FRIDAY LEGAL CORNER

JUSTICE ALEXANDER OSEI TUTU

WHAT YOU WILL FIND

Where a party intends to rely on res judicata, he is required to plead it and to tender the pleadings, proceedings and judgment in evidence.

- Is this an inflexible rule?
- What if the judgment and pleadings are only produced but not tendered in evidence?
- What if the judgment was not produced at all, but has been reported and clearly contains the requisite ingredients to sustain the defence of res judicata ?

Fun Corner

Did you know that Abedi Ayew Pele's real name is Abadi Ayuu?

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Judgment & Pleadings of Previous Suits in Res Judicata: To Tender or Not to Tender?

INTRODUCTION

When a name or concept is 'corrupted' over time due to its misspelling or mispronunciation, it becomes very difficult to revert to the original name or concept. Who would have thought that Kofi Ofori Dua will one day become Koforidua, for Nungua to be anglicized for Ningo-wa, Techiman for Takyi Oman, Cape Coast for Oguaa, Ningo for Nugo and Prampram for Gbugla? For the names of human beings, Muslim Khatib illuminates that Umar has now become Moro, Abu for Bukari, Zenabu has taken the place of Zainab, Hussein has been substituted with Fuseini, while Dramani has replaced Abdul Rahman[1]. On a personal level, I still recall that several decades ago, my grandmother and the old folks in my hometown would call me 'Oseeetu', other than its corrupted version 'Osei Tutu'.

I am particularly certain that not many a football enthusiast knows that Ghanaian football legend, Abedi Pele, was not born Abedi Ayew, but for the corruption of his name[2]. Born to an Accra based Gurunsi (Kassena) chief, his father who was not accustomed to eating outside of his home, was forced to eat outside one day when he went out. Upon returning home without yielding, he found that his wife had delivered a baby boy, so he proudly named him 'Abadi Ayuu'. 'Abadi' literally meaning - 'I will not eat'. Whilst growing up, society found a way of changing the name of the footballer, who seemed helpless in trying to restore his originality.

The trouble in restoring a corrupted name or concept over a period of time plays out prominently in the evidential principle of relying on pleadings and judgment as proof in dealing with the defence of *estoppel per rem judicatam*. Per the doctrine, cases are not to be relitigated after they have been determined to finality and it operates either as a preclusion to a cause of action or the issues. The evidential rule which was developed and construed long ago was that the one seeking to rely on the previous judgment was required to produce the said judgment as well as the entire record in evidence before the defence could succeed.

[1] Muslim Khatib, '20 Common Muslim Names that Ghanaians have Corrupted'. February 8, 2023 (Ghanaian Muslim).
[2] See Yen.com: Abedi Ayew: Ghanaian Football Legend's Name Has Been 'Corrupted' From Its Original Spelling And Pronunciation". Thursday July 06, 2033 by Magdalene Lanyoh.

The courts have had to contend with whether the true import of the rule requiring the production of the judgment and pleadings in the previous case actually meant their tendering in evidence in the new case. In pursuing that course, two seemingly inconsistent positions have emerged. The paper interrogates the two positions and the recent attempt by the Apex Court to reconcile them. Was the Court able to rectify the 'corrupted version' of the estoppel per rem judicatam rule or just like Abedi Ayew, it is too late in the day to establish its originality?

The res judicatam rule and how a previous judgment was traditionally proved

Where a defendant maintained that a case had earlier been determined, he was required by the law to plead and produce the said judgment together with the entire record for them to be scrutinized by the court, in order to be satisfied that the two actions were no different. The common law position on onus and proof of 'cause of action estoppel' has been discussed by **Spencer-Bower and Turner, The Doctrine of Res Judicata (2nd ed.), pp. 372-373**[3], thus:

> "*The burden of alleging, and, having alleged it, of establishing this identity lies upon the party who sets up the former judgment as a bar. Such onus is prima facie discharged by* ***production of the record of the judgment, and of the pleadings****, if any, in the former proceedings, and by reference to the pleadings (if any) in the second proceedings*"[4].

