IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF JUSTICE

ACCRA A.D. 2013

CORAM: ATUGUBA, JSC. (PRESIDING)
ADINYIRA (MRS), JSC
OWUSU (MS), JSC
DOTSE, JSC
BONNIE,JSC

CIVIL APPEAL
No. J4 /17 / 2012

27TH FEBRUARY,2013

ALHAJI MOHAMMED MORU **: PLAINTIFF**

PER HIS LAWFUL ATTORNEY **/RESPONDENT**
MOHAMMED MORU **/RESPONDENT**

VRS

MOHAMMED HUSEINI **:DEFENDANT**
/APPELLANT
/APPELLANT

J U D G M E N T

BAFFOE-BONNIE, JSC;

The Defendant/Appellant/Appellant is appealing against the decision of the Court of Appeal dated April 14, 2011 which upheld the decision of the Circuit Court dated March 17, 2008.

The facts of the case before the trial court were as follows; The Plaintiff/Respondent/Respondent, hereinafter referred to as the Respondent, suing per his lawful attorney, caused a writ of summons and statement of claim to issue against the Defendant/Appellant/Appellant, hereinafter referred to as the Appellant for:

a. An order for the immediate ejectment of the Appellant, then the Defendant from the piece of land particularly described in paragraph 3 of the statement of claim by reason of:
    i. Non-payment of rent; and
    ii. Fraudulent breach of the agreement between Plaintiff and Defendant.

b. An order for recovery of possession of the said land.

c. 3.4 million being rent due and owing for the period January to December 2000 and January to December, 2001.

d. Interest at the prevailing bank rate on the rent and mesne profit due to the Plaintiff.

The Defendant in turn filed a statement of defence denying the Plaintiff's claim and counterclaimed for:

a. Declaration of title to all that piece or parcel of land described in schedule
b. Recovery of possession of any portion that plaintiff trespasses on.
c. Damages for trespass.
d. Perpetual injunction restraining the plaintiff, his agents, assigns and workmen from further interfering with the defendant's land.

At the trial the Plaintiff tendered in evidence; a Power of Attorney from Alhaji Mohammed Moro as a donor, appointing Mohammed Munkaila (His Son) as his lawful Attorney.

The case of the Plaintiff as narrated by his Attorney was quite simple. The Plaintiff is a businessman and an Islamic Religious leader. By a deed of conveyance dated March 23, 1990 between the Plaintiff on one part and Nii Kpakpo Amako II Mankralo and Acting Sempe Mantse of Accra, acting with the consent and concurrence of the principal members of the said family of the other part, Nii

Kpakpo Amako, as the Acting Sempe Mantse, leased a parcel of land situate at Sowutuom, to the Plaintiff for the term of 99 years from March 23, 1990.

The indenture was tendered as Exhibit B during the trial. Exhibit B had been duly executed by Nii Kpakpo Amako in the presence of a witness and by the Plaintiff also in the presence of witness. The Indenture had been duly stamped and the Land Valuation Board Number LVB 6773A/95. According to the Plaintiff, sometime in 1999 he entered into an oral tenancy agreement with the Defendant through his caretaker to the effect that the Defendant would operate a temporary hand-pump fuel filling station on the said plot of land until the Plaintiff required it for his own use. The Defendant, acting under the terms of this agreement made payment of the first year's rent advance. The Plaintiff applied this money to erect a temporary structure on the said land for use by the Defendant as an office and a storeroom.

Subsequently, the Defendant commenced the building of additional and permanent structures on the land. Defendant also refused to pay the rent for the period January to December 2000 and January to December 2001, in the total sum of 3.4 million

Cedis, despite demands of the Plaintiff. The Plaintiff to corroborate this story, called the caretaker of the Sempe stool as a witness. The caretaker confirmed that he as the caretaker of the Sempe stool lands had given a plot of land to the Plaintiff. He bore witness to the oral contract between the Plaintiff and the payment made in respect of the first year's rent advance by the Defendant.

