IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
YEBOAH, JSC
BAFFOE-BONNIE, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/47/2017

13TH JUNE, 2018

NANA AMPAA-ANDOH VIII ……. PLAINTIFF/APPELLANT/RESPONDENT
(SUBSTITUTED BY ALBERT KOBINA KOOMSON)

VRS

1. PARAMOUNT STOOL OF BREMAN ESSIAM .. 1ST DEFENDANT/RESPONDENT/APPELLANT
(SUBSTITUTED BY NANA EFUWA ESIWA II)

2. KOBINA MENSAH ……. 2ND DEFENDANT/RESPONDENT/APPELLANT
(SUBSTITUTED BY NANA ATTA KWAW IV)

3. NANA OGUAMON ATWERE II …… CO-DEFENDANT/RESPONDENT/APPELLANT
(SUBSTITUTED BY EBUSUAPANYIN KWAME DOM)
(SUBSTITUTED BY NICHOLAS SAM)

AND

1. ENYAN DENYIRA SOOL)
2. BREMAN ESSIAM STOOL)
3. EJUMAKO STOOL) …… CLAIMANTS

JUDGMENT

PWAMANG, JSC:-

This is an appeal against the judgment of the Court of Appeal sitting at Cape Coast dated 23rd February, 2016 which set aside the judgment of the High Court and

ordered a retrial. The High Court gave judgment in favour of the defendants/respondents/appellants against the plaintiff/appellant/respondent and the co-defendant. In this judgment we shall refer to the parties by their descriptions in the trial court.

A summary of the background of the case is as follows; In 1977, in Suit No LS 25/77 the plaintiff on behalf of himself and his family, the Nsona Family of Enyan Denkyira, caused to be issued a writ of summons against the defendants endorsed with a claim of declaration of title to land commonly called "ANAPAA land" situate at Enyan Denkyira in the Central Region and for damages for trespass. The plaintiff sued the defendants because they laid claim of ownership to the disputed land. The 1st defendant was sued through its occupant and 2nd defendant hails from Breman Essiam which has a common boundary with Enyan Denkyira. At paragraphs 12 and 14 of their statement of defence the defendants pleaded that a stream called "Brobosu" has since time immemorial been the boundary between Breman Essiem and Enyan Denkyira and that the disputed land lies on the Breman Essiam side of the boundary. The court appointed a surveyor to survey the land and this was done and tendered in evidence. However, it was in 1993 that the plaintiff opened his case before G.M. Quaye J.

In the course of the cross-examination of the plaintiff, one Nana Oguamon Atwere II, Twafohene of the Bremen Essiem Traditional Area applied and was joined to the suit on behalf of his family as Co-defendant. He also laid claim to the disputed land. In 1997, while plaintiff was still under cross-examination, this time before Beatrice Agyeman-Bempa J, the defendants, who had changed their lawyer, and co-defendant filed a motion objecting to the continuance of the hearing in the High Court on the ground that the proceedings were caught by the provisions of the **Stool Lands Boundaries Settlement Decree, 1972 (NRCD 172).** They argued that from the pleadings in the case and the evidence of the plaintiff that far, the boundary between Enyan Denkyira Stool and Breman Essiam Stool lands was critical to the determination of the main issue of ownership of "Anapaa lands". Relying on Section 4(2) of NRCD 172, they prayed the court to stay proceedings in the land suit

and refer the matter of the boundary between the paramount stools to the Stool Lands Boundary Settlement Commission (to be referred to in this judgment as the Commission) established by NRCD 172, for determination and for them to come back thereafter to continue with the proceedings. Though the plaintiff opposed the application it was granted by the court on 23rd April, 1997. B. Agyeman-Bempa J stayed the proceedings and referred the issue of the boundary between Enyan Denkyira and Breman Essiam to the Commission for determination. As the Paramount Stool of Enyan Denkyira was not party to the case the trial judge directed that the paramount chief of Enyan Denkyira was to be notified of the reference.

On 10/12/97 proceedings commenced before the Commission as Enquiry No 7/97 with Enyan Denkyira Stool as the 1st Claimant and Breman Essiam Stool as the 2nd Claimant. The sole Commissioner, J. A. Osei J, ordered them to file their statements of dispute and survey instructions and appointed a surveyor to undertake a survey of the land. Plaintiff attended that first sitting of the Commission and was recorded as representing the Enyan Denkyira Stool. However, the statement of dispute he subsequently filed for the 1st claimant was headed "Statement of Dispute by Twafo Stool of Enyan Denkyira per Albert Kobina Koomson". Similarly, the Survey Instructions of the 1st claimant were filed on behalf of Twafo Stool of Enyan Denkyira. The Paramount Stool of Enyan Denkyira did not appear and did not file any processes before the Commission but the Breman Stool appeared and filed processes as the 2nd claimant. Later, Ajumako Stool applied to the Commission and was joined as 3rd claimant. A survey was conducted and an enquiry plan drawn up but there was no hearing at the Commission before it was dissolved by the **Stool Lands Boundary Settlement (Repeal) Act, 2000 (Act 587).**