Following the direction, the Supreme Court in the case of **Nyan v. Amihere**[5]**,** held:

> *"To ascertain the subject matter of a judgment forming the basis of a plea of res judicata the matters to be considered by the court are, inter alia, the judgment itself and the whole of the record especially the evidence of the parties in court substantially forming the basis of the adjudication."*

[3] At paragraph 449.
[4] See Wadsworth v. Bentley (1853) 23 L.J.Q.B. 3, p.5.
[5] [1964] 1 GLR 162.

Brobbey explains the reason for the demand of the judgment in his book

> "*That the decision was based on the fact that 'since writs and other documents in the lower courts are more often drawn up by clerks whose standard of literacy is not very high and since, therefore, they cannot be expected to be as informative and satisfactory as those drawn up by lawyers for use in the superior courts, it is often from the statement of the parties before court that further information as to what the litigation is all about may be obtained*"[6].

While the rule had demanded for the production of the judgment and the record, it was not so explicit in the 1964 judgment that they had to be tendered in evidence before they could be considered. In adopting the rule in **Poku v. Frimpong**[7], the Court of Appeal expounded that the production of the judgment and record to the new court meant nothing less than their tendering in evidence. His Lordship Azu Crabbe JSC decided at page 235 thus:

> "*In my view, where a party in a suit relies on "cause of action estoppel," the burden of establishing the identity of the subject-matter of the previous litigation with that of the second suit lies on the party who alleges the judgment in the previous suit as a bar. He discharges this burden by first producing in* ***evidence*** *(i) the* ***record of the judgment*** *in the previous suit, and (ii)* ***the pleadings*** *in that former suit*".

A decade and half later, the Supreme Court stepped forward to offer some sort of clarity to the rule in the case of **Otu X and Others v. Owuodzi and Others**[8]. It claimed that the rule was not inflexible. In their Lordships' view, the production of the judgment was not a *sine qua non* in establishing the defence of *estoppel per rem judicatam*. The Court decided that where the judgment was made available at all, it did not necessarily have to be tendered in evidence; His Lordship Adade JSC noting –

> *"A party pleading estoppel per rem judicatam assumed the burden of establishing that the matter had already been adjudicated upon and that the parties and the subject matter were the same in the instant case as in the previous suit. Where the case had been reported and was easily available it was sufficient to draw the*

[6] See Brobbey S.A.: Practice & Procedure in the Trial Courts & Tribunals of Ghana (Second Edition) at p.337.
[7] [1972] 1 GLR 230.
[8] [1987-88] 1 GLR 196, SC.

court's attention to it. But where the case had not been reported the party relying on it must endeavour to secure a copy for the court ***(not necessarily tender it in evidence****). And if in his opinion the judgment relied on for the plea contained sufficient material to enable him discharge the burden, there was no reason why he should in addition tender the pleadings and the proceedings in the previous action.* ***It could not be stated as an inflexible rule that in every case of a plea of estoppel per rem judicatam the judgment and the pleadings in the earlier action must be put in evidence,*** *or else the plea failed. Each case had to be judged and evaluated on its facts. In the instant case, the failure by the plaintiffs to put in evidence the judgment in the earlier suit was not in itself a sufficient reason for reviewing that decision*."

At that point, it had become clearer that the rule had been attenuated and 'corrupted' in the course of its development. The 'non-aligned' judges who were disinterested in joining either faction, stated the principle without showing their 'political colour'. For instance, His Lordship Anin Yeboah JSC (as he then was) in expressing the Court's unanimous opinion in the case of **Adumua Okwei v. Ashieteye Laryea[9],** tactfully stated the rule thus:

"In determining the existence of estoppel per rem judicatam, the judgment itself must be looked at; and where there had been pleadings, those should be examined being part of the record."

Realizing that the rule was losing its conservativeness, the Supreme Court in 2018 in **the Matter of Bimbilla Na, Salifu Dawuni (substituted by Sagnarigu Lana Shani Azumah), Juo Regent, Osman Mahama v. Andani Dasana (substituted by Nyelinborgu Naa Yakubu Andani Dasana), Azumah Natogma[10]**, adopted a hard-nosed position thus:

"Besides, where a party intends to rely on estoppel per rem judicatam as part of his case, he is required by the rules of procedure and judicial decisions ***to plead it and to tender the pleadings, proceedings and judgment in evidence.*** *That way, the opponent*

[9] [2011] 1 SCGLR 317.
[10]. Chieftaincy App. No. J2/01/2017, 23 May 2018, S.C., unreported.

will be able to counter any claims that he is prevented from leading evidence contrary to what was held in the judgment".

