IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: APPAU, JSC (PRESIDING)
OWUSU (MS.), JSC
LOVELACE-JOHNSON (MS.), JSC
HONYENUGA, JSC
PROF. MENSA-BONSU (MRS.), JSC

CIVIL APPEAL
NO. J4/02/2021

1TH DECEMBER, 2021

IN THE MATTER OF THE BORROWERS AND LENDERS ACT, 2008, (ACT 773)

AND

IN THE MATTER OF A DEED OF MORTGAGE DATED 23RD MAY 2012 BETWEEN GROFIN AFRICA FUNDS (GH) AND PAUL AGYEMAN DUAH & GRACE AGYEMAN DUAH

GROFIN AFRICAN FUND (GH) LTD.
SUING PER ITS LAWFUL
ATTORNEY HOPE CAPITAL LIMITED .... APPLICANT/RESPONDENT/RESPONDENT

VRS

COLLBOY ENTERPRISES LTD. — 1ST RESPONDENT/APPELLANT/APPELLANT
PAUL AGYEMAN DUAH .... 2ND RESPONDENT/APPELLANT/APPELLANT
GRACE AGYEMAN DUAH — 3RD RESPONDENTAPPELLANT/APPELLANT

JUDGMENT

HONYENUGA JSC:-

This appeal is against the Ruling of the High Court on a motion on notice for an order for a warrant to realise and /or take possession under the Borrowers and Lenders Act, 2008, Act 773. The High Court granted the application in favour of the Applicant/Respondent/Respondent as against the 1st, 2nd, 3rdRespondents/Appellants/Appellants to take possession of the property No. 67(Sector 2, Gbawe, North Accra pursuant to Act 773. Aggrieved with the Judgment of the High Court the 1st, 2nd, 3rd Respondents/Appellants/Appellants filed an appeal tothe Court of Appeal and thence to this court. The Applicant/Respondent/Respondent would be referred to as the Respondent, while the 1st, 2nd and 3rd Respondents/Appellants/ Appellants would simply be referred to as the Appellants.

BACKGROUND

The Respondent is a limited liability company engaged in the business of granting financial facilities among others. On the 14thday of May, 2012, the 1st Appellant applied for and was granted a term loan facility in the sum of two hundred and fifteen thousand Ghana (GH¢215, 000.00) at an agreed interest of 24.25 percent per annum to augment its working capital for a term of five (5) years. The 2nd and 3rdAppellants who are directors and shareholders of the 1st Appellant company guaranteed the facility. The 3rd Appellant provided an additional security for the loan mortgage over all that piece or parcel of land situate lying and being at Gbawe North Accra known as plot No. 67 (sector F) containing an approximate area of 0.17 Acre more or less with a market value of Two Hundred and Forty Two Thousand Eight Hundred Ghana Cedis (GH¢242,800.00) registered at the Land Title Registry as Number GA29196, Volume 89 Folio 171, the subject matter of the application. Pursuant to the provisions of the Borrowers and Lenders Act, 2008 (Act 773) the Respondent had the Collateral security registered at the Collateral Registry of the Bank of Ghana.

According to the Respondent, the Appellants failed, refused and or neglected to perform their financial obligations to the Respondent despite numerous demands served on them. After obtaining a copy of the Memorandum of No Objection from the Collateral Registry and in compliance with Section 342 of Act 773, instituted an action in the form of an Originating Notice of Motion which sought an order for a warrant to realize and/or take possession of the property aforementioned.

According to the Appellants, as stated in their affidavit in opposition, the loan facility was taken as one but was disbursed in two tranches with the first tranch reaching its suppliers but the second tranch failed to reach its suppliers. It is for this reason that the Appellants claim to be indebted to the Respondent only for the first branch disbursed, which at all times material to the application they have been paying. The Appellants therefore contend that they have not defaulted in their obligation to the Respondent.

