IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)
YEBOAH, JSC
AKOTO-BAMFO, JSC
BENIN, JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/48/2017

21ST FEBRUARY, 2018

SIC INSURANCE COMPANY LTD. ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

1. IVORY FINANCE COMPANY LTD.
2. DORIS AWO NKANI
3. ITALCONSTRUCT INTERNATIONAL LTD.
4. KWESI BAIDOO
5. JAMES KWEGYIR AGGREY ..... DEFENDANTS/RESPONDENTS/RESPONDENTS

JUDGMENT

ANIN YEBOAH, JSC:-

On 26/1/2015, the Plaintiff/Appellant/Appellant herein (who for sake of brevity shall be referred to as the Plaintiff) commenced these proceedings at the Commercial Division of the High Court, Accra, against the five defendants (who shall be referred to in this judgment as the defendants) for several reliefs endorsed on the writ of summons thus:

(a) a declaration that the 2nd Defendant acted in breach of Section 203 of the Companies Act 1963 (Act 179) in issuing the First and Second Guarantee bonds;

(b) a declaration that the 2nd Defendant acted in breach of Section 203 of the Companies Act 1963 (Act 179) in negotiating and signing the Terms of Settlement;
(c) a declaration that the consent judgment entered against the Plaintiff on 27th November 2014 was procured by fraud perpetrated by the defendants herein;
(d) an order to set aside the consent judgment entered against the plaintiff on 27th November 2014;
(e) damages against the 2nd Defendant for breach of Section 203 of the Companies Act 1963 (Act 179);
(f) damages against the Defendant.

It should be noted that the case before us did not proceed to trial or even application for directions stage but was truncated at the High Court when on the 17th of April 2015, the court granted an application to dismiss the suit summarily on the grounds that "the endorsement on the writ of summons and the statement of claim does not only fail to disclose a reasonable cause of

action against the 1st, 3rd, 4th and 5th defendants but was frivolous, vexatious and an abuse of the process of the court".

The facts appear not to be controverted and for the sake of consistency I shall proceed to adopt the facts as set down by the Court of Appeal thus:

> "The plaintiff is a limited liability public company registered and operating in Ghana as an insurer. The 1st defendant is a non-banking financial services provider. The 2nd defendant was at all material times the managing director of the plaintiff company whilst the 3rd defendant is a limited liability company registered and engaged in the construction industry in Ghana. The 4th and 5th defendants were at all material times the managing director and the director respectively of the 3rd defendant. The 4th defendant was also a shareholder of the 3rd defendant. The case of the plaintiff is that in her capacity as the managing director the 2nd defendant signed and issued a Guarantee Bond (known as the Second

Bond) on behalf of the plaintiff company and in favour of the other defendants herein, in particular the 1st defendant for a sum of Nineteen Million Three Hundred and Three Thousand, Eight Hundred Ghana Cedis, Eight Pesewas (GH¢19,303,800.08) contrary to previous resolution of the Board of Directors of plaintiff company to discontinue the issuance of guarantee bonds. The plaintiff further claimed that the 2nd defendant also engaged in and settled out of court a suit no. BFS/300/13 brought against the plaintiff company (which was the 4th defendant in that suit) and the other defendants in the instant suit, by the 1st defendant herein (as plaintiff in that suit) to enforce the payment of

this second Guarantee Bond when the plaintiff herein failed or defaulted to honour the said Bond upon maturity.