It is noticeable from the decision that the Court ensured that pleading the res judicata rule was an essential requirement, but in some of the earlier decisions, no mention was made about the fact that the rule first had to be pleaded. It makes sense that a party seeking to rely on the rule pleads it to enable the opponent respond to it, unless the suit is before the District Court where pleadings may not be required.

In 2022 in the case of **Saviour Church of Ghana v. Abraham Kwaku Adusei and 4 Others**[11]**,** the Apex Court was invited to affirm the rule pertaining to the tendering of the prior judgment and pleadings in evidence in its strict terms when establishing *estoppel per rem judicatam*. His Lordship Dotse JSC in articulating the views of the majority appeared to have ingeniously found a middle ground for the two positions. While he was emphatic that His Lordship Pwamang's rendition in **the Matter of Bimbilla Na & Others** was faultless, he also believed that it is the nature of the case put forward during the plea of *estoppel per rem judicatam*, that would determine the principle of law to be applied. Citing specific example, he said:

"If the judgment that has been produced by the party relying on the estoppel contains all the necessary ingredients, i.e. the parties, pleadings, identity of the subject matter of the dispute and the final decision indicating with clarity the orders of the court, then it might not be necessary to tender separately the pleadings, the judgment and the record of proceedings. However, if the judgment is bare and does not speak for itself then the party relying on it will be failing in his duty if he just tenders or refers to the judgment which may not have been reported in a law report".

The majority panel adopted a liberal approach by asserting that every court is obliged to take note of a subsisting judgment of a court of competent jurisdiction, if it is brought to its attention.

"Most of these judgments will be in printed volumes of our law reports. If the particular judgment or report is not easily available, then the party relying on it

[11] No. J7/08/2022, 9 February 2022, SC, unreported.

must endeavour to secure a copy for the court (not necessarily tender it in evidence). And as for putting in the pleadings and the proceedings in the earlier case, this is a matter which the party must decide for himself … if in his opinion the judgment he relies on for the plea contains the sufficient material (facts, parties, and identity of subject matter) to enable him discharge the burden, there is no reason why he should in addition, tender the pleadings and the proceedings in the previous action", His Lordship Dotse JSC stressed.

In effect, the decision of His Lordship Pwamang was affirmed to be the rule, while the earlier one by His Lordship Adade in the **Otu X v. Owuodzi** was treated as containing the exceptions to the rule.

Can a court in its judgment rely on a document or statement not tendered or adduced in evidence?

The Supreme Court per Benin JSC held in the case of **Ofori Agyekum v. Madam Akua Bio**[12] that where no evidence is led on a fact that has been pleaded, the court does not call it into question in its judgment, because the court only considers evidence proffered by a party in determining whether the right standard of proof has been met or not. Similarly, in the case of **Godka Groups of Companies v. PS International Ltd.[13],** it was held that statements that are not made under oaths are not to be considered evidence.

Could it be said that the mere production of the prior judgment and record only, without tendering them in evidence in the *estoppel per rem judicatam* rule, violate the established rule of evidence? While the answer to the question seems to be in the affirmative, it bears emphasis that the courts' quest to do substantial justice overrides their loyalty to the evidential rules. In fact, when it so matters, the courts have not shied away from considering documents or facts on record that were not tendered in evidence.

In the case of **Living Faith World Outreach & Others v. The Registrar General & Others**[14], the Plaintiffs mistakenly failed to tender their certificate of incorporation in evidence in proof of their corporate status during the trial, although they had earlier

[12] Civil App. No. J4/59/2014, 13TH April 2016, SC, Unreported.
[13] [2001-2002] SCGLR 918 at 921.
[14] No. J4/49/2021, 17th May 2023, SC, Unreported.

attached it to an affidavit in support of a motion for interlocutory injunction. The trial court found that they had failed to establish their corporate status. When the Court of Appeal relied on the documents attached to the affidavit on record to reverse the judgment of the trial judge, the Supreme Court affirmed the decision thus:

> *"... the presence of evidence on the record to the contrary cannot be ignored in the face of an allegation that the 1st and 2nd Plaintiffs were not duly incorporated. The principles of substantial justice require that a court should not close its eyes to the truth when the truth beckons at it*".

