IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2015

CORAM: DOTSE JSC(PRESIDING)

YEBOAH JSC

BONNIE JSC

BAMFO (MRS)JSC

AKAMBA JSC

CIVIL APPEAL

No.J4/9/2012

6TH MAY 2015

IN THE MATTER OF

J. K. KPOGO PLAINTIFF/RESPONDENT/RESPONDENT (SUBSTITUTED BY NOBLE KPOGO)

VRS.

F. K. FIADZORGBE DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

AKAMBA, JSC:

This appeal was filed on 23rd July 2001 against the decision of the Court of Appeal pronounced on 19th July 2001 affirming the entire judgment and orders of the court below.

The defendant /appellant/appellant (hereafter simply appellant) who is aggrieved by the decision has appealed to this court seeking an overturn of the decision.

BRIEF FACTS

The plaintiff/respondent/respondent (hereafter simply the respondent) issued a writ of summons at the Tema High Court claiming against the appellant a number of reliefs.

The respondent's initial reliefs as per his writ were as follows:

(i) Declaration of title to Plot No W/3/394, Ashiaman New Town
(ii) Injunction to restrain the (defendant) appellant herein from 'unauthorized construction' on portions of the said plot.

However on 17th May 1994, the respondent filed a notice of amendment seeking to add the following further reliefs:

(iii) Damages for amount of ₵1.5 million (old cedis) for 3 fruit yielding coconuts deliberately felled by the defendant on the said land at ₵500,000 (old cedis) per tree.
(iv) An order that defendant vacate the said plot forthwith yielding vacant possession to the plaintiff herein.

Then again on 17th June 1994, the respondent filed yet another notice of amendment to add the following relief:

(v) Order for ejectment of defendant and recovery of all that piece and parcel of land occupied by the said defendant on the plot named in the relief one of the endorsement on the writ.

The defendant denied that the (plaintiff) respondent was entitled to his reliefs and asserted his own claims in a counterclaim for:

1. Specific performance by the plaintiff giving letter of transfer to defendant as he has finished paying for the cost of plot No. N/3/394.
2. Declaration that defendant is the rightful owner of plot No. N/3/394, Ashaiman New Town and plaintiff should not interfere with his peaceful occupation of the said land.

The High Court after a full trial entered judgment in favour of the respondent for all the reliefs endorsed on the writ of summons as per the amendments listed above.

THE COURT OF APPEAL

The appellant filed a notice of appeal on 1st August 1996 against the decision of the High Court to the Court of Appeal raising the following grounds for their Lordships' determination:

(a) That the judgment is against the weight of evidence adduced.
(b) Additional grounds will be filed on the receipt of Judgment and Record of Proceedings.

On 3rd April 2000 the appellant, per his counsel filed the following so called additional grounds:

1. "The learned Judge erred by not adequately considering the defendants case by stating that appellant had not pleaded a Fact of Arbitration – See Judgment page 53 paragraph-lines 37-45 of Records.
   When in fact the "Arbitration had been pleaded specifically – See page 10 of Records paragraphs 40-45" Therefore a vital piece of evidence had been ignored.

   (a) <u>In Exhibit 5</u>

   Paragraph 7 the last 4 lines. (The reason why Respondent changed his mind to Lease or sell (sic) the land to Appellant).

Also please see page 4, 1st paragraph why Respondent changed his mind to no longer lease or sell his interest in the land to Appellant)

(b) Please see Page 4 – Exhibit 5. 1st paragraph.
(c) Please see page 6 last paragraph.
(d) Please see page 7 "Remarks" last paragraph.
(e) Please see Page 9 paragraph 3 and the last paragraph.
(f) Please see 11 (Decisions of the Arbitration). Signed by Respondent

(2) Since Respondent signed but had tried to deny ever attending Arbitration the judge ought to have been circumspect in relying on his evidence.

(3) Exhibit 5 was tendered without objection and so the Judge ought to have relied on it especially with Respondents signature on it."

