IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT ACCRA

CORAM: BENIN, J.S.C. SITTING AS A SINGLE JUSTICE OF THE SUPREME COURT

CIVIL MOTION NO.J8/13/2015

4TH DECEMBER 2014

1. NORA OTOO - PLAINTIFFS/RESPONDENTS
2. EMMANUEL OTOO /APPELLANTS/APPLICANTS
3. FELIX NORTEY OTOO

VRS.

1. REUBEN OTOO - DEFENDANTS/APPELLANTS
2. RICHARD OTOO /RESPONDENTS/RESPONDENTS
3. RUDOLPH OTOO
4. FRANCIS OTOO
5. NARTEY OTOO

RULING

BENIN, JSC:-

This matter is before the Supreme Court in a review application. The Defendants/Appellants/Respondents/Applicants, hereafter called the applicants, have filed their affidavit and statement of case in the said application. By the present application the applicants are asking the court to grant them leave to file a supplementary affidavit and statement of case. The main ground for the application is that the Will of the late Edward Kabu Otoo, hereafter called the

Testator, which has been at the heart of the dispute resulting in the application for review was invalid on ground that the Testator was illiterate and the Will did not meet the requirements of the law as regards a 'jurat'. This fact became known during interaction between the applicants and their new lawyers and the latter have found it necessary to disclose this to the court since it would have an important influence or effect on the decision of the court.

Paragraphs 9-14 of the affidavit in support deposed to by the 1st applicant are germane to this application. They read:

9. That the question as to the literacy or otherwise of the late Edward Kabu Otoo had never been asked by any of the previous counsel engaged by us and we thus, had not been in the position to reasonably bring it up for the consideration or determination by any court.

10. That in truth and in fact, the late Edward Kabu Otoo was an illiterate incapable of appreciating the import of the document alleged to have been signed by him, and, which contained legal terminologies like joint tenancy.

11. That I am advised by counsel and verily believe same to be true that as of the date of the execution of the will, 9th February 1944……..there was in force the Illiterates Protection Ordinance, 1912 (Cap. 262), which required a person writing any document for or at the request of an illiterate to clearly and correctly read over and explain the document to the illiterate person. This is required to be evidenced through the execution of a 'jurat' clause.

12. That I am further advised and verily believe same to be true that the writer of the document was also required to state his full name and address at the foot of the document.

13. That a perusal of the document held out so far to be the will of the late Edward Kabu Otoo will reveal the absence of any clause showing a satisfaction of the express requirements of…….Cap. 262.

14. That I am advised by counsel and verily believe same to be true that a presumption of validity of the will in dispute cannot be made in the face of the

irrefutable fact that the alleged testator …..was illiterate, and in view of the absence of an interpretation clause in the will. In essence, the alleged will of the late Edward Kabu Otoo is invalid.

The affidavit goes on in paragraph 16 to give the reason for the delay in raising this point; it states 'That the failure to raise this point so far was neither advertent nor due to an intention to overreach anyone, but simply due to the failure of previous counsel to ask applicants herein that fundamental question relating to the competence of the late Edward Kabu Otoo to execute the will in question without the assistance of a person who could understand and read in the English language.'

The application was accompanied by a statement of case. All the processes filed were duly served on the Plaintiffs/Respondents/Appellants/Respondents, hereafter called the respondents. The respondents answered the applicants by way of an affidavit deposed to by their lawyer who filed no statement of case as required by rule 57 of the Supreme Court Rules, 1996, (C.I. 16). Thus the respondents were not entitled to be heard except as to the question of costs, see rule 59(3) of C.I 16. However, I decided to waive this non-compliance with the rules under rule 79 and allowed counsel for the respondents to argue in view of the importance of the legal questions raised in the application as well as the fact that I am not aware of any precedent concerning this important point of procedure. Most importantly the applicants overlooked it apparently because it was a harmless default.

