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
NO. J4/63/2019

19TH FEBRUARY, 2020

SARAH OBUADABANG LARBI ..... PLAINTIFF/APPELLANT/RESPONDENT

VRS

TEMA DEVELOPMENT CORPORATION ..... DEFENDANT/RESPONDENT/ APPELLANT

JUDGMENT

PREAMBLE

DOTSE JSC:-

This interlocutory appeal raises issues which relate to the criteria or guidelines that an appellate court such as this Supreme Court must consider when an appeal lies against the refusal of the Court of Appeal in allowing a party to adduce fresh evidence as is provided for under Rule 26 of the Court of Appeal Rules, 1997, (C. I. 19) and expatiated further by the decision of this Court in ***Poku v Poku [2007-2008] SCGLR 996.***

FACTS OF THE CASE

The Plaintiff/Appellant/Respondent hereafter referred to as the Plaintiff on the 7th day of July, 1998, commenced a suit in the Circuit Court, Tema as the Administrator of the Estate of Ogyadu Obuadabang Larbi (Deceased) against the Defendants/Respondents/Appellants, hereafter referred to as the Defendants, claiming the following reliefs:-

1. **"A declaration that the said lease agreement between TDC and Ogyadu Obuadabang Larbi (Deceased) on plot numbers TDC 346/48/18 and 19 is subsisting and not terminated.**

2. **A declaration that by his death, the said lease property automatically became part of the deceased's estate fully vested in the Plaintiff to deal with.**

3. **An order of injunction to restrain TDC to allocate the land to any other person or to enter same either by themselves, their servants, agents or anyone claiming through TDC, or any other person." Emphasis**

In an accompanying Statement of Claim, the Plaintiff averred that the deceased, and the Defendants entered into a lease agreement duly signed, sealed and delivered on the 11th day of March 1980 wherein the Defendants leased the demised plot numbers TDC 346/48/18 and 19 located at the heavy industrial area near Aluworks Tema, for a term of 60 years to the Plaintiff's late husband.

Attempts by the Plaintiff to have the said lease transactions vested in the personal representatives of the Deceased, by the Defendants failed, whereupon she caused the said writ of summons to be instituted on her behalf against the Defendants.

The DefendantS on their part, entered appearance and filed a Defence in which they admitted the lease, but averred that the lease agreement between them and the deceased husband of the Plaintiff was terminated as far back as 1985 for non-payment of rent and non development of the plot as per their paragraph 5 of the defence.

DECISION BY THE CIRCUIT COURT

After trial, the learned Circuit Court Judge dismissed the Plaintiff's claim in the following terms:-

> *"From the totality of evidence adduced by Plaintiff, I do not think the Plaintiff has discharged the legal burden prescribed by law particularly section 14 of the Evidence Act.* ***Having denied the Plaintiff's claim of the existence of a lease agreement, the entire burden of proof albeit on the balance of probabilities or the preponderance of the evidence lies squarely on the Plaintiff****. Within the meaning of the Conveyancing Act, unless the transaction forming the basis of Plaintiff's claim is exempted as provided under the provisions of Section 3 of Act 175, unless the Plaintiff produced evidence of the said lease in writing, her burden of proof would not have been discharged.* ***That is why from***

all the evidence, the Plaintiff's claim must fail and it is hereby dismissed.

Emphasis

APPEAL AGAINST CIRCUIT COURT DECISION TO COURT OF APPEAL

Dissatisfied with the decision of the Circuit Court, Tema, dated the 6th day of April 2017, the Plaintiff herein appealed against the said decision to the Court of Appeal as per grounds of appeal contained in the Notice of Appeal filed by her on the 31st day of May 2017.

However, before the Court of Appeal could deliver judgment in the appeal lodged against the Circuit Court decision by the Plaintiff, the Defendants sought the leave of the Court of Appeal to adduce fresh evidence.