The fore going grounds of appeal offend rather than conform to the standard requirements for grounds of appeal set down in CI 19, the Court of Appeal Rules. It is lamentable to observe that these poorly drafted and so called grounds of appeal were the handiwork of counsel representing the appellant and not the client himself. Be that as it may, the Court of Appeal wasted no time at all in arriving at its decision dismissing the appeal on 19th July 2001 in the following words:

" We have studied the record of proceedings critically and we are of the view that the findings, reasons and conclusions of the trial judge are supportable and sound and we have nothing useful to add thereto. So we affirm the entire judgment and orders of the Court below and accordingly dismiss the appeal."

It is worth recalling this court's caution especially to appellate courts to spurn the temptation to render terse decisions, describing them technically as memoranda in the case of **Apeah and Another v Asamoah, (2003-2004) SCGLR 226**. In the instant case however one gets the impression that the Court of Appeal was compelled to resort to this mode of delivery owing to the rather poor and vague drafting of many of the grounds of appeal, supra, adopted by the appellant. The so called grounds did not even disclose any reasonable grounds of appeal as required by rule 8 of CI 19, of the Court of Appeal Rules, (as amended). The Court

however had a duty to discuss and consider those of the issues that were properly raised and to have given a considered opinion on those points, rather than to simply rely on the decisions and findings made by the trial High Court, however correct and unimpeachable they may be.

It is against the above decision that the appellant on 23rd July 2001 filed a notice of appeal to this court raising the following grounds of appeal for determination:

(i) The Court of Appeal erred in holding that the High Court was right in the conclusion it came to by accepting the judgment without considering the Appellant case.
(j) Further grounds would be filed when the record of appeal is completed.

The appellant has in his statement of case sought leave of this court to argue the following additional ground of appeal:

a. The learned judges of the Court of Appeal erred in law in affirming the decision of the learned trial judge in respect of reliefs 3, 4 and 5 of the purported amended Writ of Summons.

CONSIDERATION OF ALLEGATION OF FAILURE TO COMPLY WITH ORDER 28, R 2 & 6 OF HIGH COURT (CIVIL PROCEDURE) RULES, 1954 (LN 140A)

I begin my consideration of the grounds of appeal with the additional ground of appeal, it being a point of law. It is important to point out that this point of law is being raised before this court for the first time, not having been raised before the Court of Appeal. It is equally noteworthy to observe that the point was not even raised before the trial court for it to rule thereon. The point has been considered as to whether an appellate court should allow to be raised before it a point which has not been raised in the courts below. This court did consider the point in **Awere–Kyere v Foster (2003-2004) SCGLR 1050** wherein my able and respected brother Date-Bah, JSC delivered himself thus:

"An appellate court should not allow to be raised before it a point which had not been raised in the courts below except in the most exceptional circumstances……. If this court were to apply the approach of the Privy Council in

the Golightly case on this issue, it would mean not considering the merits of the procedural point on the need for the citation procedure. If the procedural point went to jurisdiction, then, of course, it would fall within the exceptional circumstances referred to [in the Golightly case] and this court should allow it to be taken."

Does the point at issue in this ground of appeal go to jurisdiction so as to fall within the exceptional circumstances envisaged?

APPELLANT'S ARGUMENTS

It is the appellant's contention that the first notice of amendment filed under order 28 of LN 140A (now repealed) by the respondent on 17th May 1994 without the leave of court was within the permissible limits granted by the rules, since the appearance was filed on 9th May 1994. This however cannot be said of the second notice of amendment which was filed on 17th June 1994 some four weeks after the appellant had filed his notice of appearance. This therefore rendered the said amendment of 17th June 1994 void ab initio and as such nothing could be premised on it citing reliance on Mosi v Bagyina (1963) 1 GLR 337 SC.

Counsel further submits with regards to the first purported amendment filed on 17th May 1994 albeit within time, that by its very wording or language used the same only evinced the applicant's intention to amend the endorsement to the writ and not that the writ had been amended. Simply put, the appellant's counsel submits that what took place before the trial court on the issue did not constitute an amendment to the writ of summons. The trial court and the Court of Appeal were therefore wrong in considering the writ as having been amended and thereby proceeding to make orders pertaining to the purported amendments regards reliefs 3, 4 and 5 which they granted.

