IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: APPAU, JSC (PRESIDING)
PWAMANG, JSC
AMEGATCHER, JSC
TORKORNOO (MRS.), JSC
KULENDI, JSC

CIVIL APPEAL
NO. J4/17/2021

1ST DECEMBER, 2021

NII LANTE LAMPTEY ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

1. R. O. LAMPTEY
2. NII TEIKO OKINE
3. FKA COMPANY LTD ..... 3RD DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

TORKORNOO (MRS.) JSC:-

The issue for resolution in this highest court arose only in the Court of Appeal. The Appellant herein was the plaintiff in the high court and appellant in the court of appeal and will be referred to as Plaintiff in this ruling. He originally sued two defendants in the high court. While the Plaintiff's suit was pending against these two defendants, the 3rd

Defendant/Respondent (hereinafter referred to as 3rd Defendant) applied to join and was joined to the high court suit with a counterclaim against the Plaintiff. A first trial was conducted between the Plaintiff and the first two defendants. The Plaintiff obtained judgment against them. In a later trial between the Plaintiff and 3rd Defendant, the 3rd Defendant obtained judgment against the Plaintiff on his counterclaim on 28th October 2016. This led to the Plaintiff filing an appeal against the judgment obtained by the 3rd Defendant on his counterclaim on 18thNovember 2016.

It was not till May 2018 that Form 6 was issued by the registrar of the court of appeal giving notice that the appeal records were ready for hearing. The records show that Form 6 was served personally on the Plaintiff on 16th May 2018, compelling the beginning of the run of time for the filing of his written submissions in support of the appeal in accordance with **Rule 20 (1) of the Court of Appeal Rules 1997 CI 19**. No submissions were filed by or on behalf of the Plaintiff within the three weeks required by **Rule 20 (1)**

In March 2019, the Registrar of the court of appeal issued a notice certifying to the court that the Plaintiff had not complied with the requirement of **Rule 20 (1)**and so **Rule 20 (2) of CI 19**as amended by the **Court of Appeal (Amendment) Rules 1999, CI 25**had been invoked. Along with a hearing notice for hearing of the appeal on 15th April 2019, the two documents were served on the Plaintiff's counsel's chambers through an employee of the chambers on 21st March 2019.

On the date fixed for the hearing of the Registrar's certificate of non-compliance, the court of appeal duly recorded the appeal as struck out in accordance with **Rule 20 (2)**of **CI 19**as amended by **CI 25** which reads:

Where the appellant does not file the statement of his case in accordance with sub-rule (1), the Registrar shall certify the failure to the Court by a certificate as in Form 11 A in Part 1 of the Schedule and the Court may upon that order the appeal to be struck out

The Plaintiff, acting per the same counsel he had filed the notice of appeal through, then filed an application to relist the appeal. In that application, he failed to exhibit the

written submissions he would make if the appeal was relisted. The court of appeal was not impressed with the application for re-listment on that account. In their ruling that refused to list the appeal, the court of appeal stated:

'*This is an application to relist the appeal which was struck out on 15-04-19 for non-compliance with Rule 20 (1) of CI 19 the proposed written submission has not being even serve exhibited (sic). The application is hereby refused*.'

This appeal is against the decision refusing to relist the appeal. Plaintiff's grounds of appeal to this court are:

a. The court below wrongly exercised its discretion by not adequately considering the affidavit evidence in the Appellant's application for relistment
b. The judgment is against the weight of the affidavit evidence.

In his Statement of Case before us, counsel for Plaintiff recognises that the second ground of appeal should have referred to a ruling and not judgment, and posits that this is not substantial.

My lords, I must discount this position of counsel for Plaintiff. My view is that it is this cavalier posture in imagining that a party before the courts can be as inattentive as he pleases, that has led to the disturbing realities of the appeal before us. The 3rd Defendant who is Respondent in this appeal obtained judgment over land five years ago.

