IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
APPAU, JSC
PWAMANG, JSC
MARFUL-SAU, JSC
KOTEY, JSC

CIVIL APPEAL
SUIT NO. J4/15/2019

18TH MARCH, 2020

1.NII KPOBI TETTEY TSURU III
(SUBST. BY NII OBODAI ADAI IV FOR AND ON BEHALFF
OF LA STOOL)
2.SFA LIMITED
3.FODAS ESTATES LTD …….. PLAINTIFFS/RESPONDENTS/APPELLANTS

VRS

1.AGRIC CATTLE
2.SANTEO MANTSE
3.KATAMANSO MANTSE
4.NII ODAIFIO WELENTSE
5.LAKESIDE ESTATES LTD . …… DEFENDANTS/APPELLANTS/RESPONDENTS

J U D G M E N T

MARFUL-SAU, JSC: -

The action that has culminated into this appeal before us was originally initiated with a writ filed on 16th May 2008. The writ was filed by the La Traditional Council as the Plaintiff suing per its lawful Attorney Joseph Annang Mensah. The original defendants

endorsed on the writ were named as Japan Motors, Agric Cattle, Katamanso (Nii Otoo Laryea) and Santeo (Atta Quarshie). On the 21st January 2009, an amended writ was filed replacing the original Plaintiff, La Traditional Council with La Divisional Council, as the new Plaintiff. The record of appeal showed that the writ and pleadings in the case suffered several amendments till it was further amended by making Nii Tetteh Kpobi Tsuru III, the Plaintiff for and on behalf of the La Stool.

Now, as a result of the several amendments, discontinuance and joinders in the suit, at the end of the trial the parties in the suit were as follows:-

"1. Nii Kpobi Tetteh Tsuru III (Deceased)- Subtituted by Nii Obodai Odai IV, La Mankralo.

2. SFA Ltd.

3. Fodas Estates Ltd.

Vrs.

1.Agric Cattle

2.Santeo Mantse (Atta Quarshie)

3.Katamanso Mantse(Nii Otoo Laryea)

4.Nii Odaifio Welentsi III (Nungua Mantse)

5.Lakeside Estate Ltd."

The trial High Court after an elaborate trial in its judgment declared title to a parcel of land measuring 2,911.53 acres for the 1st and 5th defendants and also declared title in the 1st Plaintiff, La Stool for the remaining disputed land measuring46,509 acres.The 1st and 5th defendants' lodged an appeal against the decision of the trial High Court in the Court of Appeal, which in a judgment dated 28th March 2018 reversed the decision of the trial High Court. The 1st, 2nd and 3rd Plaintiffs dissatisfied with the decision of the Court of Appeal separately appealed to this Court urging us to set aside the said decision. Several grounds of appeal were filed by the three appellants. For purposes of

easy reference the parties in this appeal will retain their respective descriptions at the trial.

In their respective statements of case filed in this appeal, Counsel for the 1st Plaintiff, who is the 1st Appellant and Counsel for the 1stand 5th defendants, who are Respondents have both raised preliminary points of law that we need to address, since the issues raised are very fundamental. Counsel for the 1st and 5th defendants has argued in his Statement of Case that the Plaintiff who issued the original writ, La Traditional Council, had no legal personality and for that matter had no cause of action against the defendants, at the time it issued the writ on the 16th May 2008. On his part, Counsel for the 1st Plaintiff had submitted that the 1st and 5th defendants also did not exist as juristic entities so they could not have been parties in the action for judgment to be awarded them.

We shall address the preliminary issues raised by Counsel for 1st and 5th defendants first. Counsel has seriously argued that the Plaintiff who issued the original writ, La Traditional Council did not exist as a legal entity and for that matter had no capacity to sue as it did on the 16th of May 2008. Counsel further argued that La Traditional Council had no cause of action against the defendants, thus rendering the writ it took null and void. What does the record reveal?

As we have observed already, on the 16thof May 2008, La Traditional Council took out the writ of summons as Plaintiff against four defendants in suit number AL 164/2008.At the close of pleadings, Application for Directions was filed by the Plaintiff on 1st August 2008. The 1st and 2nd defendants filed Additional Issues on the 12th August 2008. This was followed by the filing of Further Directions on the 27th August 2008 by the 3rd defendant.

The 1st and 2nd defendants in their Additional Issues gave notice that they will apply that "Plaintiff's entire action be struck out or dismissed as disclosing no proper cause of action and as constituting an abuse of the Honourable court process."

The 3rd defendant on the other hand raised in its Application for Further Directions, the issue whether or not the Plaintiff, La Traditional Council is a legal entity known to the law? The 3rd defendant prayed that the further issue above be set down for legal argument.