In **Republic v. High Court (Financial Division) Accra, ex parte Xenon Investment & Another**[15]**,** the trial court relied on a previous affidavit on record and Anin Yeboah JSC (as he then was) in expressing the unanimous opinion of the Supreme Court sanctioned it thus:

> "*We think the learned judge's reliance on the affidavit was supported by law"*.

The principle appears not to be alien to the common law where it has even been extended to cover affidavits in appropriate cases. In **Barber v. Mackrell**[16]**,** the court confirmed the opinion that an affidavit which has been used in prior proceedings could be used for other purposes, if relevant, since it is a form of oath.

Conflicting precedents of the Court?

While the decision of the Apex Court in the 2018 decision by Pwamang JSC in **the Matter of Bimbilla Na & Others** with regard to the rule under consideration appears to be inconsistent with the Court's prior decision in **Otu X v. Owuodzi**, (the former treating the rule as unbending and the latter with some amount of fluidity), the majority of the Court in the **Saviour Church of Ghana** case saw their synergy. Their Lordships further asserted clearly that assuming there is even a conflict at all in the two decisions, the 2018 proposition of the law in **the Matter of Bimbilla Na & Others** should be deemed to be the current operating and binding authority of the Supreme Court. According to His Lordship Dotse JSC,

[15] Civil Appeal No. J5/46/2016, 22nd March 2016, SC, Unreported.
[16] [1897] 12 Ch.D 534.

"*By the doctrine of stare decisis, it is the most current decision of the Supreme Court that is binding on it as well as other courts … [b]y parity of reasoning, assuming there is even a conflict in the two decisions, the decision in the chieftaincy Appeal (i.e. His Lordship Pwamang decision in the* ***the Matter of Bimbilla Na & Others)*** *being a later decision should be deemed to be the current operating and binding authority of the Supreme Court".*

It is not clear whether their Lordships' position was that the latter decision of the Apex Court in the **Bimbilla Na & Others** case now takes precedence over the previous decision of the Court in the **Otu X v. Owuodzi** even in the absence of a clear departure. Prior to the decision of the Court in the **Saviour Church of Ghana case**, some lawyers have held the view that a decision of the Supreme Court was binding on itself and all other courts until it had expressly departed. And in departing, the previous position would have been considered.

It is worth stating here that His Lordship Pwamang JSC in his expository remarks about the rule in **the Matter of Bimbilla Na & Others** made no reference to the **Otu X v. Owuodzi case**, where the Court appeared to have underscored that the rule was not inflexible and whittled down the strict requirement of tendering the judgment and pleadings in evidence. Could the Court depart from its previous decision when that decision was not cited in the latter case or the rule stated therein reviewed? It appears to be doubtful whether the constitutional provision envisages 'implied departure' by the Court from its previous decision.

For ease of reference, I reproduce the relevant portion of the Constitution under Article 129 (3) thus.

"(3) The Supreme Court may, ***while treating its own previous decisions as normally binding****, departs from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decision of the Supreme Court on questions of law*".

The Apex Court in the case **of Republic v. High Court, General Jurisdiction '5', Accra, Ex parte Minister for the Interior & Another**[17] said through Benin JSC thus:

> *"... where the court casts doubt on existing case law or principle, it does not amount to laying down any new law or principle, let alone departing from the existing case law. Article 129 (3) of the Constitution 1992 enables this court to depart from its previous decisions. And* ***it means the existing law must be clearly stated and the point(s) of departure must equally be clearly stated****, without equivocation. Merely casting doubt or even criticizing existing decision is not tantamount to departing therefrom".*

It is also the strong view of many that where the same court or a court of co-ordinate jurisdiction sets different precedents, a lower court is at liberty to follow any of them. I am afraid that that legal proposition may be subject to debate. Perhaps, it is plausible for precedents set by the High Court since the decision of one High Court is not binding on another High Court and such a decision may have a persuasive effect only. Hence, a lower court may choose to apply either of them.

