IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2014

CORAM: J. V. M. DOTSE JSC (PRESIDING)
ANIN YEBOAH JSC
P. BAFFOE-BONNIE JSC
N. S. GBADEGBE JSC
A. A. BENIN JSC

CIVIL APPEAL
No J4/33/2013

28TH MAY, 2014

WILLIAM ASHITEY ARMAH - - - PLAINTIFF/RESPONDENT/APPELLANT

VRS.

HYDRAFOAM ESTATES (GH) LTD - - - DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

BENIN JSC,:-

In or about the year 1997, the plaintiff/respondent/appellant, hereinafter called the appellant, sold a tract of land situate at a place called Okpoi Gonno in Accra, measuring 16.08 acres to the defendant/appellant/respondent, hereinafter called the respondent. The appellant claimed the land consisted of sixty-four plots but according to the respondent it comprised just twenty-two plots. The parties agree

that the respondent paid for twenty-two plots of land at an agreed fee of two million old cedis per plot. Thus according to the appellant forty-two plots still remained unpaid for, whereas the respondent's contention was that since the land sold comprised twenty-two plots excluding the open spaces and a school site set aside by the city planning authorities they had fully paid for the land. This was the state of the pleadings. The appellant issued the writ of summons on 12th April 2007 seeking the following reliefs against the respondent:

1. An order for the recovery of possession of the remaining forty-two unpaid for plots of land forming part of the lease registered as AR 3590B/97 and with No. 1636/1998 and stamped as LVB 5716B/98.
2. In the alternative an order that the defendant pay for the remaining forty-two plots of land at the agreed price of the cedi equivalent of ten thousand dollars per plot at the exchange rate prevailing at date of payment.
3. Perpetual injunction restraining the defendant, his agents, assigns, privies, successors in title from interfering with, building on or having anything, whatsoever to do with the remaining unpaid for forty-two plots of land ……..

At the close of pleadings the appellant took out summons for directions in which he proposed ten issues. The respondent did not file additional issues. The record shows that both counsel agreed to take only one issue in resolution of the entire dispute and the court concurred in that agreement. The only issue set down for trial was what value to place on the land, which from the record was the value of the remaining 42 plots. The trial court judge appointed a professional valuation firm to carry out the exercise with an option to the parties to appoint their own valuation expert. Subsequently the court appointed a surveyor to undertake a survey of the land indicating any portion that remained vacant.

The court appointed experts carried out their assignments and submitted their reports. These experts testified as court witnesses and were cross examined by both sides. The appellant led no evidence of his own nor did he call any evidence, and instead opted to rely on the evidence given by the two experts appointed by

the court. The respondent did not testify but called three different experts who testified in the action in respect of the valuation of the land. At the end of the day the trial High Court entered judgment for the appellant to recover the sum of GH¢550,000 plus costs of GH¢10,000 against the respondent.

The respondent appealed to the Court of Appeal which allowed the appeal on 16th December 2010 and ordered a trial de novo before another High Court judge mainly for the reason that the summons for directions was not conducted in accordance with law and practice considering Order 1(2) of the High Court (Civil Procedure) Rules 2004, C.I. 47 leading to misdirection in law and consequently to a wrong decision. The Court of Appeal took this position because in its view there were other issues that the trial court ought to have considered and so it should not have accepted the agreement by counsel to try only one issue. The trial court was also faulted for not following the law as regards the burden of producing evidence under the provisions of section 11(4) of the Evidence Decree, 1975 (N.R.C.D. 323). The Court of Appeal was of the view that the appellant was bound to give evidence either by himself and/or by independent witness/es and could not rely on the court appointed expert evidence in proof of his case.

Being dissatisfied with the decision of the Court of Appeal the appellant has appealed to this court on the following grounds:

i. The Court of Appeal erred in failing to appreciate the import of Order 32, and its purpose when it held that the trial Judge was wrong in accepting one issue, out of the issues set by the appellant, and agreed upon by Counsel for both parties for trial and when it was clear throughout the whole proceedings and both parties agreed and indeed tried the only issue agreed for trial at the application for direction stage. By such failure occasioned a miscarriage of justice.
ii. The Court of Appeal erred in its appreciation of the proceedings at the trial and adopted a rigid technical view in presentation of parties during trial when it held that, calling of expert witnesses by the court who testified and were cross examined before the defendant called its

witnesses and when the plaintiff chose not to testify but rely on the evidence of the court expert was a wrong procedure adopted by the trial High Court Judge and a departure from the acceptable rules of engagement in a trial in a common law setting and by that occasioned a miscarriage of justice.