After hearing both Counsel in their various written submissions as filed, the learned trial Judge granted the application. Dissatisfied with the judgment of the High Court, the Appellants filed an appeal to the Court of Appeal but lost. It is against the judgment of the Court of Appeal that the Appellants have filed an appeal to this court based on the following grounds and additional grounds:-

> "i. The Court of Appeal erred in holding that it was not erroneous for the trial Judge to have relied on the Power of Attorney as creating the locus standi or capacity on which the Respondent purported to invoke the jurisdiction of the trial court when the Attorney had not disclosed any such capacity.
> ii. The Court of Appeal erred in holding that as the Attorney stands in the stead of the Respondent then its representative's affidavit could be relied upon.
> iii. The Court of Appeal erred in holding that the action or the matter sought be brought and determined on an Originating Notice of Motion.

iv. The Court of Appeal erred in holding that there was no evidence of fraud to investigate in the case.

v. Additional Grounds of Appeal to be filed upon the receipt of the record of proceedings."

Indeed, on the 29th October, 2020, this court granted additional grounds as follows:-

"vi. The Court of Appeal erred when it gave judgment against the Respondents/ Appellants/Appellants without jurisdiction and contrary to or in breach of Section 35(1) of the Borrowers and Lenders Act, 2008 (Act 773).

PARTICULARS OF ERROR

a. Section 35(1) of Act773 unambiguously providing that the said Act is not applicable to the Mortgages Act (NRCD 96).
b. The Court of Appeal failing to advert it (sic) mind to the fact that the transaction in the case before them was a Mortgage transaction and as such Act 773 was inapplicable.
c. The Court of Appeal by so doing giving a judgment without jurisdiction and in clear violation of section 35(1) of Act 773."

SUBMISSION OF THE APPELLANT

The gist of the Appellants case is that the Court of Appeal had no jurisdiction to have entered judgment for the Respondent when it breached section 35 of the Borrowers and Lenders Act 2008 (Act 773). The appellant contended that the power of attorney that created capacity for the Respondent to initiate the action was wrong and did not invoke the jurisdiction of the trial court. Further, the appellant submitted that the Court of Appeal was wrong in affirming the decision of the trial court that the action could be initiated by an Originating Notice of Motion instead of by a Writ of summons. The Appellant finally submitted that the Court of Appeal was wrong in not finding evidence of fraud.

THE RESPONDENT'S SUBMISSIONS

The Respondent on the other hand, contends that a cursory reading of the particulars of error in ground (iv) indicate that the Court of Appeal and not the High Court has the jurisdiction to give judgment, as same was purportedly in clear violation of Section 35(1) of Act 773. Counsel submits that the jurisdiction of the Court of Appeal was invoked when a Notice of Appeal was filed in that court. The respondent further submits that the meaning placed on section 35 (1) of Act 773 by the Appellants was wrong and that the true meaning and the import of section 35(1) is to the effect that once a lender registers a charge with the Collateral Registry which is by way of a Mortgage, the Rights of a Mortgagee or Lender in turn realizing the security as contained in the Mortgage Act would not apply.

CONTENTS OF THE GROUNDS OF
APPEAL TO THE SUPREME COURT

It is trite that this court being the final appellate court, seeks to resolve appeals based on grounds of appeal arising from allegations of error of fact or law or mixed law and fact. Rule 6 of the Supreme Court Rules, 1996 (CI. 16) deals with notice of grounds of appeal from the Court of Appeal to the Supreme Court. Indeed, Rule 6 (2) (f) of CI 16 provides:

> "(2) A notice of civil appeal set forth the grounds of appeal and shall state: …
> (f) The particulars of a misdirection or an error in law, if so alleged."

Rule 6 (2) (f) of CI. 16 provides that grounds of appeal based on allegations of error of fact or law require that particulars of the said error of fact or law be provided. The Supreme Court has on numerous occasions in Gregory v Tandoh IV & Hanson [2010]SCGLR 971,in re Asamoah (Decd) Agyeiwaa v. Manu [2013-2014] 2SCGLR 909 among others admonished counsel to endeavour to comply with the provisions of rule 6 of the Supreme Court Rules, 1996 (CI. 16) to no avail. In the instant appeal, the Appellants failed or refused to provide particulars of the error of law or fact alleged in their grounds of appeal, thus breaching Rule 6 (2) (8) of CI 16. A perusal of grounds

(i) (ii) (iii) and (iv)of the grounds of appealindicate that they offend Rule 6 (2) (f) as aforesaid which cannot invoke arguments on errors of law or fact. It is our considered opinion that learned counsel for the appellant realized this serious lapse and therefore applied and was granted leave to file additional grounds of appeal, realizing that the rules of procedure of this court was breached. In the circumstances, we have no other option than to strike out the said grounds (i) (ii) (iii) and (iv) of the grounds of appeal. We would then adjudicate on the additional ground of appeal argued by counsel for the Appellants.

