IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)
DORDZIE (MRS.) JSC
PROF. KOTEY JSC
TORKORNOO (MRS.) JSC
AMADU JSC

CIVIL APPEAL
NO. J4/01/2022

15TH JUNE, 2022

REMA TIPTOP SURFACE PROTECTION (PTY) LIMITED	}	**PLAINTIFF/RESPONDENT/ RESPONDENT**
VRS		
1. MOSPACKA COMPANY LIMITED **2. MOSES ARMAH**	}	**DEFENDANTS/APPELLANTS/ APPELLANTS**

JUDGMENT

AMADU JSC

1) The issue for determination in this appeal is a simple procedural and conceivably insignificant one. Yet, the Defendants/Appellants/Appellants *(hereinafter referred to as the "Appellants")* have contested it through the hierarchy of the Superior Courts to the final court of the land.

2) In the High Court, the Plaintiff/Respondent/Respondent *(hereinafter referred to as the "Respondent")* issued a writ claiming from the Appellants as follows:-

"(i) Recovery of the total sum of R2,908,946.51 (Two Million, Nine Hundred and Forty-Six Rend and Fifty One Cents) particularized in paragraph 6 of the Statement of Claim, or its Cedis equivalent, in current exchange rate being the costs of goods sold and delivered to the Defendants on credit during December 2017 to January2018 and payment failed, refused and neglected despite repeated demands.

(ii) Interest on the principal sum supra at the prime overdraft Rate Plus 2% per Month as at the date of invoice until date of final payment.

(iii) Damages for breach of contract.

3) Upon service of the writ, the Appellants entered conditional appearance and proceeded to move the trial court upon an application to set aside the writ on grounds that:-

(i)The Respondent had at the time of issuing the writ not registered with the Registrar of Companies as a legal entity in Ghana.

(ii)The Respondent has no place of business within the jurisdiction of Ghana.

(iii)The trial court is by reason of grounds (i) and (ii) above not clothed with jurisdiction to entertain the Respondent's action.

The trial court dismissed the Appellants' application.

4) On appeal to the Court of Appeal the Appellants repeated substantially the same grounds upon which their application to set aside the Respondent's writ in the trial court was anchored. In the notice of appeal to the 1st Appellate Court, the Appellant

formulated one ground of appeal that: "*The (Plaintiff/Respondent herein) has no the legal capacity to sue and writ taken by it ought to have been set aside*". The Court of Appeal dismissed the Appellant's appeal.

5) In the exercise of their right of appeal, the Appellants who are dissatisfied with the decision of the Court of Appeal have appealed to this court on grounds have been set out as follows:-

"(i) The Court of Appeal erred when it held, affirming the decision the High Court that the Plaintiff has the capacity to sue out the writ in this suit.

(ii) The Court of Appeal failed to set aside writ."

It is obvious that the Appellant has prosecuted this appeal on a sole ground as set out in ground (i) only. What the Appellant has purported to formulate in ground (ii) is certainly not a ground of appeal tenable within the meaning of Rule 6(4) and (5) of the rules of this court C.I.16. Not being a concise statement of an allegation of error from the judgment of the Court of Appeal but a mere statement of the Court of Appeal did, it is not a proper ground of appeal. On the basis of settled authority ground (ii) of the Appellants' grounds is improper and unarguable. It is hereby accordingly struck out.

APPELLANTS' ARGUMENTS IN STATEMENT OF CASE

6) The gravemen of Appellants' case in this court is without controversy though legally and procedurally incomprehensible as it is untenable. The Appellants have submitted that the 1st Appellate court had in its judgment described the Respondent as a foreign company and had placed a burden on the Appellants to demonstrate why the Respondent ought to be allowed to access the jurisdiction of the Ghanaian Court. While they do not deny the Respondent's corporate legal existence, they submitted further that, the Respondent owe sits legal existence to the laws of South Africa. However, its lawful corporate legal existence in South Africa per se will not clothe the Respondent with the requisite legal status in Ghana.

In furtherance of the Appellants' misconception about the rules and the proper legal incidence of the Respondent's legal capacity within the jurisdiction, the Appellants proceeded on a self-interrogatory by questing how personal service of processes under the rules of the courts within this jurisdiction may be effected and how orders of the court may be enforced especially where a counterclaim had been set up against the Respondent.

7) While the answers to these questions in my view are simply elementary if the Appellants have applied themselves to the seeking the appropriate remedies provided by the grounds rules of the High Court, the appropriate Appellants concluded their arguments by submitting that the Respondent being beyond the scope of the local jurisdiction is *immune* to the orders emanating from the local courts.

8) The Appellants have referred us to the decision of this court in the cases of **Republic Vs. High Court, Accra Ex-parte Aryeetey (Ankrah Interested Party) [2003-2004]SCGLR 398 & Naos Holding Incorporated Vs. Ghana Commercial Bank [2005-2006] 407,** both of which are clearly inapplicable to the peculiar. Factual circumstances of this case and which respective decisions have been completely misconceived by the Appellants. We must however place on record that the Respondent elected not to file a statement of case to contest appeal.

