IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA. A. D. 2023

CORAM:

SOWAH J. A. (PRESIDING)

GAISIE J.A.

BAFFOUR J.A

SUIT NO H1/225/2022

22ND FEBRUARY, 2023

MOVELLE COMPANY LTD **PLAINTIFF/APPELLANT**

VRS

GHANA REVENUE AUTHORITY **DEFENDANT/RESPONDENT**

JUDGMENT

Baffour J.A:

INTRODUCTION

An audacious attempt has been made by the plaintiff/appellant to kill two birds with one stone in so far as this appeal is a double-barreled against two decisions of the court below. The first can be deemed to be a full judgment of the court after trial which said judgment was delivered on the 25th of October, 2021. Flowing from the judgment a consequential order was made for defendant/respondent to account for the proceeds of auction sale of forty-one (41) containers of the plaintiff/appellant within one month of the judgment. After the statement of accounts had been filed by the defendant/respondent and with the plaintiff/appellant not satisfied with the account an application was filed to set aside the account filed. The failure of the court to set aside the accounts and the pronouncements

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made has also become the subject of this appeal. This court is therefore being called upon to determine the rightness or otherwise of those decisions. Before any examination is engaged in the antecedents that has given rise to this appeal may first be recounted. The parties would be referred to as appellant and respondent throughout this opinion.

FACTS

From the nature of the writ and statement of claim issued by the appellant who claim to be in the business of importation and trading of frozen meat products. That it imported into the country fifty-two (52) forty foot reefer containers of frozen meat into Ghana between December and January of 2013 and 2014 being in total 1,750 metric tons of frozen chicken and chicken parts. To appellant it was during that period that the government commissioned a presidential task force to monitor the movement of goods into Ghana to achieve the policy objective of promoting locally produced poultry. That as part of the policy of government import permit was not required for the importation of frozen poultry but once the goods arrived in Ghana there was the need for a permit to be procured. To the appellant with the arrival of the goods into the port of Tema it took some considerable period of time before it obtained the import license to clear the goods which was not his fault.

The delay in clearing the goods from the port of Tema on time and without any notice to it the respondent on the 17th of April, 2014 auctioned twenty-one (21) forty-footer containers of appellant. This was followed up with another auction of twenty (20) footer containers of frozen chicken on the 20th of June, and 12th of August, 2014. That these auctions were confirmed by Memo from the Chief Revenue Officer, Custom Division on the 15th of June 2015 after several request made on the respondent for the confirmation of the auction sale. It was the case of the appellant that the forty-two footer containers were unlawfully seized by the respondent and the auction did not follow laid down procedure. It was also the case of the appellant that no account was rendered as to the sale of monies realized and that the total value of the forty-one (41) containers auctioned were valued at Three Million Eight Hundred and Ninety Four Thousand Seven Hundred and Fifty United States

dollars (US$3,894,750.00). It was on that basis that the appellant sought the following reliefs from the trial court:

a. A declaration that the seizure and auction of plaintiff's forty-one(41) forty-footer containers of imported frozen chicken and chicken parts was unlawful as the Defendant failed and or neglected to follow mandatory statutory and administrative customs procedures relating to the seizure and auction of goods.
b. A declaration that the Defendant breached its statutory duties to the Plaintiff by failing and or neglecting to follow these mandatory statutory and administrative procedures.
c. A declaration that Plaintiff has a property interest in both auctioned products and the proceeds of the auction and the failure and or neglect of the Defendant to declare the proceeds and to give same to Plaintiff subject to the costs of the auction contravenes Plaintiff's property rights contrary to article 20 of the Constitution.
d. An order directed at the Defendant to account for the proceeds of the auction sale of Plaintiff's forty-one (41) forty-footer containers of frozen chicken and chicken parts.
e. An order directed at the Defendant to refund to the Plaintiff the sum of Three Million Eight Hundred and Ninety-Four Thousand Seven Hundred and Fifty United States of American Dollars (U$ 3,894,750.00) being the value of the forty-one (41) containers unlawfully seized and auctioned by the Defendant with interest from the date of the sale till the date of final judgment.
f. Special damages for the resultant losses suffered by Plaintiff.
g. General damages for breach of Defendant's statutory duties to Plaintiff.
h. Costs, including legal fees; and
i. Any other order or orders as to this Honourable Court may seem fit.

