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

CORAM: ATUGUBA, JSC (PRESIDING)
DATE-BAH (DR), JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
ARYEETEY, JSC

CIVIL APPEAL
NO. J4/36/2009
19TH MAY, 2010

JOHN ATTA OWUSU ... PLAINTIFF/APPELLANT/RESPONDENT

VRS

MR. FOSUHENE ... DEFENDANT/RESPONDENT/APPELLANT

J U D G M E N T

BAFFOE-BONNIE, JSC:-

This is an appeal from the Court of Appeal. Coram Akoto Bamfo JA (as she then was) Osei and Duose JJA allowing an appeal from the judgment of the trial High Court Judge which was given in favour of the appellant herein. The facts in this case are fairly simple and straight forward.

In June 2002, the plaintiff/appellant/respondent herein referred to as Respondent filed a writ claiming;

a. Declarations that the plaintiff is the allotee/lessee of plot NºY block XXXXIV Buokrom near Kumasi.
b. Damages for trespass.

c. An order of perpetual injunction restraining the defendant either by himself or through his agents and /or workmen from in any manner interfering with plaintiff's said property plot 7 block XXXIV Buokrom near Kumasi.

The defendant/respondent/appellant hereafter appellant, filed a defence and counter claimed for;

i. A declaration of title in favour of defendant and the wife Mrs. Fosuhene to the property known as Plot no. 7 block XXXIV Buokrom, Kumasi, and (Buokrom Denteso).

ii A declaration that any purported allocation grant or transaction in respect of the said property and any document purportedly made pursuant thereto in favour of the plaintiff is null and void ab initio and the plaintiff's alleged grantors have no right to allocate or grant any portion of the said plot.

iii. An order for the cancelation and /or revocation of all documents made by the plaintiff in respect of the property the subject matter of the suit.

Iv. General and special damages for trespass.

V. An order of perpetual injunction restraining the plaintiff his alleged grantors agents assigns privies those claiming through under or by him at custom and in law and in any manner whatsoever from interfering with the defendant's right title and interest to the said property.

ii. SUCH FURTHER ORDER(S) as to this Honourable Court deem fit.

The respondent's case in that suit numbered, LS 177/2002 was that the plot in question was allocated to him by the Buokromhene. In the case of the appellant herein, his counterclaim was based mainly on the legal effect of an earlier writ LS 330/80 between Opanin Kojo Boateng versus Nana Owusu Bempoh which had declared the appellant's grantors to be owners of the land which is the subject matter of the writ. That judgment had been confirmed on appeal.

The respondent later sought and was granted leave of the court to discontinue his claim. The writ was struck out as discontinued with liberty to come back .It is needless to say that the counterclaim was not discontinued and it is still pending.
On 17th day of November, 2003, while the defendant's counterclaim was still pending, the respondent instituted a fresh action between the same parties claiming;

1. A declaration that the plaintiff is the allottee/lessee of plot no 7 block XXXVI Sisirase Street, Buokrom near Kumasi.

2. Damages for trespass.

3. Recovery of the sums of monies removed by the defendant from plaintiffs room; and,

4. An order of perpetual injunction restraining the defendant either by himself or through his agents and/or workmen from in any manner interfering with plaintiffs said property plot no 7 block XXXIV, Sisirase Street Buokrom near Kumasi.

The defendant entered appearance to this writ too and again filed a defence and counterclaimed for

A. A declaration of title to the property the subject-matter of the suit.

B. General, special and punitive damages for trespass.

C. Declaration that any purported allocation, grant or transaction in respect of the property, the subject-matter of the suit and any document purportedly made pursuant thereto in favour of the plaintiff is null and void ab initio as the plaintiff's alleged grantors have no right to allocate or grant any portion of the said plot.

D. An order for the cancellation and/or revocation of all documents made by the plaintiff in respect of the property, the subject-matter of the suit.

