IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
A.D 2011

CORAM: MRS. WOOD C.J, (PRESIDING)
DOTSE, J.S.C
YEBOAH, J.S.C
GBADEGBE, J.S.C
MRS. AKOTO-BAMFO, J.S.C

CIVIL APPEAL
No: J4/51/2010
DATE: 20TH APRIL, 2011

THE TRUST BANK LIMITED	**PLAINTIFF/ APPELLANT /APPELLANT**
VRS	
1. G.K. APPIAH & SONS LIMITED **2. GODFRED APPIAH** **3. GEORGE K. APPIAH**	**DEFENDANTS/ RESPONDENTS/ RESPONDENTS**

J U D G M E N T

WOOD (MRS.) C.J

On the 10th July, 2008, the Court of Appeal unanimously affirmed, subject to a slight variation, the decision of the trial High Court dated the 26th January, 2007. The plaintiff/ appellant /appellant, has approached this court, yet

again questioning the decision of the appellate court, on two grounds, namely that:

"The judgment is against the weight of evidence.

The learned Justices of the Court of Appeal erred in law when they held that Plaintiff/Appellant is stopped per rem judicatam from initiating this suit."

It would be useful to briefly set out the facts leading to this appeal. The appellants have sued the defendants/respondents respondents and one Kofi Appiah, (as 3rd defendants), in the High Court, Commercial Division, to recover the sum of ¢544,870,775.63 (old cedis) being balance due and owing on account of banking facilities extended to 1st Defendant Company by plaintiff Bank on 19th August 2002 and interest on the sum at 43 % per annum.

What appears on the face of the accompanying statement of claim as a simple banking transaction was challenged on two principal grounds. As averred in the statement of defence, first on the grounds of fraud, with particulars being set out as was required under the rules of court. Second and described as a "monumental abuse of the processes of court", on the grounds of res judicata, in that, "in respect of the same transaction culminating in the instant suit the plaintiff has already issued a writ in the suit entitled."

The trial judge, after reviewing the evidence on both sides of the legal divide dismissed the appellant's suit in its entirety on the main ground of estoppel per rem judicatam.

On appeal, their Lordships substantially affirmed the decision of the trial court, only varying it slightly and the reasons in support thereof, in respect

of the said Kofi Appiah, the third defendant in the original action. The appellate court ruled that, on the facts, the plea of estoppel per rem judicata did not avail him. The court thus ordered that the action against him be disposed of on the merits.

This being the correct state of affairs, the appeal cannot possibly be directed at the entire decision of the court, dated the 10th of July, 2008, as appears in the notice of appeal, but only that part of the decision dismissing the suit as against the three appellants in these proceedings before us. In other words, our intervention should be limited to the orders against the three respondents only.

Both the trial and appellate courts rightly reckoned that on the face of the evidence led at the trial,(interestingly not on the face of the pleadings, but the evidence), a crucial issue for determination was whether or not the appellants are caught by the plea of res judicata. These were predicated on the basic fact that as alleged by the respondents, a court of competent jurisdiction had in an earlier suit numbered AB1/2003, in respect of the same parties and based on the same facts, determined all the relevant issues connected thereto, in favour of the appellants, and with final judgment culminating in their favour.

Should we in court reverse this decision on the grounds that it is erroneous as not being supported by the evidence? The appellant's counsel has urged us to arguing that the plea was not sustainable on the law and evidence presented to the trial court. They had argued that there was no subsisting decision in respect of the earlier case numbered AB1/2003 which could successfully support the res judicata plea. They contend that they had successfully sought and been granted leave to discontinue the action, with

liberty to institute a fresh action. They indeed thus questioned the legitimacy of the trial commercial High court, a court of co-ordinate jurisdiction, differently constituted, in ignoring this important legal fact, namely, the grant of leave to discontinue with liberty. They argue that if the respondent were dissatisfied with the grant of leave, the proper step was for them to have appealed the decision. They argued that having failed to do so, the matter was foreclosed, and it was not open to them to challenge the grant of leave at the hearing of this substantive action. They urged further that neither the High Court nor the Court of Appeal had jurisdiction to ignore the order and make nothing of it.

