IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: ANSAH, JSC (PRESIDING)
DOTSE, JSC
MARFUL-SAU, JSC
DORDZIE (MRS), JSC
AMEGATCHER, JSC

CIVIL APPEAL
SUIT NO. J4/12/2018

5TH FEBRUARY, 2020

MRS. MARGARET YAA NTIRIWA ACHIAMPONG ….. PLAINTIFF/APPELLANT/APPELLANT

VRS

1. OBAAPAYIN ABA YAA
(SUBST. FOR ARABA ADAWOMA)
2. ANTHONY ANDOH
3. AMA NKRUMAH …… DEFENDANTS/RESPONDENTS/RESPONDENTS
4. SEWAAH
5. NANA KWABENA
6. KWAKU AWA

JUDGMENT

DORDZIE (MRS.), JSC:-

BACKGROUND

On 17 March 1995, the appellant herein commenced two separate suits in the High Court Cape Coast. The first is Suit Number 9/95, titled:

Margaret Yaa Ntiriwah Achiampong -------Plaintiff

V

Araba Adawoma

Anthony Andoh ---------- Defendants

Her claims in this suit as indorsed on the amended writ of summons are:

a) Declaration of title to the land distributed over 3 areas of Kwaadende as described in the amended statement of claim.

b) Mesne profits for cultivation the said land

c) General damages for trespass

d) Interim injunction against the defendants, their workmen and assigns

e) Perpetual injunction against the defendants, their successors and assigns.

The second is Suit Number 10/95 titled

Margaret Ntiriwah Achiampong ----------Plaintiff

V

1. Araba Adawwoma 2. Amma Nkrumah 3. Serwaah--)

4. Nana Kwabena 5. Kweku Dua -------) Defendants

The claims against these defendants are:

a) Declaration of title to House N0. 72 Assin Darmang

b) Ejection from the house of 2nd to 5th defendants.

The appellant's reliefs in Suit N0 9/95 are based on facts narrated in her statement of claim thus:

The property the subject matter of the suit was originally owned by her grandmother Obaapanyin Abena Antwiwah of Assin Darmang. Obapanyin Antwiwaah died in 1959, at her death; the appellant became her customary successor and inherited all her properties including the disputed land in a farming area called

Kwaadende. At time of this inheritance the appellant was a minor, Opanyin Atta Kweku was therefore appointed to take care of the properties that devolve to the appellant customarily. Opanyin Atta Kweku died in 1975, though the appellant was of age and could take over her properties, she lived outside the country for a long period, and therefore, she appointed various caretakers who managed the properties on her behalf. These caretakers were Teacher Yaw Tibuah, at his death, Maame Kyeraa, her son James Sam took over at her death and Afuah Mbrah of Ngresi was the next caretaker. According to the appellant, she was in possession of the disputed land until 1991 when the defendants commenced various acts of trespassed to her property. The matter went before the traditional rulers of their area but the defendants persisted with the trespass, she therefore instituted the action.

In respect of the claim of title to the house in suit N0 10/95 the appellant maintained the house forms part of her inheritance from the grandmother.

The defendant's position in respect of the disputed land is that the said land is their family property. The appellant's great grandmother Maame Appiah was married to one of their family members who originally owned the land jointly with his two brothers. The family Permitted Maame Appiah and her daughter(appellants grandmother) to farm on the family land, the appellants grandmother Obapanyin Abena Antwiwah acquired no interest in the land which she could pass on to the appellant. The defendants therefore counter-claimed for declaration of title to the land they particularly described in their pleadings.

In respect of house number 72 Assin Darmang the subject matter of suit N0 10/95, the defendants denied the appellant's ownership and maintain that the house belongs to the Oyoko family of Assin Darmang to which the appellant does not belong.

What I can glean from the record is that both suits were consolidated and tried together. In a judgment, dated 20th December 2000 found on page 116 of the record, the appellant was granted all the reliefs in both suits.

The defendants appealed against the judgment. The Court of Appeal made a finding that the trial at the High Court was unsatisfactory, the judgment, the Court of Appeal found to be based on void amended pleadings; the judgment was declared null and void and therefore set aside. The court further ordered the suit to be transmitted to the trial High Court to be tried de novo by a differently constituted court.