DETERMINATION OF THE SOLE GROUND OF APPEAL

Before we deliberate on the ground of appeal, we deem it fit to address this fundamental question on commencement of Mortgage actions and that under the Borrowers and Lenders Act 2008 Act 773 on which both counsel addressed this in their statement of case. We think that we have a duty as the final court to make a pronouncement on this essential mater despite having struck out the particular ground of appeal supra. Mortgage actions are commenced by a writ of summons and governed by Order 59 of the High Court (Civil Procedure) Rules, 2004, (CI 47). Order 59 rule (2) (a) defines "mortgage action" as an action in which there is a claim by the plaintiff for any of the following reliefs: -

> "Payment of money secured by a mortgage or charge, sale of mortgaged property, appointment of a receiver, delivery of possession to the mortgage or charge by the mortgage or person having the mortgage or charged property by any other person in or alleged to be in possession, release of the property from the security, or delivery of possession by the mortgage."

It is thus clear that the procedure in order 59 supra with regard to Mortgage actions must be commenced by claiming reliefs and for all intents and purposes means the commencement of an action by writ. Order 82 of C.I. 47 defines a Writ as follows:-

"Writ" includes a writ of summons and statement of claim or a petition in a cause or matter."

It can therefore be deduced from Order 82 that for one to claim reliefs, a writ or a petition ought to be issued out.

On the other hand, commencement of an action under the Borrowers and Lenders Act, 2008, Act 773 envisages commencement of an action by an Originating Motion. Section 35 of Act 773 gives credence to an action by an Originating motion rather than a writ. It is clear from a reading of section 35 of Act 773 that the Mortgages Act, 1972, (NRCD 96) does not apply to the rights of a lender under Act 773 and where there is a conflict between the provisions of the Mortgages Act or other laws, or rules applicable to the enforcement of a lenders right, the provisions in Act 773 prevails. This situation as we would later expatiate in this judgment is because the provisions in section 25 of Act 773 requires a borrower or a person interested in a charge to register a certified copy of a charge or collateral created by the borrower in favour of a lender with the Collateral Registry. This is a new provision which cannot be found in the Mortgages Act. It is therefore our candid opinion that while actions under the Mortgages Act ought to be commenced by a Writ, that in relation to Act 773 must be commenced through an OriginatingNotice of Motion to achieve a speedy and effective justice, avoid delays and unnecessary expense as envisaged in Order 1 rule 2 of C.I. 47.

Now, a perusal of the Additional ground of appeal appears to be founded on three fold thus:

1. That the Court of Appeal lacks jurisdiction because Act 773 is inapplicable.
2. That the transaction was a mortgage and Act 773 was inapplicable.
3. The Court of Appeal delivered a judgment without jurisdiction in clear violation of Act 773.

The editors of Black's Law Dictionary (9th ed.) at page 927 defines "jurisdiction" to mean "A circuit power to decide a case or issue or decree." The case law is not bereft of the meaning of jurisdiction. In Edusei (No. 2) v. Attorney-General [1998-99]SCGLR 753,jurisdictionwas defined at page 781 per Acquah JSC (as he then was) in his dissenting judgment as follows:-

> "Jurisdiction is the power of the court to decide a matter in controversy and presuppose the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions and declare judgments. Thus the Oxford Advance Learners Dictionary defines jurisdiction as; -"authority to carry out justice and to interpret and apply law; right to exercise legal authority."

Indeed, any court that lacks the power and authority to adjudicate a case lacks jurisdiction. In Ex parte McCardle 7 wall 5 or 6 [1869) (quoted at page 80 of Constitutional Law of a Changing America (2nd ed.) by Epstein& Walker, Chief Justice Salmon P Chase stated the effect of lack of jurisdiction which was quoted with approval in Edusei v. AG. (Supra) at Page 781 in the following words:

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Furthermore, jurisdiction is either conferred by a Constitutional provision or by Statute. In Nana Agya Bafour IV v. Joseph Adade Mensah& 3 others [2020] 170 GMJ 237 at 275-276 my esteemed brother Dotse JSC put it succinctly as follows: -

> "Jurisdiction by its very nature, is always either conferred by a Constitutional provision or by statute. Sometimes the Constitution provides the basic framework of the Constitution and Statutory provisions and other subsidiary legislations amplify it by providing the general guidelines, scope and remit of each jurisdictional stipulation."