The parties in suit numbered AB1/ 2003, which was issued on 10/10//3, are the same as parties in this instant action. Also, the two actions are based on the same facts. The appellants successfully secured judgment against all the four defendants in suit numbered AB1/2003. Subsequently, on the 25/ 7/05, the 3rd defendant succeeded in setting aside the orders against him on the grounds of non service of the writ of summons on him. Thereafter, on 27th February 2006, the appellants sought and were granted leave by the High Court Accra, to discontinue the entire suit AB 1/2003 with liberty to institute a fresh action. It would be extremely useful to set out in chronological order the detailed history of suit number AB1 2003, and the crucial legal steps that have been initiated at the date of the application.

Summary judgment entered

10/10/03 - Suit No. AB /1/03 instituted

22/3/04 - Summary judgment entered for Plaintiff by Akwaah J

31/3/04 - Judgment after trial filed and served on 14/4/04

21/5/04 - Fi:fa sealed

25/10/04 - Motion on Notice for reserved price filed on 12/10/04, and Motion for Stay and Payment by Installments both with Return dates 25/10/2004 adjourned

1/11/04 - Suit adjourned to announce settlement.

17/1/05 - Motion for stay and payment by installment is moved by Victor Ankutsede esq. counsel for 1st, 2nd and 4th defendants and granted. Plaintiff's counsel was absent. The Court Notes state as follows:

"Motion on Notice for Stay of execution and payment by installment granted. Judgment debt remaining ¢300million should be paid as follows, ¢50million at the end of every month until whole debt is liquidated starting with end of January 2005. The Dodge truck seized in execution should be released to the defendant forthwith".

16/5/05 - Plaintiff's counsel informed by Court as follows "This Motion was taken and ruling made on 17/1/05. The suit would therefore be adjourned sine die".

25/7/05 - Judgment against 3rd defendant set aside by Torkornoo J. The Court Notes state "Application to set aside Judgment against 3rd defendant not opposed. Application to set aside judgment granted. No order as to costs".

27/2/06 - Leave granted to Plaintiff by Gyaesayor J. to discontinue Suit. The Court notes read as follows: "Application for discontinuance of suit granted with liberty to re-apply. Plaintiff counsel says defendant has no intention to ask for cost and he is opposed to the entire application."

It is thus plain that the court granted leave to discontinue with liberty to institute a fresh action in a case which had travelled well beyond the judgment stage and was at the execution stage. The appellate court did not attach blame to the court, although it is on record that the respondent counsel did intimate his opposition to the entire application. Was respondent's objection to the grant not enquired into and recorded? The important lesson which emerges is this. It would serve the interest of justice best if in applications of this kind, courts spent, a little time interrogating the critical issues in relation thereto, as for example, stage at which proceedings have reached and reasons for opposing an application. Be that as this may, what motivated appellant counsel to put in the application at that late hour? How appellant counsel thought this was permissible under the rules of court defies logic. Counsel's conduct would have been excusable had he been forthright with the court and made full disclosure of all the material facts pertaining to the legal steps he had taken and, the stage at which the case had reached and the reasons necessitating the application. Unfortunately, I find that the affidavit accompanying the motion made no disclosure of any of these crucial facts outlined above, which, as is clearly borne by the evidence, were matters clearly and peculiarly within counsel's knowledge. The affidavit was rather too terse and in no shape or form to assist the court to do substantial justice to the parties. I reproduce what he presented to the court.

" 1. I am deponent herein and Lawyer for Plaintiff/Applicant herein.

2. I have due authority of Plaintiff to swear this affidavit.
3. Unless otherwise stated, matters deposed to in this affidavit are matters which have come to my notice in the course of my duties as Lawyer for Plaintiff.

4. On October 10, 2003, Plaintiff instituted this action against Defendants at the Registry of this Court claiming the reliefs endorsed on the Writ of Summons.
5. Plaintiff wishes to discontinue with the action with liberty to re-apply.
6. In the circumstances I swear positively to the facts herein deposed to praying that this application be granted as prayed."

Having kept the essential facts away from the court, how did he expect the court to exercise its discretionary judicially?

We have times without number stressed the importance of transparency in all judicial proceedings, much more so in applications to invoke a court's discretionary jurisdiction. As a general principle, it is the imperative duty of counsel, as an officer of the court, to make full disclosure of all material facts bearing on the matter under consideration. That is the clearest evidence of candour and good faith, the critical element on which all such applications must be grounded. Withholding material facts which are peculiarly within the knowledge of a deponent, and turning round to justify void orders made by an unsuspecting court based on the limited information supplied it, on the ground that the opponent did not challenge the facts as presented or failed to supply any of the missing facts makes very poor argument. The well known maxim he who comes to equity, must come with clean hands makes any such argument hollow.