The respondent denied any liability for the refund of any monies to the appellant in its statement of defence. It noted that the appellant flouted the statutory rules and procedures governing the importation of goods into Ghana and in the case of the appellant

its goods that were auctioned had overstayed the port. Respondent contended that the failure of the appellant to have obtained the requisite permit to clear the goods was the sole responsibility of the appellant. To respondent with the goods not having been cleared from the port within the period that the goods were supposed to have been cleared the containers were lawfully auctioned as they were perishable goods and did not need any notice to have been issued.

In a judgment after trial the court found that there was nothing unlawful about the seizure and sale of the goods of the appellant at the port of Tema but ordered the respondent to account for the monies realized out of the sale. The court accordingly dismissed reliefs (a), (b), (c), (f) and (g) but granted reliefs (c) and (d). Based on the order to account respondent filed statement of account on the 22nd of November, 2021 which showed that the amount realized from the sale was Gh¢1,053,875.44. This amount that the respondent claim was the money realized from the auction actually fell below the duty that was supposed to have been paid to the government if the frozen goods had been cleared from the port by the appellant.

Upon service of the statement of account the appellant moved the court by an application to set aside the statement of account. Among some of the reasons stated on the face of the affidavit that accompanied the motion were that the statement was manufactured after the judgment and if that statement of account was in existence the respondent would have tendered that statement. That the statement purporting to claim that there was a shortfall of an amount of Gh¢411,679.06 strikes at the heart of administration of justice as it sprang a surprise by alleging some amount that appellant owes the respondent which monies were not stated at all in the pleadings and during trial. The trial Judge in a ruling delivered concluded that after delivery of its judgment it had become *functus officio* and had no jurisdiction to deal with the statement of account filed by the respondent. Acknowledging the injustice in that ruling she urged the appellant to appeal. As if to say that what she did not have the power to do this court would have power to act.

Disturbed by both the main judgment and the ruling accepting the statement of accounts as a reflection of the accounts that the court below itself ordered; the appellant appealed is against both. The grounds of appeal after extension of time was granted to file the appeal are as follows:

a. The judgment is against the weight of evidence.
b. The trial Judge erred in law when she held that the plaintiff/appellant failed to prove that its seized and auctioned forty-one (41) footer containers of frozen chicken and chicken parts by the defendant/respondent were valued at US$3,894.750.00 thereby occasioning miscarriage of justice.

PARTICULARS OF ERROR

i. The Defendant/Respondent did not dispute the value of the 41 forty-footer containers of frozen chicken and chicken parts being $3,894.750.
ii. The Plaintiff/Appellant had no burden to lead evidence to prove that the 41 forty footer containers of frozen chicken and chicken were valued at $3,894,750.00 when the Defendant/Respondent did not dispute the said value.
iii. In the Plaintiff/Appellant's relief (e) endorsed on the writ the Plaintiff/Appellant's claim is for $3,894,750.00 of 41 forty-footer containers of frozen chicken and chicken parts and not $3,894,750.00 for 58 containers as contrarily stated by the trial judge.

c. The learned trial Judge erred in law when she accepted the statement of account filed by the defendant/respondent on the 22nd of November, 2021 as part of its judgment in its ruling dated 31st March, 2022.

PARTICULARS OF ERROR

i. The trial judge's acceptance of the contents of the statement of accounts filed by the defendant/respondent after judgment had already been delivered and same accepted by the trial Judge as part of her judgment is contrary to the rule in

Dam v J. K. Addo & Brothers (1962) 2 GLR 200.

ii. The acceptance of untested evidence in the form of the contents of the statement of account filed by the Defendant/Respondent is prejudicial to the Plaintiff/Appellant who never had the opportunity to challenge the contents of the statement of account thereby occasioning a substantial miscarriage of justice.

iii. The acceptance of untested evidence in the form of contents of the statement of account filed by the Defendant/Respondent thereby occasioning a substantial miscarriage of justice.

iv. The acceptance of the untested evidence in the form of the contents of the statement of account filed by the Defendant/Respondent by the trial judge is contrary to sections 5, 8 and 178(4) of the Evidence Act, 1975 (NRCD 323) thereby occasioning a substantial miscarriage of justice.

