IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
GBADEGBE, JSC
PWAMANG, JSC
DORDZIE (MRS), JSC
KOTEY, JSC

CIVIL APPEAL

SUIT NO. J4/58/2019

11TH MARCH, 2020

OPANIN E. K. AGYARKWA
(SUBSTITUTED BY OPANIN YAW ASARE
(SUING AS HEAD AND LAWFULREPRESENTATIVE
OF TETE PA OGYA AGONA FAMILY OF ADAMOROBE,
NEAR ABURI) ……. PLAINTIFFS/APPELLANT/CROSS APPELLANT

VRS

1. JAMES FOLAGIN
2. ESTHER FOLAGIN
3. WILLIAM FOLAGIN
4. MADAM ABENA KUMAH
5. BORTEFIO MENSAH …….. DEFENDANTS/RESPONDENTS/RESPONDENTS

JUDGMENT

KOTEY, JSC:-

Introduction

On the face of it, this case is an appeal from the judgment of the Court of Appeal, dated 23rd May, 2018. The case had actually commenced in 2008 when the

Plaintiff/Appellant/Respondent (the Plaintiff) brought an action against the Defendant/Respondent/Appellant (the Defendant) claiming the following:

i. "Declaration of title to all that land situated and lying and being at Adamorobe on the Dodowa road containing an approximate area of 6 plots and bounded on the South by Accra-Oyibi main road on the East by the (Plaintiff's) family land and on the North by (Plaintiff's) family land and on the West by (Plaintiff's) family land.
ii. Damages for trespass
iii. Recovery of possession
iv. An order of perpetual injunction to restrain the (Defendant), his agents, privies, assigns and servants from entering into or in any way disturbing the (Plaintiff's) family's possession of the said land".

The Defendant, who was the only Defendant in that action, entered appearance and, when he was not filing a Statement of Defence, the Plaintiff applied for judgment in default of defence. The Defendant subsequently filed his Statement of Defence. In this statement, the Defendant outlined that he had acquired the six (6) plots of land from the Mayawei family of Nungua. He also stated that upon acquiring the disputed land, "the Defendant" had built on the land "without led and hindrance" and has been living on the land for the past eight years. The Defendant counterclaimed as follows:

i. "General damages for trespass unto Defendant's six (6) plots of land lying at Oyibi.
ii. Injunction to restrain the Plaintiff from entering into Defendant's land, threatening Defendant's life and/or demolishing Defendant's property;
iii. Damaging for trespass;
iv. Cost".

Counsel for the Defendant was present at the Applications for Directions stage and directions was taken on 17th June, 2009. When counsel for the Defendant failed to attend court, hearing notice was served on him on two occasions. On 7th December

2009, Counsel for the Defendant wrote to the court, upon service of a hearing notice on him, that though it still represented the Defendant they had lost touch with him for about ten months and the hearing notice should be served on the Defendant personally. As the Defendant could not be traced, the Plaintiff was granted leave to serve the Defendant by substituted service and this was done.

Trial then commenced in the absence of the Defendant. The Plaintiff gave evidence and tendered exhibits in support of his case. Judgment was given in favour of the Plaintiff by the trial High Court on 8th June 2010. Judgment after trial was filed on 24th December 2010 and served on the Defendant on 30th December 2010. A writ of possession and an order for demolition of premises on the land was made on 10th March 2011. Pursuant to the said Order the Plaintiff took possession of the land and demolished the Defendant's property on the land.

On 8th June, 2011, the Defendant filed a motion on notice to set aside the default judgment, stating that he had not been served with the entry of judgment against him and that the land in question belonged to his children. On 22nd July 2011, the High Court set aside the judgment of 8th June 2010. In the events that happened, the 2nd, 3rd, 4th and 5th Defendants were joined to the suit and a new trial started before a different Judge. Judgment was eventually given in favour of the Defendants by the High Court, constituted by Elizabeth Ankumah, J on 17th February, 2015. Dissatisfied with the decision of the High Court, the Plaintiff appealed to the Court of Appeal which essentially dismissed the appeal and affirmed the decision of Elizabeth Ankumah J., except that the demolition of the properties on the land was held to be lawful.