iii. The Court of Appeal even though it appreciated the importance of Order 1 rule (2) failed to apply it in the circumstances of the case to achieve its objective when it held that the trial Judge misapplied it side stepping well established procedures in the court.

iv. The Court of Appeal erred in law when it failed to appreciate that even if the trial High Court Judge failed to follow any of the rules of court on summons for directions that will have amounted to a mere irregularity (not a nullity) hence not warranting the whole trial to be set aside and fresh trial ordered.

v. The Court of Appeal erred in law when it held that the resolution of the sole issue set down for trial as agreed and admitted by the parties did not determine the real issue in dispute and an (sic) other issues set down by the parties which other issues by the parties' own agreement are deemed waived or admitted and hence there was no need to lead evidence on them.

vi. The judgment was against the weight of evidence.

At the summons for directions the trial judge is required to identify the core issue/s for trial. He does this with the aid of the lawyers but he/she takes sole responsibility for whatever decision he/she takes. The judge is required to examine the pleadings carefully and to determine what issue/s will completely determine the case before him/her. In the course of doing this it is legitimate to set down one issue only for trial if that issue is identified as the real issue or often called the ultimate issue. And if in the course of determining the ultimate issue or where there are two or more issues initially set down for hearing, other ancillary or collateral matters arise, the party is entitled to apply and the trial judge is empowered to amend the issue/s by adding to it/them and in general to vary the original order/s at any time before judgment. That flexibility is permitted by virtue

of Order 32 rule 9(2) of C. I. 47 in view of the fact that summons for directions is largely a case management tool and as such it should hardly, if ever, be used to upset a court's decision on the merits, unless it has resulted in a miscarriage of justice. Thus even after the decision by the trial judge in respect of the summons for directions, the parties are at liberty to apply for further directions, as long as such decision or order is not a final judgment. This is just to indicate that an appellate court should be rather slow to set aside a decision given by a trial court where the key complaint is in respect of its conduct of the summons for directions, short of a miscarriage of justice.

Issue for trial

At the close of pleadings in this case the respondent had admitted paying for twenty-two plots out of the 16.08 acres even though it claimed that was the full payment. It is common knowledge that an acre of land comprises about four plots with dimensions of 100 x 100 feet, more or less. The respondent's pleadings acknowledged the fact that apart from the twenty-two plots, the 16.08 acres consisted of open spaces as well as a school site. The respondent admitted it did not pay for what it described as open spaces and school site. Thus from the pleadings what remained of the 16.08 acres unpaid for was far bigger than what was paid for. Having admitted that the total land sold was 16.08 acres plus, and having admitted that they paid for twenty-two plots out of a possible sixty-four plots, and having admitted that even outside the open spaces there was still a school site unpaid for it was clear the only issue was what amount to be paid for the rest of the land if indeed the remaining land had been built upon by the respondent as averred by the appellant. The respondent could no longer claim the land consisted of only twenty-two residential plots. Counsel must have realized this fact hence the agreement to take the value of the land as the only triable issue. The trial court was justified in accepting it, as the most cost effective means to end the dispute in line with Order 32 rule 1 (1)(b) of the C.I. 47. It was the ultimate issue. Ultimate issue is defined in Black's Law Dictionary, 9th edition, page 908, as **'a not-yet decided point that is sufficient either in itself or in connection with other points to resolve the entire case.'**
As to whether or not the respondent had developed the entire land was an ancillary issue to the resolution of the ultimate issue, hence the appointment of a surveyor by the trial judge. The trial court was thus justified in appointing a

surveyor to inquire whether any vacant land existed, a fact which the respondent should have disclosed on the pleadings whether they had made use of the rest of the land besides the twenty-two plots. As it turned out the respondent had developed the entire land into over sixty residential houses yet it failed to disclose this material fact in the pleadings. That conduct is seriously deprecated; it has been stressed time and again that parties owe an obligation to be frank and candid with the court. And in this case it is baffling the fact that even after the surveyor had inspected the land, Counsel for the respondent still insisted that he should go back there and tell the court if any vacant land existed, a fact which was within the peculiar knowledge of his client at the time. The court obliged and sent the surveyor back to the land only for him to come back to court the next adjourned date to inform the court that the respondent had fully built up the place. Such conduct at trials puts the court in a bad frame, for not only is the trial unnecessarily delayed but also parties are put to avoidable expenses. The respondent clearly sought to hide the development on the land because it suited their plea that the land consisted of only twenty-two plots and that they had fully paid for the land excluding the open spaces and the school site when they knew full well that they had fully developed the land into more than twenty-two plots.

