.0IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA-GHANA

CORAM: BROBBEY, JSC (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
NO. J4/28/2009
24TH NOVEMBER, 2010

NAOS HOLDING INC - PLAINTIFF/APPELLANT/APPELLANT

VRS

GHANA COMMERCIAL BANK LTD - DEFENDANTS/RESPONDENT/ RESPONDENT

J U D G M E N T

DOTSE, JSC:

The facts leading to this case show a classic example of how time that is lost, can never be regained. We cannot but agree more with George Washington, in his letter to James Anderson, December 21st 1797, when he wrote thus:-

"The man who does not estimate time as money will forever miscalculate."

In view of the many suits that had been previously filed by the Appellants in this case, we deem it expedient to set out in some detail the facts that have given rise to the instant appeal. In doing so, we consider it important to set out in a historical context the antecedents of all the previous suits and relate their relationship to the instant appeal.

The plaintiffs/appellants/appellants (hereinafter referred to as the Appellants) in suit number OS 557/97 by originating summons in the High Court claimed for a declaration that they were the holders in due course and entitled to receive from the defendants/respondents/respondents (hereinafter referred to as the Respondent) the full face value of five promissory notes issued by Sabat Motors Limited and guaranteed by the Respondents. The Respondents objected to the originating summons before the High Court and were overruled. However, their appeal to the Court of Appeal was successful. The Appellants then issued a writ of summons for the same relief as in the originating summons suit No. 465/99 on 21/5/1999. Gbadegbe J (as he then was) who presided over the case at the High Court ruled that the Appellant's endorsement in the writ was calculated to avoid the payment of the appropriate filing fees. Instead of paying the appropriate filing fees, the appellants discontinued suit No. 465/99, and instead instituted a fresh action, suit No. 656/99. In suit No. C 656/99 the appellants claimed the same reliefs as in the suit No. 465/99.

The defendants entered conditional appearance and applied for an order to strike out or stay the action on grounds that:

a. The appellant did not exist as a legal entity and therefore did not have capacity to institute the action

b. The plaintiff did not pay the appropriate filing fees.

In addition, the Respondent applied for security for costs since the Appellant company was not resident in Ghana. The writ was set aside as a nullity by the trial judge, Agnes Dordzie J, (as she then was), since the plaintiff failed to establish its existence as a legal entity.

Following the ruling of Agnes Dordzie J (as she then was) on 17th April, 2000, the Appellants filed a new writ (Suit No. C 582/2000) on 15th June, 2000, claiming the same reliefs as had been in Suit No. C 656/99. On 5th July 2000 the Respondent bank entered conditional appearance and followed that with ***Motion on Notice to Strike out Suit or Stay proceedings and Security for Costs*** which was filed on 23rd October 2000. Ten days after the filing of the writ, which was on 25th June, 2000, the plaintiffs filed an

appeal to the Court of Appeal in respect of the ruling of Justice Dordzie in suit No. C 656/99.

The grounds of appeal in that appeal were:

1. The ruling is against the weight of evidence available before the Court

2. The learned trial Judge erred in holding that the Appellant does not exist as a legal person and

3. The learned Judge erred in holding that the writ herein is void.

The appeal was dismissed and a further appeal to the Supreme Court also failed. Judgment of the Supreme Court in the appeal was given on 14th December 2005. On 5th February 2006 the Appellant filed Notice of Intention to Proceed in respect of suit No. C 582/2000 seeking as it were to revive that old case filed on 15th June, 2000.

On 24th November 2006 the Respondent filed supplementary affidavit in support of motion to strike out the Suit No. C. 582/2000 wherein the motion had also been filed as far back as 5th July, 2000. The High Court Judge heard arguments from both Counsel and on 20th December 2006 granted the application and struck out the writ. A further appeal to the Court of Appeal also failed. This present appeal to the Supreme Court has been based upon the decision of the Court of Appeal and the Notice of Appeal was filed on the 13th of August 2008 on the following grounds:

GROUNDS OF APPEAL

1. The learned Judges of the Court of Appeal erred in law when they held that bringing a fresh action in which the plaintiff/appellant/appellant fully disclosed it's capacity amounted to an abuse of the court process and on the basis of that, dismissed its appeal.

