IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA- GHANA , A.D.2014

CORAM: ADINYIRA (MRS), J.S.C. (PRESIDING)

YEBOAH, J.S.C.
BONNIE, J.S.C.
BAMFO (MRS), J.S.C.
AKAMBA, J.S.C.

CIVIL APPEAL

NO.J4/12/2014

30TH JULY 2014

1. BRENDA VERONICA WARREN
2. RUTH ALLEN

PLAINTIFFS/APPELLANTS /APPELLANTS

VRS.

1. SAM OKUDZETO
2. EUNICE BROOKMAN AMISSAH
3. PROF ABLADE-GLOVER
4. SOPHIA VANDERPUYE-ORGLE

DEFENDANTS/RESPONDENTS /RESPONDENTS

JUDGMENT

AKAMBA, JSC:

This interlocutory appeal lies from a ruling of the Court of Appeal of 27th March 2013 in which the court refused to grant the plaintiff/respondent/appellant hereinafter simply the appellant leave to adduce fresh evidence at the hearing of an appeal pending before the court. Dissatisfied with the ruling, the appellant filed a notice of interlocutory appeal on 4th April 2013 in the registry of the Court of Appeal raising six grounds for this court's determination. The notice of appeal also sought three reliefs namely; the overturn of the ruling of the Court of Appeal, an order made allowing the appellant to adduce new evidence in support of the original case in the interest of justice and an order allowing the appellant to allege facts essential to the issue that has come to the appellant's knowledge after the decision of the trial court and to adduce evidence in support of the allegation in the interest of justice.

The Appellant chose to preface her 'statement of case' with the list of authorities cited. They are as follows: " (1) The Holy Bible (Revised Standard Version and The Gideon International); Deut. 16: 18-20 (RSV) 'You shall appoint judges and officers in all your towns which the Lord Your God gives you… and they shall judge the people with righteous judgment. You shall not pervert justice; you shall not show partiality; and you shall not take a bribe for a bribe blinds the eyes of the wise and subverts the cause of the righteous. Justice, and only Justice you shall follow, that you may inherit the land which the Lord Your God gives you.": Proverbs 21: 15 *"It is a joy for the just to do justice, but destruction will come to the workers of iniquity.": Isa 30 :18 "*For the Lord is a God of justice; blessed are all those who wait for Him."

(2) The Constitution of Ghana.

(3) Poku v Poku [2007-2008] SCGLR, 996."

One would infer from a reading of the 'authorities' cited supra that the appellant has a measure of distrust for our justice system and the only reason for this has to do with an alleged failure to compile a correct record of events at the lower court as well as its refusal to grant the applicant's reliefs. It is important to remember that our courts are not ecclesiastical courts rendering divine justice but ordinary secular courts delivering justice according to mortal laws. We may falter or err but the way forward is to climb the next ladder and plead your cause in accordance with laid down man made rules. We certainly deprecate accusations or insinuations of impropriety which have no substance but based upon pure suspicion and mistrust.

We are not overly surprised at the level of passions being shown in this suit in view of the nature of the dispute which is centred on the appellants' dissatisfaction with the provisions in a will concerning her mother's estate.

However in the pursuit of justice according to law, parties are obliged to observe rules of decency and decorum, giving respect to all involved, in order for same to be reciprocated. We refuse to be bogged down by any insinuations beyond this, assuring ourselves to do justice without fear or favour, ill will or affection and in accordance with the law. In any event where issues of impropriety are established we would deal with them within the law.

