IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)

DOTSE, JSC

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

CIVIL APPEAL
NO. J4/32/2017

2ND MAY, 2018

ALFA MUSAH ---- PLAINTIFF/APPELLANT/APPELLANT

VRS

DR. FRANCIS ASANTE APPEAGYEI ---- DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

YEBOAH, JSC:-

On the 2/05/2018 we dismissed this appeal as without merits and we hereby proceed to offer our reasons.

This appeal is against the unanimous decision of the Court of Appeal, Accra, which affirmed the judgment of the High Court, Accra. The plaintiff/appellant/appellant (who for the sake of brevity shall henceforth be referred to as the appellant) commenced an action against the defendant/respondent/respondent (hereinafter called the

respondent) at the High Court, Accra on the 6/02/09 for a declaration of title to a piece or parcel of land at East Legon, Accra, and the usual ancillary reliefs of recovery of possession, damages for trespass, perpetual injunction and cost.

The appellant who claims to be an administrator of the Estate of late Malam Musa brought this action for and on behalf of the estate thus: ALPHA MUSA (serving as the administrator of the Estate of late Malam Musa). In a very brief and concise statement of claim, the appellant pleaded that he was the eldest son of Malam Musa and administrator and legal owner of the property the subject-matter of this appeal. The land was obtained by a lease by the appellant's father dated 23/05/1969 from the Nungua Stool for fifty years whereby the Nungua Stool as the lessor was represented by the Paramount Chief Nii Odai Ayiku IV. The appellant's father represented the Hausa Community and the transaction was evidenced by the lease which was registered at the Lands Registry. According to the appellant, after the death of his father, he applied for and obtained Letters of Administration from the High Court to administer the estate of his deceased father. According to him, the respondent was laying claim to the land when he caused his solicitors to commence these proceedings against the respondent for the reliefs referred to above.

The respondent lodged a statement of defence and counterclaimed against the appellant for damages for trespass and injunction. The respondent pleaded his root of title and traversed virtually all the allegations in the statement of claim and put the appellant to strict proof of his locus standi to commence this action. He pleaded that he bought the land from WILLIAM NKANSAH who was initially the second defendant to this action. He claimed that his land was within Bawaleshie and Otele now East

Legon which was part of the area covered by a land litigation in the Circuit Court, Accra, between **Nii Kotey** v **Mad. Rebecca Donkor** [Suit No. CCL 67/89]. The judgment in the said suit declared that the Klanaa Quarter of La rather owned the land at Bawaleshie and Otele. He asserted that after the judgment he proceeded to regularize his title and that of his grantor and therefore the land claimed by the appellant had changed ownership by virtue of the judgment and the Lands Commission amended its records to reflect the new ownership. Further, he pleaded that the appellant had commenced a suit at the Circuit Court, Accra, and asserted his capacity like the one in this appeal but the suit was thrown out for want of capacity.

The case at the trial High Court attracted several interlocutory applications which are not necessary for the determination of this appeal. At the application for directions, the issue of appellant's capacity to institute the suit was raised but the suit proceeded to be heard on the merits.

The High Court after hearing the evidence of both parties held that the appellant had no capacity to institute the suit and dismissed the action. The appellant's appeal to the Court of Appeal was dismissed on the grounds that he had no capacity to institute the action, thereby affirming the decision of the High Court. This appeal was lodged by the appellant to seek the reversal of the Court of Appeal's judgment.

The appellant had filed several grounds of appeal thus:

> "(i). The Court of Appeal erred in affirming the judgment of the trial High Court that the land covered by exhibit C was not the personal property of late Mallam

Musa as a result the plaintiff/appellant/appellant suing as a personal representative of late Mallam Musa lacks capacity to institute this action.

(ii). The Court of Appeal after affirming that, that land was acquired for the Hausa Community erred in not sustaining the action of the plaintiff/appellant/appellant on other capacities of the plaintiff/appellant/appellant disclosed by the record.

(iii). The Court of Appeal erred in not applying the Illiterate (Protection) Ordinance to protect the late Mallam Musa.

(iv). The Court of Appeal erred when it refused to extend the lessee in exhibit C to include the plaintiff/appellant (Appellant who is the personal representative of late Mallam Musa as provided in the exhibit).

(v).The Court of Appeal erred in holding that the Hausa Community is competent to holding interest in land.

(vi).The Court of Appeal erred in refusing to dismiss the counterclaim of the defendant/respondent/respondent after affirming that the plaintiff/appellant/appellant's lack of capacity to institute this action.

(vii). The Court of Appeal erred in holding that the ground of appeal before it relating to the cancellation of the Land Certificate of the defendant/respondent/respondent is incompetent.

(viii). The Court of Appeal erred in holding that plaintiff/appellant/appellant failed to deny the pleadings in the statement of defence and the alleged failure amounts to admission.

(ix). The judgment was against the weight of evidence before the Court of Appeal.

