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. J8/75/2014

29TH JULY 2014

1. REV. ROCHER DE-GRAFT SEFA **PLAINTIFFS/RESPONDENTS/RESPONDENTS**

2. ERNEST KWASI NYAME ASIEDU

VRS.

1. BANK OF GHANA **DEFENDANT/APPELLANT/APPLICANT**

2. ONWARD INVESTMENT **DEFENDANT**

AND

CIVIL MOTION
No. J8/76/2014

SAMUEL GYAMFI. **PLAINTIFFS/RESPONDENTS/RESPONDENTS**

VRS.

1. BANK OF GHANA **DEFENDANT/APPELLANT/APPLICANT**

2. ONWARD INVESTMENT **DEFENDANT**

BENIN JSC:-

Ordinarily, an application for leave to adduce fresh evidence on appeal, as in the instant, should pose no problem to the court to determine, for the criteria governing it have clearly been settled in a long line of cases decided at the highest level and by legislation, namely Supreme Court Rules, C.I.16, rule 76(1)(2). These criteria are:

i. The evidence was not available to the applicant at the trial;
ii. The evidence could not have been obtained by the applicant upon reasonable diligence for use at the trial;
iii. Had the evidence been adduced at the trial it would have had an important influence on the result of the case, although it need not be decisive;
iv. Such as is presumably to be believed, in other words evidence of a sort which is inherently not improbable.

The authors of Halsbury's Laws of England, 5th edn. vol. 12, para. 1676 add a timely reminder that 'these criteria need to be applied as guidelines rather than rules and subject to the overriding objective of dealing with cases justly. In addition the consequences of admitting the fresh evidence has to be taken into account'.

Rule 76(1) and (2) of C.I. 16 provide as follows:

(1) A party to an appeal before the Court shall not be entitled to adduce new evidence in support of his original action unless the Court, in the interest of justice, allows or requires new evidence relevant to the issue before the Court to be adduced.
(2) No such evidence shall be allowed unless the Court is satisfied that with due diligence or enquiry the evidence could not have been and was not available to the party at the hearing of the original action to which it relates.

Previous decisions on this subject all of which relied on the criteria set out above include **Poku v. Poku (2007-2008) SCGLR 996; Ladd v. Marshall (1954) 1 W.L.R. 149 CA** which was the leading case that established the principle; **Foli and Others v. Agya-Atta and Others (Consolidated) (1976) 1 G.L.R. 194 CA.**

However, all the cases I have been priviledged to read have turned on appeals in cases decided on merits in which some form of evidence was adduced at the trial. The factual situation in this case is entirely different in the sense that the case did not reach the trial stage, no evidence was adduced; it was a judgment obtained by default of appearance which is the subject of the appeal to this court. Thus all the cases referred to by both counsel and others that I have read cannot be relied on as clear authority. But the principles emanating from them are apt since they provide guidelines for the determination of such an application.

The respondents herein who were the plaintiffs in the court below sued the applicant herein and three others including Onward Investment Limited, hereafter called Onward, as defendants before the High Court. From the facts available in this application, the applicant and the other defendants defaulted in entering appearance to the writ so the plaintiffs moved the court and obtained default judgment against them. The applicant herein applied to the court below to set aside the default judgment but the application was denied by the court. An appeal against the refusal to set aside the default judgment was made to the Court of Appeal which also rejected it. A further appeal has been made to this court. And whilst that appeal is pending before this court the present application for leave to adduce fresh evidence on appeal has been put in by the applicant. It raises a novel situation so it was not surprising that counsel for the respondents argued that since the case did not proceed to trial and no evidence was thus led, there could be no talk about any fresh evidence being adduced as there is no authority for it. Counsel for the applicant had argued that if this piece of evidence had been available to them it would have assisted them to persuade the trial court to set aside the default judgment in the sense that the court would have looked at it and concluded that they have a reasonable defence to the claim. Under the common law that we inherited and continue to embrace the novelty of a point for lack of authority is no reason to dismiss it. In such a situation what

comes to mind as applicable is the view expressed by Parke J. in the case of **Mirehouse v. Rennel (1833) 8 Bing. 490; 6 E.R. 1015 H.L.** that because a case is new we have no right to consider it as one for which the law has made no provision at all and because it has not been previously decided to decide it according to what we consider to be just and expedient. He continued that "*the common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents and for the sake of attaining uniformity, consistency and certainty, we must apply those rules where they are not unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those in which they have not been judicially applied, because we think that the rules are not convenient and reasonable as we ourselves could have devised."*

The question that arises is whether an appellate court could entertain an application to adduce fresh evidence on appeal in respect of a default judgment wherein no evidence was adduced at the trial court. Rule 76 of C.I. 16 does not impose any limitations as to the type of appeals in which the Court may admit fresh evidence. In the absence of any such statutory limitation, not even indirectly, the Court must not disable itself from entertaining and considering an application to adduce fresh evidence in an appeal against a default judgment. Besides, the court is entitled in a situation where there is no statutory provision, to apply common law principles diligently with the aim of attaining and prevent failure of justice. The same criteria would be applied in examining the application as in all other cases where fresh evidence is sought to be adduced on appeal. Thus the seeming objection by Counsel for the respondents against this application on account of the fact that no evidence was adduced at the trial is untenable. I will therefore examine the application in the light of the facts and especially the criteria for its admissibility.