In a country described as needing investment, the use of the inherent right of appeal through the court system has allowed the Plaintiff to hold the 3rd Defendant hostage for these five years from utilizing this land. I say this with no interest in whether the appeal filed by the Plaintiff is well grounded or not. My focus is only on how this appeal has held at bay any usefulness the judgement in issue could be to the winner of the relevant suit.

I sincerely think that the Plaintiff and his counsel must be roundly berated for the failures that led to this appeal, because lethargic practices have a good deal of

influence on the value of justice delivery, and the exercise of judicial discretion cannot fail to take note of that. Plaintiff counsel, who is the same person that filed the notice of appeal to the court of appeal, and whose chambers received the notice of the Registrar's certificate of non-compliance with the rule requiring the filing of written submissions within 21 days of being served with the Form 6, is also the same person who filed the application to relist the appeal. He is now urging before us that the ruling dismissing the application to relist the appeal was a wrong exercise of discretion. Further, that the ruling is against the weight of evidence.

He submits that the hearing notice to appear before the court for hearing of the certificate to strike out the appeal for non-compliance with the requirement to file written submissions pursuant to **rule 20 (1)** should have been served on the Plaintiff personally and not his counsel who filed the notice of appeal.

He is urging on us that though both the **Supreme Court Rules CI 161996**and**CI 19** define an appellant and respondent to include their counsel, the term counsel should be limited to a lawyer '*who has at least appeared in the appellate*' court to represent the party involved and not on (the counsel) who '*merely*' files a notice of appeal without more.

He goes on to say that '*were the definition of appellant or respondent as including counsel to be given its literal interpretation, then there will be no justification in serving (say) Civil Form 6 on the parties themselves and not their lawyers or serving entry of judgments on the parties themselves and not their lawyers or counsel*'. He submitted that just as is done with service of Civil Form 6 and entry of judgments or notices of appeal, the Registrar's certificate for non-compliance must be served personally on the defaulting party whose appeal is being struck out.

I do not agree with him at all, and would say that these submissions epitomize the grave injustice that is consistently inflicted by lawyers on clients that they have represented in appellate courts by filing notices of appeal. It is unacceptable for a lawyer to agree to file a notice of appeal, and appear on record as the initiator of an

appeal process, only for him to opine that he should not be responsible for subsequent processes.

Again, it is unacceptable for a lawyer who files a notice of appeal, to wait till the appeal has been struck out before seeking to relist because counsel's submissions were not ready because of 'exigencies of work'. Now it is instructive that this motion to relist the appeal was filed in May 2019, after counsel had filed the notice of appeal in 2016! Pray, after filing an appeal with grounds of appeal and the reliefs sought by the appeal, what more is needed to prepare the draft Statement of case to the appellate court, while counsel and his client wait for the issue of Form 6? Nothing. Because all the records from the court below are already or ought to be, in the domain of a lawyer who initiates an appeal. I do not hesitate to opine that preparing for the appeal a party and his counsel have initiated by working on the draft submissions while waiting for the Form 6 to instruct them that it is time to file the submissions is the proper and best practice.

My lords, I think that it is more than high time that this court put its foot down to protect the value of justice to the citizenry by stating the obligation of counsel who present to the court that they are appealing to it on behalf of parties, and thereafter fail to comply with the statutory timelines of the Rules of Court.

In**Republic v High Court, Fast Track Division, Accra, Ex Parte Justin Pwavra Teriwajah & Korboe (Reiss and Co (Ghana) Ltd Interested Party) {2013 – 2014} 2 SCGLR 1247**, this court stated its approval of the high court's upholding of a duty to comply with section 8 (1) of the Legal Profession Act, 1960 Act 32. Under the said provision, lawyers were required to hold valid licenses before putting their hands to court processes. At first glance, the decision seemed harsh, considering that the effect of the failures of counsel fell hard on the rights and interests of his client. However, since this decision, great soundness has been introduced into law practice by the level of compliance with statutory licensing rules.

