IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
A.D 2014

CORAM: G. T. WOOD CJ (MRS) (PRESIDING)
J. ANSAH JSC
J. V. M. DOTSE JSC
P. BAFFOE BONNIE JSC
J. B. AKAMBA JSC

CIVIL APPEAL

NO.J4/27/2013

29TH OCTOBER 2014

THERESA OFORI - PLAINTIFF/RESPONDENT/APPELLANT

VRS

STAR ASSURANCE COMPANY LIMITED - DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

DOTSE JSC:

This is an appeal lodged by the Plaintiff/Respondent/Appellant, hereinafter referred to as the Plaintiff, against the Court of Appeal decision dated 28th June 2012 which was in favour of the Defendant/Appellant/Respondent hereinafter referred to as the Defendant, which judgment set aside the earlier Kumasi High Court decision of 26th June 2007 presided over by Frank Amoah J.

FACTS:

The Plaintiff who was involved in a motor traffic accident, instituted Suit No. E8/9/05 against one Aaron Owusu Mensah as defendant before the High Court, Kumasi on 12th August 2004.

It is to be noted that, as the said Aaron Owusu Mensah could not be personally served with the writ of summons, the Plaintiff therein in the suit referred to supra, applied for substituted service to have the said defendant served by registered post to P. O. Box 252, Kumasi.

Paragraph 9 of the reply of the Plaintiff in the instant suit captures the said proceedings as follows:

> *"On 30/8/04 when the defendant Aaron Owusu Mensah had not still been served with a copy of the Writ of summons and the Statement of claim we applied to this Honourable court to serve Aaron Owusu Mensah with the Writ of Summons and the Statement of Caim together with all future papers in connections with the suit by substituted service by posting them to P. O. Box 252, Kumasi and same was granted on 8th September 2004."*

Accordingly, all the future processes that had to be served on the defendant were served by substitution through the postal address given supra.

On the 26th day of June, 2007 the High Court, Kumasi delivered judgment in the case in favour of the Plaintiff in suit No. E8/9/05 in the adjudged sum of ¢739,000,000.00 now GH¢73,900.00

Armed with the said judgment, the plaintiff herein on the 28th day of December 2007, instituted the instant suit against the insured of the Defendant in suit No.

C8/9/05, who are the defendants herein. The plaintiff claimed before the High Court in suit No. C8/57/08 the following reliefs:-

Writ of summons

The Plaintiff's claim against the Defendants is for an order that the judgment debt and costs obtained in suit No. C8/9/05 on 26/6/07 in this Honourable Court by the Plaintiff against Aaron Owusu Mensah an insured of the Defendant be enforced against the Defendant herein.

b. The Plaintiff also claims interest on the said judgment debt and costs i.e. A total sum of Seven hundred and thirty nine million (¢739,000,000.00) inclusive of the fifty million cedis cost (¢50,000,000.00) at the current Bank Rate from 26/06/07 to date of final payment.

The defendants entered appearance to the writ of summons and filed a defence. The defendants herein raised the following issues in their defence:

1. Denied the existence of a valid policy of insurance between them and the said Aaron Owusu Mensah.

2. Contended that the judgment Plaintiff procured in suit No. C8/9/05 went beyond general and special damages for the injuries sustained. This is because claims for goods lost in transit were included.

3. Contended that the plaintiff breached the provisions of section 10 (2) of the Motor Vehicle Third Party Insurance Act No. 42 of 1958 by failing to bring to the notice of the insured the proceedings commenced in the earlier suit (who are the defendants herein) within 14 days after the commencement of the action. In view of this breach, the defendants contended that the judgment procured by the plaintiff is not payable.

4. **By far the most lethal and incisive contention by the defendants in their statement of defence is to the effect that the said Aaron Owusu Mensah had been shot dead during a chieftaincy dispute on 27th April 2003 to the knowledge of the plaintiff and before she instituted the action in E8/9/05 on 12/8/2004. In other words, the defendant in E8/9/05 was dead before he was sued.**

In view of the above phenomenon, the defendants contended that the suit and judgment obtained against a deceased person are a nullity and same is void ab initio.

During the trial, several documents and court proceedings in the Suit No. E8/9/05 were tendered alongside the Bill of Indictment and the record of proceedings in the criminal case in which Aaron Owusu Mensah was allegedly shot and killed. This suit is intitutled ***The Republic v Nana Yaw Nimo Kwaku Kraka and Yaw Gyamfi.***

Indeed, it was during the above criminal trial at the High Court, that it was disclosed that Aaron Owusu Mensah is also known as **Kwaku Opoku Appiah** who was allegedly murdered by the 1st accused supra, Nana Yaw Nimo Kwaku Kraka.

After considering all the material evidence including all the documentary ones as well, the learned trial Judge on the 9th day of April 2009 in the instant suit delivered judgment in favour of the plaintiff in the following terms:

> "***And in this case I venture to say that since the defendants promise to indemnify the deceased in any event when he was to be called upon to pay compensation subsisted because the consideration paid by the deceased as premium had not expired at the time of the accident. Defendants are legally bound to discharge their contract of indemnifying the deceased their insured by paying the plaintiff's claim. Defendants motion therefore fails and I dismiss it. Since the defendants are not challenging sanity of the judgment itself.***
>
> ***I order that the defendants should discharge the judgment debt obtained against the deceased by the plaintiff***."