E. An order of perpetual injunction restraining the plaintiff, his agents, assigns workmen those claiming through under or by him at law or custom and in any manner whatsoever from interfering with the defendant's right, title and interest so the said property.

F. Such further order or Orders as this Honourable Court may deem fit.

On 25/3/04 barely, 3 months after filing his defence and counterclaim, the appellant

herein filed an application praying for "an Order setting aside and/or dismissing the plaintiff's writ as being an abuse of the process of court and in exercise of the court's inherent jurisdiction."

The main grounds for this application are captured in paragraphs 5-9 of the accompanying affidavit. After referring to earlier action and counterclaim he averred as follows;

> 5 "That seeing the futility of fighting the matter, the plaintiff discontinued the action.
>
> 6 That my counterclaim is pending before the High Court, Kumasi presided over by Mr. Justice Winfred Kpentey.
>
> 7 That with full knowledge of the pendency of my counterclaim which is inextricably linked to the reliefs sought in the instant suit, the plaintiff has commenced another action.
>
> 8 That I will contend through counsel and by reference to all processes filed that the plaintiff's writ is an abuse of the process of court.
>
> 9 That I will further contend through counsel that having regard to the reliefs sought in the counterclaim, the plaintiff's action is otiose and a duplication of the process of the court in a manner which is not permissible by law".

Over the protestations of the respondent herein, the trial judge granted the application to set the writ aside saying;

> "The plaintiff's claim in suit №LS177/2002 which he discontinued cannot under any circumstances be said to be different form the present suit pending before me. Once there is a counterclaim in respect of that suit the plaintiff cannot repeat his claims in another claim here. It is a very serious case of abuse of the court process.
>
> The present writ before me is here by dismissed as it constitutes an abuse of the court process"

Feeling aggrieved by this decision the respondent appealed to the Court of Appeal which also reversed it in the following terms, Per Duose JA:

> "What I make of this aspect of the rule is that any such discontinuance consequent upon a court order granting leave with costs shall not be used as a defence in a subsequent action. It appears this aspect of the rule and the general effect of discontinuance of a suit `with liberty was lost upon the learned trial court. In my opinion despite the pendency of the counterclaim in the earlier suit, that is, suit no L.S 177/02, the plaintiff in the instant appeal is at liberty to institute a fresh action with substantially the same reliefs."

It is this decision that the appellants have appealed against to this court on the following grounds;

A .The Court erred in reversing the legally-correct judgment of the High Court of Kumasi.

B. The judgment is against the weight of affidavit evidence.

C. Additional grounds to be filed on receipt of certified true copy of the judgment.
(No additional grounds were filed or argued).

Reading through the written submissions of the appellants herein we find it incomprehensible how learned counsel for the appellant had gotten the issue at stake so wrong. It is as if he being unable to find an answer to the true legal position as espoused by the Learned Justices of the Court of Appeal deliberately misconstrued the issue for whatever effect we cannot fathom!

By his application before the High Court that has culminated in the appeal before this court, the appellant herein was simply saying that despite the fact that the respondent's first action was discontinued with liberty to come back, in view of the fact that appellant's counterclaim was still pending, the filing of a fresh action by the respondent on the same subject matter constituted an abuse of process. The application was not premised on res judicata at that stage. Counsel's only reference to the issue of res judicata was to speculate that it was because he had raised the issue of res judicata in his defence that the respondent had been forced to

discontinue his action.

Though the issue of the abuse of process found favour with the trial judge, even she did not buy into counsel's veiled submission on res judicata. This is what she said;

> "Whether the decisions the defendant/applicant is relying on to raise a defence of res judicata is applicable or not, it is an issue that can be determined by the court in that suit. The present writ of summons before me is hereby dismissed as constituting an abuse of the process."

