IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/18/2015

28TH NOVEMBER, 2018

MOHAMMED ODARTEY LAMPTEY ……. PLAINTIFF/APPELLANT/RESPONDENT

VRS

1. LANDS COMMISSION
2. APOSTOLIC FAITH MISSION
3. WAFA YAW
4. ASARE K. BOADI ……. DEFENDANTS/RESPONDENTS/APPELLANTS

JUDGMENT

YEBOAH, JSC:-

The plaintiff/Appellant/Respondent (who shall simply be referred to as the respondent) commenced these proceedings at the High Court, Accra against the defendants' respondents/appellants (who for sake of brevity shall be referred to as the appellants) for the following reliefs before the High Court, Accra (Fast Track Division)

a. An order for peaceful and quiet possession of the disputed property as covenanted.

b. Damages for breach of contract

In the alternative

c. An order to comply with its statutory duty of ejecting all trespassers on the disputed property being government land.

And against the 2nd, 3rd and 4th defendants as follows;

a. Recovery of possession
b. Damages for trespass
c. An order of perpetual injunction restraining the 2nd, 3rd and 4th defendants their assigns, servants and all persons claiming through them from interfering with the disputed property.

The respondent acquired the disputed land from first defendant (Lands Commission) under a fifty year lease for a fuel station. Prior to the grant by the Lands Commission, he had acquired the property from the Kwartei family. It was when the respondent presented the deed of conveyance for registration that it came out that the disputed land belonged to the Government of Ghana. The respondent then sought to regularize his title. The 2nd, 3rd and 4th defendants trespassed unto the land to the knowledge of the first defendant. The respondent therefore commenced these proceedings at the High Court to compel the first appellant to carry as it were, the statutory duty by ejecting all the other appellants from the disputed land to enable him put up his fuel station.

The appellants in a statement of defence stoutly denied virtually all the averments in the statement of claim and alleged that they were not trespassers on the disputed land. The second respondent denied that, its church building does not form part of the appellant's land. The 3rd and 4th appellants however, contended that they occupied the land by virtue of a license granted by the 2nd appellant and that the lands granted to them do not form part of the respondent's land. The second appellant, raised another defence by contending that the respondent did not acquire his land bona fides for the simple reason that it had already acquired the land on which the church stands from one Osei Assibey in February of 2001

when the land was bare and free from any encumbrances whatsoever whereupon the proceeded to erect temporary structures initially. The equitable defence of laches and acquiescence was also pleaded in support. The first appellant, a statutory body, however, contended that the land in dispute forms part of land acquired by the Government of Ghana under an Executive Instrument Nº L.S 506/68 dated 12/07/1968 for a public cemetery. It went forward to contend that as managers of the disputed land it granted to the respondent a fifty year lease to commence from 1/05/2000. It denied that it had ever dealt with the 2nd and 3rd appellants and contended that they are trespasses on the disputed land.

Due to the fact that the 2nd and 3rd appellants were disputing the identity of the land, the trial court appointed a surveyor to ascertain whether the land in dispute is the same. The survey plan established that the land in contention is the same land being claimed by the parties with slight shift but majority of the land appears to be the same. The composite plan of the land was tendered to establish the respective lands of parties.

After going through a trial the learned High Court Judge dismissed the respondent's claim and based its judgment on Article 20, clause 5 of the 1992 Constitution. The respondent lodged an appeal against the judgment of the High Court and had same reversed by the Court of Appeal, the notable ground for the allowance of the appeal was the judge's suo motu application of Article 20(5) of the 1992 Constitution which was not raised by any of the partied to these proceedings.