APPEAL TO COURT OF APPEAL

Dissatisfied and aggrieved with the decision of the High Court, Kumasi, the defendant appealed to the Court of Appeal, sitting in Kumasi.

On the 28th June, 2012 the Court of Appeal, Kumasi in a unanimous decision allowed the appeal and set aside the decision of the High Court, Kumasi in the following terms:-

> ***"However it is obvious that the trial Judge lost the effect of an action brought against a deceased person and thus gave his judgment ordering the defendants to discharge the judgment debt against the deceased by the plaintiff. But since it was clear that the action was commenced against a dead person and with our earlier decision that it is therefore a nullity the appeal is under the circumstances allowed and the judgment of the High Court, Kumasi dated 9th April, 2009 is hereby set aside." Emphasis supplied.***

APPEAL TO SUPREME COURT

It is against this Court of Appeal decision that the plaintiff has appealed to this court with the following as the grounds of appeal.

i. "The judgment was against the weight of evidence.

ii. The Court of Appeal erred in law when it declared the whole proceedings null and void.

iii. The Honourable Court erred in law in accepting uncorroborated assertion of Defendant to assign another name Aaron Owusu Mensah for the deceased Kwaku Opoku Appiah.

iv. The Honourable Court misdirected itself by concluding that if the customary successor's name was used on the Policy issued on 24th October, 2002 then it predates the death of Kwaku Opoku Appiah.

v. The Honourable Court erred in failing to observe that until the hearing of the criminal case against the suspect for the murder of Kwaku Opoku Appiah the purported other name for the deceased was not mentioned

at all even to the Prosecution who indicated in their bill of indictment that the said Kwabena Owusu-Mensah was their witness to be heard

vi. Additional grounds will be filed on receipt of the Record of appeal."

In this case, since no additional grounds have been filed, only the above stated grounds will be considered in this judgment.

We have read the statement of case of the plaintiff and that of the defendants. Even though the arguments of learned counsel appear to be in respect of the grounds of appeal, in substance, all the grounds relate to one issue and the value at the end of the day is the same.

Accordingly, we will formulate only one issue for determination and this will encompass all the above grounds of appeal.

ISSUE FOR DETERMINATION

Whether or not the Court of Appeal erred in law when it declared the whole proceedings in suit No.C8/57/08 as a nullity having found as a fact that the action was commenced in the original suit No. C8/9/05 against Aaron Owusu Mensah a.k.a Kwaku Opoku Appiah – deceased who according to the evidence on record died before the suit was commenced in C8/9/05.

In view of the legal consequences that flow from depositions made by the plaintiff in an affidavit sworn to by her on 26th June 2006 and in support of claims by her of what she was told by the mother of Kwaku Opoku Appiah, we have decided to set it out in full for its full effect.

AFFIDAVIT IN SUPPORT

"I Theresa Ofori of House No. SSI, Obuasi hereby make oath and say as follows:-

1. That I am the Plaintiff/Deponent herein

2. That I am the victim of the accident involving the Articulator truck vehicle No. AS. 5259 T insured by the Defendant Company.

3. That while on admission at Komfo Anokye Hospital some one paid me a visit at the hospital who told me that he was the owner of the accident vehicle and promised to pay my hospital expenses.

4. That the visitor gave his name as Mr. Kwaku Opoku Appiah and his address to his residence.

5. That Mr. Kwaku Opoku Appiah indicated that he is resident abroad and was going to take delivery of some items he consigned from abroad to the country after which he would call back to pay all my hospital bills.

6. That when I was first discharged from hospital on 23rd August 2003, the said Mr. Opoku Appiah did not show up to pay the hospital bills as he promised.

7. That after my admission for the 2nd operation and discharged, **I decided to use the address left with me by the said Mr. Kwaku Opoku Appiah and got to his house to be told he was dead.**

8. That I informed my Lawyer of this position who advised me to go back to the family to look for the one who had been appointed his customary successor.

9. That to this end the mother of the deceased told me Mr. Opoku Appiah's brother whose name was used to insure the accident vehicle is the customary successor; and that I could use the said name for my claims.

10. That when I communicated this family information to my Lawyer, he observed that this name is the same provided by the Police Report as the owner of the vehicle and issued the writ on my behalf against the said Aaron Owusu Mensah.

11. That Aaron Owusu Mensah whose name is on the Insurance document as **I was told by the mother of the deceased is the customary successor of the deceased Kwaku Opoku Appiah and he is alive, and not dead.**

12. That Mr. Kwaku Opoku Appiah never told me he had other names apart from Opoku Appiah

Therefore I swear to this affidavit to confirm that I was told by the mother of the deceased that Aaron Owusu Mensah is the customary successor of Kwaku Opoku Appiah who bought the vehicle and insured it in the name of his brother Aaron Owusu Mensah"

It is interesting to observe that the plaintiff as a matter of fact all along knew that it was really Kwaku Opoku Appiah who owned the vehicle which was involved in the accident and that it was this person who visited her in hospital.

