IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: AKUFFO (MS), JSC PRESIDING
YEBOAH, JSC
BENIN, JSC

REVIEW MOTION
NO. J7/5/2015

23RD MARCH, 2017

ECOBANK GHANA LIMITED - PLAINTIFF/APPELLANT/RESPONDENT

VRS

ALUMINIUM ENTERPRISE LTD. - DEFENDANT/RESPONDENT/APPLICANT

RULING

BENIN, JSC:-

This is an application on notice brought by the Aluminium Enterprise Limited, the defendant/respondent/applicant against Ecobank Ghana Ltd, the plaintiff/appellant/respondent praying for an order reversing the decision of this court presided over by a single judge dated 1st December 2016. Aluminium Enterprise is hereafter called the Applicant and Ecobank Ghana is called the Respondent.

The facts that have brought the parties to this court are these. The applicant obtained judgment against the respondent at the High Court, Accra for the payment of a liquidated sum. The respondent has appealed against that decision to the Court of Appeal which is yet to hear and determine same. The respondent applied to the High Court for a stay of execution pending appeal. The High Court granted a partial stay by deciding that the respondent should pay a third of the judgment debt to the applicant, whilst the remaining two-thirds should await the outcome of the appeal.

The respondent believed the partial grant of stay amounted to a refusal so they repeated the application before the Court of Appeal. The main thrust of their argument was that should they succeed on appeal the judgment would be rendered nugatory since the applicant would not be able to refund the sum of money. The argument did not find favour with the Court of Appeal presided over by a single judge so they were denied the prayer sought. The respondent took the matter before the duly constituted bench of the Court of Appeal but again they were not successful.

Being dissatisfied with the decision of the duly constituted court, the respondent applied to this court for special leave to appeal against same; the court granted their request. They filed the appeal to this court on the main ground that the Court of Appeal did not take relevant matters into consideration in arriving at their decision to deny the prayer for stay of execution.

Thereafter the respondent filed an application before the Court of Appeal seeking an order suspending the order or decision affirming the partial stay of execution, or alternatively to stay proceedings consequent upon the orders of the Court of Appeal. The application was dismissed by the said court, on ground that no exceptional circumstances had been disclosed to warrant the exercise of its discretion in their favour.

The respondent repeated the application for the suspension of the Court orders or stay of proceedings before this court. This court, presided over by a single judge, granted the application in these terms:

"I think it is fair that the order by the Court of Appeal confirming the conditional grant of stay of execution by the High Court is suspended pending the determination of the appeal before this Court against the said order. Application is accordingly granted. No order as to costs."

The present application has been brought under article 134(b) of the 1992 Constitution. It provides:

134. A single Justice of Supreme Court may exercise power vested in the Supreme Court not involving the decision of the cause or matter before the Supreme Court, except that-

(b) in civil matters, any order, direction or decision made or given under this article may be varied, discharged or reversed by the Supreme Court, constituted by three Justices of the Supreme Court.

The applicant is saying that the order by the Court of Appeal affirming the High Court's grant of a conditional stay of execution was not an executable order. For that reason it is wrong for this court to suspend such an order. They therefore prayed that the said order of the single judge of this court be reversed by virtue of article 134(b) of the Constitution. This constitutional provision merely prescribes what the three-judge panel may do after hearing an application brought by a party who is aggrieved with the decision of a single judge. It does not state under what conditions or in what situations the second panel may consider in making the determination to reverse, discharge or vary the decision or order of a single judge. Should the three-member panel consider or apply the conditions applicable to an appeal or a review or a combination of the two? It is clear to us that an application such as this cannot be treated as an appeal since the full record of appeal will not have been placed before the court;

moreover the decision of a single judge, and for that matter a three-member panel, cannot involve a substantive cause or matter before the court. Furthermore, in **Mass Projects Ltd (No. 2) v. Standard Chartered Bank (No. 2) (2013-14) SCGLR 309** this court held that an application under article 134 of the Constitution is a special review application, which was entirely different from the court's ordinary review jurisdiction under article 133 of the Constitution; therefore the provisions of rule 54 of the Supreme Court Rules, 1996 C.I. 16 do not apply. Consequently, the effect of the foregoing opinion and in the **Mass Projects Ltd** case, supra, is that an application under article 134 can neither be treated as an appeal nor an ordinary review.