PRELIMINARY AND TECHNICAL MATTERS RELATING TO THE APPEAL

Before the court delves into the resolution of the case it is necessary that this court deals with some preliminary and technical matters in this appeal. The respondent did not upon service of the written statement of the appellant file any written statement of its own. That may well be within the right of the respondent not to file any written submission as the Rules states under Rule 20(4) of the Court of Rules, 1997 C. I. 19 that:

> *"(4) A party upon whom an appellant's written submission is served shall, if he wishes to contest the appeal, file the written submission of his case in answer to the appellant's written submission within three weeks of the service, or within such time as the Court may upon terms direct."*

Respondent having failed to file any submission and not contesting the appeal does not also mean that the reliefs for which the appellant seeks from the court should be granted. All that it means is that the respondent has no legal submission to proffer in a way to assist the court to resolve the grounds of appeal but not that the appeal ought to be granted by

the court.

APPEAL AGAINST TWO DECISIONS OF THE HIGH COURT

The single appeal before us is against two distinct decisions of the court below and the propriety or otherwise of such a course must also be determined even though same has not been raised as there had not been the benefit of any written submission from the respondent. The principle is that a party or an appellant has the right to appeal against two different decisions of a lower court provided one was interlocutory and the other final as long as the two decisions emanates from the same suit. The principle in our jurisdiction was first laid down in the case of **R. T. Briscoe v Amponsah (1969) CC 99** when the court held that:

> *"...a person who is dissatisfied with an interlocutory decision does not lose the right to appeal against that decision merely because he failed in bringing the appeal within fourteen days, he still has a right to include appeal against that decision in an appeal against the final decision in the case."*

And in **Nana Ampofo Kyei Barfour v Justmoh Construction Ltd [2017-2018] 2 SCGLR 288** the apex court was of the view that the best course in an appeal was not to file separate appeals but to include both appeals against interlocutory and final decisions. This view has received further endorsement in the case of **Stanley Kotei Hammond v Agbleze J4/13/2021** unreported judgment delivered on the 8th December, 2021 wherein the court speaking through Pwamang JSC noted as follows:

> *"An appellant has a right to appeal simultaneously against two decisions by the same court in a case but the practice of filing one notice of appeal may only be resorted to where a person has filed an appeal against judgment and within that appeal also challenges an interlocutory decision that was given in the course of the proceedings leading to the final judgment".*

See also **Republic vs. High Court, Accra; Ex Parte Puplampu I [1991] 2 GLR @ page 478.** It must be conceded though that in this case the final judgment preceded the ruling delivered on the 31st of March, 2022 for which the court claimed to be *funtus officio* and impliedly accepted hook, line and sinker the statement of account filed by the respondent. I do not see why the same principles distilled in the cases referred to *supra* should not be applied with equal force, albeit *mutatis mutandis*. In fact this view is endorsed by the learned authors of Halbury's Laws of England (4th Ed.), Vol. 26, paragraph 506 when the authors states concerning interlocutory decision as one that can precede a judgment or be delivered after a judgment that:

> *"An order which does not deal with the final rights of the parties, but either (1) is made before judgment and gives no final decision on the matters in dispute but is merely on a matter of procedure; or (2)* ***is made after judgment, and merely directs how the declarations of right already given in the final judgment are to worked out, is termed 'interlocutory'."*** **[emphasis mine]**

See also **Republic v High Court (Fast Track Division) Accra; Ex parte State Housing Co. Ltd (No.2), (Koranten-Amoako Interested Party) [2009] SCGLR 185**.

The second leg of the description of interlocutory judgment by the authors of Halbury's Laws of England is befitting on the facts of this case. I conclude that the appeal filed by the appellant against two decisions for the lower court emanating from the same suit is proper for determination before the court.