We take note of the fact that in view of rule 7 of Order 32 of C. I. 47 the trial court could have gone further to record the fact the parties had shifted their positions having regard to the issue they had agreed to be tried in the sense that the plaintiff was no longer asking for a restoration of the unpaid for land, that is the alternative relief asked for; and on the other hand the respondent had abandoned the claim that it had paid for the entire land. But in this case there was no injustice caused to either party as both sides agreed to the entire process and fully co-operated with the trial judge. The respondent even went further to call three experts to establish the value of the land. The respondent also made some payment to the appellant in the course of the hearing awaiting the final outcome of the case. Even though the payment was made without prejudice yet it goes to confirm the sort of understanding the parties had reached throughout the case that the only outstanding issue was what amount the respondent was to pay for the remaining land to the appellant. The payment which was voluntarily made by the respondent, without an order of court, nor was there any demand by the appellant, nor was it paid in connection with any ongoing amicable settlement, was clearly inconsistent with the conduct of a person who believed he owed no money to the other person. The notification of this payment was made after the only issue was agreed upon and evidence was almost at an end, only the evidence

of respondent's last witness remained to be taken. Respondent Counsel's letter dated 7th May 2008, at page 106 of the record, stated that the payment was on account of the purchase price for the land conveyed by the appellant to the respondent. As pointed out a short while ago this was inconsistent with the position of a person who claimed to have made full payment for the land. Counsel knew what he was talking about in the letter if one takes into account his position during the hearing. When the court appointed surveyor Mr Torto testified, counsel for the respondent requested that he should be given further instructions by the court. The trial Judge at page 35 of the record asked Counsel for the respondent:
"What exactly do you want the surveyor to do?" and Counsel's answer was this: ***"My Lord he should tell us exactly how many plots remain beyond that which was* paid for by my client."** And with that the Surveyor had to go back to the field before resuming his testimony. The relevance of this discourse was to confirm that the parties had all accepted that the only issue was payment for the remainder of the land outside the twenty-two plots.
Thus whether it was the understanding reached at the summons for directions or instructions to the valuer and surveyor, or the payment on account during the hearing or the evidence for the respondent, or the conduct of the parties throughout the hearing, everything was geared towards finding the actual value of the plots outside the twenty-two that both parties agreed were paid for in order to end the dispute. There was nothing illegal about the procedure, and even if there was a breach of procedure both parties had compromised the rules and taken steps that are irreversible. Both parties understood and appreciated the import of the issue agreed for trial and as pointed out they actively participated in the proceedings. Thus it operates as a consent agreement which cannot be the basis of an appeal as it is a subsisting order from which there has been no withdrawal by either party. It would thus be plainly unfair and indeed unjust for either party to complain now about non compliance with the rules. There was no violation of the rules on summons for directions, we so hold.

Failure by plaintiff to give or call evidence

The other key point raised in this appeal has to do with the decision by the Court below that the appellant did not prove his case by not giving evidence by himself or by any witness. The court below cited and relied on the provisions of section

11(4) of the Evidence Decree. Section 11(1) and (4) should be read together in order to appreciate what the lawmaker means. They read thus:

(1) For the purpose of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

The appellant's view was that the Court of Appeal was wrong. Counsel for the appellant cited the authority of IN RE ASHALLEY BOTWE LANDS; ADJETEY GBOSU and Others v. KOTEY and Others (2003-2004) SCGLR 420, which decided, inter alia, that a party need not testify by himself in order to succeed at the trial. However, counsel for the respondent argued that the authority cited was not applicable to this case.

In this case the issue agreed upon was the value of the land. The trial judge considered it required expert evidence to assist him to determine it. The parties appear to have agreed with that position taken by the trial judge, for apart from the fact that they did not challenge it neither of them gave evidence by themselves. They all deferred to expert evidence. The plaintiff relied upon the evidence of the experts nominated and appointed by the court with the parties' consent. The respondent went further to call three other experts in land valuation.

A party need not call evidence by himself if the issue to be resolved is of such a nature that expert evidence was the best evidence that is required to assist the tribunal of fact to prove it or if expert evidence is dispositive of the issue. Phipson on Evidence 15th edition paragraph 37-12 at page 924 puts it this way***: '…..in cases where it is unavoidable, expert evidence may be given on the question which is the ultimate or real issue in the case. In certain extreme situations it is possible for expert evidence to be dispositive of the case, as where there is evidence***

which only an expert could provide and which is unchallenged by any other expert evidence.'