2. The learned Judges of the Court of Appeal erred when they failed to consider the ground of appeal that ***"having found that there was a valid legal reason for the plaintiff filing the present writ when its appeal to the Court of Appeal in this matter was still pending, the learned trial Judge of the High Court erred in holding that the filing of the writ in the circumstances amounted to an abuse of the process of the court"*** on the basis that it was a comment passed by the learned trial Judge in his ruling and not an order of the court which could be appealed.

From the grounds of appeal the following issues can be identified as standing out clear for determination to dispose of the appeal. These are:

a. Whether the fresh action brought by the Appellant in which it now discloses its capacity amounts to an abuse of the court process.

b. Whether or not the trial Judge made a finding that there was a valid legal reason for the plaintiff filing the present writ while its appeal in the Court of Appeal was pending.

ISSUE ONE

Whether the fresh action brought by the Appellant in which it now discloses its capacity amounts to an abuse of the court process.

In discussing this issue of the abuse of the Court process, it is important to understand what the principle of abuse of the Court process is all about. In the Supreme Court case of ***Sasu vrs Amua-Sekyi and Anr [2003-2004] 742,*** Prof. Date-Bah JSC, in his concurring opinion stated of the principle of abuse of process as follows:-

> *"In addition to the cause of action and issue estoppels…there is the related doctrine of abuse of process, commonly referred to as the rule in* ***Henderson vrs Henderson (1843) 3 Hare 100****… whose essence was set out by* ***the English Court of Appeal in Barrow vrs Bankside Agency Ltd. [1996] 1 WLR 257 at 260*** *as follows:*
>
> *"The rule in Henderson vrs Henderson requires the parties, when a matter becomes the subject of litigation between them in a Court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it may be finally decided, (subject of course, to any appeal) once and for all.* ***In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise.*** *The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do"*

The above statement of the principle of abuse of process clearly then underscores the essence of preventing those who want to make the litigation arena i.e. the law courts a career from embarking upon such a process as it is contrary to public policy and leads to loss of valuable time and resources.

This view was further buttressed by the Supreme Court in its decision delivered on the 14th of December, 2005 reported as ***Naos Holding Inc vrs GCB [2005-2006] SCGLR 407*** with respect to the previous proceedings in this case. It was noted in the judgment as follows:-

"…once its legal status was challenged and its corporate capacity was placed in issue, it was incumbent upon the appellant to produce more cogent evidence of its existence (such as its registered address or a copy of its certificate of incorporation) to satisfy the court that it has the requisite legal capacity to sue."

Since it failed to do so, the Court was justified in arriving at the conclusion that the Appellant did not exist. Furthermore, having dismally failed to satisfy the court with regard to such a fundamental issue as capacity to sue, it would have been pointless for the trial court to order the matter to proceed to trial. Having failed to take the opportunity to prove its capacity during the hearing of the motion, the Appellant did not merit any further 'sporting chance', nor was the court obliged to act suo motu to grant the Appellant leave to amend the writ to include its residential address.

The Black's Law Dictionary on 'abuse of process' states:

"There is said to be an abuse of process when an adversary through the malicious and unfounded use of some regular legal proceeding obtains some advantage over his opponent".

If the appellant succeeds in this appeal they would have obtained an advantage through the machinery of our courts that should not enure to them.

The Appellants have also argued that there is only an abuse of Court process where the later proceeding would be unfair to the other party or work an injustice on him and have premised this part of their argument on the case of ***Secretary of State for Trade and Industry v Bairstow*** [2003] EWCA Civ. 321 Court of Appeal (Civil Division). It must however be noted that, that condition would only be applicable where the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings.

The Appellants further argued that by virtue of providing their address in this instant suit they are litigating in a different capacity. They have relied on the cases of ***Golightly v Ashrifi [1961] GLR 28 and*** **Kariyavoulas and another v Osei [1982-83] GLR 670** in support of this view.

The facts in the two cases just referred to are well known that it is pointless to restate them in this judgment.