RESOLUTION

From the grounds of appeal it is not difficult to discern that grounds (a) and (b) attacks the correctness of the main judgment delivered on the 25th of October, 2021 and found at page 191 of the record of appeal. Ground (c) on the other hand vex the ruling delivered on the 31st March, 2022 wherein the trial Judge claimed that she was *functus officio*. I find it

apposite in dealing with the grounds of appeal to first deal with the ground (c) that besiege the ruling which failed to set aside the statement of account prepared by the respondent. From the nature of the reasons proffered by the lower court it wholly bought into the arguments of the respondent by stating that having delivered a final judgment it had no further jurisdiction to determine any other matter in the suit after judgment on the basis that it was *functus officio*. Indeed the court below relied on two decisions of the Supreme Court in **Peter Egyin Mensah v Intercontinental Bank Ltd (unreported) Suit No: J4/13/2009** dated delivered on 25th November, 2009 and also the case of **Faroe Atlantic Ltd v Attorney-General [2005] SCGLR ...**

With celestial respect to the learned Judge of the court below if she had diligently attended to the two cases that she cited in support of her conclusion that she was *functus officio* she would have realized that those cases had nothing at all to do with the doctrine of *functus officio*. In fact the **Egyin Mensah** case says the opposite of what she concluded. Before a determination of whether she was right or otherwise a better appreciation of *functus officio* would illume the path of this court in coming to the right conclusion on this ground of appeal. There is an unbroken trail of destitution of adequate scholarship on the treatment of the principle of *functus officio* unlike its doctrinal cousin *res judicata* for which much light has been shown and received adequate treatment in our jurisdiction. I think the time is overdue for a similar adequate attention to be paid to the concept of *functus officio* just like its kin and cousin doctrine res judicata and this judgment should set in motion the development of Ghana's *functus officio* from its common law antecedent.

Obviously being Latin in origin it means *"having performed his office"*. The first to note it was the Roman lawyer by name Ulpian (170-220 A.D). His writing was transposed into the Justinian Digest, juristic writings on Roman law commissioned by Emperor Justinian around 550 A.D. To Ulpian *"[A] Judge who has given judgment either in a greater or smaller amount, no longer has the capacity to correct the judgment because for better or for worse, he would have discharged his duty once and for all."* This was later received into the common law. That a decision once final was no longer opened for question as there

was the need for a finality to a judgment by not needlessly opening it up for questioning. The main difference between *functus officio* and res judicata is that whilst the latter is aimed at the parties the former is directed towards the Judge. For in res judicata when an issue on a matter between parties have been determined to finality, the parties and their privities are forever debarred from re-opening the matter. However with *functus officio* it is directed at the Judge and this doctrine aim the arrow of finality at the heart of the Judge.

Functus Officio precludes the Judge from tinkering or changing his decision and if it were not so many a decision makers would have the freedom to change their decisions as they deem fit which would dip the confidence and integrity that parties must have in the judicial process. That could even undermine a decision on appeal where a trial Judge could easily change his mind and rule otherwise. *Functus officio* therefore operates as an injunction against any Judge but not the parties not to change a decision once that decision is final before the court. So once the jurisdiction of the Judge is spent he no longer has power to change the decision. Without *functus officio* which is only forum sensitive being set in motion, res judicata which is forum neutral cannot be invoked and operate. A final decision that can operate to bind the Judge as *functus officio* must be one which effectively determined the question between the parties. If there are more matters even of ancillary nature to be determined the judgment cannot operate against the Judge as *functus officio*.

Finality of a judgment in relation to *functus officio* must be substantive and procedural in nature. It is substantive when the Judge has completely disposed of all the issues in the case. If there are matters to attend to in the case to bring full meaning to the judgment and settle the respective rights of the parties the Judge is not *functus officio*. Procedurally, where there is anything that has to be done to perfect the judgment *functus officio* cannot kick in. See the **Canadian cases of Qiu v Minister of Citizenship & Immigration 2019 FC 389 @ para 39; British Columbia (Director of Forfeiture) v Sanghera 2017 BCSC 1519 @ 49-50.**