The appellants set out the following grounds of appeal for our consideration:

a. The judgment is against the weight of evidence.

b. Their Lordships misinterpreted and misapplied Article 20(5) and (6) of the 1992 Constitution and how the effect and impact of same affected the plaintiff/respondent's acquisition of his land from the Government of Ghana via the Lands Commission.

c. The Court of Appeal wrongly and unfairly applied the principle in Kusi & Kusi v Bonsu [2010] SCGLR at 60 in the determination of the appeal to the detriment of the 2nd ,3rd

and 4th defendants/respondents/appellants and by so doing has occasioned the 2nd , 3rd and 4th defendants/respondents/appellants substantial miscarriage at justice.

d. The Court of Appeal wrongly applied the principle in Dam v Addo [1962] 2 GLR 200 with its findings that the trial judge erred when he invoked Article 20(5) and (8) of the Constitution in the adjudication of the matter before it.

The appellants have taken this court through the evidence led by the parties to demonstrate to us that the Court of Appeal unjustifiably reversed the findings of facts made by the learned judge in their favour. It appears from the judgment that the allowance of the appeal by the Court of Appeal was not based on the facts. The court never reversed any of the primary findings of facts made by the trial judge and therefore did not proceed to allow the appeal by upholding the ground of appeal which alleged that the judgment of the High Court was against the weight of evidence.

Whenever the appellant in an appeal alleges that the judgment is against the weight of evidence, it behoves the appellate court to review the record and ascertain from the records whether substantial justice had been done. This court has on several occasions settled this proposition of law and in the case of OPPONG v ANARFI [2011] ISCGLR 556, at 565 stated as follows:

> "There is a wealth of authorities on the burden allocated to an appellant who alleges in his notice of appeal that the decision is against the weight of the evidence led. Even though it is ordinarily within the province of the trial court to evaluate the veracity or otherwise of a witness, it is incumbent upon an appellate court in such a case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that on the preponderance of the probabilities, the conclusions of the trial judge are reasonable or amply supported by the evidence"

Wood CJ in the case of AGYEIWAA v P&T CORPORATION [2007 – 2008] 2SCGLR 985 at page 989 also said as follows:

> "The well-established rule of law is that an appeal is by way of rehearing and an appellate court is therefore entitled to look at the entire evidence and come to the conclusions on both the facts and the law"

The Court of Appeal reviewed the evidence in its entirety and we are of the considered opinion that this ground of appeal is not supported in law and accordingly dismiss same.

The main ground which the Court of Appeal relied on to set aside the judgment of the trial court was the invocation of Article 20(5) and (6) of the 1992 Constitution. It was clear from the judgment of the High Court that the parties in settling pleadings never raised any constitutional provision to rely on to make a case or defence. None of them even faintly referred to the said provisions of the constitution. However, the learned High Court judge suo motu applied the said provisions, after he did not find any merits whatsoever in the defence of the appellants to give judgment to the appellants based solely on the constitutional provisions. This was a major complaint before the Court of Appeal which allowed the appeal, on this legal point.

It should be noted that in civil proceedings commenced by writ of summons, the parties file pleadings to guide the court to know before the trial their respective cases and the evidence that may be led. Parties are therefore confined to their respective pleadings in course of trials and would be permitted to lead evidence usually within the confines of their pleadings. See HAMMOND v ODOI [1982-83] 2GLR 1215 SC, Pleadings also assist the court to know the real issues and the applicable law to be applied to the facts. A judge is not permitted to suo motu raise a point of law and base his judgment on it. The court, like the parties, is also bound by the pleadings filed on record, and pleadings guide both the trial and appellate courts, throughout the case. Before the often-quoted case of ESSO PETROLEUM CO. LTD v SOUTHPORT CORPORATION [1956] AC 218 HL was decided, SCRUTTON LJ had cautioned trial judges in the case of BLAY v POLLARD & MORRIS [1930] I KB 628 CA at 634 as follows:

"Cases must be decided on the issues raised on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleading and in my opinion he was not entitled to take such a course"

Local cases like DAM v ADDO [1962] 2 GLR 200, BISSI v TABIRI [1987-88] 1GLR 360 SC OLOTO v WILLIAMS [1944] 10 WACA 23. BENNEH v THE REPUBLIC [1974] 2 GLR 47 and more recently GAVOR v BANK OF GHANA [2013-2014] 2 SCGLR1081 affirm the basic principle that a court of law is not entitled to raise an issue ex proprio motu outside the confines of the pleadings, which is inconsistent with and contrary to what the parties themselves had put forward without allowing the parties the opportunity to amend the pleadings and thereby raising a surprise in the trial. In this case, the trial judge raised a constitutional provision, when none of the parties had raised it as a point of law permissible to be pleaded under Order II (1) rule of the High Court (Civil Procedure) Rules, CI 47 of 2004.