For the purposes of the retrial and I believe in a move to rectify the irregularities that rendered the first trial unsatisfactory, the parties took the following steps:

1. A new survey plan was ordered to be drawn
2. Plaintiff filed an amended writ and statement of claim on 18/10/2010 (see page 135 of ROA)
3. The defendants filed amended statement of defence & counterclaim on 4/11/2010
4. Reply and defence to counterclaim was filed on19/1/2011
5. Application for direction was filed on 19/1/2011.

Essentially the case was ripe for hearing; but before hearing could commence the plaintiff, who is the appellant herein applied to have the evidence of her witnesses who testified in the trial that had been declared null and void adopted. The said witnesses she maintained were dead. The trial judge refused the application and rightly too, in my view, on the ground that it would be wrong for the trial court to adopt evidence or documents in a trial that had been declared unsatisfactory by reason of void pleadings and for which reason the judgment based on those pleadings was declared null and void.

The next step plaintiff took at this stage of the proceeding was to apply for leave to withdraw the action with liberty to reapply. The outcome of that application has led to the present appeal before us.

The trial court

The appellant in her motion paper stated she was bringing the application under the inherent jurisdiction of the court for leave to 'discontinue/ withdraw case with liberty to come back or reinstitute the case afresh'. I however believe Order 17 of the High Court (Civil Procedure) Rules, 2004 C. I. 47 regulates the procedure for such applications. The plaintiff having taken a fresh step after statement of defence was served on her by filing a reply, needed leave of the court to discontinue the action**. Order 17 Rule 3 of C.I 47 provides as follows: *Except as provided in this rule, the plaintiff shall not be entitled to withdraw the record or discontinue the action without leave of the Court, but the Court may before, during or after the hearing or trial upon such terms as to costs and as to any other action as may be just, order the action to be discontinued or any part of the alleged cause of action to be struck out"*** The appellant rightly sought leave of the court to discontinue the action. The wording of Order 17 rule 3 clearly shows that the grant or refusal is at the discretion of the judge.

In paragraph 7 of her accompanying affidavit the appellant put the grounds for the application in the following words: "...since the court found out that there were void amended pleadings and also serious irregularities in the trial in which all the parties and the trial judge were involved, it is my understanding and belief that it will be in the interest of justice to pray this honourable court for leave to discontinue/withdraw the action with liberty to reinstitute the action"

The defendants resisted the application; to them it would be an abuse of the process if the application were granted. They have been in court for 18 years; they are poor peasant farmers, who had to raise a colossal sum of over 30,000 cedis to cover the cost of litigating in this case. There must be an end to litigation; they will suffer hardship if the case has to be started all over again in a fresh action.

The trial court in the exercise of its discretion granted the appellant leave to withdraw the application and struck out the action accordingly but refused the prayer to

reinstitute the action. This means the ruling of the trial court finally determined the matter. It is worth quoting the relevant portion of the ruling of the court showing the reasoning behind the decision of the court. ***"I am of the view that the void amended pleadings can be rectified or regularized with leave of the court upon proper application made upon satisfactory reasons. It cannot be said therefore that the suit must necessarily be discontinued for a fresh action to be taken. There must be an end to litigation as properly stated by counsel for the defendants/respondents, which I admit and it would be more prudent, in my opinion that the present suit at the stage it has got to ought to be maintained and mended to continue to determination. Since the plaintiff insists on her prayer for leave to withdraw/discontinue her action, which is her right, I will not stand in her way. I am however not convinced having regards to the grounds preferred by the plaintiff for the discontinuation of her suit that she is entitled to any liberty to start a fresh litigation upon the same facts. I will therefore grant the plaintiff's prayer to discontinue her case and hereby strike out the case as discontinued. I however refuse to grant the plaintiff any liberty or right to come back or reinstitute the case afresh,..."***

The appellant was dissatisfied with the decision and appealed to the Court of Appeal

The Court of Appeal

The grounds canvassed in the Court of Appeal were two:

a) The ruling is against the law and facts of the motion filed
b) The Court completely failed to appreciate the basis and import of the orders of the court of Appeal.

The Court of Appeal dismissed the appeal on the findings that : a)The appellant failed to demonstrate that the trial court committed any error of law in the exercise of its discretion b) The trial court exercised its discretion in dismissing the application

judicially and fairly, there is therefore no cause that warrants interference by the appellate court.