The consideration for this court on ground (c) would involve whether with the filing of the statement of account the jurisdiction of the High Court was spent or exhausted that notwithstanding any obvious lapses discovered in the report it needed to be accepted as it is. There would also be the need to consider whether the motion filed by the appellant to set aside the statement of account by settled practice was the proper procedure after the filing of the statement of account. In dealing with both issues; clues that points to the answer was given by the Court of Appeal and roundly endorsed by the Supreme Court in the **Peter Egyin Mensah** case supra. At the Court of Appeal Gbadegbe JA (as he then was) stated that when a judgment has been given and an order for accounts has been ordered; if upon the filing of the account a party is dissatisfied the proper procedure is to come by way of motion to set aside the report. For this is what Adinyira JSC stated when she accepted the dictum of Gbedegbe JA as right in **Peter Egyin Mensah** case that:

> *"The settled practice of our courts is that whenever an order made in an action has not been properly carried out the remedy of a party who claims to be aggrieved thereby is to apply by motion in the cause in which the order was made to the court seised with jurisdiction over the subject matter for the act which has been wrongly done to be set aside and for the proper thing to be done. Where however the wrong has been perfected into an order of the court by its adoption then any party claiming to be aggrieved may appeal against it."* Per page 10 of the unedited judgment.

This direction that the Court of Appeal gave in **Egyin Mensah** case and which the apex court endorsed is what the appellant followed to the letter when it sought to set aside the statement of account. Quite strangely the trial Judge relying on the same case held that she was *functus officio*. It is necessary that the court set out briefly what happened in the **Egyin Mensah v Intercontinental Bank** case to show how that case cannot and did not support the position of the trial Judge. In that case the plaintiff who was the personal representative of a deceased person sued the defendant Bank for what he claimed to be outstanding balances on a *susu* passbook with the Bank. A reconciliation of the accounts

done in the passbook was different from the Bank balance that the defendant provided as the outstanding amount and that the Bank was indebted to the plaintiff in an amount of Gh¢50,910. Plaintiff then issued a writ for reliefs including an order for reconciliation between the recordings in the *susu* passbook and the account statement and interest on the amount for which the Bank failed to capture in the Bank statement.

Plaintiff had judgment and proceeded to attach properties of the defendant. Defendant successfully set aside the judgment on the ground that the judgment was only an order for account to be taken or reconciled and did not decree the recovery of any amount. The court then ordered the defendant to comply with the order by filing an account. Plaintiff instead of insisting on the filing of the account rather chose to issue a fresh writ for recovery of monies. Defendant resisted that fresh writ on the grounds that the new suit was res judicata. The trial court ruled that it was not and both the Court of Appeal and Supreme Court held that the second suit by plaintiff was res judicata. The **Egyin Mensah** had nothing whatsoever to do with the doctrine of *functus officio*. And as explained *supra* both doctrines are cousins but not the same. There was nothing at all about *functus officio* in that case and the reliance by the trial court on that case was a palpable trip on the law.

Similarly, the case of **Faroe Atlantic Ltd v Attorney-General [2005] SCGLR** for which the trial court claimed in her ruling as also binding on her regarding *functus officio* was also not correct. Faroe Atlantic case concerned the raising of a constitutional matter for the first time in a matter that had travelled from the High Court to Supreme Court. The constitutional matter was whether the international business transaction agreement entered into had the approval of Parliament under article 178 of the Constitution, 1992. Res *judicata* was discussed by some of the Judges including Twum JSC. However, what was at stake had nothing to do with *functus officio* and if it was mentioned, the significance and the ratio in that Faroe Atlantic had completely been taken out of its context. Nothing in that case again support the claim of the trial Judge that once a judgment is delivered and a statement of account is filed an adjudicatory officer was precluded from examining the propriety of the account.

We rule from the above therefore that the trial Judge abdicated her judicial duty by behaving like the Biblical Pontius Pilate by washing her hands of the case when there were other matters emanating from the judgment she was by settled practice ought to have dealt with. There was nothing *functus officio* about her in relation to the filing of the statement of account and the subsequent motion to set that account statement aside. For as noted in the case she cited being the **Peter Egyin Mensah** case the approach when such a statement is filed and falls short of what is required the procedure is by motion to set same aside as noted by the Court of Appeal and same having been endorsed by the Supreme Court that:

> *"The settled practice of our courts is that whenever an order made in an action has not been properly carried out the remedy of a party who claims to be aggrieved thereby is to apply by motion in the cause in which the order was made to the court seised with jurisdiction over the subject matter for the act which has been wrongly done to be set aside and for the proper thing to be done."*