Now, as the record of appeal revealed, the Plaintiff filed an amended writ on 21st January 2009, in which La Traditional Council was replaced with La Divisional Council as the Plaintiff.

The record further revealed that the Application for Directions was adopted and all the issues set down for trial by the High Court on the 7th of December 2009.We observed however, that the issue challenging the legal status of La Traditional Council, the original Plaintiff who initiated this action was not addressed by the trial court as well as the Court of Appeal. We are thus being called upon to determine the issue for the first time in this appeal.

Indeed, we welcome the invitation to address the legal issues raised at the Application for Directions stage because they are very fundamental which must be addressed in order not for it to be said that this Court gave tacit judicial blessings to the procedural flaws, revealed in the record of appeal. What then is the law on this matter?

The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter, it can be raised at any time even after judgment on appeal. The issue is so fundamental that when it is raised at an early stage of the proceedings a court mindful of doing justice ought to determine that issue before further proceedings are taken to determine the merits of the case. Thus, a Plaintiff whose capacity is challenged need to adduce credible evidence at the earliest opportunity to satisfy the court that it had the requisite capacity to invoke the jurisdiction of the court. If this is not done, the entire proceedings founded on an action by a Plaintiff without capacity would be nullified should the fact of non-capacity be proved.

In **Naos Holdings Inc. vrs. Ghana Commercial Bank (2005-2006) SGLR 407**, this Court speaking through Sophia Akuffo, JSC (as she then was) delivered herself at page 412 as follows:-

> **"Once its legal status was challenged and its corporate capacity was placed in issue, it was incumbent upon the appellant to produce more cogent evidence of its existence(such as its registered office address or a copy of its certificate of incorporation,) to satisfy the trial court that it has the requisite legal capacity to sue. Since it failed to do so, the trial court was justified in arriving at the conclusion that the appellant did not exist. Furthermore, having dismally failed to satisfy the trial court in regard to such a fundamental issue as capacity to sue, it would have been pointless for the trial court to order the matter to proceed to trial."**

This court in an earlier case **Sarkodie I vrs. Boateng II (1982-1983) 1 GLR 715, at page 724, stated the principle on capacity as follows:-**

'' It is elementary that a plaintiff or petitioner whose capacity is put in issue must establish it by cogent evidence……But it is no answer for a party against whom a serious issue of locus standi is raised, to plead that he should be given a hearing on the merits because he has a cast iron case against his opponent."

See also Manu vrs. Nsiah (2005-2006) SCGLR 25.

The issues we need to determine as raised by Counsel for the 1st and 5th defendants, are whether the La Traditional Council, was a legal entity and thus clothed with capacity to sue? And if so, did it have a cause of action against the defendant? Indeed, whether or not we have to address the merits of this appeal depends largely on our determination of the preliminary issues raised by Counsel for the 1st and 5th defendants.

Indeed, by the writ and statement of claim that originated this action, La Traditional Council claimed against the named defendants, declaration of title and recovery of possession of all that piece and parcel of land lying and situate at La Tsui Anaa, which belongs to the La Stool, injunction and damages for trespass. In the statement of claim the plaintiff pleaded at paragraph 1, thus '' The Plaintiff is the La Traditional Council which is the allodial owner of the land in dispute."

The law is trite that a civil action can only be taken by a natural person or a juristic entity created and recognized by statute. If not, a writ issued in the name of a non-existent Plaintiff is a nullity and same void. The law also is that when the legal status of a Plaintiff is challenged and made an issue, as in this case, it was incumbent on the Plaintiff to adduce cogent evidence to satisfy the court that it had the requisite legal capacity to sue and be sued.

See Naos Holding Inc. vrs. Ghana Commercial Bank, supra.

In the case of Oppong vrs. Attorney-General & Others (2000) SCGLR 275, this court speaking through Atuguba, JSC at page 280 delivered as follows:-

> **''.....where the step by a party to proceedings before this court is fundamentally wrong, such error is not within the purview of the rule and cannot be waived. One cannot waive a nullity."**

We observed from the record of appeal that when the issue of the legal status and capacity of La Traditional Council was raised by the 3rd defendant who applied that the issue be taken by legal argument, La Traditional Council avoided the challenge and decided to do the forbidden. What the plaintiff did was to amend the writ and replaced itself with La Divisional Council. In effect what the original Plaintiff did was to disqualify itself and then substitute the La Divisional Council as the new Plaintiff. The question we ask, is why did La Traditional Council disqualify itself as a Plaintiff? The answer can only be that it realized that it had no legal status to issue the writ as it did. The facts from the pleadings clearly demonstrated that the La Traditional Council was not a legal entity and as such had no capacity to sue as it did in this case.