RESPONDENT'S REPLY

The respondent's counsel for his part submits that the objections being presently canvassed are rather belated since they ought to have been raised earlier on. Had it been raised in the trial court, the court would have determined whether this was a trivial procedural infraction which was curable, in which case it could deem

the amendment duly effected as it stood or it could have granted a dispensation subject to terms for the applicant to file the amended process. Given the present circumstances, the appellant would be deemed to have taken a fresh step despite knowledge of the irregularity he is now complaining about amounting to a waiver of any objection he could have raised to the alleged procedural infraction under Order 70 rule 1 of LN 140A, the rules of court operative at the time. Respondent counsel also lamented the appellant's failure to have aired his grievance about the trial court's apparent infraction of the procedural rules when he came before the Court of Appeal and only raised it before this court for the first time, a situation akin to what occurred in the case of **Friesland Frico Domo v Dachel Co Ltd (2012) 1 SCGLR 41**.

ANALYSIS

I deem it appropriate to consider this point as falling within the exception since it raises the jurisdictional point whether the courts below rightly granted the reliefs 3, 4 and 5 in the circumstances in which they were made.

It worthy to recap the provisions of Order 28 r 2 and 4 and Order 70, r 1 of LN 140A due to their relevance in resolving this matter as follows:

"Order 28 Amendment

2. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

……..

4. Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading apply to the Court or a Judge to disallow the amendment, or any part thereof, and the Court of Judge may, if

satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just.

…….

6. In all cases not provided for by the preceding Rules of this Order, application for leave to amend may be made by either party to the Court or a Judge, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just."

"Order 70 - Effect of Non-Compliance.

1. Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such a manner and upon such terms as the Court or Judge shall think fit.
2. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

Since the issue in contention relates to the accusation that the respondent had failed to comply with the rules by his apparent failure to obtain the leave of the court prior to filling his amendment, the applicant would be satisfying the rules governing his objections if he could point to a direction by the trial judge whereby the non-compliance thereby rendered the proceedings void. The same requirement obtains in regard to the accusation that the expressions or language used for the application connoted an intention to amend rather than an amendment to the writ. Worse still, there was no date of amendment. There is no record that the Judge had directed that the lapses complained of had rendered the proceedings void to give the appellant a platform to urge as he has proffered before us.

I have no doubt as to the relevance of the *Friesland Frico Domo* case (supra) to the present dilemma in so long as the relevant rule under consideration is order

70 of the LN 140A (now repealed) which same is quoted supra. This is what this court said in holding 1:

"(1) Both Order 81 of the new High Court (Civil Procedure) Rules 2004 (CI 47) and Order 70 of the Old High Court (Civil Procedure) Rules 1954 (LN 140A), had provided in clear terms that non-compliance with the rules of procedure should not render any proceedings void but be regarded as a mere irregularity which might be allowed, amended or set aside on terms at the discretion of the court upon an application brought within a reasonable time and the person applying had not taken a fresh step after becoming aware of the irregularity. Thus, contrary to the contention of counsel for the Defendant, the distinction between void and voidable proceedings could not be maintained on account of the plain and ordinary meaning of the provision in Order 70, r 1 of LN 140A. The word "any" in the phrase "any of the Rules" in Order 70, r 1 of LN 140A should be given its ordinary meaning in order to serve the ends of justice. Consequently, in the instant case, non-compliance with the procedural rule in Order 2, r 4 of LN 140A (the same as Order 8, r 1 of the new CI 47), should not render the proceedings in which the defendant had actively participated and pursued a counterclaim, automatically void. There was no evidence of disadvantage occasioned by the irregularity or erosion of natural justice. Accordingly, the court did not think it was fit and just to set aside the whole proceedings for a mere irregularity. **Republic v High Court, Accra; Ex Parte Allgate Co Ltd (Amalgamated Bank Ltd Interested Party) (2007-2008) 2 SCGLR 1041 at 1052-1053; and Ankumah v City Investment Co. Ltd (2007 - 2008) 2 SCGLR 970** cited**."**

The appellant in the present case was magnanimous enough not to have swayed into any arguments about any distinctions between fundamental errors and mere irregularities as obtained in the *Friesland Frico Domo* case. The obvious answer is that non-compliance with the rules of procedure or any existing practice is a mere irregularity that does not automatically render proceedings following the non-compliance void. A party who is aware of any non-compliance is at liberty to bring an application to the court for appropriate orders to issue in accordance with order 70 rule 1 (as was then the case).