As it is not in dispute that the statement of account raises serious questions of law and fact. Among some of the reliefs that appellant sought for was relief (d) for an order for account of the proceeds for the auction of the forty-one (41) containers of frozen chicken. Throughout the defence of respondent it admitted auctioning the frozen chicken to recover unpaid taxes and duties and further claimed that the monies realized was paid into the consolidated fund never showed how much was realized after the sale. There is nothing on the face of the account to indicate that it existed at the time appellant came to court. What it means is that any figures at all could have been stated by the respondent as the monies realized from the sale of the frozen chicken of the forty-one (41) containers seized from the appellant. The contention of the appellant therefore was a question of authenticity of the statement and the figures contained therein. Authentication in evidence implies that there must be evidence from which the court can infer what the proponent puts forward is actually and genuinely what it is. Authentication also connotes relevancy as there must be

a logical connection between the exhibit and the matter in issue before the court. See S. A. Brobbey in his work **"Essentials of the Ghana Law of Evidence"** at page 233. Section 136 of the Evidence Act, NRCD 323 states as follows:

> *"Where the relevancy of evidence depends upon its authenticity or identity, so that authentication or identification is required as a condition precedent to admission, that requirement is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims".*

Section 136 of NRCD 323 lays equal emphasis on authenticity and identification as a basis to relevancy. And sub-section 2 of section 136 of NRCD 323 permits means of authenticating a writing which are provided for from sections 137 to 161 of the Law. Where a party does not oppose the admission of a document, its admission presupposes that the genuiness of the writing is not disputed. However, in this suit the appellant claim that what was filed was not a reflection of the sale of the containers of the frozen chicken. The least was for the trial Judge to have taken evidence but not to have accepted the report as it is and claim that she was *functus officio*. The fact of an order having been made for statement of accounts to be filed did not give rise to a party to file anything and contend that the trial court was precluded from interrogating the figures in it. There is nothing genuine about the report filed by the respondent and I would set aside the statement of account filed for the reasons stated *supra.*

GROUNDS (a) AND (b)

The first two grounds relates to the judgment of the court on the 25th of October, 2021. Throughout the submissions of counsel for the appellant some of the essential findings of the trial Judge regarding some of the allegations made at the trial were not touched on or disputed. For instance the court found that the goods sold were perishable items for which the appellant had failed to clear them on time. That the sale was not unlawful as the law mandate the respondent to do what it did. That it was not obligatory for the respondent to have notified the appellant of the sale. These findings have not been attacked by the

appellant and I presume that those findings not having been impugned they have been accepted. From the submission of the appellant his complaint among others are that the trial Judge made a wrong finding that the appellant failed to prove fifty-two (52) containers of frozen chicken as seized by respondent when in fact it is its case that the containers auctioned were forty-one (41) and never stated fifty-two. That to the appellant with its pleadings to the effect that the value of the chicken containers auctioned being $3,894,750.00 and same having not been disputed the subsequent finding by the trial court that the appellant failed to prove that amount of $3,894,750 was wrong as it had no obligation to prove what had been admitted in a pleading. It is in that respect that in dealing with grounds (a) and (b) the court would confine itself to the specific instances of alleged errors pointed to the court by the appellant to verify if that is well grounded.

From the record of appeal it is true that the court denied the relief (e) of the appellant for an order for refund of the total amount of $3,894,750 by claiming at page 207 of the record of appeal that the said sum remained unproved by the appellant at the end of the trial. The trial court attributed this sum as the value of fifty-eight containers contrary to the claim of the appellant that it was the value of forty-one (41) containers auctioned by the respondent. The pith of the claim of the number of containers seized and auctioned can be seen from paragraphs 11, 14, 16, 17 of the statement of claim of the appellant found at pages 5-6 of the record of appeal. In all it was emphatic that even though forty-two (42) containers were seized, it was rather forty-one (41) containers that were auctioned as one container was declared unwholesome, therefore the assertion by the trial Judge that appellant could not prove the value of fifty-eight containers misrepresented the total number of containers that appellant claimed were seized.