In his written submissions, while applauding the ruling of the High Court as the legally correct position of the law, learned counsel has criticised the Learned Justices of the Court of Appeal in rather harsh and uncomplimentary terms. After erroneously expending all his energies on the non issue of res judicata he said;

> "My lords it cannot be denied that the Court of Appeal erred in arriving at the decision the subject matter of the appeal.
>
> Having regard to the above, it cannot be controverted that the decision of the Court of Appeal reversing the trial court is legally untenable. Firstly, the Court of Appeal asked itself the wrong question by putting undue emphasis on the discontinuance with liberty. That was a wrong question because it would have been relevant if no counterclaim were pending before the high court even after discontinuance. The pendency of the said counterclaim meant that issues had been joined in relation to the same subject matter between the same parties. It is thus erroneous for the plaintiff/appellant/respondent to be permitted to initiate another suit relative to the same subject matter between the parties.
>
> The posing and answering of the wrong question by the honorable court made it embark on an enquiry which was clearly extraneous to the relevant issues before their lordships at the Court of Appeal. This path of error has undoubtedly occasioned a substantial miscarriage of justice to defendant/respondent/appellant which this august court ought to correct."
>
> Contrary to what the appellant said in his statement of case we believe the Learned Justices of the Court of Appeal actually asked themselves the right question and came to the right decision!

In his reasoned opinion, Duose JA said:

> "I have thoroughly perused the brief but concise written submissions of Counsel in the case. I am however of the opinion that the crux of this appeal will be the determination of the effect of the grant of an application of a discontinuance of a suit with liberty. What is the procedural legal effect, when a suit is discontinued with liberty? This literally means that the party in whose favour such an application is granted has the liberty, after the case has been discontinued to institute a fresh action"

It is our view that the question that the Court of Appeal asked itself was at the heart of the problem and it was perfectly answered by them making their decision unassailable!

Order 26 rule1 of the old High court Rules LN 540 provides as follows;

> "The plaintiff may, at any time before receipt of the defendants defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's cost of action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out".

The effect of this rule vis-à-vis a party's right to bring a fresh action in respect of the same subject matter in a suit that has been discontinued has been given judicial interpretation in a legion of cases. In the unreported case of **Foly Adama vrs Messrs Norpalm ASV and one other civil suit no 212/2002 Sekondi Dotse**

J as he then was said

> "It must be noted that the effect of a discontinuance with leave does not operate as estoppel and the effects of a discontinuance with leave is based on the order of the court granting such leave. In other words, the court would determine whether the grant of leave to discontinue is subject to liberty to institute a fresh action or not."

See also

> **Nmako Salt Concession; Concession enquiry no. 1120(Accra) 1962 GLR354**
> **Amoako AttaII v Osei KofiII [1962]1GLR**
> **AhenkoraII vKumah [1963] 1GLR 77**

In his lucid judgment in the case of **Amoako vrs. Kwan [1975]1 GLR 25**, after reviewing a host of cases on the subject, Osei Hwere J, as he then was, said at page 29

> "It is rather unfortunate that our highest courts have given the very harsh interpretation to the construction placed by the Court of Appeal on the rule regulating discontinuance with leave in **Fox v. Star Newspaper Ltd.** Our courts have interpreted the ruling that it is only by the discretion of the judge that the plaintiff can discontinue with the right to bring another action to mean that where the plaintiff discontinues with the leave of the court and he does not obtain leave to bring a fresh action he will be estopped from doing so: see **Biei v. Assah (1953) 14 W.A.C.A. 303** at p. 305. I think that the better interpretation of the construction placed on the rule should be that where the discontinuance is with leave, unless the order giving the leave expressly prohibits the commencement of a fresh action, it must be no bar to the plaintiff bringing a fresh action except the nature of the order concludes the matter between the parties. Where the order merely strikes out the action which is discontinued but is silent as to the right of commencing a fresh action it must not operate as a bar to the plaintiff. Where, on the other hand, it dismisses the action and it is silent as to the right to bring a fresh action, it must operate as an estoppel."

Like Osei Hwere, we are of the view that where an action is discontinued with leave of the court, unless the court's order striking out the action specifically prohibits it, the applicant for leave to discontinue is perfectly within his or her rights to bring a fresh action on the same subject and on the same facts between the same parties.