According to the plaintiff company in settling out of court the said suit (No. BFS/300/13) against the plaintiff, the 2nd defendant did not obtain the approval and authority and in so doing breached her duty of being honest and faithful to the plaintiff company. The plaintiff claimed that in so doing or acting the 2nd defendant was in fraudulent collusion with the other defendants herein who had been sued with the plaintiff. It was on the basis of these claims that on the 26th day of January 2015 the plaintiff issued the writ of summons against the defendants seeking the following reliefs:"

The Court of Appeal after hearing the appeal dismissed the appeal and affirmed the judgment of the trial High Court. It proceeded to dismiss the entire case on the merits regardless of the fact that the case did not go for full trial. This is a subject of a couple of legitimate complaints as captured in the grounds of appeal which will be discussed later in this delivery. After the dismissal of the appeal by the Court of Appeal on the 15/12/2016, the plaintiff lodged this appeal that very day and on 1/02/2017 successfully sought leave and amended the Notice of Appeal with the following grounds of appeal to seek the reversal of the judgment:

(i) The decision by their Lordships upholding the ruling of the High Court Judge is not supportable.

(ii) Their Lordships in the Court of Appeal erred in raising anew and determining the issue of estoppels without giving the appellant a hearing on the issue.

(iii) The decision of the Court of Appeal on the novel issue of estoppels was made without giving the Appellant a hearing, and in breach of the rule of natural justice.

(iv) The Court of Appeal erred in determining factual and other matters not raised or determined in the Court below.

(v) The Court of Appeal erred in determining factual and other matters not decided in the Court below without giving the appellant a hearing on those issues, thus violating the *audi alteram rule.*

(vi) The Court of Appeal erred in raising and determining the issue of estoppels in disregard of the rule of mutuality.

(vii) The authority of the Managing Director to issue the bond in issue was not relevant to the matter on appeal in the Court of Appeal.

(viii) The Court of Appeal erred in not complying with the directive of the Supreme Court in Suit No. J5/20/2016 entitled Republic v High Court, Commercial Division, Ex parte Ivory Finance Company Limited, that the action ought to be heard on the merits.

(ix) The Court of Appeal omitted to decide on the ground of appeal against the trial judge striking out 3rd, 4th and 5th defendants' *suomotu.*

We have recited all the grounds of appeal to show the extent of the complaints raised against the judgment of their Lordships at the Court of Appeal which is now before us.

Before we proceed to discuss the grounds of appeal, we have decided to point out a serious procedural issue which appears to have eluded the two lower courts.

This action in our respectful opinion was commenced to set aside a consent judgment obtained before a court of competent jurisdiction on grounds of fraud. The basic common law procedure which has been a settled practice is that the plaintiff's claim should be based on fraud and nothing else. In the proceedings before us, the plaintiff in the statement of claim raised issues relating to Section 203 of the Companies Act 1963 (Act 179) and its apparent breach by the managing director. In the statement of claim the plaintiff pleaded breach of duty and supplied copious particulars based on allegations of second defendant's recklessness also based on Section 203 of Act 179 of 1963. No complaint has been raised by the defendants against the procedural flaw and the lower courts never raised it. We think that it would advance substantial justice to determine this appeal without raising this issue on second appeal. This court has in the recent case of **OKWEI MENSAH (Decd) (acting by) ADUMUAH OKWEI V LARYEA (Decd) (acting by) ASHIETEYE LARYEA & ANOTHER [2011] 1 SCGLR 317** made it clear that when a court is called upon to set aside a judgment on grounds of fraud, the case should be limited to only the allegation of fraud and it should not re-open the matter as if it is a fresh trial of issues raised in the earlier case. As pointed out, we prefer to deal with the issue of fraud and nothing else since fraud was adequately pleaded with clear particulars in the statement of claim. In our view this was not a fundamental error to deny us the opportunity to proceed with this appeal on the merits.

Ground one of the of grounds of appeal raises the issues of the propriety of the manner in which the two lower courts formed the opinion that as a consent judgment has been given by the High Court, another High Court (a court of coordinate jurisdiction) was bereft of any jurisdiction to set it aside. We think that explains why the Court of Appeal in affirming the judgment of the trial High Court exhaustively dealt with estoppel per rem judicata and proceeded to cite several

cases on the subject; notably **HENDERSON V HENDERSON [1843] 3 Hare 100, FOLI & ORS V AGYA ATTA & ORS (consolidated) [1976] 1 GLR 194 CA and SASU V AMUA-SEKYI & ORS [2003/04] 2 SCGLR 746** and other cases to form the view that the plaintiff was estopped from re-litigating the matter.