More importantly is the question whether the appellant failed to prove the value of the containers he alleged were seized by the respondent? It is the case of the appellant that as far as the value of the forty-one (41) containers were concerned no issue was joined to have placed any burden on the appellant to have proved the value as respondent admitted same in its pleadings before the court. In the statement of claim of appellant at paragraph

17; the appellant stated as follows:

> *"Plaintiff avers that the remaining forty-one (41) forty-footer containers valued at a total of Three Million Eight Hundred and Ninety-Four Thousand Seven Hundred and Fifty US dollars (US$3,894,750.00), were unlawfully seized and auctioned by the defendant."*

In the statement of defence of the respondent at paragraph 14; respondent in response to paragraph 17 of the appellant's statement of claim stated as follows *"save that the goods valued at US$3,894,750 were unlawfully seized, the rest of the averments in paragraph 17 of the statement of claim are admitted".*

From the above admission one needs to pause and ask if that constituted an unequivocal admission that the goods were indeed valued at the value placed on them by the appellant and two if the respondent admitted that the goods were unlawfully seized. Previous paragraphs such as 8 of the statement of defence admitted seizure of the goods and that they were auctioned or confiscated or destroyed in accordance with law. That not having been cleared within the time specified by law they were auctioned. It follows that the paragraph 14 which appears to state that the containers were unlawfully seized when compared with the preceding paragraphs such as 8 and 11 of the same statement of defence produces two repugnant and inconsistent results from the same statement of defence. One that deny the unlawfulness of the confiscation and the paragraph 14 that appears to admit that the seizure was unlawful. Noting at page 14 of the record of appeal that the first issue which was joined was the fact of the lawfulness or otherwise of the seizure makes me conclude that the seeming admission in paragraph 14 of the statement of defence of the unlawfulness of the seizure do not appear to reflect what the respondent intended to convey more so when it is not consistent with the overall pleading in the statement of defence.

Again from paragraph 14 of the statement of defence, respondent appeared to have

admitted that the value of the goods of the containers seized valued at $3,894,750.00. unlike the admission of the lawfulness or otherwise of the seizure which was ambivalent, in respect of the value of the goods, I do not find any part of the pleadings of the respondent that he denied the values assigned by the appellant. And it is now a settled principle of law that where averments are made and they are not denied by an opponent no issue may be joined for determination at trial. In the case of **Asante v Bogyabi (1966) GLR 232 @ 240**, the held that:

> "*Where admissions relevant to matters in issue between parties to a case are made by one side, supporting the other, as appears to be so in the instant case on appeal, then it seems to me right to say that that side in whose favour the admission are made is entitled to succeed and not the other unless there is good reason apparent on record for holding the contrary view*".

And in the case of **In Re Asere Stool; Nikoi Olai v. Amontia IV (Substituted by Nii Tafo Amon II) v. Akortia Oworsika III (Substituted by Laryea Ayiku III) [2005-2006] SCGLR 637**, it was the opinion of the court speaking through Dr. Twum, JSC that:

> "*Where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence of estoppel by conduct. It is a rule whereby a party is precluded from denying the existence of some state of facts formerly asserted. That type of proof is salutary of evidence based on common sense and expediency.*"

See also **Adams Addy v Solomon Mintah Arkaah**, a recent unreported decision of the Supreme Court speaking through Kulendi JSC on the **14th April, 2021; Suit No: J4/19/2021; Baffoe-Bonnie JSC in Opanin Nantwi Ababio v Pastor Nana Edusei Suit No: J4/19/2014** and delivered on the 14th March, 2018; **West African Enterprise Ltd v Western Hardwood Enterprise [1995-96] 1 GLR 155 @ 169**.

With such an admission as to the value of the containers it is our view that the conclusion of the trial Judge that the value of the containers seized were not proved could not have been correct in view of the admission contained in the statement of defence.