9) **DETERMINATION OF THIS APPEAL**

As aforesaid, the Appellants have prosecuted this appeal on a sole ground which is a challenge to the affirmation by the 1st Appellate court that, the Plaintiff has the capacity to issue out the writ in this suit. The drift of the Appellants' case from the trial court to this court is the position that, the Respondent whose legal existence is not being challenged as a legal entity in South Africa, must endorse or have a local address within the jurisdiction for purposes of service of processes and enforcement of court orders before it can assume a legal capacity for remedies against any party

within the jurisdiction of this court. I have taken a journey through the rules of court applicable in the High Court and I find no such pre condition placed on a foreign person, natural or artificial to provide for or endorse an address within the jurisdiction. Neither is it the law that accompany duly registered outside the jurisdiction must endorse such address failing which an action commenced by such entity will suffer perdition on grounds of lack of capacity.

10) It is obvious that the Appellants herein have a complete misconception of the allied but different incidents of capacity and laws as it affects jurisdiction which this court has in a number of cases expounded on. For, as has been settled by this court, it is not every situation of want of compliance with the rules of court on the requirement for particular endorsement of parties and other particulars which go to jurisdiction. In the **Standard Bank Offshore Trust Co. Ltd. Vs. National Investment Bank Limited and 2 Others [2017-2018] 1 SCGLR 707,** this court per Benin JSC held at page 726 of the report *inter alia* that: ***"A person's capacity to sue, whether under a statute or rule of practice, must be found to be present and valid before the issuance of the writ of summons else the writ will be declared a nullity. In the case of a company, its authority to bring a laws suit is one of capacity and not standing".***

11) Therefore as rightly held by the Court of Appeal, the concept of capacity as was applied in the **Standard Offshore Trust Co. Ltd. Vs. National Investment Bank Ltd**. (supra) had been explained in the **Edusei Vs. Diners Club Suisse S.A. [1982-1983] GLR 809** in the following words:- ***". . . a court must be satisfied that the parties appearing as suitors before, it, did exist as legal personae whether human in form or artificially created. In the latter class of cases, the court must see whether the legal indices that constitute the clothing really adore a legally acceptable fictional character, permitting it access to our courts".***

12) We are aware that in the **Standard Bank Offshore Trust Company Ltd. Vs. National Investment Bank Ltd.**, this court held that the failure by the Plaintiffs therein to comply with the mandatory provision of Order 2 rule (4)(2) of the High Court (Civil Procedure) Rules 2004 C.I.47, which provides that:

"(2) Before a writ is filed by a Plaintiff who acts by an order on behalf of a person resident outside Ghana, the writ shall be indorsed with a statement of that fact and with the address of the person so resident", deprived the trial court with jurisdiction to entertain the Plaintiff's action. We find not such analogous provision which has been contravened by the Respondent in the instant case. The failure to indorse its writ with an address within the jurisdiction is therefore not a statutory requirement which will have the effect of nullifying the Respondent's action.

13) Similarly, in the case of **Republic Vs. High Court, Accra, Ex-parte Aryeetey (Ankrah, Interested party) [2003-2004], SCGLR 398 at 405,** Kpegah JSC speaking for this court held *inter alia* that: ***"The requirement that a party endorses on the writ the capacity in which he sues is to ensure that a person suing in representative capacity is actually invested with that capacity and therefore has the legal right to sue. This includes the submission that the requirement also enables submission that the requirement also enables a Defendant, if he is so minded, to challenge the capacity the Plaintiff claims he has, and such a challenge may be taken as a preliminary issue. 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 judgment founded on it. . ."*** The endorsement of a Plaintiff's capacity where necessary is therefore a legal requirement to give validity to an action. The failure to endorse an address within the jurisdiction by a company duly registered outside the jurisdiction does not give rise to a challenge to capacity. Indeed no issue about the capacity of such an entity will arise.

14) Further, in **Naos Holding Incorporated Vs. Ghana Commercial Bank [2005-2006] 407 at 412** this court per Sophia Akuffo JSC *(as she then was)* held that: "***Once the legal status was challenged and its corporate status was placed in issue, it was incumbent upon the Appellant to produce more cogent evidence (such as its registered office, address or copy of its certificate of incorporation) to satisfy the trial court that it has the requisite legal capacity to sue".*** Significantly, the competence of a foreign company to litigate within the jurisdiction whether as Plaintiff or Defendant was never in issue. Indeed, the decision of Hayfron-Benjamin J. in the case of **Kimon Campania Naviera S.A.R.P and Others Vs. Volta Lines Ltd. (Consolidated) [1973]1 GLR 140** at **143H.C**.to the effect that it is sufficient for the address and place of incorporation of a Plaintiff company to be endorsed on the writ as the instant Respondent had done is and remains the accurate position of the law.

