IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: DOTSE, JSC PRESIDING
YEBOAH, JSC
GBADEGBE, JSC
BENIN, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/10/2016

11TH MAY, 2017

OFEI KWAKU MANTE
(Subs. by REV. ALEX ARYEEQUAYE) -- PLT/APPLT/APPELLANT

VRS

1. MIKE SIMILAO)
2. S. K. BOTCHWAY) -- DEFENDANTS
3. KOTEI BOTCHWAY)

NII ARYEE ANNANG
(Subs. by EVANS OKAI ANTEH) -- CO-DEFENDANT/RESPONDENT/
RESPONDENT

JUDGMENT

GBADEGBE JSC:-

We have given careful thought and consideration to the appeal herein and come to the view that the decision of the trial court to try the question of res judicata as a

preliminary point of law was wrong for the reasons which follow shortly. In the first place, at the time of the order being made, there was no certainty regarding the area in respect of which the plea of res judicata, if upheld by the court was to apply. In our opinion before a court of law can cause the issue of res judicata to be determined before a full scale trial, the identity of the area to which it relates in relation to the previous judgment on which the point is planked must be clear. In relation to the subject matter of the action herein the identity of the disputed land must either be the same or have a juridical identity with the area covered by the previous judgment; both areas must be relational, so to say. See: Radstock Co-op Industrial Society Ltd v Norton- Radstock UD [1968] 2 All ER 59. The problem with which we are confronted in this appeal is not lightened by the failure of both parties who instead of describing the respective areas claimed by them in the writ of summons and or their pleadings curiously attached site plans to their pleadings. In the circumstances, notwithstanding a clear admission by the plaintiff of the issue of a previous case between them in the Circuit Court in which the ownership of part of the disputed area was decided, one of the essential conditions necessary to sustain the plea of res judicata was absent rendering it improbable for a trial of that issue alone likely to result in a decision that would substantially dispose of the matter as contemplated by order 33 rule 5 of the High Court (Civil Procedure) Rules, CI 47. We are of the opinion from a fair reading of the said rule that when an order for the trial of a preliminary point of law does not achieve the purposes of sub-rule 5 then the decision directing the trial of the issue is unjustified. The rule provides:

"Where it appears to the Court that the decision of any question or issue arising in any cause or matter and tried separately from the main cause or matter substantially disposes of the cause or matter or renders trial of the main cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such other order or give such judgment as may be just."

See: Apenteng & Ors v Bank of West Africa Ltd & Ors [1961] GLR 196

We think that when a trial judge is faced with an application under Order 33 of the rules of the High Court, he must read the entire provisions of the Order as if it were a single document in order to discern the purpose for which such provisions were made and direct his mind to whether the order sought is likely to advance the course of the action towards an earlier disposal within the intendment of the rules

and only make the order when satisfied from the pleadings and the application before him that indeed, making an accession to the prayer of the applicant would result in a substantial disposal of the matter or render the determination of the other issues in the matter unnecessary. This explains why in the rule authorizing the exercise of that discretion contained in Order 33 rule 3, it is provided as follows:

‘‘ The Court may order any question or issue arising in any cause or matter whether of fact or partly of fact and partly of law, and raised by the pleadings to be tried before, at or after the trial of the cause or matter and may give directions accordingly.”

Contrary to what must have weighed upon the mind of the learned trial judge, preliminary points of law need not necessarily be tried before the action goes to trial but may in the words of rule 3 of the Order be tried “before, at or after the trial of the cause or matter.” We think that courts should give careful consideration to such applications before deciding which of the three options open to them they are to decide on. The decision as to which particular order to make is dependent on the circumstances of the case. Where such a point cannot be conveniently tried before the trial of the main action then the preferable approach is to enable the said point of law or fact or both to proceed to trial so that after receiving all the evidence in the matter, the court may determine the point. The issue of res judicata need not be determined separately but may subject to the particular circumstances of the case be determined “ at the trial of the main cause or matter.’’

In the case before us, having regard to the uncertainty over the subject matter and the fact that at the time, a merit consideration of the action had already begun , the learned trial judge erred when he purported to have put an end to the full scale trial in order to determine the issue of res judicata. In our view, the court should have taken the factors hereinbefore alluded to into account and allowed the trial to proceed in order that the issue of res judicata might be determined “at the trial”. Adopting that course of proceeding would have saved the time and expense which have been expended to date in the action herein and actually have benefited the parties as by the time evidence closed in the matter the learned trial judge would have been in a position to find the facts on which the issue of res judicata was based. Reference in this regard is made to the observations of Wilberforce LJ in the

case of Tilling v Whiteman [1979] 1 All ER 737 in the course of which he made the following observation at page 738-739:

"**I with others of your Lordships have protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings.**"

Before bringing this matter to rest, we wish to echo the words of Sachs LJ at page 70 in the Radstock case (supra) wherein he observed as follows:

" **Any preliminary issue that falls to be tried in the course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well defined and that the facts on which it has to be considered are clearly ascertainable**."

The resort to order 33 to make orders for separate trial of issues is thus a case management technique which when not well employed might end up delaying the action as the instant one clearly appears to have done.

In our view, these reasons are sufficient to allow the appeal for the case to be remitted to the trial court for a re-trial in accordance with law.

SGD. N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

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

SGD. ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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