I will at this stage refer to the material parts of the affidavit in opposition which appear to provide answer/s to the issue/s raised in the application. These are contained in paragraphs 7-14 of the said affidavit and they provide thus:

7. That the Respondents say that the application is an attempt to introduce new issues that can only be determined by the taking of evidence.

8. That this is an application for review and therefore this Honourable Court is disabled from taking evidence.

9. That this application is in fact and in law an application to adduce new evidence in review disguised as an application for leave to file supplementary affidavit and statement of case.

10. That fresh evidence cannot be adduced at this stage of the proceedings because the Applicants have not proven that these facts were unknown to them at first instance.

11. That assuming without admitting that the testator was indeed illiterate, the issue of his illiteracy should have been raised at first instance and since it was not raised the Applicants have slept on their rights.

This application has been brought under rule 54 of C.I. 16 which reads:

The Court may review any decision made or given by it on any of the following grounds:

(a) exceptional circumstances which have resulted in miscarriage of justice;
(b) discovery of new and important matter or evidence which, after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the decision was made.

According to the applicants this application is founded on both grounds. Counsel for the applicants writes in paragraph 4 of the statement of case that "it is the humble contention of the applicants that the new matter raised herein apart from satisfying ground (b) for a review as set out in Rule 54 of C.I.16, is so strong as to even meet the threshold of exceptional circumstances which have resulted in a miscarriage of justice. In essence, the applicants contend that the allegation of the illiteracy of the late Edward Kabu Otoo, will also constitute an exceptional circumstance resulting in a miscarriage of justice in this action. In the light of the foregoing, the instant application can be said to be hinged on the two grounds for a review cognizable by Rule 54 of C.I. 16."

Whilst I examine the scope of rule 54, supra, I will endeavour to place the present application in the context of the rule. An applicant succeeds if he satisfies either ground (a) or (b) or both under rule 54. First is the requirement for the existence

of exceptional circumstances. This particular provision has been the subject of several interpretations and applications by this court. I would thus not dwell at length on it except to make a few references that are relevant to the present discussion. In **NASALI v. ADDY (1987-88) 2 G.L.R. 286 at 288** per Taylor JSC, "the jurisdiction is exercisable in exceptional circumstances where the demands of justice make the exercise extremely necessary to avoid irremediable harm to the applicant." And in the words of Francois JSC in **AGYEKUM v. ASAKUM ENGINEERING & CONSTRUCTION LTD. (1992) 2 G.L.R. 635, at page 651 "**the acid test remains as always, the existence of exceptional circumstances and the likelihood of a miscarriage of justice that should provoke the conscience to look at the matter again." What is important to state is that each case is to be examined on its peculiar facts and circumstances before deciding whether exceptional circumstances exist to justify the court's intervention with its earlier decision. See the case of **IN RE EFFIDUASE STOOL AFFAIRS (NO. 3); REPUBLIC v. NUMAPAU, PRESIDENT OF THE NATIONAL HOUSE OF CHIEFS and OTHERS; EX PARTE AMEYAW II (NO. 3) (2000) SCGLR 59.** Thus in the case of **KOGLEX (GH) LTD and Another v. ATIEH (2001-2002) SCGLR 947** where the court found its decision had unjustly enriched the co-defendants, yet it refused to review the decision for lack of exceptional circumstances. Thus the fact that a valid legal ground exists is per se not a ground for review. See also holding 3 in the case of **AGYEKUM and ALHASSAN v. AMADU BABA and Another (2003-2004) SCGLR 60.** A review application was allowed in the case of **HANNA ASSI (No. 2) v. GIHOC REFRIGERATION & HOUSEHOLD PRODUCTS LTD. (No. 2) (2007-2008) SCGLR 16** when the court concluded that an error in respect of jurisdiction was fundamental to merit a review. Thus the bottom line is whatever legal point that was relied upon must have resulted in a miscarriage of justice by the court's decision.