BRIEF FACTS

Suit number PD46/2003 was initiated by the 1st Defendant/Respondent, Sam Okudzeto together with two others as the Executors of the will of Verna Eloise Warren (deceased) seeking to prove the will in common form pursuant to order 1 of the Probate and Administration Rules L.I 1515. The Defendant/Respondent shall hereinafter be referred to as the Respondent whilst the Plaintiff/Appellant shall simply be referred to as the Appellant. The Appellant entered a caveat against the grant of probate and subsequently filed suit number FA70/2003 against the 1st Respondent and others, alleging fraud and undue influence on the testatrix in the making of her will. The High Court, (Automated) Accra, constituted by Justice Agnes Dordzie ordered the consolidation of the two separate suits. However, hearing of the case came before Justice Ofoe, who delivered judgment

on 28th March 2006. The Appellant who was dissatisfied with the decision filed an appeal on 3rd April 2006. She then applied for a stay of execution which was granted by the trial judge on June 9th 2006. The hearing of the appeal was delayed for several reasons. It was struck out for failure to file written submissions and restored when it was proved that there had been non service of process on the appellant. Eventually when the appellate court was properly seized with the appeal, the Appellant filed on 20th February 2013 an application to adduce new evidence under rule 26 of CI 19.

After some adjournments for purely administrative reasons, the application came up for hearing on the 25th March, 2013. The Court of Appeal gave its ruling on 27th March, 2013. It is from this ruling that the appellant has launched the present appeal.

GROUNDS OF APPEAL

Six grounds of appeal have been filed for our determination. These are:

(i) The learned judges of Appeal erred in law and misdirected themselves when they failed to follow the decision of the Supreme Court of Ghana in the case of Poku v. Poku as to how Rule 26 of the Court of Appeal Rules 1997 (C.I. 19) ought to be interpreted and applied.

(ii) The learned judges of Appeal erred in law and misdirected themselves when they dismissed the application made by the Appellant to adduce new evidence in support of the original case in the interests (sic) of justice.

(iii) The learned judges of Appeal erred in law and misdirected themselves when they ruled that the Appellant over-reached the Trial Court by not obtaining the order of the Trial Court to get the new evidence.

(iv) The learned Judges of Appeal erred in law and misdirected themselves when they ruled that no exceptional circumstances exist to warrant the making of an Order in the Appellants favour to adduce new evidence.

(v) The learned Judges of Appeal erred in law and misdirected themselves when they ruled that the Appellant 'says she has abandoned her claim to get access to her mother's passport to prove her nationality and now claims to be saying that drugs were administered to her mother before she made a will.'

(vi) The Ruling of the learned Judges of Appeal is against the public interest of Ghana because it prevents the revealing of crime."

ANALYSIS OF GROUNDS

I will determine **grounds (i), (ii), (iii), (iv) and (v) together** because they raise issues that bear on each other. In order to unravel the issues in contention it is necessary to refer to the Court of Appeal Rules 1997 CI 19 rule 26 (1) and (2) under which the appellant sought leave to adduce new evidence on appeal as well as this court's decision in the case of **Poku vs Poku [2007-2008] SCGLR 996** relied upon by both parties in this application. The Court of Appeal Rules CI 19 enacts:

"26. New Evidence on appeal.

(1) It is not open as of right to any party to an appeal to adduce evidence in support of his original case but, in the interest of justice, the Court may allow or require new evidence to be adduced; such evidence shall be in the form of oral examination in Court, an affidavit or a deposition taken before an examiner or commissioner as the Court may direct.

(2) 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."

This court in **Poku v Poku** (supra) construed rule 26 above, among others, as follows:

> "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 factors delineated in rule 26 (2). Consequently, in an application to lead fresh evidence 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 the 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. Furthermore, on a grant of the application, the Court of Appeal has a duty to set out, in explicit terms, the evidence to be introduced. The matter must not be left at large, but explicitly detailed to forestall some other evidence outside of the express terms being smuggled into the record under the guise of new evidence."

It is necessary to point out that an applicant who seeks to adduce fresh evidence under the rule must first establish whether or not the evidence sought to be adduced was not in his/her possession or was not obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was rendered.(See per Wood, C.J. in **Poku v Poku** (supra). This interlocutory appeal impugns the evaluation of the facts and law made by the Court of Appeal. This mandates this court to take its own look at the record and to come out with our own conclusion one way or the other. The answers to the appellant's present prayer are evident in her own pleadings.