In this case, it is the jurisdiction of the Court of Appeal that is under attack. The jurisdiction of the Court of Appeal is provided for in Article 137 (1) & (2) of the Constitution, 1992 as follows:-

(1) The Court of Appeal shall have jurisdiction throughout Ghana to hear and determine subject to the provisions of this Constitution, appeals from a judgment, decree or order of the High Court and Regional Tribunals and such other appellate jurisdiction as may be conferred on it by this Constitution or any other law.

(2) Except as otherwise provided in this Constitution, an appeal shall be as of right from a judgment, decree or order of the High Court and a Regional Tribunal to the Court of Appeal."

Section 11(1) and (2) of the Courts Act, 1993 ACT 459 as amended is an exact replica of Article 137 (1) and (2) of the Constitution. The above provisions from the Constitution and the Courts Act are clear and unambiguous to the effect that the jurisdiction of the Court of Appeal is limited to the hearing of appeals from the High Court or from the Circuit Court in civil cases. It is therefore obvious that the jurisdiction of the Court of Appeal is invoked by the filing of a notice of appeal at the High Court against the judgment or ruling of the High Court. In the instant appeal, the jurisdiction of the court was invoked by the filing of the appeal dated the 11th day of May 2018 challenging the judgment of the High Court dated the 9th day of May 2018.

Furthermore, the learned trial Judge at page 163 of the record of appeal concluded as follows:-

> "I am satisfied that the Applicant has complied with the provisions in Section 32 of Act 773 and the Collateral Registry Guidelines and Bank of Ghana notices. It is therefore my considered opinion that the Application should be granted. Same is accordingly granted. It is hereby ordered that the Applicant take possession of the property No. 67 (Section F), Gbawe, North Accra).

It was against this decision of the learned trial judge that the appellants appealed to the Court of Appeal which affirmed the judgment of the High Court. Indeed, the

decision of both the High Court and the Court of Appeal are sound. Now, the appellants' pliant is with the provisions in section 35(1) of Act 773 which provides:-

> "35 (1) The Mortgages Act, 1972 (NCRD 96) does not apply to the rights of a lender under this Act in the event of default on the part of a borrower.
>
> (2)Where there is a conflict between the provision of this Act and the provisions of the Mortgages Act or other laws or rules applicable to the enforcement of a lender's rights, the provisions of the Act shall prevail."

Learned counsel for the appellants' statement of case interpreted section 35(1) at page 9 thus: -

> "MY LORDS the provisions of Section 35(1)of Act 773 is clearly unambiguous and it is to the effect that where a property is a subject matter of a mortgage, the provisions of Act 773 would not be applicable to that particular transaction."

Are the Appellants' right in their interpretation of section 35 of Act 773? A recourse to the various sections of Act 773 would provide the answer. Sections 22, 23 and 25 (1) (3) of Act 773 provides:-

> "22. The object of the Registry is to register charges and collaterals created by borrowers to secure credit facilities provided by lenders.
>
> 23. The Registry shall register charges and collateral perform other functions as are determined by the Bank.
>
> 25 (1) A borrower or a person interested in a charge shall register a certified copy of a charge or collateral created by the borrower in favour of a lender with the Collateral Registry within twenty-eight days after the date of the creation of the collateral charge.
>
> (3) A charge which is not registered in accordance with subsection (1) is of no effect as security for a borrower's obligations for repayment of the money secured and the money secured shall immediately become payable despite any provision. To the contrary in any contract."

It is our candid opinion that the said provisions in Act 773 are clear, unambiguous and require no interpretation. It is a cardinal principle of interpretation that when words are

clear and unambiguous there is no need to imagine or speculate their meaning. In New Patriotic Party v. Attorney-General [1993-94] 2 GLR 35 SC. Archer C. J.in his dissenting opinion in the celebrated 31st December case opined thus:-

> "When the words are clear and unambiguous, we do not go further to imagine or speculate on what the words mean."