We are mindful of the flexibility in the application of Order II rule 8 of the existing High Court [Civil Procedure] Rules, 2004 CI47, which states thus:

8(1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality

a. Which the party alleges makes any claim or defence of the opposite party not maintainable, or
b. Which, if not specifically pleaded might take the opposite party by surprise; or
c. Which raises issues of fact not arising of the preceding pleading.

(2) Without prejudice to sub rule (1) a defendant to an action for possession of immovable property shall plead specifically every ground of defence on which the defendant relies, and a plea that the defendant is in possession of the immovable property in person or by a tenant shall not be sufficient.

Indeed the above-stated rule is the same as the Order 19 rule 16 of the repealed High Court (Civil Procedure) Rules, 1954 (LN 140 A). Under the old rules, which is the same as the new rules, cases like ASARE v BROBBEY [1971] 2 GLR 331 CA, NATIONAL OMNIBUS SERVICES AUTHORITY v OWUO Court of Appeal, 20th August, 1969; digested in [1969] CC 158 CA establish the principle that if the point of law raised would not take the other party by surprise it must be considered by the court, regardless of the fact that it was not pleaded. In the daily administration of the law by the courts, constitutional provisions may be applied on a regular basis but under this particular circumstances, the learned trial judge with due respect, went beyond bounds and offered the respondent no opportunity whatsoever of being heard on that point when he based his judgment exclusively on it.

Our adversarial system of justice clearly frowns upon this course. In the case of BISI & ORS v TABIRI alias ASARE [1984 – 86] 2 GLR 282 CA, the Court of Appeal per Adade JSC (sitting as an additional judge) after subjecting most of the cases on the principle above stated thus:

> "The principle enunciated in DAM v Addo [1962] 2 GLR 200 at 230, SC to the effect that a court must not substitute for a party a case contrary to, and inconsistent with, that which the party himself had put forward by his pleadings and evidence was clear and unexceptional. The general principles guiding the application of that principle deducible from the cases were that;
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> a. The new case was not pleaded either expressly or by necessary implication;
> b. The new case was raised after obvious difficulties with, or failure of the old case, the party clearly turning a complete somersault
> c. Sufficient notice of the new case was not given, it was not contested. It was raised either at the address stage or on appeal or by the court itself.
> d. The new case was irrelevant to the resolution of the issues on hand; and

e. The new case was not just a matter of interpreting and giving effect to a document relevant to the issue, and properly tendered in evidence".

It is thus clear that the learned High Court judge's judgment was based solely on the invocation of Article 20 clause 5 of the 1992 Constitution and offended all the principles laid down in the above case as the case for the appellant had failed after facing obvious difficulties. The resort to the provisions of the Constitution and not allowing both counsel to address him on it was clearly erroneous and same was righted by the Court of Appeal. Learned counsel for the appellant has not successfully in his written submission raised any point of law to show that the learned justices of the Court of Appeal were wrong in their application of the law to the undisputable facts in this case.

The appeal therefore lacks merits and same ought to be dismissed, even though other grounds were argued by the appellants, we think that the grounds discussed could sufficiently dispose of this appeal.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

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

V. J. 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)

PWAMANG, JSC:-

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

RAPH POKU ADUSEI FOR THE 2ND – 4TH DEFENDANTS/RESPONDENTS/APPELLANTS.

NARTEY TETTEH FOR THE PLAINTIFF/APPELLANT/RESPONDENT.