The rationale and the criteria for the grant or refusal of leave to discontinue with liberty under the rule, makes this duty even more imperative. The discernible principle from the age old, but instructive case of Fox v Star Newspapers & Co [1898] 1QB 636 at 639, which we quoted with approval in the case of Republic v High Court (Fast Track Division) Accra ; Ex parte

Electoral Commission [2005-2006] 514 at 535, and which sets out the rational clearly, aptly applies to applications brought under the Order 17 (rule) 2 . The explanation is that:

"…after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer be dominus litis, and it is for the Judge to say whether the action shall be discontinued or not upon what terms."

This takes us to the next important issue. Do the two lower courts and indeed this court have jurisdiction in the new substantive suit to interfere with the grant of leave? The firm conclusion of the two lower courts that on the law, the order obtained is a complete nullity and is entitled to be ignored, it not being justified in law or procedure is, in my opinion absolutely correct.

I find appellant counsel's argument that, the order granting leave, even if a nullity, subsisted, since it has not been set aside on appeal, disingenuous. The Commercial High Court, in particular it was contended, being a court of co-ordinate jurisdiction lacked jurisdiction to interfere with the order.

The two lower courts proceeded on the premises that given the facts, the order of discontinuance with liberty to re-institute a fresh action was not warranted by the law or the rules of procedure and thus a complete nullity and could therefore be ignored.

Certainly, the rules of court do not permit the discontinuance of an action to after judgment has been entered. Order 17 rule 2 (1) of the High Court Procedure Rules CI 47 sets out the parameters of the exercise of this

discretionary relief, which can be open to abuse and injustice if not properly scrutinized and strictly exercised in accordance with the rules of court. It states:

"Except as provided in this rule, the Plaintiff shall not be entitled to withdraw the record or discontinue the action without the leave of the Court, but **the Court may before, during or after the hearing or trial** upon such terms as to costs, and as to any other action as may be just, order the action to be discontinued or any part of the alleged cause of action to be struck out."

Plainly, the stages at which an action may be discontinued are before, during or after the hearing or trial. After judgment or execution is not included in the stages at which the relief may be applied for. Rules of court which regulate the conduct of legal proceedings must be construed strictly to give full effect to the rules. The language of order 17 rule (2) cannot be strained to include after judgment or execution. The undisputed facts support the appellate court's view that having regard to the summary judgment, the rights of the parties have been firmly and finally determined and no action exists for discontinuance.

The decision of this court in Mosi v Bagyina cited with approval in Acheampong v The Republic [1996-97] SCGLR 569 answers the point raised. The honourable court observed that in respect of proceedings that are a nullity and that are entitled to be set aside ex debito justitiae:

"…it does not mean that a court is bound by the proceedings of another court that are a nullity unless it can by itself set aside those proceedings. The crux of the principle of Mosi v Bagyina (supra) is that such proceedings are automatically void and can be treated as such, without more ado. This

meansw that such proceedings stand nullified ex vigore legis, i.e. by operation of law and be ignored simpliciter… The clarity of the principle is conveyed by a statement of Lord Denning in MacFoy v United Africa Co. Ltd (1961) All ER 1169 at 1172, PC that:

"If an act is void, then it is in law a nullity. It is not only bad , but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is bad and incurably bad."

In Kumnipah 11 v Ayerebi Supreme Court, 22 June, digested in [1987-88] GLRD, 28, Amuah –Sekyi JA, concluded, quite understandably, in my view that there is no fixed procedure for dealing with such orders. The power to ignore null judgments and give no effect to them is not limited to the judge which gave the order.

Should a court of law and legality, close its eye to such a blatant inequity committed, in my view by appellants who kept the bald facts away from the seat of justice? The plea of res judicata was, commendably, properly decided by both courts. The judgment obtained in the case numbered AB/1 2003 subsists, as being conclusive of the rights of the parties in this appeal and their privies and a complete bar to the issuance of a subsequent action involving the same claim, demand or cause of action."(see Nyame v Kese alias Konto [1998-99SCLGR 476 at 478].

In the result this appeal fails. I affirm the decision of the court of appeal.

[SGD] G. T. WOOD (MRS)
CHIEF JUSTICE

[SGD] J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

[SGD] ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

[SGD] N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

[SGD] V. AKOTO-BAMFO (MRS)
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KWASI AFRIFA WITH HIM KWABENA POKU MENSAH FOR THE DEFENDANTS/ RESPONDENTS/RESPONDENTS.