IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: AKUFFO (MS), CJ (PRESIDING)

ANSAH, JSC

ADINYIRA (MRS), JSC

YEBOAH, JSC

BAFFOE-BONNIE, JSC

CIVIL APPEAL
NO. J4/55/2017

9TH MAY, 2018

EASTERN ALLOYS COMPANY LIMITED …… PLAINTIFF/APPELLANT/APPELLANT

VRS

SILVERSTAR AUTO LIMITED …….. DEFENDANT/RESPONDENT/RESPONDENT

J U D G M E N T

ADINYIRA (MRS), JSC:-

FACTS OF THE CASE

The Plaintiff/Appellant/Appellant (Appellant), Eastern Alloys Company, a limited liability company, incorporated under the laws of Ghana, primarily engaged in the processing and production of aluminum products and also engaged in haulage, was a defendant in an earlier suit numbered RPC/268/07, before the High Court (Commercial Division), Accra;

whilst the Defendant/Respondent/Respondent (Respondent) Silver Star Auto Ltd, a limited liability company, incorporated under the laws of Ghana, engaged in the sale and servicing of Mercedes-Benz vehicles and spare parts, was the plaintiff in the said suit.

The claim in the earlier suit was for an outstanding balance of money, owed by the appellant, in respect of workshop services rendered by the respondent on Benz trucks, it sold to the appellant. The appellant filed a defence and counterclaim. The dispute was settled at the pre-trial settlement stage and a consent judgment was duly entered on 30 January 2008.

On 17 April 2014, the appellant issued a writ of summons with a statement of claim in relation to 25 units of Mercedes Benz Actros trucks claiming general damages from the respondent for breach of implied warranty of fitness, replacement value of affected trucks and costs.

The respondent filed a statement of defence to the action and then brought an application under **Order 11 rule 18(1) (b) (d) of the High Court (Civil Procedure) Rules 2004, (C.I. 47),** on grounds *inter alia* that the action was an abuse of process, as the matters raised in the appellant's statement of claim were raised as a defence in the earlier suit. The respondent also raised an additional issue that the appellant's action was caught by the **Limitation Act, 1972, (NRCD54).**

The High Court upheld the objection and struck out the suit on 29 May 2015 and this ruling was affirmed by the Court of Appeal in their judgment dated 14 July 2016. Their Lordships at the Court of Appeal were of the view that: "the main issue of contention is a question of fact whether or not as at the time of the earlier judgment the cause of action which is the alleged defects in the gear boxes of trucks had accrued. If it had but the appellant failed to raise the issue in its counterclaim but waited until 2014 to institute action, then the contention that it constitutes piece meal litigation and abuse of process may be maintainable."

This is an appeal filed on 14 July 2016 against the judgment of the Court of Appeal, Accra.

GROUNDS OF APPEAL

The Appellant has raised four grounds of appeal before this Honourable Court to wit;

1. That the judgment is against the weight of the pleadings and the affidavit evidence adduced.

2. That the learned justices of the Court of Appeal erred in holding that the case of the Appellant constitutes piecemeal litigation and abuse of the process of court

3. The learned justices of the Court of Appeal erred when they held that "Once the respondent pleaded *res judicata* the appellant was duty bound to produce all the evidence it had to support its contention that the cause of action was maintainable. It failed to do this", which error occasioned a grave miscarriage of justice to the Appellant.

4. The learned justices of the Court of Appeal misdirected themselves in coming to the conclusion that; "The main issue of contention is a question of fact whether or not as at the time of the earlier judgment the recent cause of action which is the alleged defect in the gear boxes of the trucks had accrued", which misdirection resulted in an erroneous application of the doctrine of estoppel per rem judicata, specifically cause of action estoppel.

On the facts and submissions by the parties, the issue that stands out for consideration is whether the appellant's action is an abuse of court process if at the time of the settlement of the earlier suit the present cause of action had accrued. This issue formed the basis of three of the grounds of appeal. We intend to deal with this issue as its resolution may dispose of the entire appeal.

The law relating to abuse of process

Under **Order 11 Rule 18(1) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47)**, a court may strike out the pleadings of a party in any of the circumstances set out below:

> "Striking out pleadings
>
> 18. (1) The Court may at any stage of the proceedings order any pleading or anything in any pleading to be struck out on the grounds that
>
> (a) it discloses no reasonable cause of action or defence; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass, or delay the fair trial of the action; or
>
> **(d) it is otherwise an abuse of the process of the Court**." [Emphasis supplied]

The procedural rule (d) above is grounded in the broader doctrine of abuse of process, commonly referred to as ***the rule in Henderson v. Henderson*** **[(1843) Hare 100]** which

> "…requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of its might be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. This doctrine is not based on the doctrine of resjudicata in a narrow sense or even on a strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest of as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

Submissions by Parties

Counsel for the appellant submits the issues and cause of action raised by the pleadings in the previous case are materially different and easily distinguishable from the issues and cause of action raised in the present case. He argues that the respondent did not make any allegation in respect of the defect in the gear box, to warrant a defence to the said allegation by the appellant and that the existence or non-existence of the appellant's case was not determined by the High Court in the first suit. Counsel submits further that both the High Court and Court of Appeal erred as per Order 12 rule1(1) of C.I. 47, a party is permitted to either elect to bring a counterclaim in respect of any claim or to institute a fresh action to enforce a claim against a party.