It is the further dissatisfaction with the decision of the Court of Appeal that brought the appellant before this court. Her prayer is that this court should reverse the decision of the Court of Appeal and allow her to "exercise her right to institute a fresh action against the defendants or any of them upon the same facts to claim her family inheritance"

Consideration of the grounds of appeal

The grounds of appeal as contained in the notice of appeal filed on 1st of August 2016 are as follows:

a) The judgment is against the weight of evidence
b) That the Learned Appeal Court judges erred in Law in endorsing the judgment of the trial High Court, Cape Coast dated 9th July 2013 by not appreciating the legal import of the finding of the Court of Appeal, Accra for their reasons for remitting the case to the High Court, Cape Coast for retrial

Ground (b) of these grounds seriously sins against ***Rule 6 sub rule 4 and 5 of the Supreme Court Rules, 1996 C I 16. Rule 6 (4) & 5 read:***

(4) The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal, without any argument. or narrative and shall be numbered seriatim; and where a ground of appeal is one of law the appellant shall indicate the stage of the proceedings at which it was first raised.

(5) No ground of appeal which is vague or general in terms or discloses no reasonable ground of appeal shall be permitted, except the general ground that the judgment is against the weight of evidence; and any ground of

appeal or any part of it which is not permitted under this rule may be struck out by the Court on its own motion or on application by the respondent.

This ground in my view is argumentative and narrative, above all it failed to particularize the errors of law alleged. The appellant herself I presume realized this error and therefore abandoned this ground because she failed to address the court on this ground. In the circumstances ground (a), that the judgment is against the weight of evidence remains the only ground of appeal for us to consider.

It is a well-established legal principle that an appellant who relies on this omnibus ground of appeal has the duty to demonstrate that the trial judge failed to consider adequately the evidence placed before it; further the appellant must properly demonstrate the lapses he complains of, which lapses if corrected would cause the scale of justice to tilt favourably towards him, See Abbey & Others v Antwi V [2010] SCGLR 17.

The appellant's submission on ground (a) of the grounds of appeal is that the Court of Appeal failed to consider the reasons the first Court of Appeal gave for declaring the first trial null and void. According to the appellant, the trial court and the first appellate court completely ignored the import of the ruling of the Court of Appeal that declared the first trial irregular and the judgment null and void. The appellant further submitted that the Court of Appeal as well as the trial court failed to consider all the circumstances of the case, this resulted in the wrong decisions both courts arrived at.

In their submissions opposing the appeal the respondents argued that the first ground of appeal must fail because the appellant failed to demonstrate that there were lapses in the judgment, or point out any pieces of evidence wrongly applied to her detriment.

It is further argued by the respondent that the appellant in her appeal to the Court of Appeal was attacking the exercise of discretion by the trial judge; the Court of Appeal rightly dismissed the appeal. This court must do the same.

ISSUES

In my view the issues arising in this appeal are two i) whether the appellant has sufficiently demonstrated to this court that the trial court and the court of Appeal failed to consider the evidence placed before it in such a manner as to do justice to the case. ii) Whether the trial court exercised its discretion fairly,

Analysis

I will consider these two issues together. As earlier stated, the application before the trial court, which is leave to discontinue the action falls under Order 17 rule 3 of the High Court (Civil Procedure) Rules C. I 47. The principle behind this rule has been considered in many decided cases in our court. The principle simply put is that a plaintiff having reached a stage in an action he has brought before the court cannot discontinue the action at will. The rule gives the court the discretion to determine the terms of the discontinuance to maintain the balance of justice between the parties.

Kpegah J (as he then was) emphasized the effect of Order 17 rule 3 in the case of **SASRAKU III v. ELLIS & WOOD FAMILIES [1989-90] 1 GLR 498** and held that: "***Before the enactment of Order 26, r. 1 of L.N. 140A, the plaintiff's right to elect to be non-suited at any stage and still retain his option to bring a fresh action went unchallenged. Order 26, r. 1 has greatly curtailed that privilege. It is a complete code on the subject of discontinuing an action or withdrawing a defence. The power of the plaintiff at common law to claim a non-suit, or of a plaintiff in equity to dismiss*** his ***bill at his own option at any time and still retain the right to bring a fresh action, was removed"***

(Order 26 r 1 of LN 140A and Order 17 rule 3 of C. I 47 are in pari materia; in a similar vein Order 26 r 1 of the then Civil Procedure rules of England was replicated in order 26 r 1 of LN 140 A). Thus the decision of the English Court of Appeal in the case of ***Fox v Star Newspaper Ltd. [1898] 1 QB 636*** which considered the principle behind Order 26 r1 became the locus classicus on the issue. In the Fox v Star Newspaper Ltd case,