Suffice it to be that the Courts in the said cases made the necessary but important distinctions as follows:

It is very apparent therefore that in the cases of ***Golightly v Ashrifi and Kariyavoulas and another v Osei*** already referred to supra, the different capacities in which the parties litigated were distinct and cannot be compared to the instant appeal where the parties litigated in the previous proceeding as NAOS Holding only that they provided no cogent proof of their existence either in Ghana or in Panama and are now re-litigating under the same name. The only difference being that they have now provided proof of their existence in Panama by way of providing an address. This is clearly an abuse of process.

This principle of abuse of process had been formulated years ago by the English Courts as was evident in the statement of the principle in Date-Bah JSC's opinion which had been accepted and applied by the Courts in Ghana. Some of the English cases that readily come to mind are the following:

1. **Stephenson vrs Garnet [1898] 1 QB 677**
2. **Reichel vrs Magrath [1889] 14 AC 665**
3. **Macdougall vrs Knight [1890] 25 QBD 1**
4. **Phosphate Sewage Co. Ltd. vrs Molleson [1879] 4 App Cas. 801 at 814**
5. **Hunter vrs Chief Constable of West Midlands [1982] AC 529 or [1981] 3 A.E.R. 727 H.L**
6. **Secretary of State for Trade and Industry vrs Bairstow [2003] EWCA Civ 321 Court of Appeal [Civil Division]**

In all the above cases, the principle of abuse of process that is discernible has been postulated on the fact that the matters in controversy have been determined by a Court of competent jurisdiction between the same parties and basically on the same subject matter and that it would therefore be an abuse of the process of the Court to allow a suitor to have an open ended opportunity to be litigating and religating over and over again in respect of the same issue which has over the period and in previous decisions been decided against him.

In the circumstances of this case, it is evident that the Supreme Court in its decision of the appeal that was brought before it firmly decided against the appellant on the 14th of December, 2005. To permit the appellants to succeed in their present endeavour is to

allow them to launch a collateral attack on the decision of the Supreme Court given on the said date.

After considering the facts of this case and the principles of law clearly enunciated in the cases referred to supra and others too numerous to be referred to, we are of the considered opinion that to permit the instant appeal to stand, will amount to an abuse of the process of the Court in that, the Courts would be enabling and or encouraging the appellant to challenge the factual findings and conclusions reached by the Judges in the earlier proceedings.

In such a situation it would clearly be unfair and unjust to a party in the earlier proceedings that the same matters would be relitigated again. To allow such a litigation to remain on the table of the parties and the court in our view would not only be tantamount to bringing the administration of justice into scorn, opprobrium and ridicule but also into serious disrepute.

We would in the circumstances dismiss the appeal in relation to the first issue raised in the appeal herein. But before we do so, it is deemed appropriate to refer once again to the decision of the Supreme Court in the case of ***Sasu vrs Amua-Sekyi and Anr [2003-2004] SCGLR 742*** already referred to supra as well as the opinion of Bamford Addo JSC as follows:

The Supreme Court held as follows:

"In any case the appellant had contravened the rule that litigation must end by filing multiplicity of actions which had delayed the case from reaching finality despite findings of estoppels by the Court against him. Thus in his counterclaim before Apaloo J, the appellant should have brought forth his full case and the rule in ***Henderson vrs Henderson*** *would not permit him to present his case piecemeal by bringing a subsequent case seeking to set aside the Court of Appeal's judgment for fraud. Consequently, the appellant's conduct in bringing a fresh action amounted to abuse of judicial process."*

Per Bamford Addo JSC as she then was in the same case:

"Although he was not allowed by the Court to proceed, he was able to continue this conduct which should be deprecated and discouraged since public policy demands that litigation be brought to a speedy end in the interest of justice"

This ground of appeal therefore fails.

ISSUE TWO

Whether or not the trial judge made a finding that there was a valid legal reason for the plaintiff filing the present writ while its appeal in the Court of Appeal was pending.

The relevant part of the Court of Appeal judgment complained of is as follows:

"It appeared to me that the plaintiff gambled by pursuing the same issue on appeal and in fresh action at the High Court. I believe the plaintiff instituted the fresh action in order to beat the six-year bar to actions founded on simple contracts under section 4 of the Limitation Decree, 1972 (NRCD 54). I say so because after the verdict of the Supreme Court on 14th December 2005 the plaintiff quickly filed a notice to proceed on 8th February 2006."

