IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
AKOTO-BAMFO (MRS), JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/50/2017

21ST MARCH, 2018

GEORGE AGYEMANG SARPONG ..... PLAINTIFF/RESPONDENT/ RESPONDENT

VRS

1. GOOGLE GHANA ..... 1ST DEFENDANT/APPELLANT/APPELLANT

2. GOOGLE INCORPORATED ..... 2ND DEFENDANT

J U D G M E N T

ADINYIRA (MRS), JSC:-

By an amended writ of summons and statement of claim, George Agyemang Sarpong, the Plaintiff/ Respondent/ Respondent [Plaintiff] commenced an

action seeking jointly and severally reliefs against Google Ghana, as 1st Defendant/Appellant/Appellant [1st Defendant] and Google Inc. LLC as the 2nd Defendant. The Plaintiff alleged that the Defendants had published defamatory material against him on www.google.com.gh (the 'search engine"). Consequently, the Plaintiff sought *inter alia,* an order directed at the Defendants to expunge from their search engine and any related records and archives, all the alleged defamatory publications and statements regarding the Plaintiff; an undertaking not to make, publish or communicate any other untrue and damaging statements about the Plaintiff; an order to render and publish an agreed apology to the Plaintiff; as well as damages and perpetual injunction from repeating similar actions.

The 1st Defendant who was at first sued alone, contending it was not the proper party to be sued, sought to have his name struck out of the suit. The learned judge Lovelace- Johnson, J.A. sitting as an additional High Court Judge refused the application and went ahead to join the 2nd Defendant which was alleged to be the owner of the search engine.

The 2nd Defendant acknowledged in his statement of defence that it was the owner of the search engine. It was upon that the 1st Defendant applied again to the High Court differently constituted to strike out its name from the suit contending it was not the proper person to be sued. The High Court refused the application relying on the prior ruling.

The 1st Defendant unsuccessfully appealed to the Court of Appeal with the same request; and being dissatisfied has filed a notice of appeal to the Supreme Court on 13 grounds.

ISSUES TO BE DETERMINED

For the sake of brevity we would not be set out the 13 grounds of appeal in extenso, as Counsel for the 1st Defendant in his statement of case, had merged the 13 grounds of appeal into **five issues** as follows:

a. Whether the judgment of the Court of Appeal is against the weight of evidence on record.
b. Whether the Court of Appeal misinterpreted and misapplied the Costeja decision to the [Plaintiff's] action against the [1st Defendant].
c. Whether or not the Court of Appeal erred in holding that the Appellant is a necessary party to the action because of its business relationship with the 2nd Defendant.
d. Whether or not the Court of Appeal erred in holding that [the 1st Defendant] had the capacity/locus standi to maintain the action against the [the 1st Defendant]
e. Whether the learned Court of Appeal judges erred in deciding the merits of the case in an interlocutory appeal when it held that the alleged defamatory articles had been published on the Google Search Engine.

On the issue: Whether the judgment of the Court of Appeal is against the weight of evidence on record

Submissions by parties

Counsel for the 1st Defendant submits that the judgment of the Court of Appeal is against the weight of evidence which implies that there are certain

pieces of evidence on the record that the Court of Appeal ought to have applied in favour of the 1st Defendant. He referred to **Djin v. Musa Baako** [2007-2008] 1SCGLR 686.

The1st Defendant set out the various roles of itself and Google Inc. LLC and submits that from the pleadings alone all the facts demonstrate that the 1st Defendant does not own, operate or control the search engine and that its business is different from the 2nd Defendant's.

The 1st Defendant sets out in paragraphs 28 to 36 of his statement of case filed on 26 July 2017 the argument that the Plaintiff did not dispute these facts.

Counsel further submits that the 1st Defendant is and would be incapable of satisfying the reliefs that the Plaintiff is claiming in his writ of summons and he concludes that his continued presence as a party in the case was no longer necessary.

Counsel for the Plaintiff on the other hand countered that there is no such agreement on the above issues as alleged by the 1st Defendant and referred us the pleadings. He further submits that the Defendant is a necessary party to the action.

