IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA, GHANA – A.D. 2014

CORAM: ATUGUBA, J.S.C(PRESIDING)
ADINYIRA (MRS), J.S.C.
ANIN YEBOAH, J.S.C.
BAFFOE BONNIE, J.S.C.
AKOTO BAMFO (MRS), J.S.C.

CIVIL APPEAL
NO. J4/14/2014

13TH NOVEMBER, 2014

1. NENE FIESU GBLIE GBENARTEY ::: PLAINTIFFS/APPELLANTS/
2. MADAM DEDE GLIE APPELLANTS

VRS

1. NETAS PROPERTIES & INVESTMENT ::: DEFENDANTS/RESPONDENTS
2. EMMANUEL ADOLF TAGOE RESPONDENTS
3. LANDS COMMISSION

JUDGMENT

ANIN YEBOAH JSC.

On the 13th of November 2014, we allowed this appeal and reserved our reasons. So we now proceed to offer our reasons for the allowance of the appeal.

This appeal before this court is against the decision of from the Court of Appeal, Accra, dated the 25/02/2013, which affirmed the judgment of the trial High Court, Accra. For the sake of brevity, the Plaintiffs/Appellants/Appellants shall be referred to in these proceedings as plaintiffs and the Defendants/ Respondents/Respondents as Defendants. The case of the trial High Court did not go beyond application for directions stage and therefore the facts appear not to be contentious.

On 13/2/2009 the plaintiffs commenced these proceedings against the defendants claiming several reliefs which should be stated to enable one to appreciate the basis for this decision:

1. An order directed at the 3rd defendants to expunge from their records the following indentures in favour of the 1st defendant on grounds of fraud: -

   (a) An indenture dated 24th September, 2003 covering an area of 560.36 acres and made between Numo Nartey Kwaku for and on behalf of Gbenartey Fiesu Family of the one part and the 1st defendant on the other part.

   (b) An indenture dated 22nd September, 2004 covering an area of 330 acres and made between the said Numo Nartey Kwaku for and on behalf of the Gbenartey Fiesu Family of the one part and the 1st defendant of the other part.

(c) An indenture dated 12th April, 2005 covering an area of 398.19 acres and made between the said Numo Nartey Kwaku of the one part and the 1st defendant on the other part.

2. Damages for fraud against the 1st and 2nd defendants.

3. An order restraining the defendants from dealing with the plaintiffs' family land.

4. An order setting aside all agreements made between the 1st defendant acting through the 2nd defendant and the plaintiffs' family with regards to the above-mentioned indentures on grounds of unconscionability or in the alternative on grounds of undue influence.

5. An order directed at the 1st and 2nd defendants to furnish the plaintiff's family with a list of persons with whom they have had any dealings in connection with the plaintiff's family land prior to the commencement of this action.

6. Any further reliefs as to the court seem just and proper to grant under the circumstances of this case.

The plaintiffs, in a comprehensive statement of claim filed together with the writ of summons brought this action as Head of Gbenartey Fiesu family of Odumase and principal member respectively. The allegations pleaded against the first and second defendants was simply that one Numo Nartey

Kwaku, a member of the plaintiffs' family had without the consent of the Head of family and principal member, alienated parcels of their family lands totaling an acres of 1,288 area to the first defendant, a limited liability company represented by the second defendant as its Managing Director. The plaintiffs pleaded that the said alienation was done by the said Numo Nartey Kwaku fraudulently to the first defendant. The third defendant appears on the record to be a nominal party to these proceedings.

The first and second defendant jointly filed a statement of defence on 16/3/2009 and on 20/03/2009 amended their statement of defence by adding a counterclaim. The first and second defendants sought declaration of title to the very three parcels of lands which the plaintiffs claimed in the writ of summons, and sought a declaration that the first defendant had lawfully acquired the lands, the subject matter of these proceedings. The first and second defendants pleaded in their joint statement of defence that the lands originally belonged to three deceased brothers namely: AGBLAH TEYE, DJOBLOKU TETTEH and FIESU GBLIE and that after their deaths AGLA TEYE's lineage is now headed by Theophilus Gbenartey, DJOBLOKU TETTEH lineage is now headed by Kwabla Charwetey and FIESU GBLIE lineage is now headed by the plaintiffs herein. The first and second defendant contended further that the lands did not exclusively belong to the plaintiffs but to the descendants of the three brothers. The allegation and particulars of fraud was also denied and the first and second defendants contended that their vendor/lessor had the consent of all the principal members of the family including the plaintiffs herein. It was also pleaded by way of defence that the plaintiffs had knowledge of the transactions by Numo Nartey Kwaku and that the plaintiffs had collected

various sums of money from the first defendant which was consideration for the lands leased to the first defendant. Lastly it was pleaded that the plaintiffs had ratified all documents executed by the said Numo Nartey Kwaku on behalf of the family.