The Defendant on his part contends in relation to the land in dispute that the so called lessors of the Plaintiff are not the rightful owners of the said land. He denied that he had ever been a tenant of the Plaintiff's. In defence to the action brought against him by the Plaintiff, the Defendant contended that in 1997, he was granted a piece of land by Colonel John Tetteh Odoi Addy(Rtd), head of the Abola Piem (Tunma We) Family who are the lawful and rightful owners of the land in dispute. In support of his case, the Defendant tendered an Indenture dated April 19, 1997, Exhibit I, this evidenced a lease between Colonel John Tetteh Odoi Addy (Rtd), head of the Abola Piem (Tunma We) Family acting with the consent and concurrence of the Principal Members of the said family of the one part and the Defendant of the other part.

By the terms of the said lease the Abola Piam Tunma We Family granted the Defendant a lease of the disputed land for a term of 99 years. Exhibit I was duly executed by Colonel John Tetteh Odoi Addy (Rtd) in the presence of the Treasurer of the Abola Piam Tunma We Family, and by the Defendant in the presence of Rudolph Amoah. The Indenture was duly stamped and bore the Land Valuation Board Number LVB 11869/98.

The Defendant contended that since he was in possession of the disputed land as far back as 1997, he could not have entered into an agreement with the Plaintiff for the use of the land of which he was already in possession of. The Defendant did not call his Lessors nor any witness to corroborate His story.

Upon evaluating the evidence, the trial court came to the conclusion that looking at both the verbal and documentary evidence, on the balance of probability the Plaintiff had been able to prove his case.

The Defendant appealed against this decision on the following grounds:

a. That the decision is against the weight of evidence;

b. That the trial judge failed to consider the fact that when the Defendant denied being the Plaintiff's tenant and claimed ownership of the property then tile to the land was the main issue.

c. That the trial judge attempted to consider the weakness in the Defendant's case rather than the strength of the Plaintiff's case.

Under the first ground of appeal, the Defendant argued for the first time in the case that, the entire evidence of the Plaintiff's Attorney be disregarded since the power of Attorney tendered was void for not conforming to the Power of Attorney Act 1998, (Act 548). Exhibit A which was the Power of Attorney was only signed by the donor of the power. The signature of the Donor had not been witnessed. The Plaintiff cited the case of Edmund Asante-Appiah vrs Madam Kate Amponsah alias Yaa Mensah (2009) 1 MLRG 100 in support of this stance, that ***"where the instrument is signed by the author of the power, one witness shall be present and shall attest the instrument".***

The Court of appeal agreed with the appellant on this submission and came to the conclusion that the defect in the power of attorney was incurable and therefore expunged the entire evidence of the attorney. Nevertheless, the Court Of Appeal concluded that even though the evidence of the attorney had been expunged, since

the defendant was counterclaiming, he assumed the onus of proving his title. But in their estimation, the defendant counterclaimant had failed to adduce sufficient evidence to be declared owner of the land. The court therefore confirmed the decision of the trial Circuit Court. Before us the appellant has filed the following grounds of appeal;

1. The judgment is against the weight of the evidence before the court.

2. The Honourable Court of Appeal failed to consider the appeal in the proper light of the burden placed on the plaintiff at the trial court.

3 That the Honourable Court of Appeal failed to consider properly the fact that once Plaintiff/Respondent/Respondent's evidence has been dismissed the evidence of his witness fails to sustain the evidence required to sustain the Plaintiff/Respondent/Respondent's case at the trial court.

4 That the Honourable Court failed to consider the fact that the writ was filed by and suit fought by attorney.

In the case of Djin V Musa Baako 2007-2008 SCGLR 636 it was held;

> ***"Where as in the instant case an appellant complains that a judgment is against the weight of evidence, he is implying that there are certain pieces of evidence on record which if applied in his favour could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."***

See also the cases of AKUFFO ADDO V CATHELINE (1992) GLR 377 SC, and PRAKA V KETEWA [1964] GLR 423.