(xa). The Court of Appeal decision is unconstitutional for not being bound by its earlier decision, exhibit K, which found the late Mallam Musa was the person who acquired the land covered in exhibit C.

(xb). The Court of Appeal erred in holding that in one breath late Mallam Musa was the grantee of the land covered by exhibit "C" and in another the Hausa Community was the grantee of the land covered by exhibit "C".

Since the issue of capacity was raised against the appellant at the High Court and the Court of Appeal the first ground of appeal appears to be very fundamental to the determination of this appeal and in every Civil Proceedings for that matter.

In compliance with Order 2 rule 4 of the High Court [Civil Procedure] Rules CI 47 of 2004, the appellant indorsed his capacity as suing as the administrator of the estate of Mallam Musa.

The evidence conclusively established beyond doubt that the only root of title of the appellant was the lease tendered as exhibit "C", executed by the Chief of Nungua and Mallam Musa. In exhibit C, Mallam Musa executed it as the representative of the Hausa Community. A careful reading of exhibit "C" clearly proved that the lease was

for the Hausa Community and was never the personal property of the late Mallam Musa. The High Court formed the opinion, rightly in our view that since the said property was not the personal property of the said Mallam Musa, the appellant had no capacity as his successor to prosecute the action. This finding was affirmed by the Court of Appeal without any reservations whatsoever. In the High Court, the appellant's capacity resurfaced under cross-examination and the appellant made admissions against his capacity which is reproduced for fuller record:

Q. In that case there was objection to your capacity

A. Yes.

Q. You recall the judge made a specific findings that the land belonged to the Hausa Community but that Mallam Musa only bought it for the Hausa Community.

A. Yes

With the evidence conclusively pointing to lack of capacity of the appellant to institute this suit the learned trial judge proceeded to state the well-known proposition of law that when the suitor's capacity is challenged he must prove it before he can succeed on the merits. The often-quoted cases of **Sarkodie I** v **Boateng** [1982-83] GKR 715 and Asante **Appiah** v **Amponsah alias Mansah** [2009] SCGLR 715. Another case worth citing is **Sokpui II** v **Tay Agbozo III** [1951] 13 WACA 241.

We think the law is that, when a party lacks the capacity to prosecute an action the merits of the case should not be considered. However, the two lower courts, with due

respect, proceeded at length to discuss all the issues raised as if the appellant's case should be considered on the merits. If a suitor lacks capacity it should be construed that the proper parties are not before the court for their rights to be determined. A judgment, in law, seeks to establish the rights of parties and declaration of existing liabilities of parties. In the case of **Akrong & Or** v **Bulley** [1965] GLR 469 the then Supreme Court after holding that the plaintiff lacked capacity to prosecute the action as an administrator of the deceased, did not proceed to discuss the merits. For proceeding to discuss the merits when the proper parties are not before the court is not permitted in law. In this appeal, regardless of the other issues raised, the High Court, and the Court of Appeal for that matter erred in determining the other issues raised.

Even though the court may resort to taking evidence on all the issues raised by the pleadings, the court must always consider the issue of capacity first. In the Akrongs's case, supra, where lack of capacity was successfully raised on appeal before the Supreme Court, Apaloo JSC (as he then was) said at page 476 thus:

> "But the question of capacity, like the plea of limitation is not concerned with the merits and as Lord Greene MR said in HILTON v SUTTON STEAM LAUNDRY, once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitations [and I would myself add, or unanswerable defence of what of capacity to sue] is entitled of course, to insist upon his strict right"

The above would have sufficed to be reasons for this appeal but there is a procedural point which trial courts usually ignore in determination of cases of this nature in which

the issue of capacity, stature of limitation, estoppel per rem judicata are raised. Order II rule II (1) of CI47, the High Court [Civil Procedure] Rules, permits a party to raise any point of law in his pleadings. Order 33 rule 3 permits a trial court to dispose of such issues raised in the pleading. It states thus:

Order 33 rule 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 any may give directions as to the manner in which the question or issue shall be tried".

In these proceedings, if the learned trial judge had exercised his discretion to hear or determine the issue of appellant's capacity, the costs of litigation, time, etc. would have reduced significantly. Even though the rule above imposes a discretion on trial courts, it should in appropriate cases be exercised to fulfil the main objective of the drafters of the rules under Order 1 rule 2 of CI 47 to achieve expeditious and less expensive mode of adjudication of causes or matters before the Circuit Courts and the High Courts. Even though the two lower courts put in a lot of industry to discuss all the other issues and should be praised for their efforts, the matter should not have been decided on the merits.

We found that the appeal was clearly unmeritorious and we accordingly dismissed same with costs.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

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

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

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

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

BAFFOE-BONNIE, JSC:-

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

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

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

ALI GOMDAH WITH HIM RITA KUNTI ALI FOR THE PLAINTIF/APPELLANTS/APPELLANT.

COLONEL KOFI DANSO (RTD.) FOR THE RESPONDENT/RESPONDENT/RESPONDENT.