Consideration

Once the whole judgment is called into issue, then we must analyze the entire record and take into account all the pleadings, affidavits, documents and submissions by both counsels in the record of proceedings before us to

find out whether the conclusion by the Court of Appeal can be supported. See the case **Tuakwa v. Bosom** [2001-2002] SCGLR 61.

We will restrict our opinion in this appeal to the overriding issue as to whether the 1st Defendant's presence in the case is necessary to ensure that all matters in controversy are effectively and completely adjudicated upon even where the 2nd Defendant has claimed ownership of the search engine. We think that by this mode, this appeal can be disposed of by a resolution of the issue whether the judgment of the Court of Appeal is against the weight of evidence on record.

Contrary to Counsel's submissions, we find that the Plaintiff did not make any admissions on the relationship between the 1st and 2nd Defendants as portrayed by the 1st Defendant in its arguments. We see that the Plaintiff in his Reply denied these averments and consequently, by the rules of evidence they are put in issue. See paragraphs 3, 4, 4A, 5 and 5A of the Amended Statement of Claim of the 1st Defendant filed on 12 December, 2013 at pages 192 to 193 and paragraphs 2, 3, 4, 5 and 6 of the Plaintiff's reply to the 1st Defendant's amended statement of defence filed on 18 December, 2013 at page 197 of the record of appeal respectively.

Further we note that on 14 February 2014, the 1st Defendant filed and set down these matters as additional issues to be determined by the trial judge. See pages 206 to 207 of the record of appeal. For purposes of clarity we set them out:

1. Whether or not the 1st Defendant is a web search engine provider.

2. Whether or not the 1st Defendant hunts for text in publicly accessible documents offered by web servers.

3. Whether or not the 1st Defendant is wholly owned subsidiary of the 2nd Defendant.

4. Whether or not the 1st defendant published any alleged articles on the Plaintiff.

5. Whether or not the 1st Defendant is in a position to control the Google web search engine and or remove or expunge any materials from same.

We find from the pleadings that there is no agreement on the record between the parties about the relationship between the 1st and 2nd Defendants as portrayed by the 1st Defendant in its arguments.

It is trite law that once these issues are in controversy they have to be resolved according to the evidential rules relating to burden of proof provided under sections 10 and 11 of the **Evidence Act, 1975, NRCD 323**. The submission by Counsel for the 1st Defendant, on this issue, with due respect, is misconceived and misleading and is therefore rejected.

The Court of Appeal in determining the appeal said at page 182 of the record of proceedings per Agyemang (Mrs.) J.A.:

> "On the first defendant's own showing: its business is to "provide sales and operational support for services provided by other legal entities…" The distinction regarding who is responsible for material appearing on www.google.com.gh, Google's search engine operating in Ghana, is not so clear as to absolve the first defendant from blame before trial.

Thus in the circumstance where there is alleged wrongdoing out of the said business by reason of its operation and/ or management, a suit brought claiming reliefs, jointly and severally (or even in the alternative) is not improper in the circumstances."

We find no fault with this reasoning and we affirm it.

It is our considered opinion that once these matters concerning the search engine are in contention and are yet to be determined at the trial on the strength of evidence to be led at the hearing; we hold that the presence of the 1st Defendant as a party to the suit is necessary

The question as to whether the 1st Defendant can comply with the Plaintiff's demands is also a matter to be determined at the trial.

From the foregoing we hold that the Court of Appeal did not misdirect itself as there were no agreed facts to warrant a judgment in favour of the 1st Defendant. The appeal accordingly fails.

Further we dismiss the appeal against the costs of GH¢5,000 awarded to the Plaintiff as we do not find it excessive and it was well within the discretion of the Court.

From the foregoing the appeal is dismissed.

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

DOTSE, JSC:-

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

J. V. M. DOTSE
(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)

AKOTO-BAMFO (MRS), JSC:-

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

V. AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

BRIGHT OKYERE AGYEKUM WITH HIM GWENDOLOVE OWUSU FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.

KIMATHI KUENYEHIA WITH HIM PAA LARBI ASARE FOR THE 1ST DEFENDANT/APPELLANT/APPELLANT.