It is against this decision of the Court of Appeal that the parties have appealed and cross appealed. Upon a close examination of the record of appeal, the chronology of events and the law, doubts were raised in the minds of the justices of this court about the lawfulness of the proceedings that happened after execution had been completed. Since this issue had not been addressed by Elizabeth Ankumah J, the Court of Appeal and counsel for the parties, this Court, on 3rd February, 2020 and pursuant to rules 6(7)

and (8) of the Supreme Court Rules, 1996 (C. I. 16) invited the parties to file written submissions on "the lawfulness or otherwise of the ruling of the High Court dated 22nd July 2011 which purported to set aside the judgment of the trial High Court, dated 8th June 2010, and all subsequent proceedings, in view of the fact that judgment had ended".

The fundamental issue confronting the court in this appeal therefore is whether the trial High Court can set aside its judgment more than one year after the judgment and after execution had ended, in an application brought in the same case.

Summary of arguments of Counsel

Counsel for the 1st, 2nd and 3rd Defendants submitted that the judgment of 8th June, 2010 irregular and a judgment in default of appearance which has occasioned a miscarriage of justice and it was therefore sight that it was set aside. He also submitted that the Defendant was not served with the requisite hearing notices during the first trial and his sight to be heard was violated. He therefore contended the judgment of 8th June, 2010 was a nullity, having been given without jurisdiction. He therefore submitted, on the authority of **Republic v. High Court, Accra; Ex parteSalloum and others (Senyo Coke – Interested Party)** [2011] 2 SCGLR 574; **Republic v. High Court, Accra; Ex parteOsafo** [2011] 2 SCGLR 966, that the decision of 8th June 2010 being a nullity it can be set aside at any time. Lastly, Counsel submitted that execution had not ended when the judgment of 8th June 2010 was set aside on 2nd July 2011. He contended that though the premises on the land had been demolished the Plaintiff had not recovered possession of the land. Counsel submitted:

> *"In the instant matter before my Lords, the demolition order carried out by the cross Appellants is only partial execution of the order. The ownership of the disputed land remained unresolved after the demolition.*
> *The real test will come when the cross Appellants attempt to use the default judgment to take possession of the land against the real owners and their*

grantors as they were never heard, which is a clear breach of the natural justice, audialterem partem rule."

The Counsel for the 5th Defendant contended that the Defendant (the only Defendant in the first trial) was not served with hearing notice and was not in court when the Plaintiff gave evidence at the first trial. He also contends that the Defendant was not served with hearing notice to open his defence and lead evidence and did not lead any evidence at the first trial. He therefore submits on the authority of in **re Nungua Chieftaincy Affairs OdaiAyiku v Attorney-General (BorketeyLaruseh xiv Applicant)** [2010] SCGLR 413; **MossiBagyina** [1963] 1 GLR 337 and **Republic in Court of Appeal &Thomford. Exparte Ghana Institute of Bankers** [2011] 2 SCGLR 961 that there was a breach of the audiatteram partem principle of natural justice in the first trial and therefore the judgment of 8th June 2010 was a nullity having been given without jurisdiction. Being a nullity therefore, he contended, that judgment could be set aside at any time.

Predictably, counsel for the Plaintiff contends that the Order of 22 July, 2011 which sought to set aside the judgment of 8th June, 2010 was unlawful. He therefore submitted that the subsequent proceedings in the case are a nullity.

Counsel first submitted that the judgment of 8th June 2010 was not a default judgment but a final judgment entered after trial, albeit without the participation of the Defendant. Counsel emphasised that the Plaintiff entered judgment after trial on 24th December 2010 and that the Defendant was served with the Entry of Judgment on 30th December 2010.

Counsel also contended that the application to set aside the judgment of 8th June 2010 was unlawful because it was filed out of time. Counsel submitted that by Order 36, rule 2(2) an application to set aside a judgment obtained in the absence of a party "shall be made within fourteen (14) days after trial". As the application to set aside the judgment

of the trial court was filed on 8th June 2011, counsel submitted that the order to set aside the judgment was null and void.