But it is observed in the cases cited above and others which this court has decided that, the factual basis was existent on the record which enabled the court to decide on the application. Thus at page 67 of the record in the **AGYEKUM and ALHASSAN** case, supra, the court said that "it is important to note that whenever a party intends to impugn the legality of a decision of a superior court, the pleadings of that party must sufficiently disclose enough materials to

demonstrate on the face of his pleadings that the decision was wrongly made to deserve to be set aside."

In the instant case, the application is not founded upon existing facts appearing on the face of the record. It is my view that it is not possible to talk about exceptional circumstances when the factual basis for the claim is not present and apparent on the face of the record. The question of the Testator's illiteracy is sought to be raised for the first time both in terms of fact and law. The ordinary bench of the court had no opportunity to consider or fail to consider the question of the Testator's illiteracy and could not therefore be said to have done anything wrong for which a review could lie.

I am aware that counsel for the applicants sought to invoke rule 54(a) if they successfully invoked rule 54(b). But even then if they succeed under rule 54(b), it would still not afford a basis for saying special circumstances exist since the ordinary bench had no way of dealing with this question. Rule 54(a) envisages a situation where the facts and evidence are in place on the record, as distinct from 54(b) where the applicant may bring in new facts. For these reasons I reject the application in so far as it is founded under rule 54(a).

The application appears to come within the purview of rule 54(b) for it is a new matter which is sought to be introduced for the first time on the record. Counsel for the respondents said it is fresh evidence that the applicants seek to lead but dressed in the garb of new evidence. By whatever name one calls it, what the sub-rule (b) requires is that the matter or evidence must first be new in the case, second it must be important and third and most critical that it was not known to the applicants upon due diligence or if it was known to them, that they could not produce it at the time of the court's decision.

Under sub-rule (b), an applicant may introduce either a new matter or new evidence. I start with what is meant by 'new evidence'. It envisages a situation where an issue has been raised in the pleadings, the material facts have been pleaded and probably (but not invariably) the issue has been set down as a triable issue. However, the evidence could not be introduced due, for instance, to the unavoidable absence of the sole or key witness from court as a result of severe

physical impairment. Let us assume for the purposes of argument that the witness was in a coma and so could not testify, and this fact has been noted on the record by the trial court. The witness has recovered since the ordinary bench delivered its decision; in this scenario the court could admit his testimony as new evidence. Or where at the trial a vital document pleaded could not be located and the fact has been noted on the record but it is found subsequent to the court's judgment. The court should be in a position to admit it as new evidence under rule (b). These instances are by no means exhaustive. The modality for admitting such new evidence must be left to the court to decide. The court could either take viva voce evidence itself by assuming the power of a trial court under Article 129(4) of the 1992 Constitution or by way of affidavits, or direct the court below to do so, always mindful that the principle 'audi alteram partem' is duly observed. Thus contrary to the position taken by the respondents in paragraph 8 of the affidavit in opposition that being an application for review "this Honourable court is disabled from taking evidence", it is not disabled because the rule permits new evidence to be introduced even in a review application if all the other requirements are met and it is in the overriding interest of justice to do so.

It is clear from the foregoing that the instant application does not meet the qualification of new evidence since the issue of the Testator's illiteracy has never been pleaded and is not said to even arise by inference from the pleadings, so there is no factual basis upon which any new evidence could be introduced.

What remains is a consideration of the application under 'new matter'. I think 'matter' as used in this context means the subject-matter for determination in a legal proceeding which raises some right, duty or liability to be established. And once a matter exists, the lawmaker provides the means by which it would be established. That explains the reason the court is able to admit evidence even at this stage. The question of the Testator's illiteracy is thus a matter within the meaning of rule 54(b). A new matter is thus a matter which has not been raised throughout the proceedings and on which no determination has been made by the court. Let us take an estate matter which was contested on the basis that the deceased died intestate. After the Supreme Court judgment it is then discovered for the first time that the deceased actually died testate. The discovery of the Will

thus become a new matter within the meaning of the sub-rule (b) which the court would be entitled to take into account and reverse its earlier decision, if other criteria under the sub-rule are satisfied.