The appellant in this case has thus thrown himself on the altar of the Supreme Court with no fresh evidence, but imploring us to scrutinize evidence already scrutinized by two lower courts, and overturn a decision given by one and confirmed by the other. This is a tall order indeed particularly in the light of admonishment given by Acquah JSC (as he then was) in the case of,

ACHORO V AKANFELA [1996-97] SCGLR 209. He said;

> ***" now in an appeal against findings of facts to a second appellate court like this court, where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject matter of***

which is peculiarly within the bosom of the lower courts or tribunals, this court will not interfere with concurrent findings of the lower courts unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower tribunals dealt with the facts."

See also the case of Bonney v Bonney (1992-93) GBR 779 SC.

However, before we come to the evidence on record, there is the small but important matter of capacity which is the subject of the third and fourth grounds of appeal. The issue of void power of attorney was raised before the Court of Appeal for the first time by the appellant. He argued that since the power of attorney was not properly attested to and thus did not conform to the requirements of the Power of Attorney Act (Act548), it is void and conferred no

capacity on the plaintiff's attorney to issue the writ and prosecute the case. He therefore argued that the plaintiff's case had to be expunged from the record.

In answer the respondent argued that the defendant was present when the power of attorney was tendered in court without objection, he was estopped from raising it on appeal. After reviewing the authorities and citing the cases of Fosua and Adu

Poku v Dufie (deceased) and Adu-Poku Mensah 2009 SCGLR 310 and The Republic V High Court, Accra; ex parte Aryeetey (Ankrah, Interested party) (2003-2004) 1 SCGLR 398, the Court of Appeal said capacity to sue was a matter of law and could be raised by a party at any stage of the proceedings, even on appeal. It could be raised by the court suo motu. So it was no answer to say that once the power of attorney was not objected to when it was being tendered, its genuineness or admissibility could not be a subject of appeal.

They then proceeded to examine the document and said;

> ***"In the instant case, the plaintiff's attorney testified on behalf of the plaintiff relying on exhibit A((the power of attorney) which was not witnessed by anybody and therefore did not conform to the requirement of act 546. The trial court in the circumstances should not have admitted it in evidence even if the defendant failed to object to its admissibility"***

The learned justices did not end there. They proceeded as follows;

> ***"I would have ended there but I noticed from the title of the suit that the plaintiff's action was instituted on his behalf by his attorney. The Supreme Court, in Fosua and Adu Poku v Adu Poku Mensah's case at pg 338 of***

the report held, per Ansah JSC , that, *'The Supreme Court considers the question of capacity in initiating proceedings as very fundamental and can have catastrophic effect on the fortunes of a case'*

Dotse JSC, was also of the opinion in that judgment that;

'want of capacity is a point of law, which if raised goes to the root of the action'
"Having rejected exhibit A on which the plaintiff's attorney obviously relied to institute the action it follows automatically that the foundation on which the action is based has collapsed for want of capacity and therefore no action can be based upon it."

Based on this conclusion the Court of Appeal not only expunged the evidence of the attorney, but since the writ was issued by the Attorney, the whole of plaintiff's case was avoided for want of capacity. However, on the ground that the defendant had counterclaimed, the court proceeded to review the evidence of the defendant on his counterclaim and came to the conclusion that he had failed to prove his counterclaim and so upheld the trial judge's finding on the counterclaim as well.

Before us the Appellant has argued that despite the Court of Appeal's finding that the power of attorney was void and therefore purported to avoid plaintiff's whole case, they still made use of the evidence from the plaintiff's case to defeat his

counterclaim. There was no case for the plaintiff either direct evidence or cross-examination on record to defeat his counterclaim.