This principle is applicable to both civil and criminal proceedings. In England, as in Ghana, it is expressly provided by statute that in civil cases an expert may testify on an ultimate issue, see section 3(1) of the English Civil Evidence Act of 1972 and sections 112 and 115 of Ghana's Evidence Decree. Sections 112 and 115 of N.R.C.D. 323 provide thus:

112. If the subject of the testimony is sufficiently beyond common experience that the opinion or inference of an expert will assist the court or tribunal of fact in understanding evidence in the action or ***in determining any issue****, a witness may give testimony in the form of an opinion or inference concerning any subject on which the witness is qualified to give expert testimony.* Emphasis supplied.

115. Testimony in the form of an opinion or inference admissible under section…….112 shall not be inadmissible because the opinion or inference concerns an ultimate issue to be decided by the tribunal of fact.

Valuation of land, especially one which is developed, is the work of experts, and the trial court could not be faulted in that regard when he called for expert evidence with the support of both parties. And the value of the land being the ultimate issue the parties were absolutely entitled to rely upon expert evidence only as expert evidence was dispositive in the circumstances of this case. Thus there was no violation of section 11(1) and (4) of N.R.C.D. 323 on the burden of producing evidence.

The authority of KARLETSE-PANIN v. NURO (1979) G.L.R. 194 C.A. is also inapplicable since there was no burden on the plaintiff to prove title to the land as was the case in the Karletse-Panin case, supra, where the court rightly held the plaintiff was bound to succeed on the strength of his own case. In the instant case the value of the land was the issue which did not warrant the plaintiff to give evidence by himself, he not being an expert in land valuation.

Let us turn next to this court's decision in the ASHALLEY BOTWE case, supra. The relevant part of the decision under consideration is at page 448 where Wood JSC

(as she then was) said this: **"Admittedly, in most civil actions, the parties themselves do testify as key witnesses. Without dispute, that is a most worthy and prudent step to take, where the disputed facts happen to be within their personal knowledge. Indeed, where the nature of the dispute calls for a party's personal testimony he cannot avoid the witness box. But I know of no rule of law which states that a party would succeed in his case only if he testified at the trial. The standard test in any given case is not whether the party himself gave evidence at the trial, but whether he was able, through whomever, to provide the needed evidence. So that even if a party did not make himself available at the trial as a witness, provided sufficient evidence was led on his behalf in proof of his case, he ought not to lose the action on the basis that he himself never testified at the trial."**

This decision was not considered by the Court of Appeal at all when it decided that the plaintiff should lose for failing to give any evidence. The provisions in section 11(4) of N.R.C.D. 323 cited by the Court of Appeal and Order 36 rule 4 of the High Court (Civil Procedure} Rules which Counsel for the respondent relied upon do not enjoin a party to testify at all costs; it all depends on the issue to be tried that will determine which party assumes the burden of producing evidence and the nature of evidence to be adduced in proof of the issue. Thus the basic requirement is for the person with peculiar knowledge of the facts to testify in the action. Where the plaintiff and for that matter any party is not personally knowledgeable about the subject-matter, he is not bound to testify. At the end of the day what the tribunal of fact will look for is whether there is satisfactory and reliable evidence produced in proof of the issue on a preponderance of probabilities. The court's concern is not who has produced the evidence but whether the witness is credible and knowledgeable of the facts about which he testified. Thus contrary to what Counsel for the respondent said, the Ashalley Botwe decision, supra, is relevant to this case, in view of the fact that the issue agreed upon for trial did not require that the appellant should testify. He was entitled to rely upon the expert evidence only.

A retrial in this case will achieve no purpose because the key issues which Counsel for the respondent herein in his address at page 2 referred to as being salient and

central to the determination of the dispute have been resolved. Issues i and ii have been established clearly that the land sold was 16.08 acres and not twenty-two plots. It was established that the respondent did not pay for all 16.08 acres. That goes for issue iii. On issue iv the evidence established clearly that the respondent had developed the entire land into residential properties. It was only issue v that the parties decided to use present values thereby effectively determining any purported agreement on the price. These were the five issues counsel for the respondent has stated were central to this case. And with all of them resolved a retrial is clearly otiose; it's a sheer waste of time and resources.

The court below should have considered that whatever limitations the procedure had, they did not result in a miscarriage of justice as the parties were given every opportunity to do the case without any coercion by the trial judge. The appellant was satisfied with the valuation done by the expert. The respondent tried to water down the figures as testified to by the court expert in order to pay less for the plots. The respondent even made some payment directly to the appellant on account. The parties were satisfied with the entire process until the High Court in its judgment decided against the respondent. Wherein lay the injustice or miscarriage of justice? None do we find.