It is a basic common law principle that a consent judgment obtained before a Court of competent jurisdiction could be set aside on grounds of fraud, mistake or on any other vitiating factor, regardless of its finality. In the case of **REPUBLIC V HIGH COURT (COMMERCIAL DIVISION) ACCRA; EX PARTE THE TRUST BANK LTD (AMPONSAH PHOTO LAB LTD. & THREE OTHERS (INTERESTED PARTIES [2009] SCGLR 164** this very court relying on **EMERIS V WOODWARD [1889]46 Ch D 185** held in holding 1 thus:

> "Notwithstanding that a consent judgment had been given and completed, a trial High Court had ample jurisdiction to set it aside upon any grounds which would entitle it to set aside an agreement entered between the parties on the grounds of mistake. And given that an appeal would not ordinarily lie against a consent judgment, bringing a fresh action to challenge the validity of a consent judgment was a standard and accepted procedure.Thus a fresh action to establish fraud, mistake, or other vitiating factor seemed a reasonable procedure for achieving justice in the circumstances. And it was not for the Supreme Court to determine whether the circumstances had been established which would justify the setting aside of any aspect of the consent order; that would be an issue determinable by a High Court of co-ordinate jurisdiction" (emphasis is ours).

In our respectful opinion their Lordships at the Court of Appeal in treating the case as res judicata were in error by affirming the judgment of the learned trial judge, who also formed a similar view and denied himself the jurisdiction to go into the merits of the case.

Another fundamental issue arising from the first ground of appeal was the procedure adopted in terminating the proceedings without any plenary trial. It was not in doubt that the High Court could under its inherent jurisdiction and under Order 11 rule 18 of CI 47 of 2004 strike out an action on the grounds that the pleadings do not disclose any reasonable cause of action or that the action is frivolous, vexatious and abuse of the process. This jurisdiction when successfully invoked could terminate proceedings or

stay proceedings before the High Court. Indeed the new rules of court is not different from the old rules under Order 25 rule 4 of LN 140A of 1954 and the basic principles guiding the High Court in striking out pleadings on the above stated grounds are the same. The cases like **GHANA MUSLIMS REPRESENTATIIVE COUNCIL V SALIFU [1975] 2 GLR 246 CA**, and **OKOFO ESTATES LTD. V MODERN SIGNS LTD. & ORS [1996/97] SCGLR 224** and the current decisions of this court in **JONAH V KULENDI & KULENDI [2013/14] 1 GLR 272** and **GBENARTEY & GLIE V NETAS PROPERTIES & INVESTMENTS & ORS [2015/16]1 SCGLR 605** spell out the same basic principles.

In the GBENARTEY'S case, supra, this court said, at page 619 per AninYeboah JSC thus:

> "It therefore follows that the procedure of terminating proceedings by summary process should be applied only in cases where the action is clearly unsustainable, plain and obvious that it is beyond doubt that the case is unarguable, frivolous and vexatious, and even legitimate amendments could not cure the defect."(emphasis ours)

In all the cases above referred to, the courts insisted that theprocedure should be sparingly exercised with extreme care and circumspection in plain and obvious cases. See **THE REPUBLIC OF PERU V PERUVIAN GUANO [1887] 1 Ch 465 and HUBBUCK & SONS LTD. V WILKINSON HEYWOOD & CLARK [1899] 1 QB 86.** In these proceedings, the plaintiff had expressly pleaded fraud with sufficient particulars which the defendants strongly denied which in our respectful opinion was treated lightly by the two lower courts. Fraud qua fraud is such a serious vitiating factor that in judicial proceedings care must be taken not to suppress it when legitimately raised in the course of any proceedings. This very court in the case of **DZOTEPE V HAHORMENE III [1987/88]2 GLR 681** made it clear that fraud is such a serious matter that when it is raised before a court of law should be investigated by evidence and proceedings set aside if it is so proved. Taylor JSC said on page 695 as follows:

> "In Kerr on Fraud and mistake 7th Edition at P 416 it is stated on the authority of De Grey CJ in Duchess of Kingston's Case [1776] 20 st Tr 355 at 357 that "Fraud is an intrinsic, collateral act, which vitiates the most solemn proceedings of court of Justice and Lord Coke is quoted as saying "it avoids all judicial acts ecclesiastical and temporal"

(emphasis ours).