In the instant case the appellant participated fully in the trial notwithstanding the alleged breaches raised in his present complaint. Appellant also proceeded to file processes including his statement of defence and counter claim notwithstanding the lapses. Appellant effectively waived any right he had to stay proceedings. He was neither disadvantaged nor deprived of his natural justice. He actively participated in the trial and exercised his options. (See Skanska v Klimatechnik Engineering Ltd (2003-2004) SCGLR 698 holding 2). There is no evidence that he was deprived of his own volition in the exercise of his rights. It is too late in the day to cry foul. This court as in the Allgate case does not find any cause to set aside the amendments for the mere irregularity complained of, more so when the appellant dealt with the matter as though there was no infringement. This ground of appeal fails and is dismissed.

The next ground of appeal to be determined is that the Court of Appeal erred in holding that the High Court was right in the conclusion it came to by accepting the judgment without considering the Appellant's case.

It is obvious from the above stated ground of appeal that the appellant impugns the decision of the Court of Appeal for its failure to consider the appellant's case when it accepted the judgment of the High Court as right.

The legal position as espoused in numerous decisions of this court is that an appellate court might interfere with the findings of a trial tribunal where specific findings of fact might properly be said to be wrong because the tribunal had taken into account matters which were irrelevant in law; or had excluded matters which were relevant in law; or had excluded matters which were crucially necessary for consideration; or had come to a conclusion which no court, instructing itself in the law, would have reached; and where the findings were not inferences drawn from specific facts, in which case such findings might properly be set aside. See Effisah v Ansah (2005-2006) SCGLR 943 holding 5.

Also, when an appellant complains that the judgment failed to give due consideration to the appellant's case, he is implying that there are 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 in such an instance is on that appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against.

On this ground of appeal, the onus is on the appellant to clearly and properly demonstrate to this court the lapses in the judgment being appealed against.

The appellant does not dispute that he was permitted by the respondent to be on the latter's land to undertake his poultry business. His (appellant's) case was however premised upon a claim of a contract of sale of the disputed land between him and the respondent. The agreed price was said to be 280,000 old cedis and the only witness to the contract was one Vorgbe who died before the action was instituted. The issue for determination in the counterclaim was whether there was a contract of sale and if so whether the appellant had part performed his obligations spelt out in the contract.

The task of proof in court is summed up in the Supreme Court decision in Zabrama **v Segbedzi (1991) 2 GLR 221-247** where the court aptly stated the proposition in the following words:

"The correct proposition is that, a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of that burden."

It is trite to state that a counterclaim is a separate action in which the counterclaimant assumes the burden to establish that his assertion is true. Since

the appellant contends that the trial judge failed to consider his case we would embark upon an examination of the judgment to ascertain the veracity or otherwise of the claim. This is what the trial judge said in his judgment concerning the appellant's discharge of his evidential burden and why he took such a position:

"The defendant when he opened his case failed to adduce satisfactory evidence in support of his claim that the plaintiff after initially giving him permission to establish a poultry farm on a portion of the land in dispute, later made an outright sale to him of that portion of the land on which he had established his poultry farm. It is true that the defendant sought to support his case by tendering a number of documents in evidence, but these documents were inconclusive. For example, Exhibit 3 was a counter-foil of a cheque meant to be proof of part payment to the plaintiff in respect of the sale. The plaintiff denied having been issued any such cheque by the defendant. In those circumstances the defendant should have gone on to call on the bank to support his claim that the cheque had indeed been issued to the plaintiff and had been cashed by the person in whose name the cheque had been issued. Having failed to do so, no weight can be attached to Exhibit 3."

On the claim that certain payments were made to Vorgbe, this is what the trial court said:

"The defendant also tendered receipts issued by one Vorgbe to the defendant. Although these receipts state that payments had been made to Vorgbe, there is nothing to show that they were received by the plaintiff. The said Vorgbe had died sometime before the writ was taken out and this aspect of the case was therefore left hanging. In any case the defendant failed to satisfactorily explain why payments were made to Vorgbe instead of being made directly to the plaintiff when the plaintiff had been available and could have been reached directly throughout all that time. These examples could be multiplied but there are more telling defects of the defendant's evidence in support of his counterclaim."