Setting aside a default judgment is an exercise in discretion, see Order 10 rule 8 of the High Court Rules, 2004, C.I. 47. Several factors may be considered by the court in deciding to exercise its discretion or not. For our present purposes one factor that could sway a court in vacating a judgment given by default is whether the

applicant has a real prospect of successfully defending the claim, otherwise stated as reasonable defence to the claim. Thus an application to set aside a default judgment must be supported by an affidavit indicating the evidence or nature of the defence, whether factual or law or mixed fact and law. Hence where the factual evidence was not known or available to the applicant at the time he made the application to set aside, it affords him the opportunity to seek the leave of the appellate court to adduce it on appeal. The appellate court would be considering all available material in deciding whether the trial court was justified or not in the exercise of its discretionary power. The question then is whether the applicant could have relied on the evidence now sought to be adduced in the application to set aside or in their defence as raising a reasonable defence. If the answer is positive the appellate court would not shut it out if the applicant is able to clear the first hurdle of satisfying the court that he did not know about the existence of the evidence then or was not available to him in spite of diligent search or enquiry.

The applicant described the circumstances which led them to chance upon this piece of evidence which shows that as at the time they made the application to the High Court to set aside the default judgment they did not even know it existed. Something whose existence they did not know about could not have been available for there was no possibility to search for it. I take note that the respondents did challenge the applicant on this claim saying it was in the public domain. But apart from this bare assertion no evidence was produced and I am not satisfied that it is a document available to the public because of the confidentiality required between financial institutions and their clients. The authority of **Foli v. Agya-Atta**, supra, decided that the court would deny such an application if the evidence was available and known to the applicant. In this case even if the evidence was available as stated by Counsel for the respondents, it was not known to the applicant as they said and I have no reason to doubt that. And even if the applicant was aware of the evidence or could have become aware with due diligence, this is one of those cases where the court should depart from the rule in the interest of justice, on the authority of **Foli v. Agya-Atta,** supra, and also the inherent right to allow the application in the interest of justice under rule

76(1) of C.I. 16. Phipson on Evidence affirms this principle in these words in the 15th edition, at para. 12-02, page 286: 'Even if the relevant issue has been identified, the party knows of the existence of the evidence and it is physically possible to bring it before the court, it is still possible for an applicant to justify his failure to bring the evidence forward at the time of the first hearing. The question is one of reasonableness in all the circumstances.' The court is also prepared to relax this criterion in cases of fraud, deception or other inappropriate conduct, see **Latimer v. Cumbria CC (1994) P.I.Q.R. P395, CA.**

This case did not go to trial so it would be plainly unjust to shut any party out of any evidence that might help their case at this stage when the party is seeking to be heard on merits. Thus if the other criteria are satisfied the application should be allowed even if evidence was known to the applicant at the court below. I hold that the first step has been cleared by the applicant in that the evidence was not even known to them at the trial.

The next hurdle to surmount is whether the evidence sought to be adduced could have an impact on the defence case. As said in **Wood v. Gamlings (1993) P.I.Q.R. P76 CA** it suffices if it is probable that it would have had an important influence on the result. Act 673 places the responsibility for licensing all banks in the country on the applicant. Read together, Article 183 of the 1992 Constitution, Bank of Ghana Act, 2002, (Act 612) and Banking Act, 2004 (Act 673) make the applicant the lead institution in the country in the banking sector to ensure proper regulation of the banking industry. In other words banking supervision or regulation however described is their mandate. It follows that any organization that is performing non-banking functions is not the applicant's business. It is for this reason that the evidence that they seek to introduce is acceptable. If it is true that Onward was indeed not operating as a bank but as an investment firm it would afford some reasonable defence to some of the reliefs on the claim, especially reliefs a and d indorsed on the writ, wherein the plaintiffs accuse the applicant of allowing Onward to operate as a bank illegally. The said reliefs a and d read:

(a) A declaration that the deliberate and or intentional act of the 1st defendant, 2nd defendant & 3rd defendant permitting and or indulging the 4th defendant to operate commercially as a bank concern…….without the requisite Bank of Ghana banking licence was not only negligent and or unconscionable but unconstitutional, fraudulent and legally impermissible and as a result have caused substantial miscarriage of justice and civil injuries to the plaintiffs.

(d) The recovery of liquidated cash sum of……which the plaintiffs herein……..deposited with the 4th defendant as a bank concern on grounds of the 1st, 2nd and 3rd defendants' admission and contribution to the 4th defendant's commission of fraud against the plaintiffs herein.

The applicant was the 1st defendant and Onward was the 4th defendant in the High Court suit. Hence the applicant was alleged to have allowed Onward to operate illegally as a bank to defraud the plaintiffs. I am satisfied that if this evidence had been available to the trial court it could have had an important influence on its decision. It might also have a significant influence on the appeal before this court.

For the foregoing reasons I allow the application and give leave to the applicant to adduce fresh evidence on appeal. They are directed to do so by way of affidavit within ten days from today. Since the appeal is pending before this court the respondents will have the opportunity to answer it when they file their statement of case. The application is granted accordingly. There will be no order as to costs.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

COUNSEL

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