Notice must also be taken of the fact that during all the previous processes, to wit the Statement of Claim and Reply in Suit No. E8/9/05 the plaintiff never made mention of the facts which she deposed to in the affidavit just referred to.

The crux of the matter therefore is that, having stated that Kwaku Opoku Appiah the owner of the vehicle is dead, and there is evidence on record that this same person is also known as Aaron Owusu Mensah what legal consequences flow there from?

Learned counsel for the Plaintiff has made really strenuous efforts to convince this court that the depositions made by the plaintiff referred to supra in her affidavit represent a correct statement of the facts. This being the case, learned counsel contended that the said Aaron Owusu Mensah insured the vehicle in his own name even before the date of the accident.

What must be noted is that, the conduct of the plaintiff and her legal representative all lend credence to the fact that the said Aaron Owusu Mensah is really dead.

Indeed if, as was said by the plaintiff that someone visited her in hospital by the name Kwaku Opoku Appiah and claimed to be the owner of the vehicle but had been reported to have died then that is consistent with later events on record.

Secondly, the plaintiff herself throughout the proceedings proceeded by substituted service through registered post, even though according to her depositions, she knew the residential address of the owner of the vehicle.

For example, as early as the service of the writ of summons, the plaintiff sought by an order of the court and purported to serve the defendant by substituted service by registered post, not even by posting on the residential house where she was directed to and where she eventually went to in case for verification of the death of the said owner of the vehicle.

To us, it meant that the plaintiff and her legal advisers knew something which they were hiding and were hence in an indecent haste to procure judgment.

We have taken into consideration the cases referred to by the learned counsel and we are of the view that, if it is established that the suit was commenced against a deceased person, then it meant that the proceedings and the subsequent judgment had been procured against a deceased person. Speaking

legally, such a phenomenon amounts to a nullity and has no legal effect whatsoever. Under the circumstances, the judgment procured by the plaintiff is unenforceable not only against the deceased defendant but also against the instant defendants, (Star Assurance). See cases **of Edusei v Diners Club Suis S. A. [1982-83] GLR 809** and **MACFOY v UAC [1963] AC 152 at 160 or [1961] 1 WLR 1045,** which was cited with approval **in Mosi v Bagyina [1963] 1 GLR 337, SC** where it was held thus:

> ***"If an act is void, then it is in law a nullity it is not only bad, but incurably bad, and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse.***

In similar vein, you cannot institute a writ against a deceased person and purport to serve that deceased person and expect such a proceedings to stand with its outcome. Once the basic foundation of the case is non-existent, i.e. the defendant had died to the knowledge of the plaintiff and his legal adviser, no proceedings can be founded on such a situation and expect it to stay there.

This court will formulate a rule of thumb to the effect that, whenever a process is commenced against a deceased person, any proceedings had in the case with its attendant judgment are a nullity and cannot stand because you cannot put something on nothing and expect it to stand

This is because, the original suit against Aaron Owusu Mensah must itself be valid and enforceable before any liabilities can flow to the defendants herein under section 10 (2) of Motor Vehicles Third Party Insurance Act, No. 42 of 1958

The authorities are quite certain that proceedings and judgment against a deceased person are a nullity and renders everything void.

In the instant case, once there was evidence in the prosecution of the criminal case that the same person Aaron Owusu Mensah was also known as Kwaku Opoku Appiah, and that the said person had died, then it meant that the suit was commenced and instituted against a non existent person.

As we have stated earlier, the plaintiff herself had some inkling about the death of the owner of the vehicle. Once this piece of evidence was passed on to the lawyer, he should have exercised proper professional judgment in ensuring that the necessary steps were taken to sue the proper person.

For example, if as was deposed to by the plaintiff in her affidavit referred to supra the ownership of the vehicle had changed to the customary successor, then the title of the writ should have reflected that.

In the instant case, the lawyer, especially that of the plaintiff did not act professionally in our estimation. The presentation of the written statement of case for instance had been so incoherent that it was very difficult to follow the narrative.

CONCLUSION

Taking all the above into consideration, this court is of the view that since a deceased person cannot be sued and a valid proceedings held against him, it follows that the proceedings and judgment in suit no. E8/9/05 intitutled ***Theresa Ofori v Aaron Owusu Mensah*** and by necessary implication its follow up case Suit No. C8/57/08 are accordingly set aside as null, void and of no effect.

The appeal herein therefore stands dismissed and the Court of Appeal judgment of 28th day of June, 2012 is hereby affirmed.

(SGD) ***J. V. M. DOTSE***

JUSTICE OF THE SUPREME COURT

(SGD) **G. T. WOOD (MRS.)**

CHIEF JUSTICE

(SGD) **J. ANSAH**

JUSTICE OF THE SUPREME COURT

(SGD) **P. BAFFOE BONNIE**

JUSTICE OF THE SUPREME COURT

(SGD) **J. B. AKAMBA**

JUSTICE OF THE SUPREME COURT

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