Indeed, as per paragraph 12 of the affidavit sworn and deposed to by the Defendant's Goff Opoku Gyamfi who described himself as Estate Officer, and filed on 18th April, 2018 the following depositions were made:-

12. "That the Record of Appeal was compiled and forwarded to the Court of Appeal and subsequently parties, filed their written submissions to the court and **same has been fixed on 10th of May 2018 for judgment to be delivered.**

In paragraphs 13, 14, 15 and 16, the Defendant made a very strong case for the adduction of fresh evidence in the following terms:-

13. **"That the Applicant until recently has decided to digitized its operations by scanning all its property files which will become easy to search and locate."**

14. "That it was in the process of scanning the property files when somewhere in April 2018, **the file of Mr. Ogyadu Obuadabang Larbi with Plot No. IND/A/48/18-19 emerged and the Legal Department of the Applicant** was informed of it. The property file is attached and marked as exhibit "GOGI".

15. "That I have been informed and I believe same to be true that the information on the file especially at folios 15 and 17 **which show the letter of termination will assist the court in arriving at a just decision of the process the Applicant went through in having the tenancy of the said plot terminated.**

16. That this evidence has become necessary to be adduced as fresh evidence on appeal since the main argument of the Respondent (who is the Plaintiff herein) is that the Applicant failed to show any such termination." Emphasis

The Plaintiff quite naturally opposed the application to adduce this fresh evidence as per paragraphs 15 and 19 of the affidavit sworn to by Kumi Obuadabang Larbi in opposition and filed on 24/5/2018 as follows:-

15. **"That the evidence/document sought to be adduced at this stage has at all material times to and during this suit been in the custody and/or possession of the Defendant/Applicant.**

19. "That the evidence sought to be adduced does not fall within the ambit permitted by the rules of this Honourable Court, same being documentary in nature. "Emphasis

DECISION OF THE COURT OF APPEAL UPON RECEPTION OF ARGUMENTS TO ADDUCE FRESH EVIDENCE

Following the reception of arguments on the adduction of fresh evidence by the Defendants in terms prayed for and referred to supra, the Court of Appeal, Coram *V. D. Ofoe, B. Ackah-Yensu and S. G. Suurbareh, (JJA's)* in a brief ruling dated 5th June 2018 dismissed the application in the following words:-

> *"After listening to both Counsel and reading the processes filed and the record of appeal,* ***this is an application that we should refuse. Application accordingly refused".*** *The appeal itself is due for hearing which we had adjourned sine die. Depending upon the circumstances the Registry should issue hearing notice for the hearing of the appeal." Emphasis*

LEAVE TO APPEAL TO SUPREME COURT AND GROUNDS OF APPEAL

Being dissatisfied with the decision of the Court of Appeal on the dismissal of this application to adduce fresh evidence, the Defendant on 16th day of July 2018 successfully obtained leave from the Court of Appeal Coram: *Marful-Sau J.A (as he then was) E. K. Ayebi J.A, and Lovelace-Johnson JA, (as she then was)*

Following the grant of leave, the Defendants filed the following as the sole ground of appeal.

"The learned Justices failed to give due and proper consideration to the appellant's application for leave to adduce fresh evidence."

From the above sole ground of appeal, the Defendants sought the setting aside of the ruling of this court dated 5th June 2018 and referred to supra.

ARGUMENTS IN SUPPORT OF THE GROUNDS OF APPEAL BY THE DEFENDANTS

Learned counsel for the Defendants Opoku-Ware Boateng anchored his submissions on Rules 26 of the Court of Appeal Rules 1997 C. I. 19 which provides as follows:-

26. "New Evidence on Appeal

(1) It is not open as of right to a party to an appeal to adduce a new evidence in support of the original case **but in the interest of justice may allow or require new evidence to be adduced.**

(2) Evidence allowed under sub rule (1) shall be in the form of an oral examination in court, an affidavit or a deposition taken before an examiner or commissioner who the court may direct.

(3) A party may, by leave of the Court, allege any facts essential to the issue that has come to his knowledge after the decision of the court below and adduce evidence in support of the allegations." Emphasis

On reception of arguments, learned counsel for the Defendants submitted that, the justice of the case required that the property file on the lease transactions between the parties herein which has now been located and thus available, be produced to settle once and

for all the issues which ought to have been settled during the trial. Learned counsel made really strenuous efforts in his arguments that, the said property file was not available during the trial despite diligent and thorough search for them at the time. It was also contended by learned Counsel that, the property file was only recently located during the digitization process of the Defendants documents and processes.