I see that a similar watershed has been raised in the testy question brought to us to resolve in this appeal. And the question is: what is the legal effect of representing to

the court of appeal that a lawyer is counsel on record for an appeal by filing the notice of appeal? It has become necessary to consider this question because it is the submission of appellant counsel that to interpret Rule 67 literally is wrong, and any process served on counsel who has filed a notice of appeal should not be upheld as proper service of the process unless the said counsel has taken a further step in the prosecution of the appeal.

What is the import of issuing a notice of appeal? It is no different from when counsel file any other originating process such as a Writ of Summons, Originating Motion, or Petition. Those processes invoke the jurisdiction of a court to consider the matter submitted to court. Without a notice of appeal to an appellate court, that court's jurisdiction is by no means invoked. By the issue of a notice of appeal, that court is compelled to administer any process rightly filed before it. Thus the proper legal position is that after filing a notice of appeal, the counsel on record is obliged to receive service of every process issued in pursuance of that notice of appeal, whether it is a Form 6, a notice to settle records, or any other proceeding. The same counsel is obligated to ensure the timeous discharge of every duty that the appeal entails. And service on the counsel who files a notice of appeal is good service.

As rightly conceded by counsel for the Plaintiff, **Rule 82 of CI 16** and **Rule 67 of CI 19** define an appellant as including the party appealing the judgement, order and decree **and his counsel** (emphasis mine). **Rule 9(3) of CI 19,** the relevant rules of court in this matter directs that

9(3) An appeal is brought when the notice of appeal has been filed in the Registry of the court below.

Thus if a lawyer files a notice of appeal in the court of appeal indicating that he is acting for an appellant, he is rightly recognized as a proper person to be served with any processes for the appellant that pertain to the appeal, including notice of Form 6 informing the appellant that his appeal records have been dispatched to the appellate

court. This is both the literal and purposive meaning of Rule 67 of the Court of Appeal Rules 1997 CI 19.

The exercise of discretion

The primary requirement for exercise of discretion is that it must be grounded in the law and facts of the matter before a court. The direction of the law is that an appellate court ought not to disturb the exercise of discretion by a judge who heard the parties unless certain factors are present which would render the exercise of discretion perverse. In **Adu (per attorney) Akonnor v Ghana Revenue Authority 2013-14 2 SCGLR 1176** this Court cited with approval the dictum in **Ballmoos v Mensah 1984-86 1 GLR 725** setting out the grounds on which an appeal against the exercise of judicial discretion should succeed. These grounds include where '*the discretion was exercised on wrong or inadequate materials if it could be shown that the lower court had acted under a misapprehension of fact in that it had either given weight to irrelevant or unproved matters, or omitted to take relevant matters into account*'. In the **Adu case**, (cited supra), this court found it necessary to overturn the decision of the Court of Appeal because '*it took extraneous matters into consideration'*, '*it acted under the wrong appreciation of the facts of the case*', it took into consideration '*irrelevant matters*' and the '*misapprehension of facts weighed very heavily on them in their decisions*'.

Counsel for Plaintiff's submissions are an invitation to find as wrong the exercise of discretion by the court of appeal when it refused to relist the appeal because the application to relist the appeal did not have attached to it at least a draft of the Statement of Case required to be filed under Rule 20(1) of CI 19 as amended

But the court of appeal's decision cannot be considered a wrong exercise of discretion at all. The legality surrounding the filing of a notice of appeal, as determined, is that counsel is as responsible for the prosecution of the appeal as his client is. Further, time for the filing of the appellant's statement of case begins to run with the service of Form 6 on the appellant, which expression includes their counsel, if the notice of appeal was

filed by the counsel. The decision to affirm the striking out of the appeal was grounded in law.

On the peculiar facts in the case before the court of appeal, the application for relistment of the appeal had indicated that the same counsel who filed the notice of appeal had failed to file the written submissions of the case of the appellant 'because of exigencies of work', three years after the filing of the notice of appeal. Our humble opinion is that this is a totally unreasonable time lapse compared to the twenty one days required by law for an appellant to file the written submissions of their case, and under no circumstance should the courts excuse counsel from preparing and filing processes pertaining to appeals timeously.