Lastly, Counsel for the Plaintiff submitted that even if the judgment of 8th June 2010 was irregular or flawed in some way, or even a nullity, it could not have been set aside by an application filed in the same case one year after judgment and after execution had ended. He submitted that in that case the proper procedure is for any person aggrieved by the judgment of 8th June 2010 to issue a fresh writ to have it set aside. Counsel therefore contended that since the procedure adopted by the Defendant in his attempt to set aside the judgment of 8th June, 2010 is fundamentally flawed, the order of 22nd July, 2011 which sought to set aside the judgment of 8th June 2010, and all the subsequent proceedings in the case are a nullity. Counsel relied on **NiiOtuo Tetteh v. Opanin Kwadwo Ababio (Dec), substituted by NaacheAwoChochoBotwey and Nai Kojo Adu II &Ors,** Civil Appeal No J4/30/2017, unreported, judgment dated 14th February 2018. **Peter Egyin Mensah & Anor v. Inter-Continental Bank (Gh),** Civil Appeal No. J4/13/2009, Judgment dated 25th November, 2009, **Republic v. High Court, Kumasi Ex parteAtumfuwa Kwadwo Bi & Anor,** Civil motion No. 56/97, judgment dated 15th July 1998 and **Standard Bank Offshore Trust Co. Ltd v. National Investment Bank Ltd,** Civil Appeal No. J4/63/2016, judgment dated 21st June, 2017.

Consideration of Submissions of Counsel

We have carefully considered the facts of this case, the submissions of counsel and the law in relation to case. We find the submission of counsel for the 1st, 2nd and 3rd Defendants that execution had not ended and the attempted separation of the demolition of the premises from recovery of possession of the six plots of land as disingenuous and untenable.

The Defendant was the only Defendant during the first trial. He filed a Statement of Defence and counterclaim. Nowhere in his Defence did the Defendant (the only Defendant) deny ownership of the land and the premises thereon, nor did he mention the 2nd and 3rd Defendants (his children) as the real owners of the land and the premises. On the contrary, the Defendant in his counterclaim claimed damages for "trespass unto the Defendant's six plots of land".

The Defendant also sought an injunction to restrain the Plaintiff "from entering the Defendant's land…… and/or demolishing Defendant's property".

So at all material times during the first trial, the Defendant claimed to be the owner of the six plots in dispute and the premises thereon. It is only after the purported setting aside of the judgment 8th June 2010 on 22nd July 2011 that the 2nd and 3rd Defendants emerged. We find it improbable that the 2nd and 3rd Defendants were unaware of the pendency of the first trial from 2008 to 2011.

The attempt to separate and distinguish recovery of possession of the land from the demolition of the premises thereon is equally disingenuous. The demolition of the premises is in fact a consequences of the recovery of possession. It is because the Plaintiff has recovered possession of the land pursuant to the Order for recovery of possession that the Plaintiff demolished the offending unlawful premises on his land.

We therefore find that the judgment had been executed before 22nd July 2011. In the circumstances was it lawful for the High Court to purport to set aside the judgment upon an application by the Defendant in the same action?

Order 19, rule 1 of the High Court (Civil Procedure) Rules, 2004 (C. I.47) provides that "Every application in pending proceedings shall be made by motion." As at 8th July, 2011 when the Defendant filed a motion to set aside the judgment of 8th June 2010, there were no 'pending proceedings'. It is therefore not clear what jurisdiction trial judge exercised on 11th July 2011, when it purported to set aside its judgment of 8th June 2010. The Trial judge had tried the case, albeit in the absence of Defendant, and given judgment. The Plaintiff had entered judgment after trial, served the Defendant, gone into execution, taken possession of the land and demolished property on the land. At this point, the Court became *functus officio* and had no jurisdiction to set aside the judgment of 8th June 2010 which had been completely executed.

It is for this reason that Order 36 of C. I. 47 establishes strict timeframe for setting aside a judgment obtained when a party had at the trial. Order 36, rule 2(1) provides that a judge may set aside or vary a judgment claimed against a party who fails to attend at the trial. But rule 2(2) provides that "An application under this rule shall be made within fourteen (14) days after the trial". This is mandatory and must be complied with. This court reiterated the need for courts to uphold mandatory provisions of the rules of court when it stated per Benin, Jsc in Standard Bank Offshore Trust Company Limited v. National Investment Bank citation at pages 728-729;