The Appellant filed her motion to adduce new evidence, together with a supporting affidavit before the Court of Appeal on 20th February 2013. It is trite knowledge that an affidavit should state facts which are within the knowledge of the deponent except as otherwise authorized by law and not evidence. Nevertheless the applicant's affidavit deposed to facts and evidence. Nonetheless

the answers which will help dispose of this appeal are embodied in it. The following paragraphs illustrate the point: (See pages 96 to 102 of the ROA) as follows:

"3) *That I am a lawyer by profession and I have resided in Ghana since 2002. In Ghana I am the Managing Director of a registered Ghanaian charity named Truth First Ministries which promotes education of the youth.*

4) That the new evidence sought to be adduced was not in my possession before the Judgment given by the lower Court, but was in the custody of the 1st Defendant/Respondent at all material times, and although I exercised due diligence and human ingenuity to obtain such evidence during the trial, I was unsuccessful.

5) That the new evidence now sought to be adduced was in my mother's room from which I had been locked out by the 1st Defendant/Respondent and the keys are still in his possession to this date.

6) That at the trial I made application on two occasions for the Court to make an Order that the room of my mother, the late Verna Eloise Warren, be opened and searched for documents so that I could prove her nationality since 1st Defendant and Co-Defendant had denied in their defence that she was a Jamaican. My first application was made on June 29, 2005 and is seen in the transcript of my evidence dated 28th day of June, 2005 at page 87 of the Record of Appeal, quoted verbatim as follows:

A. "My Lord there are other documents which I wish to tender that is my mother's passport and my mother's residence permit, unfortunately they are locked up in my mother's room and I will like the court to make orders for the room to be opened to enable me get them since the keys are with Mr. Okudzeto. So I have not been into my mother's room since I came to Ghana."

(The words 'on my own' should be inserted between 'room and 'since'.)

Judge: "Mrs Attram you should have made this application before the case start.(sic)

Attram: My Lord it was when we came last week that it became pertinent that we have the place opened. So that we could get the documents and I am working on that.

A. My Lord the fact is that I could have entered my mother's room by force to seize those documents but I refrained from doing so for two and a half years. If I have done so I could have been accused by my opponents of manufacturing evidence. So I have lived at my side of the house.

Judge : Now continue your evidence.

7) That the second time I asked the Court to have my mother's room opened so as to retrieve documents was on the next trial day, July 4th 2005. On that day the Court made an order that 1st Defendant hand over the keys to my mother's room to the Registrar of the Fast Track Court and that the Registrar and lawyers of the parties should visit 10 Seventh Road, Tesano for my mother's room to be opened and searched for documents. The Co-Defendant's lawyer changed his mind and withdrew his consent to the Search. The Judge also ordered that the search should be done on July 7th and that Court should resume on July 11, 2005.

8) That on July 7th 2005 my lawyer and I and two witnesses whom we had invited to attend, waited at 10 Seventh Road for the Registrar and other lawyers to come. The Registrar did not come. Instead 1st Defendant came with the keys. My Lawyer and I asked him why he had not delivered over the keys to the Registrar as ordered by the trial Judge, and we refused to allow him to enter and search the room unless he gave the keys to the Registrar. As a consequence the room was not searched. When the Court resumed on July 11th 2005 the trial Judge made no mention of the Search Order he had made and the outcome thereof. He simply ordered that the case should continue. In the 'Plaintiff's Written Submission' at the trial,

lawyer Attram made reference to the Judge's order for search and its outcome at page 212 of the Record of Appeal, quoted verbatim as follows:-

"e) The attempt of the 1st and 3rd defendants during these proceedings to mislead and deceive the Court that the testatrix Verna Eloise Warren was not a Jamaican. The 1st and 3rd defendants in their pleading denied that the testatrix was a Jamaican and when the court made an order that the 1st plaintiff, the registrar and lawyers should go to deceased's house to search for her passport and other relevant documents the 1st defendant circumvented the said order of the Court. The plaintiff at the next trial date, July 11, 2005 tendered a letter dated September 5, 2003 written by the 1st defendant to the Chief Justice in which he admitted that the testatrix was a Jamaican, and the plaintiffs were her daughter and mother which was marked Exhibit M."