15) Consequently, the Court of Appeal cannot be faulted in affirming the decision of the trial court in dismissing the Appellants' application to set aside the Respondent's writ for want of endorsement of an address within the jurisdiction. From the Respondents pleadings on record, it never asserted that it is an external company doing business within the jurisdiction. It is the Appellants who are attributing to the Respondent the status of an external company with the deliberate intention to bring it within the requirements of Section 329(2) of the Companies Act 2019, (Act 992). The references to the said provisions of Sections 329 and 330 of Act 992 are therefore inapplicable in the instant case. There being no justifiable challenge to the Respondent's legal capacity to sue, this appeal fails. The sole ground of appeal is accordingly dismissed.

16) Before the last word is said about the trajectory this simple case of recovery of money has taken, it is in my view relevant to quote the words of **Evershed MR.** in the case of **Windsor Refrigerator Co. Ltd. Vs. Branch**

Nominees Ltd. [1961]1CH.375 at 396 CA cited with approval in **Commissioner, Customs Excise and Preventive Service and Another Vs. Mahogany Furniture Limited & Another [2001-2002]2 GLR 470** as follows:- ***"I repeat what I said at the beginning, that the course which this matter has taken emphasize, as clearly as any case in my experience has emphasized, the extreme un wisdom - save in every exceptional cases of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasizes the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round".*** This statement was as relevant then as it is today in the instant case.

17) For all the reasons hereinbefore set out, this appeal wholly fails, and is accordingly dismissed.

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

PWAMANG JSC:-

My Lords, while I concur with the judgment of the court read by our honourable brother Amadu, JSC, I wish to add some words of my own. The defendant/appellant/appellant (the defendant) took a preliminary objection to this suit on the grounds that the plaintiff/respondent/respondent (the plaintiff) lacks capacity to sue as plaintiff in the courts of Ghana. The reason for that contention is that the plaintiff is incorporated in South Africa and though it sold some goods to the defendant, it does not have a recognised place of business in Ghana and has not registered as an external company under our Companies Act, 2019 (Act 992). In its arguments the defendant takes the position that it is only companies registered in Ghana or having a place of business that can sue in the courts of Ghana and that a non-resident and non-registered external company cannot sue in our courts. This amounts to saying that in order to sue as a

plaintiff in the courts of Ghana, one must either be a resident or have Ghanaian nationality. No authority was provided by the plaintiff for this rather profound principle of law that relates to the civil jurisdiction of Ghanaian courts.

Meanwhile, this very question has long been settled by our Court of Appeal in **Edusei v Dinners Club [1982-83] GLR 809** where at pages 816-817 Francois, JA stated the position of our law, which is the same under common law, as follows;

"It is clear therefore that no dispute was raised as to the respondents' status as a limited liability company as such and the correct inference from the facts and the pleadings is that the appellant acknowledges the existence of the respondents as a limited liability company. The simple task of the appellant therefore is to satisfy this court that under Ghanaian law, a company so limited in its liability but which is not registered or carrying on business in Ghana is debarred from suing in our courts. Apart from citing the **Levandowsky** and **Vincenta** cases, learned counsel for the appellant made no effort to bring to our attention, any authority (statute law or case law) where a foreign limited liability company has been denied access to our courts.

In the **Merabello** case (supra), it was held that a foreign limited liability company need not have carried on business or have had a place of business in England to be amenable to English jurisdiction on winding-up proceedings provided it had assets to be dealt with within the jurisdiction. The **Levandowsky** and **Vincenta** cases involved partnerships or firms, not limited liability companies. The decisions derive their viability from the interpretation of Order 48A of the High Court (Civil Procedure) Rules, 1954 (LN 140A). That Order permits partnership actions to be prosecuted in our courts, where it is disclosed that the partnerships are either registered or doing business here and the suit is by an identifiable human persona suing for the partnership. But with a limited liability company, the identity of the company is known at law. It is a legal persona; that is why the preliminary hurdle, in other jurisdictions, of making quite sure the company exists, is undertaken.

Where the identity is known, a necessary assumption follows that a fictional entity created by law exists and that body can pursue legal actions. The only hostage to fortune that the courts in their discretion impose is security for costs. This is only fair so that the party sued, if he won, would not be damnified in seeking relief from the plaintiff who was chasing a mirage in foreign climes: see eg. Bishop (John) (Caterers) Ltd. v. National Union Bank Ltd. [1973] 1 All E.R. 707."

This position of our law has not changed and in furtherance of it, under Order 24 of the **High Court (Civil Procedure) Rules, 2004 (C.I.47),** provision has been made for a defendant to apply to the court to order a non-resident plaintiff to deposit security towards meeting any costs that may be awarded against her by the Ghanaian court. The provision of Or 24(1) is as follows;

(1) Where, on the application of a defendant, it appears to the Court that

(a) the plaintiff is ordinarily resident outside Ghana;

... the Court may, having regard to all the circumstances of the case, order the plaintiff to give such security for the defendant's costs of the proceedings as it thinks just.

The plain effect of the above provision is that a plaintiff ordinarily resident outside Ghana, such as the plaintiff herein, has access to our courts. The question is thus so well-settled that the defendant's objection ought to have been summarily dismissed with costs.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

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