I must say that I find the conclusion of the Court of Appeal after a rather brilliant analysis of the law on power of attorney and capacity, a little intriguing. The court said

> ***"Having rejected Exhibit A on which the plaintiff's attorney obviously relied to institute the action it follows automatically that the foundation on which the action is based has collapsed for want of capacity and therefore no action can be based upon it"***

Confronted with a similar situation in the case of Edmund Asante Appiah V Madam Kate Amponsah alias Yaa Mansa 2009 7 GMJ 75 THE Supreme Court held as follows;

> *"Since no one signed the power of attorney as a witness in line with the requirements of section 12 of the power of attorney act, 1998 act 458, same is invalid to that extent and it could not have provided legitimate basis on which nana Twum Barima could have prosecuted the case on behalf of the appellant.*
>
> *In effect, the evidence given by Nana Twum Barima was inadmissible to the extent that he had no capacity to testify as he did. In the face of this reality, the appellant was left in a situation as if no one represented him and his*

case thus reduced to mere pleadings filed on his behalf. In fact even before considering the merits of the case, want of capacity alone was sufficient for the appellant to have lost the case,"

The distinguishing feature of this case and the one just cited is that whilst in this case the plaintiff issued his writ per his attorney, in the cited case the attorney only gave evidence on behalf of his principal who had issued the writ. So while in the cited case the pleadings and the evidence of other witnesses could be saved, in the case before us writ and pleadings and all evidence based upon it is void for want of capacity.

I would have thought that with the conclusion the Court of Appeal came to that would be the end of the matter. But the court decided to deal with the counterclaim pursuant to Rule 1 of Order 12 of the High Court Civil Procedure Rules 2004, CI 47 which provides that;

"a defendant who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in an action in respect of any matter, whenever and however arising, may instead of bringing a separate action, make a counterclaim in respect of that matter" rule 3 (a) provides that rule 1 of Order 12 "shall apply to a counterclaim as if it were a statement of claim".

This is where, with due respect to their Lordships, the Court of Appeal fell into error. It is true that a counterclaim is a separate action from the claim. But in the peculiar circumstances of this case the bottom of the matter had been knocked off for want of capacity. If there was no capacity to sue because of the defective Power of Attorney, then there was no capacity to defend the action, any pleadings served on the Attorney would be deemed not to have been properly served on the

principal. To the extent that service of defendant's counterclaim on the deficient attorney is deemed as no service, evidence given in proof of the counterclaim cannot be allowed to stand.

What is worse, even though the Court of Appeal clearly stated that the evidence of the plaintiff was being expunged for want of capacity, in dealing with the counterclaim they kept on referring to excerpts of this same rejected evidence to challenge the evidence of the appellant in proof of his counterclaim. For example on page 90 of the record of proceedings, in the course of their judgment the court said,

'In answer to these several submissions made by the counsel for the defendant, counsel for the plaintiff submitted that irrespective of the inconsistencies, there was ample evidence of facts on the record which swayed the court to enter judgment in favour of the plaintiff, He invited the courts attention to the dates in

exhibit B and Exhibit 1 and contended that Exhibit B relied on by the plaintiff predates Exhibit 1 relied on by the defendant.'

Then at page 94 we find this

"I will now consider the submission of counsel for the defendant in respect of the signature of PW1 on exhibit B which he submitted contradicts the evidence of PW1 that he signed as the owner of the property. The evidence of PW1 covers pages 31 to 34. Nowhere in his evidence-in-chief did the PW1 state that he signed Exhibit B as the owner of the land"

There are several other instances in the course of their judgment when the Court of Appeal referred to the "expunged" evidence of the plaintiff to defeat the evidence of the defendant on his counterclaim. This we believe was erroneous.

In conclusion we find that the Power of Attorney was defective and could not have been the foundation on which the action was mounted. With the defective Power of Attorney the trial judge should have struck out the plaintiff's case for want of capacity as was rightly done by the Court of Appeal.

Even though a counterclaim is a separate action from a claim, in the peculiar circumstances of this case, with the plaintiff struck off for want of capacity, there was no defendant to the counterclaim and therefore the counterclaim could not have been prosecuted.

Both the claim and the counterclaim are struck out.

P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

R. C. OWUSU (MS)
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