In the said 'Plaintiffs Written Submissions' at p212 of the Record lawyer Attram also referred to the fact that on a previous occasion the 1st defendant had also refused to deliver the keys to the Registrar of the High Court pursuant to the order he had caused the Court to make when attempting to evict the 1st Plaintiff from her mother's house in Tesano:

"iii) Conduct of 1st defendant in refusing to surrender the keys of testator's room to the Registrar in accordance with the order they caused the court to make is evidence of how the 1st defendant sought to control the estate single handedly.

9) That some the transcript of the proceedings on July 4th 2005 and the Order of the trial Judge that my mother's room be searched were omitted from the Record of Appeal and on February 4th 2013 the Court of Appeal granted my application that the Record of Appeal be amended to include these documents. That in the Fast Track Registry I was able to get only the transcript of what had been written in the Judge's Record Book on July 4th 2005. No mention had been made of the Order for Search. The Book shows that the Judge recorded only that on July 4th 2005 there were proceedings and that the trial was adjourned on that day to July 11th 2005. In the

transcript of evidence dated June 29th 2005 it was falsely stated that on that day the case was adjourned to July 11, 2005. In addition some of the transcript of the evidence given on July 4th 2005 was backdated to June 29, 2005. June 28, 2005 was never a trial day. That I honestly and truly believe that this falsification of the transcripts of the evidence was done deliberately so as to omit the Judge's order for search made at the trial proceedings on July 4th 2005 from the Record of Appeal and that the 1st Defendant/Appellant is responsible. Attached hereto and marked "Exhibit W1' for identification is the Order of the Court of Appeal that the Record of Appeal be amended to include the proceedings of July 4, 2005 as requested in my letter marked Exhibit DIPI. Attached as 'Exhibit W2' is a copy of the letters marked 'Exhibit D1P1' and Exhibit D1P2. Attached as 'Exhibit W3' is the certified copy of the transcript of proceedings of July 4 2005 from the trial Judge Victor Ofoe's book (now included in the amended Record of Appeal as page 103A).

……..

13) *That as further proof of the truth that 1st Defendant/Respondent kept me locked out of my mother's room at all material times, I have attached as "Exhibit W6" the Affidavit in support of my application for Stay of Execution of Judge Dordzie's order that I should vacate my mother's house (The Order is Exhibit L, p306 of the Record of Appeal). The pictures exhibited in the Affidavit show that the iron gate of my mother's apartment was padlocked.*

14) *That because the keys of my mother's apartment were at all material times in the custody of the 1st Defendant/Respondent, everything in my mother's room, including the new evidence sought to be adduced was in the custody of the 1st Defendant/Respondent. It was therefore impossible for me to get the said evidence during the trial.*

15) *That the new evidence sought to be adduced will have a positive effect on the outcome of my Appeal for reason that, the new evidence will support my allegation of fraud and undue influence committed by the 1stDefendant/Respondent and the Co-Defendant/Respondent upon the*

Testatrix, Verna Eloise Warren, to which they have put me to strict proof thereof in their Statement of Defence."

Clearly the application was made for two reasons. These were to enable the applicant to retrieve documents to prove the nationality of the testatrix (See paragraph 6 of the affidavit (supra) and secondly for evidence to support her allegation of fraud and undue influence. The first objective was however obviated by the defendant/respondent's admission that the testatrix was a Jamaican national as evidenced by exhibit M which was before the trial court. This consequently rendered it unnecessary to lead any evidence in proof of the deceased's nationality, not least before the Court of Appeal.