By virtue of the provisions of Act 587, Enquiry No 7/97 was transferred to the High Court, Cape Coast in 2003 and was listed before Nana Gyamera-Tawiah J. After the transfer to the High Court the 2nd claimant filed a motion on notice for consolidation of the two suits, i.e Enquiry No 7/97 and Suit No.LS 25/77 and same was granted by the court on 22/12/03. The order for consolidation stated that the two suits were to be tried together. Subsequent to that, there were amendments to the pleadings

without a clear indication whether the amendments were in respect of Suit No. LS. 25/77 or Enquiry No. 7/97. Hearing resumed and the surveyor who undertook the survey at the Commission gave evidence and tendered the enquiry plan he prepared. Thereafter, the cross-examination of plaintiff in Suit No. LS 25/77 continued to completion after which plaintiff called his witnesses followed by the case of the defendants. 3rd claimant's representative testified as a witness for plaintiff and did not give any distinct evidence in respect of its claim in Enquiry No. 7/97. In the course of the trial the lawyer for the plaintiff, Cab-Addae, drew the attention of the court to the obvious confusion in the proceedings but Alhaji M. A. Mustapha J, who tried the case after the consolidation, responded that in the judgment the matters would be clarified. However, when Alhaji M. A. Mustapha delivered his judgment on 3rd May, 2011 he did not separate the cases but gave one judgment. The plaintiff appealed against the judgment on grounds of substantial errors of law committed by the trial judge and wrong evaluation of the evidence.

In their judgment setting aside the decision of the High Court and ordering a retrial, the Court of Appeal held that the trial was attended with fundamental procedural blunders and flaws that compromised the fidelity of the court processes and disabled the court from doing substantial justice in the case. They faulted the trial judge for failing to observe the separate identities of the cases after the consolidation and pronouncing separate judgments as has been held in a number of decided cases. They stated that they came to their decision very reluctantly having regard to the chequered history of the case.

Although the Court of Appeal did not pronounce on the merits of the case, the defendants who decided to appeal against their judgment to this court filed ten grounds of appeal, including additional grounds, and in most of them they impeached the judgment on the basis of the evidence led at the trial. In respect of the procedural breaches at the trial, the Court of Appeal held that the judge erred in giving judgment on a non-existent amended statement of defence and counterclaim. However, defendants have disputed that the amended defence and counterclaim

was non-existent. Alternatively, they have argued in their statement of case that on the authority of **Hanna Assi (No 2) v GIHOC (No 2) [2007-2008] SCGLR 16,** where parties have joined issue on title to land, declaration of title may be made in favour of a defendant who did not file a formal counterclaim. The next issue tackled by the defendants in this appeal is in respect of the holding by the Court of Appeal that since the Paramount Stool of Enyan Denkyira was not served in respect of the proceedings before the Commission those proceedings were a nullity. Strangely, the defendants who in their address in the High Court made the point that plaintiff herein had no capacity to represent the Enyan Denkyira Stool this time round now contend that plaintiff effectively represented the Enyan Denkyira Stool at the Commission. In concluding their arguments on the legal objections to the judgment of the High Court, the defendants relied on **Order 1 Rule 2 of the High Court (Civil Procedure) Rules, 2004 (C.I.47)** and submitted that the rules of the High Court are to be interpreted and applied to achieve speedy justice and avoid delays and that the order by the Court of Appeal for a retrial would delay the case by about forty years. They therefore prayed us to overlook the lapses of the trial court and restore its judgment on the basis of the evidence led. They referred to the case of **Republic v High Court, Kofoidua, Ex parte Eastern Regional Development Corporation [2003-2004] SCGLR 21.** The plaintiff on his part agreed with the Court of Appeal that the errors of the trial court occasioned a miscarriage of justice but he nonetheless prayed that in the event that we decide to determine the case on the evidence, then judgment ought to be given in his favour.

From the record before us, our view is that the Court of Appeal was right in holding that the proceedings in the Commission were not properly constituted. The proceedings were to be between Enyan Denkyira Paramount Stool and Breman Essiam Paramount Stool and the court in making the reference to the Commission was clear in stating that the Chief of Enyan Denkyira was to be notified. This was not done and though plaintiff in the land suit was served and appeared at the Commission and also filed processes all were done in the name of Twafo Stool family and not Enyan Denkyira Paramount Stool. In the judgment of the High Court it held that Enyan Denkyira Paramount Stool was never party to the proceedings in

the Commission and that plaintiff lacked capacity to represent it. Though in this appeal the defendants argued that plaintiff represented the Enyan Denkyira Paramount Stool at the Commission, they did not appeal against the finding by the High Court that plaintiff had no such capacity. What that simply meant was that those proceedings were void because the 1st claimant was never served and never participated in the proceedings as ordered by the Court. In the case of **In re Kumi (Decd); [2007-2008] SCGLR 623 at 634** Sophia-Adinyira, JSC, on behalf of the Supreme Court, approved of the following statement of Amissah JA in **Vasquez v Quarshie [1968] GLR 62 at 65;**

"A court making a decision in a case where a party does not appear because he has not been notified is doing an act which is a nullity on grounds of absence of jurisdiction."