The next criterion is the importance of the illiteracy of the late Joseph Kabu Otoo as a factor to consider. There is no denying that it is also an important matter because the existing legislation namely, Illiterates Protection Ordinance, Cap 262 imposes the requirement of interpretation of any document to an illiterate before he sets his mark thereto. Without such 'jurat' the document could not be valid as against the illiterate. That legislation is particularly important when it applies to a Will since it takes effect only after the demise of the testator who thus would not be available to say that it was his deed. So the 'jurat' must appear on the face of the document evidencing the Will if in truth the testator was illiterate. See the following cases on the application of Cap 262: **KWAMIN v. KUFFUOR (1914) 2REN. 808; WAYA v. BYROUTHY (1958) 3 W.A.L.R. 413; FORI v. AYIREBI and Others(1966) G.L.R. 627 S.C**. The second criterion is thus satisfied.

The third and final criterion is the necessity to satisfy the court that the applicant exercised due diligence in respect of one of two situations: either the new matter was not within his knowledge, or if within his knowledge he could not produce it at the time of the court's decision. C.I. 16 does not define diligence or due diligence, as the case may be. We ought therefore to have recourse to other legal sources for the meaning of the expression. Black's Law Dictionary, 9th Edition, at page 522 defines 'diligence' to mean i. a continual effort to accomplish something. ii. Care, caution, the attention and care required from a person, in a given situation. And at page 523 'due diligence' is defined as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation, also termed common diligence or reasonable diligence. Reasonable diligence is defined at the same page 523 as 'a fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue'.

To my mind the underlying strand in these definitions is care on the part of the applicant. In litigation a party ought to exercise some amount of care in

prosecuting his case, nothing should be taken for granted. In that respect I agree with the view expressed by Willmer, LJ, in the case of **MEAT CO. PTY. LTD. v. LANCASHIRE SHIPPING CO. LTD. (1960) 1 All ER 193** at 219, CA, where he said "an obligation to exercise due diligence is …..indistinguishable from an obligation to exercise reasonable care."

The Counsel for the applicants graciously admitted that the applicants were aware the Testator was illiterate. Consequently I hold that the first option of a lack of knowledge of the new matter is inapplicable.

It seems that what the applicants seek to rely upon is the fact that they did not produce it because their previous lawyers had not asked the relevant questions to provoke the appropriate answer from them that the testator was illiterate. Does this satisfy the requirement of due diligence? Did they exercise that reasonable amount of care that every litigant must exercise in the conduct of their case? In the prosecution of a case a party decides which part of numerous pieces of evidence to put before the court in proof of his case. And legal advisers who advise the parties must ask such relevant questions as will aid them in conducting the case. Thus where, as in this case, the facts have been within the knowledge of the party from day one, I am not able to agree that the party exercised that reasonable care or due diligence in telling his whole story to the court. They had every opportunity from the trial court where the issue of the Will was central to the litigation to raise such an issue if indeed it existed as a fact. Reasonable care would dictate to any ordinary person to ask the question how come an illiterate person executed a written deed, like a Will. It does not require a lawyer to challenge the proponent of such a document to prove that indeed the illiterate did execute the document to make it his own.

It seems clear the applicants have not exercised any diligence at all in as far as this matter is concerned since they admit having been aware of it all along. We cannot also lose sight of the fact, as Counsel for the respondents pointed out, that since probate of the will was taken some seventy years ago, some rights have been acquired thereby which must not be disturbed, especially by the careless attitude

of the applicants. For these reasons I do not consider it proper to grant this application; I reject same accordingly.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

COUNSEL.

GODFRED YEBOAH DAME ESQ. (WITH HIM FREEMAN SABBAH) FOR THE DEFENDANTS /APPELLANTS/ APPELLANTS/APPLICANTS .

DIANA ASONA DAPAAH ESQ. FOR THE PLAINTIFFS/RESPONDENTS/ APPELLANTS /RESPONDENTS.