Did the appellant meet the requirement to lead new evidence which under the circumstance would be limited to the second reason (supra) as stipulated by rule 26 of CI 19? The most profound answer to this question is provided by the appellant herself in the following dialogue at the court below between the trial judge, counsel for the appellant Mrs Attram and the Appellant (see paragraph 6 supra):

Judge *"Mrs Attram you should have made this application before the case start.(sic)*

Attram *My Lord it was when we came last week that it became pertinent that we have the place opened. So that we could get the documents and I am working on that.*

A. *My Lord the fact is that I could have entered my mother's room by force to seize those documents but I refrained from doing so for two and a half years. If I have done so I could have been accused by my opponents of manufacturing evidence. So I have lived at my side of the house.*

This is an admission that the appellant was aware of the evidence sought to be tendered for over two and half years while the suit was pending at the trial court

and yet did not take steps to produce it before that court. Not even after the appellant's counsel had informed the trial judge that she was working on getting the documents (supra). As Brobbey JSC rightly stated in the Poku v Poku case (supra): "The reality of such application is this: A party who applies for fresh evidence on appeal concedes that his case has failed and will fail on appeal if the case is allowed to stand as it is. The fresh evidence is additional evidence which is required to prop up his case so as to tilt the scales of balance in his favour. No party who wins a case at the trial or believes that he will win the case on appeal on the basis of the evidence on the record ever applies for fresh evidence. At the same time, if the party is allowed to conduct his case anyhow at the trial court and when he fails, all he has to do is to apply to lead fresh evidence, litigation will never end because human ingenuity is limitless.

It is to forestall the latter situation in particular that rule 26 attaches conditions to the consideration of application to lead fresh evidence." The appellant claims to have applied to the trial High Court on two occasions for an order directed at the 1st respondent to grant her access to the deceased's room to obtain the evidence. Unfortunately this is not borne by the record. The High Court of Justice is a court of record. By this, all proceedings in the court are recorded. This is done either solely by hand recording by the trial judge or simultaneously with electronic recording of events which are later transcribed and printed out.

It is therefore startling that the appellant could not support her claims about the purported orders granted by the court with actual copies of the orders. The appellant did not exhibit any record of her said application, such applications being usually by motion.

Having known of this evidence for about two and half years while the trial was on-going, and in the absence of proof of steps taken to obtain same, how could such evidence pass the test of 'any facts essential to the issue that has come to his knowledge after the decision of the court below'? Faced with this conundrum, the Court of Appeal rightly in our view dismissed the interlocutory application to lead fresh evidence.

Could the Court of Appeal have allowed the appeal "in the interest of justice" whether such evidence was available at the time of the trial or not? The answer to this was provided by my respected brother Date-Bah JSC in the **Poku v Poku** case (supra) where he warned that this would "constitute a serious inroad into the principle of policy and good sense, i.e. interest rei publicae ut finis sit litium. There must be an end to litigation! In principle, evidence that was available at the time of the trial should be adduced then. It would not be in the interest of justice for it to be adduced, with leave, after the trial. Thus, even though the language of rule 26 (2) is not present in rule 26 (1), it virtually has to be imported into it in order to make the rule operationally sound, in policy terms.

Not to do this, would make trials open-ended and susceptible to piecemeal adduction of evidence by one party with the indulgence of the Court of Appeal." The Court of Appeal was thus right in its refusal to grant the application "in the interest of justice" so called.

Ground (vi) - The Ruling of the learned Judges of Appeal is against the public interest of Ghana because it prevents the revealing of crime.

The Appellant has not shown any linkage between the ruling of the Court of Appeal and concealment of any crime. If the appellant has any evidence of criminality on the part of any of the parties to this contest her remedy lies in a report to the Police for same to be properly investigated and appropriate steps taken.

For the reasons stated above the appeal lacks merit in its entirety and is accordingly dismissed.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA(MRS)

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) **P. BAFFOE BONNIE**

JUSTICE OF THE SUPREME COURT

(SGD) **V. AKOTO BAMFO (MRS)**

JUSTICE OF THE SUPREME COURT

COUNSEL

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AYIKOI OTOO ESQ. FOR THE CO-DEFENDANT/RESPONDENT/ RESPONDENT.