> *"The rules of court form an integral part of the laws of Ghana, see article 11(1)(c) of the 1992 Constitution. Consequently, they must be treated with equal amount of respect in order to produce sanity in court proceedings. Where a rule is mandatory by the use of the expression shall; it should be so regarded in view of section 42 of the Interpretation Act, 2009 (Act 792)"*

The motion to set aside the judgment of 8th June 2010, was filed on 8th July 2011, more than one year after the trial. It was woefully out of time. The judge had no right to waive this flagrant violation of the Rules and had no jurisdiction to enter the application. The order of 22nd July 2011 to set aside the judgment of 8th June 2010 is therefore null and void. Any person who became aggrieved by the actions of the Plaintiff in the execution of the lawful orders of the Court can institute a fresh action against the Plaintiff.

Even if, as Defendants argue, the judgment of 8th June 2010 is a nullity because it was obtained without the Defendant being heard, it is our considered view that it could not have been set aside upon an application in the same action after execution had ended. We agree with counsel for the Plaintiff that in that case, the proper procedure for the Defendant or any other person who claims to be aggrieved is to institute a fresh action.

The procedure adopted by the Defendant in this case being fundamentally flawed, the decision of 22nd July 2011 purporting to set aside the judgment of 8th June 2010 is a

nullity. That being the case all the subsequent proceedings are also null and void. As was stated by **Lord Denning M.R. in Macfoy v. United Africa Co Ltd. [1961] 3 All E.R 1169;**

> *"If an act is void then it is in law a nullity. It is not only bad but incurably bad. It is automatically null and void without much ado… And every proceeding which is founded on it is also incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse".*

This Court has affirmed this position in a long line of cases including **Republic v. High Court, Accra; Ex parteAtumfuwa Kwadwo Bi & Anor** [2000] SCGLR 72; **Oppong v. Attorney-General** [2000] SCGLR 275; **Republic v. High Court, Tema; Ex parte Owners of M V Essco Spirit (Darya Shipping Sa, Interested Party)** [2003-2004] 2 SCGLR 689 and **Standard Bank Offshore Trust Company Limited v. National Investment Bank** [2017-2018] 1 SCGLR 707. In **Oppong v Attorney-General** Atuguba JSCstated at page 280 that;

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

And in **Standard Bank Offshore Trust Company Limited v. National Investment Bank, supra,** Benin JSC stated at page 724 that; "the entire proceedings may be set aside for non-compliance with a rule of practice".

Policy Rationale

There are also strong policy reasons why courts should be loathe to set aside judgments after execution has ended. An efficient legal system is based on certainty and predictability as much as justice and fairness. Allowing parties and other aggrieved persons to overturn judgments and completed execution processes is a very drastic

step which must not be undertaken lightly. In the instant case we are not persuaded that the conduct of the Defendants, quite apart from the rules, is deserving of this reprieve. As a policy Court, we are also not unmindful of the deleterious effects that encouragement of the practice of the setting aside of the judgments after the completion of execution would have on the operation of the legal system. In this particular case, premises had been demolished pursuant to the judgment and orders of the court of competent jurisdiction. An aspect of this appeal is that the 2nd and 3rd Defendants should be compensated in damages for the demolition of their premises. Setting aside judgments after execution is a slippery slope. Extreme circumspection must be exercised by courts before embarking upon such a course of action.

Conclusion

In light of the foregoing, the appeal of the Plaintiff is allowed on the ground that the order of the High Court, dated 22nd July 2011 which purported to set aside the judgment of the Court dated 8th June 2011 and all subsequent proceedings in this case, to wit the trial at the High Court before Elizabeth Ankumah, J and her judgment dated 17th February 2015 and the appeal before the Court of Appeal and its judgment dated 23rd May 2018 are null and void.

We accordingly set aside the order of the High Court, dated 22nd July 2011 which purported to set aside the judgment of the Court dated 8th June 2011 and all subsequent proceedings in this case, to wit the trial at the High Court before Elizabeth Ankumah, J and her judgment dated 17th February, 2015 and the appeal before the Court of Appeal and its judgment dated 23rd May 2018.

We also restore the judgment and orders of the first trial High Court, constituted by Ocran J and his judgment dated 8th June 2010 and all processes and actions taken pursuant thereto.

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

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

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

G.PWAMANG
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