What considerations then will be applicable in a special review application, in the absence of guidelines provided by the Rules of Court? Once the right has been given to parties and the court has been given jurisdiction to entertain applications, the court has an inherent obligation to do justice in the circumstances of the case. However, the court is constrained, in the absence of directions, in putting its hand on what situations and circumstances it will exercise this jurisdiction, unlike the provisions in rule 54 of C.I. 16 in cases of ordinary review application. We would venture to suggest that in exercising its jurisdiction under article 134 the court should examine each case on its merits. With time a certain regime of guidelines will have been developed by this court through various decisions in order to light the path of litigants who seek to take advantage of the leeway afforded by the existence of article 134 of the Constitution. We would take this opportunity to add our voice to the call upon the Rules of Court Committee to make appropriate rules to govern the exercise of this jurisdiction.

But it is not far-fetched to argue that rules on review should largely apply, because where an applicant succeeds in proving that special circumstances exist it is legitimate for the court to grant his request. And for that reason all the factors that this court has decided may constitute special circumstances will come into play, but always bearing in mind, as decided

in **Swaniker v. Adotei Twi II (1966) G.L.R. 151 SC** that the categories of what constitute exceptional circumstances are never closed.

Besides, where the decision rests on a patent error of law or procedure, the court may reverse the decision. Thus where the single judge of this court was considered to have taken a wrongful view of rule 76 of C.I. 16 the three-panel judge granted an application brought under article 134(b) of the Constitution and reversed the decision. This was in the case of **Sefa & Asiedu (No. 2) v. Bank of Ghana (No. 2); Gyamfi (No. 2) v. Bank of Ghana (No. 2) (Consolidated) (2013-14) 1 SCGLR 530.**

In the instant case the application is premised on these grounds:

i. "That the order of the Court of Appeal dated 18th March 2016 is a non-executable order and the court erred in ordering the suspension of a non-executable order of the Court of Appeal."
ii. "Additionally, respondent has not demonstrated any exceptional circumstances to warrant a grant of an order of suspension because their notice of appeal discloses no arguable points of law. Anyhow, the applicant, on the other hand, has demonstrated exceptional circumstances and should reap the benefits of the judgment given in its favour."

Both of these grounds have received judicial pronouncements, a number of which have been referred to by counsel for the applicant in their statement of case. In respect of the first ground counsel stated that where there is no executable order, such an order cannot be stayed. The cases they cited in support are **Anang Sowah v. Adams (2009) SCGLR 111; Golden Beach Hotels (Gh) Ltd v. Packplus International Ltd (2012) 1 SCGLR 452**. They also stated that the order that is sought to be stayed must have been made by the court whose order is sought to be stayed and not the trial court's decision or order. They cited in support of this submission the case of **Ghana Football Association v. Apaade Lodge Ltd. (2009) SCGLR 100.** This is because as stated by this court in the case of **Standard Chartered Bank (Ghana) Ltd. v. Western**

Hardwood Ltd. (2009) SCGLR 196, the judgment of a lower court which has been affirmed on appeal remains the judgment of such lower court and not that of the appellate court.

The applicant's position is that the Court of Appeal merely affirmed the decision of the trial court and so it did not make any order which was capable of enforcement. The order of the trial High Court which is executable is not before this court.

Besides they also argued that the respondent did not raise any matters before the Court of Appeal from which it could be decided that special circumstances exist. It is for these reasons that they believe the single judge wrongly exercised his discretion.

The applicant also argued quite extensively about the grounds for a stay of execution. However potent these arguments may appear to be, we would decline the invitation to make a pronouncement as that is the subject-matter of the substantive appeal before this court, which article 134 of the Constitution does not entitle us to discuss in exercise of this limited jurisdiction.