The law as we have known it to be is that a non- existent person or entity cannot sue as a Plaintiff neither can a non-existent person or entity be sued as a defendant. Parties initiating any civil proceeding must be either natural persons who are alive or personal representatives of such persons and juristic entities recognized by statute. As revealed by the facts on record and by the conduct of the La Traditional Council itself, we are satisfied that the preliminary objection raised by Counsel for the 1st and 5th defendants is very legitimate and fundamental and we endorse same.

As the facts clearly showed, the original writ was a nullity since the Plaintiff, La Traditional Council had no capacity to sue. Now since the original writ was a nullity, all the subsequent amendments taken on the writ were also a nullity. In fact the nullity of the original writ operated like a virus that nullified all the several amended writs. The writ was the foundation upon which the entire action was build, thus when it is nullified, the super-structure of the action, which are the proceedings and the judgments founded on the invalid writ must totally collapse.

In Republic vrs. High Court, Accra; Exparte Aryeetey(Ankrah Interested Party) (2003-2004) SCGLR 398, this Court held at holding (2) as follows:-

> **'The requirement that a party endorses on the writ the capacity in which he sues, is to ensure that a person suing in a representative capacity is actually invested with that capacity and therefore has the right to sue. Whether a person who has sued in a representative capacity, indeed, has the capacity he claims to have or not, is a question of fact; and if challenged, he must prove same to avoid his suit being dismissed since it is analogous to taking an action against a non-existent defendant..... This is because if a party brings an action in a capacity he does not have, the writ is a nullity and so are the proceedings and the judgment founded on it. Any challenge to capacity puts the validity of the writ in issue." –**emphasis supplied.

Besides, the issue regarding the legal status of La Traditional Council, is the related issue whether it had a cause of action in the matter it took to court, assuming it had the capacity. As noted, in the original writ and statement of claim, La Traditional Council claimed that it was the allodial owner of the land in dispute. However, by its relief 2 endorsed on the writ, the same La Traditional Council claimed that the land belongs to the La Stool. We are at a loss and we ask the question, when did Traditional Councils became owners of Stool land? The pleadings filed by the Plaintiff, La Traditional Council, clearly showed that it had no cause of action to bring the action against the defendants as it sought to do. The La Traditional Council never pleaded that it was bringing the action on behalf of the La Stool or that the La Stool had authorized it to take the action. The pleadings thus showed that, La Traditional Council had no cause of action to sue as it did, even if it had the legal status.

In the English case of **Letang v. Cooper [1965] 1 Q.B. 232**, **C.A. Diplock L.J. (as he then was) defined cause of action at pp. 242-243 as "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."**

Also, in the case of **Ampratwum Manufacturing Co. Ltd v. D.I.C. [2009] SCGLR 692**, **it was held by Baffoe- Bonnie JSC as follows:**

> **"It is fundamental in litigation that parties must commence action against relevant parties to the suit. To institute an action against a party, one must have a cause of action against the defendant."**

Now, having showed that La Traditional Council had no legal status and as such had no capacity to sue, what is its effect on the writ it issued and all proceedings founded on the said writ. The law is long settled that capacity is a preliminary issue, in that an action cannot proceed to be determined on the merits if the Plaintiff or defendant had no capacity to sue or defend the action. Indeed, a plaintiff who had no capacity cannot invoke the jurisdiction of a court for anything, since the writ and the reliefs claimed thereon must be derived from the capacity of the Plaintiff.

It therefore follows that a challenge to capacity puts the validity of a writ in issue, so when the challenge is not displaced, the writ becomes a nullity together with the proceedings and the judgment founded on it. In this case having established that La Traditional Council had no capacity to sue, the writ that was issued to commence this action was invalid and a nullity. We will therefore set aside the writ as a nullity and by that all the proceedings including the judgments founded on it are also declared void.

See Republic vs. High Court, Accra: Ex-parte Aryeetey (Ankrah Interested Party), supra.

We now address the preliminary issue raised by Counsel for the 1st Plaintiff. Counsel had argued that the 1st and 5th defendants were non-existent entities and were not parties in law. From the record of appeal, it is clear that the 1st defendant was made a party by the Plaintiff. The 1st defendant was sued as Agric Cattle, even though its corporate name was Agric Cattle Ltd. The 5th defendant however applied to join the suit. It applied in the name of Lakeside Estate Ltd. The evidence on record is that on the 13th June 2005, Agric Cattle Ltd changed its name to Agric Cattle Lakeside Estates Ltd. The change in name was registered in the registrar of companies at the Registrar General's Department. What this meant was that as at 16th May 2008, when the original writ was issued, there was no entity as Agric Cattle Ltd. However, when the writ was served, Agric Cattle entered Appearance and filed a defence to contest the action. Then in the course of the proceedings the 5th defendant also applied to be joined to the suit. It also erroneously joined the suit as Lakeside Estates Ltd.