In support of his arguments, learned counsel for the Defendants referred to the Supreme Court case of ***Poku v Poku [2007-2008] SCGLR 996.***

Learned counsel therefore concluded that, in order to arrive at a fair and just decision, this court should allow the appeal for the adduction of the fresh evidence as stated supra.

BY THE PLAINTIFF

Learned Counsel for the Plaintiff, Osafo-Buabeng, also relied heavily on the Supreme Court case of ***Poku v Poku*** supra, and contended that, the evidence sought to be adduced on appeal was at all material times in the actual possession of the defendants and same would have been obtainable ***had the defendants exercised some diligence during the trial of the case.*** It was indeed argued by learned counsel for the plaintiff, that had the defendants exercised the same level of diligence they purportedly exercised during the digitization process, they would have found the property file during the trial of the case especially as the trial process took a long time to be completed.

Concluding the arguments, learned counsel invited the court to dismiss the appeal.

ANALYSIS OF LEGAL ISSUES RAISED

What are the facts of the ***Poku v Poku case*** supra? This was a case in which the Plaintiffs/Appellants therein appealed against the leave granted to the defendants/respondents by the Court of Appeal under Rule 26 of the Court of Appeal Rules, referred to supra, seeking to adduce fresh or new evidence before the Court of Appeal after the trial High Court had given judgment for the Plaintiffs.

By that judgment, the will of the deceased Francis Poku, was declared invalid on the ground that as a blind man, the Will was not read and interpreted to him before it was executed by him as required by the Wills Act, 1971 (Act 360), S. 2 (6).

In a majority decision, the Supreme Court held as follows:-

> *"On construction, the adduction of fresh or new evidence in the "interest of justice" as provided in rule 26 (1) of the Court of Appeal Rules, 1997 (CI. 19) was clearly delimited by the facts delineated in rule 26 (2).* ***Consequently, in an application to lead fresh or new evidence before the Court of Appeal, the first criterion, which an applicant ought to establish, was whether the evidence sought to be adduced, was neither in the possession of the applicant nor obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was given by the lower court.*** *It was only when that first hurdle had been surmounted, that the court should proceed to determine the other pertinent question of whether or not the intended evidence would have a positive effect on the outcome. If the first criterion*

was not met, no useful purpose would be served by examining the other factors."

Emphasis

From the peculiar circumstances of this appeal, the first point to be noted is that the Defendants herein at all material times had judgment in their favour at the trial Circuit Court.

Secondly, the Defendants as a statutory body, were in possession of all the property files of all leases granted by them to the lessees, like the Plaintiff's deceased husband.

Thirdly, a reading of all the processes and the entire appeal record has revealed that the Defendants did not exhibit any diligence and seriousness in the conduct of the case at the trial court.

Finally, the Defendants did not exhibit any degree of professionalism, and reasonableness in ensuring that the property file in this case was procured to help them in prosecuting their case.

In other words, the Defendants were not able to establish that they did all that was humanly possible to locate the fresh document but failed.

In all fairness, the Defendants were lackadaisical and sloppy in their conduct of the case at the trial and did not exhibit any evidence of seriousness in their bid to locate the said documents which would have been very vital to their case. That notwithstanding, the Defendants had judgment in their favour, at the trial court and the logic behind their application to adduce fresh evidence beats our imagination and is therefore unreasonable.

The justice of the case in our opinion does not require that the Defendants be granted leave to adduce any fresh evidence as prayed for.

Under the circumstances, once it appears certain to us that the Defendant did not make any genuine, real and strenuous efforts to look for this fresh evidence during the trial, the appeal herein must fail.

We have indicated that, judgment was entered in favour of the Defendants herein, and since the fresh evidence was at all times available during the trial and no serious effort was made to locate and tender same at all material times, the criterion set out eloquently in Rule 26 of the Court of Appeal Rules and in ***Poku v Poku*** (supra) has not been made out.

In the premises, the appeal herein against the Court of Appeal judgment, dated 5th June 2018 fails in its entirety and is dismissed. The case is remitted to the intermediate appellate court for judgment to be delivered in the substantive appeal which had been adjourned sine die.

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

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)
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