But in this case the issue is even much simpler. The respondent was granted leave to discontinue with liberty to come back. So how could another court come to the conclusion that a fresh action filed pursuant to leave granted by another court of concurrent jurisdiction is an abuse of process?

This, as the Court of Appeal rightly held, was the crux of the matter. And as said earlier it was rightly resolved in favour of the respondent herein and we do not think we ought to disturb it.

Even though we believe this discourse should dispose of the appeal we will briefly touch on the subject of res judicata of which the appellant seems to so enamoured!

In the case **of Dahabieh vs. Turqui** cited by counsel for the appellant it was held;

> "It is a well known rule of law that a person cannot bring an action where the cause of his claim or the issue he seeks to have determined has as between the parties or their privies **already been disposed of by a competent court**. This is a salutary rule intended to prevent the harassment of people by a multiplicity of law suits. Accordingly the rule is framed widely enough to cover not only matters which are **actually dealt with in the previous judgment** but those as well which ought to have been brought up then but which were not."(emphasis added)

Then in the case of **SPEEDLINE STEVEDORINGCO.LTD; REPUBLIC VRS HIGH COURT, EX PARTE BRENYA 2001/2002SC GLR 775'** also cited by couinsel it was said,

> " for a **judgment** to operate as res judicata, **it must be valid and subsisting, that is it must be a final judgment** delivered by a court of competent jurisdiction."(emphasis added)

Reading through the written submissions of learned counsel for the appellant it is not easy to discern why he is raising *res judicata*. Is the *res* here referring to the two judgments referred to in his counterclaims which he claims dealt with the

subject matter or he is referring to the earlier suit filed by the plaintiff which has been discontinued? If he is referring to the two earlier judgments then clearly he got a legally correct answer from the learned High Court judge when she said:

> "Whether the decisions the defendant/applicant is relying on to raise a defence of *res judicata* is applicable or not, it is an issue that can be determined by the court in that suit."

If on the other hand the *res* here refers to the discontinued action then the Dahabieh and Brenya cases cited are clearly inapplicable as that suit was not tried or any judgment given that decided the rights of the parties in that case.

In this courts recent decision in the case of The **Republic V National House of Chiefs Ex parte Odeneho Krofa Krukoko(Enimil VI Interested Party) Civil Appeal No J4/18/2009 dated 2nd Dec 2009, (to be reported in 2010 SCGLR at page 134,** Dr Date Bah JSC said this of res judicata in relation to interlocutory matters.

> "In the case of **Pocklington Foods Inc. v. Alberta (Provincial Treasurer), (1995) 123 D.L.R. (4th) 141,** the Alberta Court of Appeal determined that res judicata and issue estoppel did not apply to procedural interlocutory motions. I agree with this view of the law and I am not aware of any Ghanaian precedent to the contrary which is binding on this Court. I consider therefore that this Court should follow the persuasive authority of that decision. This view is also in accord with the opinion of the leading text writer on the Ghanaian law of evidence, the late **Justice Ofori Boateng**, who in his **The Ghana Law of Evidence (at p.18)** spells out certain preconditions which have to be established first before estoppel per rem judicatam can apply. Among these he spells out the following:

"(iii) That the judgment was final, in that it determined the disputed rights of the parties in the case, and was not just an interlocutory judgment, for example, a preliminary matter such as interim injunction, or committal order in a criminal trial, or a coroner's finding relating to cause of death.

(iv) That the judgment was on the merits of the case. A judgment will not be on the merits of the case if, for example, the case was dismissed for want of prosecution, or in default of appearance or any procedural step.

(v) *Nolle prosequi* granted will not constitute a decision on merits. In a civil

> action a case discontinued before judgment will also not be a judgment on the merits of the case. But a party to a suit who suffers an adverse judgment through default will be estopped from raising a defence in a subsequent judgment;…"

This is the state of the law on the principle of res judicata.