For their part, the respondent argued that in granting the special leave to appeal, this court was satisfied that "a decision by this court on an important matter of law regarding the point sought to be appealed against would be an advantage to the public." They also stated that the notice of appeal raises serious grounds of law for this court's consideration, which influenced the single judge in arriving at his decision, as he found them not to be frivolous. All these were said in response to the argument as regards the appeal being meritorious or otherwise, which we have declined to go into.

On a more relevant note, the respondent, in response to whether the order of the court below was executable or not, deposed in an affidavit in opposition that:

"15. That I verily believe to be true that the plaintiff/appellant/respondent correctly applied to this Honourabe Court to SUSPEND the order of the court below dated 18th May 2016 because the said order of the court below was a non-executable order.

16. That I verily believe that if the order of the court below dated 18th May 2016 was an executable order the plaintiff/appellant/respondent would have applied for a STAY OF EXECUTION and not an order to SUSPEND the said order of the court below."

The respondent has thus agreed with the applicant that the order of the Court was non executable. Therefore in order to get around this apparent hurdle the respondent chose to apply to the court to suspend the order. The first point that comes to mind is whether this course is sanctioned by any rule in the Court of Appeal or this Court. There is none that we can find. The only recourse is the Court's inherent jurisdiction to do justice. But the inherent jurisdiction can only be invoked where there is no rule or judicial pronouncement to the contrary. The principle in **Anang Sowah v. Adams**, supra, is simply that where there is no executable order from the decision of the court immediately below, this court cannot make an order staying execution.

It is noted that the respondent did not apply for a stay of execution, but to all intents and purposes the application to suspend the decision of the Court of Appeal was aimed at achieving that objective. The court will always look at the substance of an application and not the mere words used in describing it. It is most absurd to craft an application for a stay of execution as one to suspend the court's decision. Rule 20 of C.I. 16 makes provision for a stay of execution of decisions which are executable, so once the original decision is executable, this court will see through any application which is disguised in whatever form to achieve a stay of execution. Indeed paragraphs 15 and 16 of the respondent's own affidavit did not conceal the deceitful act that they were aiming at achieving a stay

of execution in the appellate courts what they had failed to achieve in the trial court.

We do recognise that the existing law that literally debars a party from seeking a stay of non-executable order of the first appellate court may appear to work hardship in certain situations, yet those decisions must be re-visited in appropriate case/s to enable this court to take another look at them. But until then the respondent as well as the single judge and we ourselves, (as the point has not been urged on us), are bound to respect them. We think the application was effectively seeking a stay of execution but was disingenuously disguised as one to suspend the order of the Court of Appeal which they concede was non-executable. The application should have been declined on this point of law and we thus decide that the single judge did not have regard to the existing authorities on the subject and the decision cannot be allowed to stand.

The next point is that there were no special circumstances raised before the single judge which warranted the decision. As pointed out earlier, the categories of what factors, matters or situations would go into a consideration of special circumstances are not closed, yet the court must state on the record why a decision based on special circumstances was taken. The exercise of every discretion must have a basis, factual and/or legal, to sustain it, lest it should assume the character of arbitrariness, which is deprecated by article 296 of the 1992 Constitution.

The entire decision of the single judge does not disclose what factors were taken into account that enabled him to conclude that it was 'fair' to grant the application. The record as we have it does not disclose any factors which amount to special circumstances which merited the court's decision in favour of the respondent. On the contrary, it is apparent from the narration of the facts above that the respondent has embarked upon series of applications to frustrate the applicant from enjoying the fruits of his victory, albeit partially. The fact that the respondent is challenging the basis of the grant of the partial stay of execution is not sufficient to

constitute special circumstance, at least not until this court has had the benefit of the full record of appeal.

Given all the circumstances of this application, we consider that apart from the decision of the single judge being contrary to existing authorities, there were also no special circumstances to warrant a departure from the decision of the Court of Appeal as duly constituted. We therefore grant this application and vacate the order of this court dated 1st December 2016.

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

(SGD) S. A. B. AKUFFO (MS)
(JUSTICE OF THE SUPREME COURT)

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