In these proceedings it appears that no serious attention was given by the learned judges of the two lower courts on the crucial issue of fraud being raised to set aside the judgment. In the OKOFO ESTATE'S case which was summarily terminated by a motion under the rules of court as it then stood that is, Order 25 rules 4 of LN 140A of 1954, Edward Wiredu JSC (as he then was) said at page 253 as follows, while admonishing judges for resorting to the rule when allegation of fraud is in issue:

> "on the face of the materials presented before the High Court, the plaintiff alleged "fraud" against the defendant (particulars given). An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document obtained by fraud pass no right. An allegation of fraud, if denied, needs to be investigated and proved. This can be done only by taking evidence. A denial of allegation of fraud raises a triable issue which a court cannot determine summarily. In the instant case the allegation of fraud ought to have alerted the High Court that it could not competently determine the case before it without going into the allegations. The summary way in which the court dismissed this case erroneously denied the plaintiff a hearing, a denial which amounted to a violation of fundamental rule of natural justice. It was not within the competence of the High Court on the available materials before it, to have dismissed the plaintiffs action summarily"
> (emphasis ours).

We have quoted *ad longum the dictum* of Edward Wiredu JSC (as he then was) to illustrate how trial courts should be very circumspect in striking out actions summarily when fraud is in issue.

We think that enough has been said to demonstrate that the lower courts, with all due respect, were in clear error when they ignored the plea of fraud and treated the action as an ordinary suit in the manner they did.

The above issue of fraud exhaustively discussed should have been enough for the allowance of this appeal without resort to dealing with the other grounds but there is a disturbing issue which is captured in ground (v) of the Notice of Appeal

which we think the lower courts must take note of. The Court of Appeal went on to discuss the merits as though there was evidence led on those issues. As the case was terminated summarily, the issues which were adequately discussed were not based on any evidence. Counsel for appellant has, indeed, pointed not on the settled authorities that pleadings do not constitute evidence and it was thus out of place for the court below to have treated it so and delved very deep into all matters not in issue on appeal. We think counsel's complaint is legitimate and well founded.

The last ground which we think is also worth resolving is ground (viii). In a certiorari application brought before this court in **Suit No.JS/20/2016** entitled: **REPUBLIC V HIGH COURT, COMMERCIAL DIVISION, EX PARTE IVORY FINANCE COMPANY LIMITED, dated 19/05/16,** this court, per Benin JSC cautioned thus:

> "since the plaintiff had raised fraud which has not been rebutted by evidence apparent on the face of the record, it would seem that the party alleging the fraud is entitled to be heard on merits".

We think that this caution, no matter when and the circumstances under which it was raised should have been carefully considered. The Supreme Court as the highest Court of the land is enjoined to give directives, directions and orders to courts lower than it to foster judicial harmony. We think the Court of Appeal ought not to have disregarded this well considered opinion of His Lordship. We think that such practice would not advance substantial justice and judicial harmony. If the Court of Appeal had considered the issue of fraud it would certainly have set aside the judgment of the learned High Court Judge.

For the reasons canvassed above we allow the appeal and set aside the judgments of both the High Court and the Court of Appeal and order a trial on the merits based on the pleadings as they stood at the High Court.

ANIN YEBOAH
(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)

AKOTO-BAMFO, JSC:-

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

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

BENIN, JSC:-

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

A. A. BENIN
(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)

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