It would appear based on the facts and the law that the Court of Appeal was right when it noted that, on reading the entire ruling of the court below, one would not fail to realize that the above quoted portion of the court's ruling was a mere surmise by the court which did not in any way contribute to the basis of its ruling. The supposed finding thus cannot be a legitimate basis for a ground of appeal.

This point is further elucidated very clearly and concisely in the words of Sophia Akuffo JSC in the earlier proceedings in the Supreme Court, ***Naos vrs GCB [2005-2006]*** SCGLR where she stated as follows:

> *"Once its legal status and its corporate capacity was placed in issue, it was incumbent upon the plaintiff to produce more cogent evidence of its existence (such as its registered address or a copy of its certificate of incorporation) to satisfy the Court that it had the requisite legal capacity to sue, and having failed to do so, the trial Court was justified in arriving at the conclusion that the plaintiff did not exist".*

Clearly therefore, as can be seen no valid compelling or reasonable basis has been established as constituting the basis for the institution of a fresh action by the appellant against the respondents grounded on same facts and circumstances. Indeed the appellants did not proffer any such valid reason why they chose to have commenced a fresh suit whilst an appeal filed by them was pending before an appellate court of competent jurisdiction.

Where therefore judgment has been delivered by a Court of competent jurisdiction and or an appeal has been properly filed and is pending in an appellate Court of competent jurisdiction and the appellant or the parties therein decide to file or institute a fresh suit

against the same party or parties based on the same facts, it will call in aid the invocation of the principles of abuse of process to nullify the said fresh suit, especially if no valid reason has been given as in the instant case for such a conduct. This Court must deprecate and frown upon the conduct of the appellant in its bid to use the judicial process to perpetually keep aflame in our law Courts, matters whose flames had already been put out by previous litigations to finality.

This means that, the Courts must not on the flimsiest of reasons re-open any matter that has been finally put to rest in a judicial proceedings to which there has been no appeal or to which there can be no appeal such as the decision by the Supreme Court in the earlier proceedings. This issue also fails and appeal is dismissed.

Conclusion

Concluding her opinion in the case of ***NAOS Holdings Inc. vrs Ghana Commercial Bank***, already referred to supra, Sophia Akuffo JSC stated as follows:-

"In conclusion, the Court of Appeal committed no error in upholding the High Court's ruling. The writ was void for failure to state the residence of the plaintiff in the action and, in any event, there was such serious doubt as to the corporate status of the appellant that the court was justified in its conclusion that the appellant did not exist at all".

Under these circumstances, we are of the considered opinion that the instant appeal must suffer the same fate as its predecessor appeal before this very court.

It definitely appears to us that time has indeed caught up with the appellant, and conscious of the effect of the doctrine of limitation in respect of the timelines that have been established under the Limitation Act 1972 NRCD 54, the appellant clearly chose to buy more time with the institution of the current proccedings.

In arriving at our decision that this appeal fails in its entirety and should be dismissed, we have been guided by our resolve as a final appellate court to strive

i. to administer justice;

ii uphold the rule of law;

iii. resolve and adjudicate cases expeditiously and justly and; finally

iv. to preserve public confidence and trust in the administration of justice.

In the premises, the appeal herein fails and is accordingly dismissed. The result is that, the High Court decision in suit No. C. 582/2000 dated 20/12/2006 that the said suit is an abuse of process and therefore struck out is upheld together with the Court of Appeal decision of 29th May, 2008 which affirmed same.

This case definitely epitomizes the lack of appropriate legislation to enable the courts to enforce the timelines that have been stated in the rules of procedure at the various levels of Court. It is surprising that this simple matter which the High Court decided in 2006 as an abuse of process has taken almost four (4) years to come to finality. Perhaps the time is ripe to take a second look at the rules of procedure at the appellate Courts, to wit the Court of Appeal and the Supreme Court with a view to making it possible for the Courts to expeditiously dispose of such cases.

The appeal stands dismissed.

J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
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