He submits further that the present case hinges on the fact that there were breakages in the gear box arm of the tractor heads six months after the trailers were mounted on the trucks and used; which was an incident that happened after the first action had been settled. Finally, Counsel submits that the Court of Appeal ought to have determined whether the existence or non-existence of the appellant's cause of action was determined by the court in the earlier action.

Counsel for the respondent submits that the defects and alleged gearbox problems had been diagnosed and correspondences between the parties on the defects were carried out as far back as 2006 before the earlier suit between the parties in September, 2007. Counsel submits the appellant had the opportunity at the time of filing its statement of defence to bring up these matters which it did but abandoned them when they settled the matter and agreed to add the judgment debt of GH¢21, 068. 75 to the cost of new trucks it would purchase from the respondent. The respondent claimed the appellant filed the present suit in order to circumvent the consent judgment.

We have taken pains to study the entire record and we state our findings as follows:

i. The appellant was aware of the defects in the gear boxes of the trucks as there were series of correspondence between the parties on these defects before the first suit was initiated in September 2007.

ii. The appellant in its statement of defence and counterclaim filed on 25 October 2007 in the earlier suit averred *inter alia* that it had suffered loss and damage by reason of the failure of the respondent to furnish and fit required features on the 25 trucks.

iii. The appellant averred further that the required fixtures were fitted on the trucks between January and March 2006.

iv. The appellant complained that between November 2005 and March 2006 when the fitting of the required fixtures were completed, the trucks could not be put to work.

v. The appellant pleaded it had suffered special damages, interest on bank loan over the same period as a result of that.

vi. The appellant counterclaimed for special damages as well as general damages.

vii. The respondent in its reply to the statement of defence and counterclaim averred that the counterclaim was an afterthought contrived to delay the payment of its workshop bill of GH¢21, 068. 75

viii. The suit was settled at the pretrial stage and judgment entered in favour of the respondent against the appellant in the sum of GH¢21, 068. 75

From the above, it is not difficult for us to conclude that all the defects relating to the trucks were known to the appellant at the time it filed its pleadings in the earlier suit. Looking at the terms of settlement of 30 January, 2008, it seems to us that the appellant abandoned its counterclaim.

It is trite for us to say that this judgment entered into at the pretrial stage is of the same binding effect as if it was a judgment after a full trial. Accordingly in the absence of special or vitiating circumstances the appellant cannot file a fresh suit against the respondent to resurrect the counterclaim. To allow or permit the present action to stand would be an abuse of process, a practice that the Court clearly abhors.

The rule in **Henderson v. Henderson, *supra,*** adopted and applied by the courts in Ghana requires the parties, when a matter becomes the subject of litigation between

them in a court of competent jurisdiction, to put forward any arguments, claims or defences which they could have put forward for decision on the first occasion so that all aspects of the dispute might be finally decided once and for all as it is a rule of public interest that there should be finality in litigation and also in the interest of the parties themselves against piecemeal litigation. The dangers of piecemeal litigation apart from being vexatious may result in a party's cause of action being caught by the statute of limitation as was raised by the respondent against the appellant's action.

In our opinion, this is an appropriate case in which to apply the rule in **Henderson v. Henderson** on abuse of process and **Order 11 Rule 18(1) (b) and (d)**. See **Naos Holdings Inc. v. Ghana Commercial Bank Ltd. [2011] 1 SCGLR 492** where this rule in **Henderson v. Henderson** was applied and Dotse JSC said at page 503 as follows:

> "Where, therefore, a judgment has been delivered by a court of competent jurisdiction and the plaintiff-appellant or the parties decide to file or institute a fresh suit against the same party or parties based on the same facts, the Supreme Court would invoke the principles of abuse of process to nullify the said fresh suit, especially if no valid reason has been given, as in the instant case."

The appellant's reasoning that a cause of action estoppel does not prevent a party from asserting a cause of action simply because the cause of action had accrued at the time of an earlier action is misconceived as the underlying principle in a cause of action estoppel and issue estoppel is based on the rule of public interest that there should be an end to litigation. This underlying public interest applies in the doctrine of abuse of process. This was aptly put by Lord Bingham of Cornhill in **Johnson v Gore Wood & Co [2002] AC 1 at 31** and cited with approval by Dr Data-Bah JSC in **Sasu v. Amua - Sakyi [2003-2004] SCGLR 742:**

> **"**But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much

in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter."

In conclusion, we hold that the High Court in the first suit determined the matters between the parties at the pre-trial conference and the appellant having succumbed to the consent judgment, it would be an abuse of the process of the court to allow the appellant to relitigate in respect of the same matter.

The appellant has not raised any special or vitiating circumstances to warrant the present action and accordingly we affirm the decision of both the trial and appellate courts that the present action is an abuse of process.

From the foregoing, the appeal fails and is thereby dismissed. The judgment of the Court of Appeal is affirmed.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

AKUFFO (MS), CJ:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

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

COUNSEL

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