The record of this appeal revealed that throughout the trial both the 1st and 5th defendants were represented in court by the same person Dr. Noble Prince Joseph Ayiku. His evidence at page 526 to 535 of Volume 1 of the record of appeal, revealed that the 1st and 5th defendants were one and the same entity. Dr. Ayiku testified that on 13th June 2005 Agric Cattle changed its name to Agric Cattle Lakeside Estate Ltd. From his evidence therefore, it is clear that in 2008 when the writ was issued and when the 5th defendant also applied later to join the suit, they were not legal entities, as Agric

Cattle Ltd and Lakeside Estates Ltd were not in existence with the capacity to sue or be sued.

Notwithstanding their non-existence as legal entities and even though the 1st and 5th defendants were one and same entity, they both filed separate pleadings and were represented by separate Lawyers throughout the trial. The record also showed that even in the Court of Appeal they filed separate written submissions.

Clearly, from the facts demonstrated above, the 1st and 5th defendants were non-existent entities and as such could not have been sued, neither could they maintain an action since they lacked the requisite capacities to sue. The counterclaim of the 5th defendant therefore ought to suffer the same fate as the writ issued by the Plaintiff. The law is that a counterclaim is a cross-action and the defendant- counter claimant was deemed a Plaintiff. Such a defendant must exist as a legal entity before it could be clothed with capacity to sue. The 5th defendant counterclaim was a nullity since it did not exist in law, and as such had no capacity to maintain the counterclaim. In this appeal, once the evidence is clear that the 1st and 5th defendants were one and same and lacked the corporate capacity, they ceased to be parties properly so called in law and they could not derive any benefit from the action for the simple reason that they never existed in law and as such could not litigate.

Counsel for the 1st and 5th defendants has urged this court to exercise its inherent jurisdiction to amend the title of the suit by treating the 1st and 5th defendants as one and same entity under the name" Agric Cattle Lakeside Estate Limited." Counsel further refers this court to apply Order 4 Rule 5 of the High Court (Civil Procedure) Rules, 2004, CI 47. The said rule states as follows:-

> **''5 (1) No proceedings shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any proceeding determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties of the proceedings.**

(2) At any stage of the proceedings the Court may on such terms as it thinks just either of its own motion or on application:

a. Order any person who has been improperly or unnecessarily made a party to cease to be a party;

b. Order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon tobe added as a party."

We are of the considered opinion that Order 4 Rule 5 cannot aide the 1st and 5th defendants. Firstly, the said defendants as demonstrated did not exist as legal entities and for that matter they are not qualified to be parties as envisaged under Order 4 Rule 5 of CI 47. The rule is about parties who are either misjoined or not joined to an action. Order 4 generally deals with parties who can sue and be sued. It deals with natural persons or juristic entities that exist and are recognized by law and for that matter who are clothed with capacity to sue and be sued. The rule empowers the court to non-suit such persons with legal status who are wrongly sued or join such persons with legal status to an action and ensure that all matters in dispute are completely adjudicated upon. The rule was never intended to replace non-existent parties with persons or entities with legal status. The reason is that a writ against a non- existent defendant is equally a nullity, just like a writ issued by a person without capacity. Simply put a non-existent person cannot litigate.

Now, assuming even if the rule enabled this court to join Agric Cattle Lakeside Estate Ltd, to replace the 1st and 5th defendants as argued by Counsel, the counterclaim would still be struck out since the Plaintiff's writ is a nullity for lack of capacity. A counterclaim cannot be maintained when the writ which commenced the action is declared a nullity.

In conclusion, we are of the considered opinion that the two preliminary legal points raised are well found and very fundamental for which this court cannot gloss over. Accordingly, for the reasons expressed in this judgment, the writ issued by the La

Traditional Council on 16th May 2008, is hereby set aside as being a nullity. Our further opinion is that the 1st and 5th defendants were non-existent and as such were notparties in the action. The action taken against them as defendants was a nullity. The consequences of declaring the writ a nullity is that all the proceedings founded on it including all the judgments are hereby set aside as being null and void. We do not find it necessary to consider the merits of the appeal, in view of the nullities described in this judgment.

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

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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