In the instant appeal the respondent merely discontinued his first action with the leave of the court which also granted him liberty to come back. And as Apaloo JA as he the was said in the case of **ATTA KWADWO AND OTHERS v. BADU 1977 1GLR 1** holding 1;

> "The notice of discontinuance and the order for costs against the respondent made pursuant to it wholly terminated the proceedings. **Although the respondent was given liberty to bring a fresh action, he might not do so, and even if he did, that action would not be a continuation of the first but an entirely new action"**(emphasis added)

From whatever angle you look at it this appeal clearly lacks any merit, so same is dismissed. The decision of the Court of Appeal is confirmed and the matter is remitted to the High Court for trial on its merits.

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

YEBOAH, JSC:-

I had the privilege of reading beforehand the opinion of my learned brother Baffoe-Bonnie JSC. I entirely agree with him that the appeal be dismissed. I am, however, adding few words of my own in support of his opinion.

In the affidavit in support of the application for striking out the action at the High Court, the Respondent herein deposed to paragraphs 6 and 7 of the said affidavit as follows:

> *"6. That my counterclaim is pending before the High Court, Kumasi presided over by Justice Winfred Kpentey.*
>
> *7. That with full knowledge of the pendency of my counterclaim which is inextricably linked to the reliefs sought in the instant suit, the plaintiff has commenced another action"*

In my opinion, it appears the defendant has misconstrued what a counterclaim is in civil proceedings of this nature. The defendant is of the view that in so far as his counterclaim is actively pending and relates to the very subject –matter of the claim the plaintiff should not be allowed to prosecute his action by a fresh writ of summons. The Supreme Court in the case of GBEDEMA V. AWOONOR-WILIAMS [1970] CC 12 threw some light on the nature of a counterclaim:

> *"A counterclaim is to all intends and purposes an action by the applicant against the respondent. It is an independent and separate action"*

The court relied on the case of WINTERFIELD V. BRADNUM 3 QBD 324 in which BRETT LJ said at page 326 as follows:

> *"A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is that they*

are wholly independent suits which for convenience of procedure are continued in one action".

Bowen LJ also said in AMON V. BOBBETT [1889] 22 QBD 543,548 as follows:

"A counterclaim is to be treated for all purposes for which justice requires it to be so treated, as an independent action"

Lord Esher MR. in STUMORE V. CAMPBELL & CO [1892] IQB 314, at page 317 said,

"*For all purposes except those of execution a claim and a counterclaim are two independent actions"*

From the line of authorities therefore, it is settled that a counterclaim is in law a separate and independent action which is tried together with the original claim of the plaintiff.

It follows that if in the course of an action in which there is a counterclaim and the plaintiff's claim is struck out, dismissed, discontinued or stayed the defendant can proceed to prosecute his counterclaim as it is independent of the original claim even though a counterclaim has no separate suit number different from the original suit. In practice, a counterclaim may be claimed from entirely new cause of action unrelated to the original claim and even against new parties who were not appearing as parties in the original action. An action in tort against a defendant could attract a counterclaim from the defendant in contract. The learned authors of BULLEN & LEAKE & JACOBS: PRECEDENTS OF PLEADINGS 18TH Edition at page 98 said of a counterclaim as follows:

"In short, therefore, if the defendant has a valid cause of action of any description against a plaintiff, there is no necessity for him to bring a

separate cross-action, since he can make a counterclaim in the same action against the plaintiff"

As the defendant's counterclaim was a separate action in law, even though the subject-matter of the claim and counterclaim were the same, the plaintiff was in law at liberty to issue a fresh writ to determine his interest in the subject –matter.

The plaintiff as a citizen of this country is entitled under the constitution to own property and can exercise his right to sue to protect same, subject of course to the existing laws regulating his access to the courts for redress.

I find no case law or rule of procedure inhibiting the plaintiff's right to commence fresh action under the circumstances. There is obviously no merit in this appeal and I accordingly vote for its dismissal.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

DR. S. K. DATE-BAH
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