IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA

CORAM: WOOD (MRS), C.J. (PRESIDING)
BROBBEY, JSC
DOTSE, JSC
YEBOAH, JSC
GBADEGBE, JSC

CIVIL APPEAL
NO. J4/18/2010
28TH JULY, 2010

BALLAST NEDAM GHANA B.V
149 ACHIMOTA ROAD … PLAINTIFF/RESPONDENT/
ROMAN RIDGE APPELLANT
ACCRA

- VRS -

HORIZON MARINE CONSTRUCTION LTD … DEFENDANT/APPELLANT/
47 OSU BADU ROAD RESPONDENT
DZORWULU-ACCRA

J U D G M E N T

GBADEGBE, JSC:-

This is an appeal from the decision of the Court of Appeal that reversed the judgment of the High Court, Accra, which had allowed in favour of the appellant an application for summary judgment. It appears from the judgment of the Court of Appeal that it was of the opinion that there were triable issues disclosed by the respondent's affidavit to the application under Order 14 of the High Court (Civil Procedure) Rules, 2004, CI 47.Delivering the judgment of the court, Kusi Appiah JA after referring to the case of

SADHUWANI v AL- HASSAN [1999-2000] 1 G.L.R 19 observed as follows at pages 162-163 of the record of appeal:

> *"In the instant appeal, it is one of the appellant's contentions that the mode of payment to the respondent was subject to the general terms and conditions of the contract, clause 4, where the defendant/appellant has to satisfy itself that the works had been properly done according to the specifications before invoices are accepted and payments made (see Exhibit "KET 4"). If the appellant claims that they did not accept the last invoices for payment because the respondent had not done the works in accordance with their specifications, it certainly is an issue for the court to determine and apportion responsibility."*

In our view, the above pronouncement by the learned justices of the Court of Appeal whose judgment is under attack before us satisfies the requirements of Order 14 rule 3(1) of the High Court Rules, CI 47 that is expressed thus:

> *"A defendant may show cause against the application by affidavit or otherwise to the satisfaction of the court."*

Although the procedure for summary judgment under order 14 enables the appellant to obtain speedy and summary judgment without a trial even in cases where the defendant to the action expresses an intention to defend the action, the court may only grant the application in cases where the defendant is unable to set up a good defence or raise an issue which ought to be tried. See: **(1) ANGLO-ITALIAN BANK v WELLS**, **ANGLO-ITALIAN BANK v DAVIES** (1878) 38 LT 197; **(2) ROBERTS v PLANT** [1895] 1 QB 597.

We are of the opinion that the allegation by the respondent that the payment was subject to the appellant satisfying the requirement contained in clause 4 of the agreement was a good defence to the action and also raised an issue that under rule 5

(1) of Order 14 raised an issue that comes under the description 'there ought for some other reason to be a trial of that claim or part of it.' It is to be observed that respondent had in "Exhibit HMC 1A" and "HMC 1B" which were written before the commencement of the action herein raised issue with some works that the appellant had carried out under the agreement between them. These letters were written even before the appellant's lawyers made a demand contained in "Exhibit KET6", which was dated 10 August 2007 in respect of the same amount that is claimed by the appellant against the respondent in the action herein. As it seems those issues were not resolved before the writ herein was issued and therefore it was only right that when the appellants filed the application for summary judgment the respondent by way of defence in their affidavit in answer made reference to what in their view was an outstanding obligation that was undischarged by the appellant. In our thinking, the said defence was made in good faith and not being a sham ought to have been inquired to by the learned trial judge else its effect would be to shut out the respondent.

Indeed, the respondent had categorically in its affidavit in answer to the application for summary judgment deposed to in paragraphs 11 -14 as follows:

> *"(11) Defendant/Respondent denies paragraphs 4, 10, 11, and 14 of the Plaintiff/Applicant's affidavit in support of this present application.*
>
> *(12) Defendant/Respondent disputes the claim of the Plaintiff/Applicant and contends that the Defendant/Respondent that it is not indebted to the Plaintiff/Applicant.*
>
> *(13) Defendant/Respondent Company in response to the said paragraphs of the Plaintiff's Affidavit in support of the application for Summary Judgment states that the Agreement executed by the Parties on 1st of August, 2006 provided in various schedules the specifications for the execution of works for which the Plaintiff/Respondent either failed to execute or executed them not according to the said specifications.*

(14) The Defendant/Respondent Company therefore rejected Plaintiff/Applicant's invoice raised on the bases that they were not yet due. Defendant/Respondent further states that the invoices amount to an attempt by Plaintiff to make ill-gotten gain by claiming money for no work done."

These depositions were in contrast to those of the appellant particularly; paragraph 11 wherein it was deposed thus:

"The Defendant has not disputed owing the said debt, yet the same remains due and owing from it despite many demands both oral and written from the Plaintiff to the Defendant. Attached hereto, respectively marked "KET5", are a letter to the Defendant from the plaintiff dated 28th July, 2007 and another from our lawyers in the Netherlands which, together with earlier demands, have simply been ignored."

In the face of the controversy relating to the demand from the appellant and the inability of the appellant even in its supplementary affidavit to counter the denial by the respondent with any evidence of an admission by the respondent of the claim to the money, on the balance of probabilities the appellant had failed to lead such evidence as to entitle it to a summary judgment in the matter.