From the facts and the law therefore, the court of appeal did not wrongly exercise its discretion by refusing the application to relist the appeal that was filed.

Weight of evidence

Is the decision against the weight of evidence? Indeed my lords, it is painful to contemplate what counsel presents as the reason for failure to prosecute the appeal that they had filed notice of. He submits in paragraph 18 of the Statement of Case that he '*went to sleep and were absent at the hearing of the Registrar's Certificate*' Then he continued in the same paragraph to say that '*the main reason contained in the supporting affidavit was they (counsel) could not prepare and file the written submissions of appellant due to the exigencies of work*'.

As stated earlier, this is the same counsel who filed the notice of appeal in 2016, and was the counsel who prosecuted the case in the trial court. In 2021, he is informing this court that as at 2018, two years after he had filed the notice of appeal against a case he prosecuted, he was too busy to prepare his submissions on the appeal he filed. Even worse, because of the exigencies of work, he was still too busy a year later in 2019 to show the written submissions he would rely on if the appeal was relisted, after '*possibly realising the effect of the Registrar's certificate*' and applying to have the appeal restored.

The decision before us refusing to relist the appeal is not against the weight of evidence.

Our decision

This then brings us to the extremely weighty position of whether the appellant should be driven from the judgement seat of the court of appeal because of the conduct that led to the striking out of the appeal.

This case has a peculiar history. Two different high court judges tried the case between the parties to this one suit and arrived at two judgments with respect to the three defendants. This situation occurred because after the third defendant was joined to the suit, the first trial judge decided to conduct the trial between the plaintiff and the first two original defendants before trying the suit between the plaintiff and the newly joined third defendant. After the first trial and a judgment that went in favour of the plaintiff, he determined that there was no need to try the suit between the plaintiff and the 3rd defendant who had a counterclaim. This determination went on appeal and was overturned with the court of appeal ordering that the counter claim of the 3rd defendant against the plaintiff ought to be tried. A new judge took over the case. The second judge found in favour of the third defendant's counterclaim and dismissed the case of the plaintiff in defence to the counterclaim. In the three grounds of appeal in the notice of appeal that has been struck out, one ground of appeal urges that the second trial judge usurped the powers of the court of appeal in giving a judgment that is in direct conflict with the judgment obtained by Plaintiff against the 1st and 2nd defendants. Since an appeal is a rehearing of all the matters raised therein, we deem it necessary that the grounds of appeal raised be considered to ensure cogency and finality in the matters in dispute.

In **Isaac Frimpong v S. B. Facture Civil Appeal J4/22/2014 [7th November 2017]** this court considered a case similar to this one only in the situation that the court of appeal refused to relist the appeal that had been earlier struck out in that case. The records showed that there were conflicting results given in searches conducted by

the parties with regard to compliance with conditions for the appeal. The court of appeal did not take cognisance of this discrepancy in the results emanating from the registry of the court in the exercise of its discretion against restoration of the appeal. This court found it expedient to exercise discretion in favour of relisting the appeal for this reason however, and did so pursuant to its power under **Article 129 (4)** of the Constitution which reads:

For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law.

In the matter before us, we will exercise our discretion differently from the court of appeal for the sole reason of ensuring that the court of appeal is enabled to determine whether the fissure in the trials conducted between the plaintiff and the three defendants led to the miscarriage of justice urged in the grounds of appeal.

We are allowing the appeal on the ground that we choose to exercise our discretion by not visiting the sins of Counsel on the client. Again, on account of the fact that the appeal has not been heard on its merits, we choose to exercise our discretion to enable that necessity of justice.

However, we dismiss the grounds of appeal canvassed by the Appellant as unsubstantiated and state that we do not find the submissions of Counsel for Appellant appealing.

There will costs of GH₵10,000.00 against the Appellant to be paid by Counsel for the Appellant.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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