On allegations that the defendant failed to substantiate certain factual allegations, the court stated*:*

"For example although in his evidence he made specific allegations of fact that required to be substantiated by witnesses he never called a single witness in support of his case. What he did instead was to issue a subpoena to certain persons who simply refused to turn up. One of those persons even went as far as to write to the court, that he would not for certain reasons come to court to give evidence."

On the defendant's counsel's failure to initiate the necessary steps to compel the potential witnesses to testify for him, the trial judge observed as follows:

"In my considered opinion, the defendant ought to have compelled the witnesses to come to give evidence in court, and if when they came, they refused to speak the truth, then he could have applied to have them treated as hostile witness (sic). That course of action would have given the court, a means of determining whether the defendant indeed had a case but his witnesses for some reason or the other were refusing to speak the truth."

The trial judge considered whether or not the dispute had gone to arbitration. This is what he said:

Again defendant although he did not plead that the matter had gone to arbitration and a finding had been made in his favour, his case was conducted placing much reliance on an arbitration. Curiously, the defendant had not appended his signature to the portion meant to be signed by him although all other persons at the meeting had signed. It is difficult to understand how he could place reliance on proceedings which had been attended by him but which he had failed to sign to show that he was a party to those proceedings and that he had agreed to what had been recorded.

The trial judge's statement that the appellant did not plead that the dispute had gone for arbitration is incorrect. This is because the appellant had specifically pleaded same in paragraphs 20 to 23 of his statement of defence filed on 26/9/1994. The trial judge however did consider the proceedings of the arbitration tendered as exhibit 5, which he rejected because the appellant had not only failed to sign it to signify acceptance of the outcome but had also

disputed the accuracy of the document. This is what transpired during the cross examination of the appellant on the point as captured in the record of proceedings at page 43 thereof:

"Q. What evidence do you have that the plaintiff received those sum (sic).

A. *He told the arbitration that he had received the part-payment of ₵80,000.00 as per exhibit 5.*
Q. But you said yourself that Exhibit 5 is not a true reflection of what took place at the arbitration.
A. Some parts were changed some portions are not correct-others are correct.
Q. I put it to you that exhibit 5 is …..(Sic)
A. It is true.
Q. I put it to you that you have nothing to show for the land you claim to have purchased – no site plan etc.
A. At Ashaiman the purchaser is asked to make his own site plan. I made one but the TDC rejected it."

The trial judge in his final consideration of the appellant's counterclaim had cause to pronounce upon counsel's submission that respondent had no title to the disputed land and hence could not make any grant thereof since it was only the Tema Development Corporation which could grant those lands. In essence the appellant was denying the respondent's title to the disputed land. This is the holding of the trial court:

"According to counsel's argument it is only the Tema Development Corporation that can make grants of the land. The question arises, if the plaintiff has no right to make any grant of the land, then on what basis is the counterclaim brought that he had obtained a grant for consideration from the plaintiff? For these reasons I find that the plaintiff has successfully proved his case and is entitled to all the reliefs endorsed on his amended writ of summons. The defendant on the other hand has failed to prove his counter-claim. Accordingly, judgment is given in favour of the plaintiff for reliefs 1, 2, 3 and 5 endorsed on his amended writ. In

respect of reliefs 4 and 5 the defendant is given a period of 4 months within which to vacate the plot in dispute. ….”

In summary, the appellant failed to discharge the burden of proof placed on him by sections 10 and 11 of NRCD 323 on his counterclaim satisfactorily and the trial court correctly found against him. This ground of appeal therefore lacks any merit and is accordingly dismissed.

From the foregoing analysis I agree with the judgment of the High Court as concurred with by the Court of Appeal on all the findings of the trial court since there was evidence on record to support those findings of fact by the said court. Accordingly, I would dismiss the appeal and affirm the decisions of the two lower courts which I hereby do.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

AKOTO BAMFO (MRS) JSC;

I have had the opportunity of reading before hand the opinion of my respected brother affirming the decision of both the High Court and the Court of Appeal and therefore agree with his conclusion that the appeal be dismissed.

Additionally I give my consent that the reading of the decision be read in my absence.

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

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