Writing on the subject of summary judgment, the learned authors in Halsbury's Laws of England, Volume 37 (Fourth Edition) paragraph 414 at pages 308-309 provide as follows:

"The power to give summary judgment under Order 14 is intended to apply in clear cases, where there is no reasonable doubt that the appellant is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes of delay. Leave to defend will therefore be given where the defendant shows that he has a fair case, that there is an issue or question which ought to be tried, or that there

are reasonable grounds for setting up a defence or even a fair probability that he has a bona-fide defence. However, the defendant does not have to show a complete defence, but only a fair probability of a defence, or that there is a real or substantial issue or question to be tried or that there is a dispute as to facts or law which raises a reasonable doubt whether the appellant is entitled to judgment. The procedure under Order 14 was not intended to shut out a defendant who could show that there was an issue or question that ought to be tried or that for some other reason there ought to be a trial."

Although the above statements were made in relation to Order 14 of the 1965 rules of procedure that govern procedure in the High Court in England at the time, the provisions contained in Order 14 of CI 47 are expressed in substantially the same words and accordingly these statements are equally applicable to us. We think that the statements alluded to above are substantially the same as pronounced by Wood JA (as she then was) in the Sullivan case (supra) wherein she observed at page 25 thus:

"We think that in such applications, i.e. applications to sign final judgment, what is required of a trial judge is that he or she examines the pleadings and determines whether there exists a bona fide or good defence that is a defence known in law. In my view, any such bona fide or good defence or a defence known in law when raised would constitute a triable issue of fact or law. But a judge is not empowered to try the merits of the respective claims using the affidavit evidence in hand. Indeed the application for summary judgment is not intended to be used for the resolution of triable issues that may emanate from the pleading."

This being the case, we think that the learned justices of the court of Appeal were right when they came to the conclusion on the materials on which the appellant obtained

summary judgment in the trial High Court that they disclosed matters, which ought to be tried. We are unable to comprehend how in the face of the affidavit of the respondent that clearly raised an issue the learned trial judge proceeded to allow the application. A fair reading of the proceedings founded on the application before the High Court at pages 125- 133 when counsel engaged in arguments reveals clearly that the application was not one that comes within the scope of Order 14. We have tried to read the application and the processes based thereon and each time we read it we had the impression that the application disclosed an issue that the court ought to have inquired into even if not by plenary trial by resort to the powers conferred on it under Order 14 rule 3 (2) as follows:

> *"Where the defendant proceeds to show cause, the Court may order the defendant or in the case of a body corporate, any director manager, secretary or similar officer of it, or any person purporting to act in such capacity to attend and be examined on oath or to produce any document f it appears to the Court that special circumstances make this desirable.".*

The power conferred on the court under this sub-rule is to be exercised in exceptional circumstances. In the case of ***SULLIVAN v HENDERSON*** [1973] 1 All ER 48 at the hearing of an application for summary judgment in the course of a winding up application under Order 86 that conferred on the court powers that are substantially the same as order 14, at page 51 of the judgment, MEGARRY J (as he then was) made the following observation that we consider useful to this case:

> *"There is one further point that I should mention for guidance in future cases. The present case seems to me to illustrate the difficulties that may arise if leave to cross-examine a witness on his affidavit is given in cases under RSC Ord 86.The summary process under RSC Ord 86 is one thing, and the trial of an action is another: a hearing under RSC Order 86 with oral evidence is liable to become neither one nor the other, and to share the disadvantages of each. The hearing ceases to be summary and the*

absence of pleadings and discovery, for example, prevents the hearing from achieving the exhaustiveness of a trial. The court may be put in a position, at the end of a two day hearing, of saying that there ought to be a trial of the action, in which case there will then be a repetition of much that has occupied the court and the parties during the hearing under RSC Ord 86. I observe that rule 5(3) (b) of the order, which authorizes the making of an order for the defendant to attend and be examined oath, qualifies the power by the words 'if it appears to the court that there are special circumstances which make it desirable that he should do so' These are weighty qualifications, and I would subscribe to the cautionary words of Field J in ***Millard v Baddeley*** *uttered in relation to the corresponding procedure under RSC Ord 14.There may be cases where it is right to give leave to cross-examine, perhaps limited to a single point, although this has its own problems both for counsel and for litigants who are bursting to reveal all; and in any case I would expect cases in which it would be desirable for such leave to be given to be of comparatively rare occurrence."*

Further to this, we are of the view that having regard to the fact that the contract on which the action turned was in a technical area of engineering that required a judge before whom any dispute is faced to patiently consider the subject-matter before acceding to an application that by its nature was summary such as that before us was not one suitable for summary judgment once the defendant raised an issue that the appellant had not satisfied the requirement in the agreement that may be said to be a condition precedent to payment. We think that the nature of the agreement and the technical details contained therein are such that the court ought to have made an order granting leave to the defendant to defend the action so that the issue of the appellant's compliance with the technical details might be inquired into.

For these reasons, we are of the view that the Court of Appeal was right in reversing the decision of the High Court and accordingly the instant appeal is dismissed and the decision of the Court of Appeal that is on appeal to us is affirmed.

N.S. GBADEGBE
JUSTICE OF THE SUPREME COURT

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