In answer to the allegations pleaded in the statement of defence by the first and second defendants, the plaintiffs filed a reply. In the reply, the plaintiffs stated their position that the land originally belonged to the late Gbenartey Fiesu who had three children; namely: Tei Agbla, Tetteh Djobloku and Fiesu Giblie and that Theophilus Gbenartey and Kwabla Gbenartey are both grandchildren of Tei Aglah and Tetteh Djobloku are junior members of the family and could not have concurred in the alienation of the lands in dispute. The counterclaim by the first and second defendant was stoutly denied by the plaintiffs.

On 9/04/09, the plaintiffs filed their application for directions. Several issues were put up for determination and upon service of same on the defendants, the first and second defendants filed three additional issues which were very crucial issues. The application for directions was taken on 18/12/2009 and the suit suffered several adjournments on the grounds that the parties were exploring ways to settle it out of court.

However, on 15/6/11 the first and second defendants filed a motion to dismiss the suit under Order 11 rule 18 of the High Court Civil Procedure Rules, CI 47 of 2004 and the inherent jurisdiction of the court. The grounds for the application captured in the affidavit in support are that: the action is frivolous, vexatious and an abuse of the process of the court and obviously

unsustainable. The affidavit in support which was deposed to by one ADOLF TAGOE made references to an earlier suit which were discontinued without liberty to institute any fresh action which were crucial to their case but surprisingly not pleaded by the defendants in their statement of defence and counterclaim. The affidavit also deposed to facts that the plaintiffs had received moneys from the first defendant. The affidavit had several documents as evidence to support the application, some of which had indeed no bearing on the case at all. Indeed some receipts were issued in the names of FOREMOST MINING CO. LTD, NETAS MINING COMPANY, NETAS COMPANY LIMITED, NETAS FARMS LIMITED, NETAS LIMITED, three indentures, and other documents not on any letterheads of any company which runs into several pages on record.

The plaintiffs, as expected, opposed the application by filing an affidavit to answer the depositions in the affidavit. The defendants filed supplementary affidavit with an exhibit to show that in all 1,190.31 acres of land had been leased to them.

The application itself was argued on 5/07/2011, and on 20/07/2011, the learned High Court Judge granted the application and dismissed the action with cost. The learned trial judge placed heavy reliance on the exhibits of a meeting annexed to the affidavit and the provisions of section 18 of the Coveyancing Act NRCD 172 and held that the action was unsustainable, frivolous and vexatious.

The plaintiffs, however, lodged an appeal against the said ruling to the Court of Appeal which dismissed the appeal and affirmed all the grounds for striking out of the claim. It is against the judgment of the Court of Appeal that the plaintiffs have invoked our appellate jurisdiction on several grounds to seek the reversal of the judgment. Given the nature of this case it would be worthwhile to state the various grounds of appeal argued in support of this appeal.

The grounds of appeal are as follows:

1) The judgment of the Court of Appeal is against the weight of evidence.

2) The learned judges made an error of fact in dismissing the appeal of the appellants by holding that the 1st appellant was a witness in the three indentures executed by Numo Nartey Kwaku granting leaseholds to the 1st respondent herein and marked Exhibits 1, 1A and 1B as the incontestable facts show that the said leases were witnessed by Nene Fiesu Gblie III who is not the 1st appellant.

3) The learned judges further erred in holding that Numo Nartey Kwaku was the head of the Gbernartey Fiesu Family at the time the said indentures were signed when the issues settled for trial before the High Court, Accra included the question whether the appellants were the lawful head and principal elder of the said family at the time of the execution of the lease by Numo Nartey Kwaku.

4) The learned judges erred in law by invoking the provisions of section 26 of the Evidence Act, 1975, (NRCD 323) in holding that there was a valid contract between the appellants and the 1st respondent herein as the appellants were never parties to the contract which was executed by Numo Nartey Kwaku and witnessed by Nene Fiesu Gblie III and another.

5) The learned judges erred in law by holding that an application to dismiss an action for not disclosing a reasonable cause of action under Order 11 r 18 of the High Court, (Civil Procedure) Rules, 2004 (CI 47) can be entertained at any stage of the proceedings notwithstanding the fact that issues have been settled for trial by the parties in the suit.

