judgment seat. Writing on the topic "STRIKING OUT PLEADINGS", the learned authors of Halsbury's Laws of England, Volume 37 of the Fourth Edition state at page 318, paragraph 430 thus:

"However, the powers are permissive, not mandatory, and they confer a jurisdiction which the court will exercise in the light of all the circumstances concerning the offending pleading. The discretion is exercised by applying two fundamental, although complimentary principles. The first principle is that the parties will not lightly "be driven from the seat of judgment", and for this reason the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may "often be required by the very essence of justice to be done" so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation."

A careful consideration of the plaint in the action herein compels us to the view that it disclosed a cause of action that was fit to be investigated. The mere fact that the claim as filed before the High Court may be described as weak or unlikely to succeed does not authorise it to be dismissed as the learned justices of the Court of Appeal sought to do. Regarding the allegation of vexation and frivolity and abuse of the process, we agree with the learned trial judge that the matters on which they were based were such that having regard to all the circumstances, a trial was necessary. In particular, the questions raised on the question of estoppel by the previous proceedings and the related identity of the plaintiff are matters that would have to be interrogated at the trial of the action. We are of the opinion that had the learned justices of the Court of Appeal adverted their minds to the attributes which the rules place on a party who applies to have pleadings struck out

and the action dismissed on the ground that it discloses no reasonable cause of action, they would in all probability have reached a decision contrary to that which is the subject matter of the appeal herein.

Having preferred the decision of the learned trial judge to that of the learned justices of the Court of Appeal, the corollary is that decision of the learned justices to the contrary is in error. Accordingly, we allow the appeal of the plaintiff from the decision of the Court Appeal and restore the decision of the learned trial judge dismissing the application to have the action herein dismissed.

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

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

A.M.A DORDZIE (MRS)
(JUSTICE OF THE SUPREME COURT)

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

COUNSEL

BEN TAIWO ADEKANLA FOR THE PLAINTIFF/RESPONDENT/APPELLANT

KWAKU OSEI ASARE FOR THE DEFENDANT/APPELLANT/ RESPONDENT WITH HIM ABIGAIL ANTWI