Be that as it may, even if one where to ignore paragraph 14 of the statement of defence and explain it away as a drafting error or inelegant pleadings, from the nature of the evidence the invoices on the 41 containers were put in evidence as Exh "B" series. These are found at page 81 to 87 of the record of appeal. A tabulation of all the invoices from the appellant would give a figure slightly higher than even what the appellant stated. The total amount of these verified invoices came to $3,914,750. There is no where in the judgment of the trial court that it adverted its mind to this exhibit. And there is no where in the judgment that the trial court sought to find any evidence or law to conclude that Exh "B" was manifestly unreliable. Being such evidence on record as the value of the goods and the authenticity of Exh "B" not having been impugned; I think reliance should have been found on that evidence that we find credible. We conclude on this that the nature of the pleadings showed that the value of the goods had been admitted by the respondent. And if this finding is even not accurate from the record there was ample evidence as to the proof of the value of the containers seized and the conclusion by the trial Judge that the value of the containers were not proved is not correct.

Does that mean that this court should proceed to order respondent to pay to the respondent the value of the goods at $3,894,750.00? The trial court made some other findings from the nature of the evidence on record that has not been impeached by the appellant in this appeal and which may be relevant for the purposes of the determination as to whether respondent is liable for the whole or total sum of $3,894,750.00. One such finding was that the seizure and the auction of the containers was not unlawful. The court below referred to the Customs Excise and Preventive Service (Management) Act, PNDCL 330 and examined the procedure spelt out under section 116, 117 and 118 for seizure and sale of perishable goods. The trial court found nothing unlawful about the seizure and sale

of the containers of the frozen chicken which are perishable goods. That with a sale having been completed how the monies realized should be utilized has been provided for by law.

Indeed section 117(3) quoted by the trial Judge states as follows:

> *"(3) Where goods are sold under this section, the proceeds shall be applied first in the discharge of duties, of the expenses of removal and sale, and of rent and charges due to the Government, and of freight and other charges; and, subject to section 118 (3), the balance, if any, shall be paid to the owner of the goods if he applies for it within 180 days from the time of the sale, but otherwise shall be paid into the Consolidated Fund."*

There is no evidence that the appellant was made aware of the dates that the goods were auctioned for him to have known and made an application within the 180 days stated by the Law. There is no evidence of compliance of section 117(3). And as the above was not complied with even though the seizure and sale was lawful this court is imbued with the power under Rule 31 of the Court of Appeal, Rules, 1997, C. I. 19 which states as follows:

> *"The Court may-*
>
> *(a) make any order necessary for determining the real question in controversy;*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) direct the court below to enquire into and certify its finding on any question which the Court considers fit to determine before final judgment;*
>
> *(e) ... and*

(f) direct any necessary enquiries or accounts to be made or taken and shall generally have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a court of first instance."

With the Rule 31(f) of C. I 19 where this court has power to make orders for enquiries and accounts as if this court is a court of first instance and with our finding that the value of the goods was not in dispute between the parties and even if it was in dispute the values as evinced by Exh "B" being $3,894,750.00 was proved; we proceed to order the respondent that it must file before the trial High Court statement that must show how much duties were standing in the name of the appellant, the expenses incurred in the removal and sale, the rent and charges in compliance with section 117(3) of PNDCL 330. The statement to be filed must not be like what respondent filed previously at the High Court. The one being ordered to be filed must be backed by the necessary background documents of proper documentations on the duties that were due, the expenses incurred in the sale, copies of receipts issued for the sales and all the outstanding obligations. Those expenditure verified should be deducted from the sum of $3,894,750.00 and the outstanding balance would be the money that the appellant is entitled to. Respondent is ordered to properly file the statement with the background documentation within twenty-one (21) days of this judgment. Where the respondent fails to comply the appellant is at liberty to file an entry of judgment for the whole of the sum of $3,894,750.00.

The appeal substantially succeeds before us save for the order made for account to be refiled with background documentation which expenses would be deducted from the sum of $3,894,750.00 and the outstanding to be the sum due to the appellant.

We make no order as to cost.

(Sgd.) Eric K. Baffour, Esq.
(Justice of Appeal)

I agree. **(Sgd.) Cecilia H. Sowah, JA**
(Justice of Appeal)

I also agree. **(Sgd.) Amma A. Gaisie, JA**
(Justice of Appeal)

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23-02-23
REGISTRAR
COURT OF APPEAL

Representations:

Godwin Tamakloe with Seth Nyaaba for Plaintiff/Appellant.
Freeman Sarbah for Defendant/Respondent.