As the jurisdiction to strike out was based on Order 11 rule 18 and the inherent jurisdiction it must be answered first. For the purposes of appreciating the procedural implications under Order 11 rule 18 of the High Court, (Civil Procedure) Rules, 2004. The said Order states as follows:

> "18(1) The court may of any stage of the proceedings Order any pleading or anything in any pleading to be struck out on the grounds that
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> (a) it discloses no reasonable cause of action on defence; or
> (b) it is scandalous, frivolous or vexations; or
> (c) it may prejudice, embarrass, or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed, or dismissed on judgment to be entered accordingly

(2) No evidence whatsoever shall be admissible on an application under rule (1)(a)".

As stated earlier in this delivery, this application was brought under the above rule and the inherent jurisdiction of the court. When both are invoked together, the court is allowed to receive extrinsic evidence as it has been the practice both under the old rules and the current one. See the cases of GHANA MUSLIMS REPRESENTATIVE COUNCIL v SALIFU [1975] 2 GLR 246 and OKOFO ESTATES LTD v MODERN SIGNS LTD & ANR [1995-96] 1 GLR 310 SC. In this case, the plaintiffs complained that the case had gone beyond the application for directions stage and issues already set down for determination. The rule states that: at any stage of the proceedings this jurisdiction could be invoked. The settled practice, however, is that, when the offending pleading is served the party invoking the jurisdiction to strike out the action must promptly apply to have the pleading struck out. The position of the law has been succinctly stated in BULLEN & LEAKE & JACOBS; PRECEDENTS OF PLEADINGS 18th Edition at page 141 as follows:

"Although the application may be made "at any stage of the proceedings", still it should always be made promptly and as a rule soon after the service of the offending pleading though exceptionally it may be made after the pleadings are closed but the court may refuse to hear such an application after the action is set down for trial"

It is clear that the court has discretion to hear the application after the case has been set down for hearing. However, like every judicial discretion, it must not be exercised unfairly without taking all the circumstances of the case into consideration. In this case it was plain that there were several contentious issues arising out of the pleadings. Indeed the defendants themselves set out three crucial issues for determination. The issue of whether the land exclusively belonged to the lineage of FIESU GBLIE to deny the said Numo Nartey Kwaku the defendant's vendor the right to alienate the lands to the defendants was one of the crucial issues. It was also contentious as to whether the three children of the original acquirer of the land, GBENARTEY FIESU owned the land jointly. The issue of whether the defendants' vendor had the consent of all the principal members of the family before he alienated the land was crucial. In the statement of defence, the first and second defendants maintained that the lands do not exclusively belong to the plaintiffs. It was not clear on the pleadings beyond doubt as to who exclusively owned the lands leased to the first and second defendants.

With all these contentious issues which could be resolved by a plenary trial the trial judge proceeded to terminate proceedings at a state when the parties had settled issues for determination by the learned judge. It was pointed out by FLECTHER – MOULTON LJ in the often quoted case of DYSON v ATTORNEY GENERAL [1911] 1 KB 410 at page 419 where he said as follows:

> "To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad".

It therefore follows that this procedure of terminating proceedings by summary process should be applied only in cases where the action is clearly unsustainable, plain and obvious that it is beyond doubt that the case is unarguable frivolous and vexatious, and even legitimate amendments could not cure the defect. See: HUBBUCK & SONS LTD v WILKINSON HEYWOOD & CLARK [1899] 1 QB 86, DRUMMOND-JACKSON v BRITISH MEDICAL ASSOCIATION [1970] 1 WLR 688, REPUBLIC OF PERU v PERUVIAN GUANO [1887] 1 Ch 465, EMERSON v GRINSBY TIMES & TELEGRAPH CO. [1926] 42 TLR 238.

At the stage the proceedings had reached, the learned trial judge and the Court of Appeal for that matter were enjoined to ask itself what exceptional circumstances existed to warrant the application at that stage when application for directions had already been taken. To us, nothing on record shows that any exceptional circumstances existed for the court to entertain the application at that stage. Order 11 rule 18 of CI 47, must be purposively interpreted to avoid resort to it at that advanced stage of proceedings. In the authoritative works by BULLEN & LEAKE & JACOBS in PRECEDENTS OF PLEADINGS 18th Edition at page 141 answers the question as follows:

> "Although the application may be made" at any stage of the proceedings "still it should be made promptly and as a rule soon after the offending the service of the offending pleading, though exceptionally it may be made after the pleading are closed but the court my refuse to hear an application after the action is seen down for trial."

Cases like ATTORNEY GENERAL OF DUCHY OF LANCASTER v LONDON AND NORTH WESTERN RAILWAY [1892] 3CH 274 and WRIGHT v PRESCOT URBAN DISTRICT COUNCIL [1916] 115 LT 772 are clear on this point.