Let us address a point raised by counsel for the respondent in his address. He submitted that "having set down the value to be placed on the land as the only issue for trial, the trial court had a duty to call upon the Appellant to adduce evidence in that regard……contrary to Order 36 r 4 of …C. I. 47….Quite clearly the rules of procedure contemplate that in every trial the parties should state their cases in accordance with Order 36…" Counsel buttressed this point when he submitted that "…the trial judge acted in excess of his jurisdiction when he proceeded to enter judgment without hearing any evidence from the parties themselves….."

With all due respect to learned counsel this is an erroneous interpretation of the Order in question and the decision in KARLETSE-PANIN v. NURO, supra which he cited in support. In the case cited the court's decision was that the absence of a defendant from court did not relieve the plaintiff from leading evidence to

establish his case when the burden of producing evidence and the burden of proof rested upon him, so it was erroneous for the court to enter judgment for him without any evidence. It is an entirely different situation from the instant case.

A court has no duty to call upon any party to testify in the case; the court acts as an umpire and only hears such evidence as the parties will proffer; whether the parties will testify or not is none of the court's business. Indeed for a court to insist that a party should testify will amount to the judge descending into the arena of conflict. After determining the triable issue/s the trial court leaves the field clear for the parties themselves to decide who will testify. We know of no law or rule which entitles a court to call upon a party to testify in the action. If such a law or rule does exist we would venture to say that it is inapplicable under our legal dispensation.

Laches and acquiescence and limitation of action

At the tail end of his statement of case counsel for the respondent submitted that this action is "…on the face of the pleadings, caught by laches and acquiescence or alternatively by the statute of limitation." The argument is in two parts. To begin with, counsel referred to the fact that the sale of the land took place in October 1997 but it was not until April 2007 that the plaintiff commenced this action claiming the agreed price of the cedi equivalent of $10,000 per plot. Counsel's submission was that the clam was unduly tardy so equity would not come to his aid. Next counsel cited section 4(1)(b) of the Limitation Act, 1972 (N.R.C.D.54) which provides that

'A person shall not bring an action after expiration of six years from the date on which the cause of action accrued, in the case of an action founded on simple contract.'

His argument was that since the claim for the alleged agreed price of the land being founded on a simple contract it was statute barred after six years.

The initial response by counsel for the appellant was that this was not pleaded at all to enable same to be argued as a preliminary issue under Order 33 rule 5 of the High Court rules, C. I. 47.

A party who seeks to rely on laches, acquiescence or limitation has a duty or obligation to plead them or to plead such facts as evince an intention to rely on same. Order 11 rule 8(1)(a) of C.I. 47 provides in material terms as follows:

'A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example…….any limitation provision…or any fact …..which the party alleges makes the claim…of the opposite party not maintainable.'

These matters like laches, acquiescence and limitation are all to be pleaded since the party who is entitled to rely on them may decide not to do so; the other party should not be taken by surprise and is therefore entitled to notice in the pleadings in order to raise any answer he may have to these claims. And if they are relied upon as a defence it will save the time of the court and the parties for same to be dealt with as preliminary matter under Order 33 rule 5, as counsel for the appellant rightly pointed out. Thus they cannot be raised for the first time on appeal, unless the pleadings disclose the factual basis and evidence on it was led at the trial. That is not the position in this case, as there was no plea and no evidence was forthcoming on the record. The plea is accordingly rejected.

Award of damages.

The Court of Appeal did not set aside the award by the High Court on merit but the entire decision was set aside for reasons explained already. The present appeal has not raised any issue concerning the award or the basis thereof by the High Court, and there is no cross appeal either. Hence it is just that the award should not be disturbed, except where this court finds some error, whether legal or factual apparent on the record in which case it will have to intervene. The High Court judge made findings of fact based on the evidence. He gave reasons for deciding on the award and as pointed out there is no issue with the award. We therefore endorse it and enter judgment for the appellant and restore the High Court's award of damages. The appellant is also entitled to recover interest on the

judgment sum from the date of the High Court's decision to date of payment by virtue of Rule 2(1) of C. I. 52 that is Court (Award of Interest and Post Judgment Interest) Rules, 2005. The payment made by the respondent in the course of the hearing should be deducted from the total figure found due to the appellant. For the reasons advanced herein we allow the appeal.

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
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