Though the trial judge rightly held that Enyan Denkyira Paramount Stool was not part of the proceedings at the Commission, what he probably did not realise was that the proceedings conducted in the case in the High Court after the dissolution of the Commission were a continuation of the incompetent enquiry proceedings because the authority to continue with those proceedings was conferred by Act 587 for purpose of the determination of the boundary between Enyan Denkyira and Breman Essiem. Sections 2 & 3 provide as follows;

"2. Repeal of N.R.C.D. 172

The Stool Lands Boundaries Settlement Decree, 1973 (N.R.C.D. 172) as amended by the Stool Lands Boundaries Settlement (Amendment) Law, 1986 (P.N.D.C.L. 147) is hereby repealed.

3. Saving and transitional provisions

(1) Subject to subsection (2) the cases and proceedings pending before the Commissioner immediately before the coming into force of this Act are by this Act transferred to the High Court."

So it is the improperly constituted proceedings pending before the Commission that was transferred to the High Court. The Commission and after it the High Court failed to notice the fundamental defect in proceeding without the Paramount Stool of Enyan Denkyira, and unfortunately the lawyers in the case too did not help matters, so they all travelled on a journey to no where. The manner the High Court conducted the proceedings after the transfer of the Enquiry case showed that no attention was paid to the provisions of the statutes under which it exercised jurisdiction in the cases. For instance, it was pursuant to Sections 4 (1) & (2) of NRCD 172 that the proceedings in Suit No. LS 25/77 were stayed but the High Court resumed proceedings in that case without regard to those provisions. They are as follows;

"4. (1) The Commissioner shall have exclusive jurisdiction to determine the boundaries of stool lands and to hear and determine questions or disputes relating thereto.

(2) Where on or after the commencement of this Decree any proceedings are pending or are brought in any Court and in either case it appears to the Court that the situation of any stool land boundary is the real issue in dispute before the Court, the Court shall decline jurisdiction over the determination of that issue; but *where it appears to the Court that the situation of the said boundary is only incidental to the determination of the real issue, the Court shall order a stay of those proceedings until the boundary shall have been finally determined* as provided in this Decree and may also make such incidental or consequential orders as the Court may deem just." (emphasis supplied)

The proceedings in Suit No. LS. 25/77 were stayed on the basis that a determination of the boundary between Enyan Denkyira and Breman Essiam was incidental to the determination of the real issue which was ownership of "Anapaa lands". That being so, by the provisions in Section 4(2) of NRCD 172 quoted above, the proceedings in

the land suit were stayed until the stools boundaries were determined. So the Commission was to first determine the stool lands boundary in separate proceedings and after that the High Court would resume proceedings in the land suit having regard to the stool boundaries determined by the Commission. That is the scheme of proceedings that was adopted by the statute and it ought to have been followed despite its subsequent repeal.

That notwithstanding, the High Court purported to resume proceedings in Suit No. LS. 25/77 by consolidating it to Enquiry No. 7/97, which was void anyway, when the boundary had by then not been determined. The High Court's authority to conduct proceedings in Suit No. LS 25/77 had been suspended by Section 4(2) so its resumption of jurisdiction in that suit was pre-mature and the consolidation order was void.

We have given sympathetic thought to the plea of the defendants that affirmation of the judgment of the Court of Appeal will cause considerable delay in bringing finality to this case but we wish to note that Order 1 Rule 2 of C.I.47 that defendants have referred to also provides that the rules of court are to be interpreted and applied to ensure complete and effective justice. Effective justice can only be achieved by trial courts following judicial precedent and complying with provisions of enactments binding on them. Beside, in this case the trial court did not only breach the rules of court but it breached provisions of substantive statutes and rules of natural justice.

Where statute has provided for a procedure for the determination of a dispute that procedure ought to be strictly adhered to because parties appearing in court have a right to have their dispute determined in accordance with laid down procedure. NRCD 172 and Act 587 are substantive statutes and a court of law is not entitled to set aside the provisions of a statute that prescribes the manner it is required to exercise jurisdiction in matters regulated by the statute.

From the above analysis, the proceedings in Suit No.25/77 up to the order by B. Agyeman-Bempa J on 23rd April, 1997 for the determination of the boundary between Enyan Denkyira Stool and Breman Essiam Stool by the Stool Lands

Boundary Settlement Commission were regular but those in the Commission and the High Court up to and including the judgment were fundamentally incompetent and are set aside. As things stand now, the reference Agyeman-Bempa J made to the Commission has lapsed by operation of law since it has been dissolved and its jurisdiction re-conferred on the High Court. We therefore affirm the judgment of the Court of Appeal and order a retrial.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

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

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

YEBOAH, JSC:-

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

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

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

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

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

EDWARD SAM CRABBE FOR 1ST, 2ND AND CO-DEFENDANTS/RESPONDENTS/APPELLANTS.

MICHAEL ARTHUR DADZIE FOR THE PLAINTIFF/APPELLANT/RESPONDENT.