With the Court of Appeal, it may appear that where there are conflicting precedents, the former prevails. The reason is not far-fetched! The Court of Appeal is constitutionally bound by its previous decisions on questions of law and that renders the latter decision no better than *per incuriam*[18]. Conceivably, the same position is shared by some legal analysts in respect of conflicting decisions of the Supreme Court.

On when a precedent will not bind a lower court, Justice Ollenu in an article[19] explained:

> *"The first exception is that a decision which was given per incuriam is not binding either on the higher court who gave it or on a lower court. When a decision is made in ignorance of a rule of law, statute law or common law, or of some important facts, or upon a point not directly in issue in the case, that decision is not binding upon any court, because the court that gave it has not considered all the relevant matters which should warrant a decision on the subject. In effect, we*

[17] Suit No. J5/10/2018, 8TH March 2018, SC, Unreported.
[18] See article 136 (5) of the 1992 Constitution.
[19] See 'Judicial Precedent in Ghana' [1966] Vol III, Vol. 2, UGLJ 139-164 by Ollenu N.A.

would say in such a case that there has been no judicial pronouncement on the subject".

On when there are two inconsistent decisions by the same court, the learned Judge in part of his article stated:

"*That where there exist inconsistent decisions, a court has a discretion to follow the one which in its own opinion is sound; it* ***need not follow the latest of them****".*

While agreeing substantially with the position of the learned judge in his paper, it may seem that he overelaborated in his concluding part when he stated:

"... where there are two conflicting decisions of the final appellate court, neither is binding on any court, and a court is entitled to choose which of them it would follow, and is also entitled to come to its own decision on the subject".

This is the principle which Bossman J. (as he then was) applied in **Bakpoweri v. Oluwa**[20]. He elected to follow **Kofi v. Mensah**[21] instead of **Delor v. Foli**[22] which in his opinion is inconsistent with it. In the course of his judgment his Lordship said:

"I am aware that my view in this matter would appear to be contrary to, and indeed in the teeth of, the decision of W.A.C.A. in Civil Appeal No. 31/50, Reuben Delor v. Norli Foli. which, as a decision of the Appeal Court, is necessarily binding on me. But it is in conflict with another decision of the same court by which also I am bound, namely, Osei Kofi v. Mensah, and therefore I think I am permitted to choose which I should follow."

Conclusion

The journey trodden by the *estoppel per rem judicatam rule* depicts how a 'corrupted' name or concept may later struggle to re-assert its identity. In the recent case of **Saviour Church of Ghana,** the Apex Court succinctly stated the principle, but yielded to the exceptions containing the flexibility as a result of modern realities enunciated in the **Otu X v. Owuodzi** case. It appears that their Lordships have now found an abode for both

[20] High Court, June 15, 1957.
[21] 1 WACA
[22] [1952] 14 WACA 54.

positions under the same roof. Be that as it may, there are some lessons to be learnt from the decision by the legal fraternity.

For us as judges, we are to ensure that our judgments are clear enough to make it easier for the parties to rely on them for the purpose of establishing *estoppel per rem judicatam* in later cases. Regrettably, there have been instances where some judges do not specifically mention the actual reliefs sought by the plaintiffs in their judgments but only make references to the claim '*as contained in the plaintiff's writ of summons'*. In granting the reliefs after their evaluation, they proceed to decree thus: '*Accordingly, the reliefs sought by the plaintiff as contained in his writ of summons are hereby granted'*. Obviously, anyone who reads the judgment would not be able to know the said reliefs in the absence of the Writ of Summons and the pleadings of the parties. It is for this reason that judges are entreated to be clearer in their judgments.

For lawyers, since the requirement of tendering the judgment and pleadings in evidence basically is the rule, other than the exception, it is important that they do not consider the recent decision in the **Saviour Church of Ghana** as issuing them a license to throw caution to the wind by conducting their cases anyhow and expect judges to search for the judgment to back their cases for them. Such a venture could be a risky gamble that can backfire. As far as possible, lawyers and litigants are to plead and tender the judgment and the proceedings creating the *estoppel per rem judicatam* in court.

Significantly, the new direction taken by the Supreme Court in recognizing documents on record not tendered in evidence at the trial will certainly vex the foundation of the law of evidence. Nevertheless, as we seek to ensure substantial justice within the four corners of the law, we desperately need more of such pragmatic rules, unfettered by the shibboleths of past practice or decrepit dogma.