Chitty L J explained the principle in the following words: ***"The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term 'discontinuance' or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject matter." (Emphasis mine)***

Osei-Hwere J (as he then was) in the case of ***Amoako v Kwan & Another [1975] 1 GLR 25*** cited with approval the decision in Fox v Star Newspaper Ltd. and put his opinion in the following words: "***The court, therefore, has a wide discretion as to the terms upon which it may grant leave to a plaintiff to discontinue the action. The court, for instance, will consider all the circumstances, and, if it seems just, will impose a term that no other action shall be brought: It may, in like manner, refuse leave to discontinue and give judgment for the defendant.***

From the operation of Order 17 r 3, there cannot be any hard and fast rule on the exercise of the court's discretion to allow a discontinuance and deny the plaintiff liberty to reinstitute the action as it is in the present case. The circumstances of each case would determine the orders the court could make in an application to discontinue under order 17 r 3 of C. I 47.

Kpegah J (as he then was) in the **Sasraku v Ellis & Wood Families** case cited supra extensively discussed this point and held that ***"Each case has to be considered on its own merit. Where, however, special circumstances exist making it unjust,***

inequitable, and unfair to retain in the plaintiff the option to bring a fresh action, the court can deny such liberty:"

The case before us had travelled the roads in the court system in a very peculiar manner. The record discloses tardiness in the conduct of the case by both parties for over 20 long years. Pleadings were amended several times; the appellant had been accorded the opportunity in all the proceedings to exercise her right as plaintiff in prosecuting her claims. In the interest of justice, the Court of Appeal ordered a retrial. The appellant took the opportunity to amend her writ and pleadings for the retrial. The trial court further made its position clear to the appellant that a further amendment to her pleadings would be a better option and the rules of court gives her that right. The appellant however ignored promptings from the bench and remained adamant to her detriment.

The trial court deemed it just in the circumstances to refuse the appellant's plea to reinstitute the action. The first appellate court found that the discretion of the trial court was fairly and judicially exercised therefore dismissed the appeal.

The question is, are there any circumstances that warrant interference by this court. In so far as interfering with the exercise of judicial discretion by an appellate court is concerned the legal position is that the appellate court interferes only in exceptional circumstances. Thus this court in the case of ***Crentsil v Crentsil [1962] 2 GLR 171 at 175*** emphasized the point in the following words:

"As to appeals from the exercise of the courts discretion, it is a rule of law deep rooted and well established that the Court of Appeal will not interfere with the exercise of the court's discretion save in exceptional circumstances."

In the Court of Appeal decision in *BALLMOOS v. MENSAH [1984-86] 1 GLR* 724 at 730 the eminent jurists, endorsing the holding of the House of Lords in Blunt v Blunt [1943]

AC 517 maintained the position of the law that ***"An appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account,……."***

Factors the trial court considered in coming to the conclusion not to allow the plaintiff to reinstitute the action are spelt out in the portion of its ruling I quoted in the earlier part of this judgment. The salient factors are: a) the parties have been in court for over 18 years the defendant would suffer hardship if the case would be discontinued and a fresh action instituted on the same facts. b) The plaintiff could rectify or regularize her pleadings with leave of the court. It was not necessary in the circumstances of the case to totally discontinue the action and institute a fresh one. c) The long protracted litigation must see an end.

Contrary to the appellant's assertion that the trial court and the first appellate court failed to properly consider the evidence and therefore came to wrong conclusions, the court particularly the trial court, in my view carefully considered the facts of the case and did not in any way misrepresented the facts or gave weight to irrelevant matters in coming to its conclusion; neither did it exercise the discretion without considering relevant matters.

The appellant had every opportunity to regularize the processes she had in the pending case to have the case determined but she rejected the suggestions by the court to do so. The situation where a plaintiff remains dominus litis in a matter has been taken away by Order 17 r 3. The court determines what is just to both parties in every circumstance of application under the said rule. The reasons the trial court gave for refusing the appellants plea to reinstitute the action afresh on the same facts are fair and just in my view. The first appellate court had no cause to interfere with the

discretion exercised by the trial court; we as the second appellate court do not have any cause either.

The appeal is without merit it is hereby dismissed.

A. M. A DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

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