The jurisdiction to strike out pleadings should therefore be sparingly exercised with extreme cause and circumspection in plain and obvious cases. As a case has been listed for hearing on the merits there is a subsisting order for a plenary trial, and the trial judge ought to have exercised extreme care and circumspection in dealing with the application. This has been acknowledged by Professor Stuart Sime in his book: A PRACTICAL APPROACH TO CIVIL PROCEDURE 7th Edition at page 324 as follows:

> "The jurisdiction to strike out is to be exercised sparingly, because striking out deprives a party of its right to a trial, and its ability to strengthen its case through the process of disclosure and other court procedure such as requests for further information. Further, examination and cross-examination of witnesses often changes the complexion of a case. The result

is that striking out is limited to plain and obvious cases where there is no point in having a trial".

The learned author relied on the case of: THREE RIVERS DISTRICT COUNCIL v BANK OF ENGLAND No 3 [2003] 2 ACI to support his proposition of law on this point.

If the trial court had itself set down the case for hearing, there was no point in entertaining the application when no exceptional circumstances existed. The two lower courts with due respect, were clearly in error.

We could have allowed this appeal on this ground alone but learned counsel for the plaintiffs as appellants herein argued the other grounds with such industry that we have to comment on few of the other grounds.

The other ground which was well argued dealt with the evidence placed before the learned trial judge when he proceeded to strike out the action. As pointed out earlier in this delivery several documentary evidence in the nature of receipts were exhibited to the affidavit of the defendants. These exhibits cover pages 50 to 148 of the record of proceedings. Some were leases, receipts and processes filed in previous proceedings before the High Court, Accra. In the leases none had the signatures or thumbprints if any, of the plaintiffs herein. The receipts exhibited as evidence of payments of moneys for the three parcels of land were also of doubtful validity. Indeed, all the receipts never bore the names of any of the plaintiffs herein. Most of them were prepared on the letterheads of some companies who had nothing to do with the transactions culminating in this action. Some of

the companies were mining companies. The plaintiffs were not named as having received any sum of money for conveying the lands to the defendants. It is pertinent to note that one Abraham Gbenartey appeared to be the person who on most of the receipts evidencing of the payments, received the moneys.

The Exhibit "B" which is captioned as MINUTES ON MEETING HELD ON THE 5TH OF APRIL, 2006, BETWEEN NENE FIESU'S FAMILY AND MR TAGOE AT DODOWA also had doubtful validity. The first plaintiffs name is not there as a member of the family who attended that meeting and it did not even detail the discussion leading to the decisions allegedly reached between the family and the defendants. Exhibit "6" which was titled: "AGREEMENT NOTE" was executed by KWABLA CHARWETEY, ALBERT AKWETEY GBENARTEY, CHARLES QUAYNOR and ABRAHAM GBENARTEY in favour of the second defendant. Nowhere did the names of the plaintiffs feature for them to be bound by the said agreement. Indeed, some of the exhibits had no relevance to the case at all and would obviously have failed the test of admissibility if tendered in course of any plenary trial as none of the receipts were even stamped as required by law.

It was therefore clear that the case was not fit for the summary process of striking out the suit without hearing. The allegations of fraud pleaded were also ignored by both lower courts without any convincing reasons whosoever. In the case of OKOFO ESTATES LTD v MODERN SIGNS LTD [1996 -97] SCGLR 224 where the trial judge proceeded to dismiss the claim under its inherent jurisdiction and under order 25 rule 4 of the old rules Edward Wiredu JSC. (as he then was) was very emphatic in

condemning the procedure adopted by the trial court when allegations of fraud had indeed been pleaded by the plaintiff. The learned judge said at page 253 as follows:

> "On the face of the materials presented to the High Court, the plaintiff alleged" fraud" against the defendant (particulars are given). An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document or a document obtained by fraud pass no right. An allegation of fraud, if denied, needs to be investigated and proved. It is can be done only by taking evidence. A denial of an allegation of fraud raises a triable issue which a court cannot determine summarily. In the instant case the allegation of fraud ought to have alerted the High court that it could not competently determine the case before it without going into the allegation. The summary way in which the court dismissed this case erroneously denied the plaintiff a hearing – a denial which amounted to a violation of fundamental rule of natural justice."

Apart from the requirement of abduction of evidence to prove the allegations of fraud, other issues were set down for determination including the three triable issues which the defendants themselves had set down. It was therefore erroneous for the trial court to have ignored the settled issues to terminate the action summarily without plenary trial.

We think that no special circumstances existed in this case for the learned trial judge to have dismissed the action after application for directions had

been taken almost six months before the application was to strike out filed. The decision is that the appeal is allowed and the case remitted to the trial court to take its normal course.

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JUSTICE OF THE SUPREME COURT

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