However, it is our considered opinion that before a charge or collateral is created, a borrower or any person interested, must register with the Collateral Registry, a certified copy of the charge or collateral created by the borrower and in favour of the Lender within twenty-eight days after the said creation of the collateral or charge. Further, a charge which is not registered is of no effect. Section 38, the Interpretative section of Act 773 defines "charge" as "charge" means charge, mortgage, security, interest, lieu, pledge, assignment by way of security, covenant, restriction, reservation, lease, trust, order, decree, judgment, title defect (including retention of the title claim), or any other encumbrance of any nature other than arising by operation of law."

There is no hesitation to conclude that the definition of charge includes mortgage and this definition has led to the inclusion of Section 35 of Act 773. Section 33 of Act 773 stipulates some rights for the Lender in case of default as follows:-

> "Remedies of lender on default,
>
> 33. where a borrower fails to pay an amount secured by a charge under this Act, the lender may
>
> (a)sue the borrower on any covenant to perform under the credit agreement, or
>
> (b) realize the security in the property charged on notice to the person in possession of the property."

Section 34 (1) & (2) states the Lenders right to possession as follows:-

> "Lender's right to possession.

34(1) in the exercise of right of possession of property that is subject to a charge to secure a borrower's obligations under a credit agreement, a lender is not obliged to initiate proceedings in court to enforce the right of possession.

(2) Where a lender is unable to enforce a right of possession in a peaceful manner, the lender may use the services of the police to evict the borrower or other person in possession pursuant to a warrant issued by a court."

The provisions in sections 33 and 34 of Act 773 read in conjunction are devoid of any interpretation and simply mean that the lender is not obliged to initiate proceedings in court but may sue the borrower on any covenant under the credit agreement or realize the security in the property charged with notice to the person in possession. The Lender may even use the services of the police where the lender is unable to enforce a right of possession through a peaceful means. In the instant appeal, the lender being the respondent exercised her right under section 33 (1) (b) of Act 773 to realize the security as charged on the property with notice to the appellants in possession by invoking the jurisdiction of the High Court by an Originating motion on notice to secure the property. The Respondent clearly stated in paragraphs 15 of the affidavit in support of the said notice thus:

"15. That I am advised and verily believe same to be that due to the failure of the Respondents to comply with the terms of the facility and the repayment of the amounts outstanding upon by the Applicant, it is entitled to realize the security in the property aforementioned charged under the Act after taken (sic) possession."

A perusal of the provisions of the Mortgage Act NRCD 96 and Act 773 indicates an apparent conflict in the rights of a lender or mortgagee in case of a default in securing the property charged. It is our candid opinion that it is to avoid this conflict that section 35 of Act 773 was included to resolve such conflict. It is evident that from Section 35 supra, that once the borrower or a person interested in a charge registers it in the form of a mortgage with the collateral Registry in favour of the lender, the rights of a

mortgage or lender in realizing the security under the Mortgage Act NRCD 96 would be inapplicable. It is evident that section 35 (2) of Act 773 makes it explicit that in case of a conflict between the provisions of Act 773 and the Mortgages Act, NRCD 96, the provisions of Act 773 shall prevail. Act 773 therefore takes precedence over the Mortgages Act as aforesaid. The interpretation placed on Section 35(1) of Act 773 by the learned counsel for the Appellants is clearly wrong. In the instant appeal, it is our respectable opinion that the form of the security, having been drafted as a Mortgage in favour of the Respondent, the registration of the Collateral at the Collateral Registry in accordance with the relevance provisions of Act 773, the rights of the Respondent in Act 773 would prevail over the Mortgages Act. In the instant appeal, therefore the application filed by the Respondent and entertained by the trial court which judgment was affirmed by the Court of Appeal to realize and take possession of the charged property was properly invoked.

This court has clearly reiterated in a long chain of cases such as Achoro v Akanfela [1996-97] SCGLR 209, Koglex Ltd (No. 2) v Field [2000] SCGLR 175, Obeng v. Tandoh IV & Hansen [2010] SCGLR 97, Mensah v Mensah [2012] SCGLR 391, In re Asamoah (Decd), Agyeiwaa v. Manu [2013-2014] 2 SCGLR 909 and Tamakloe v Gihoc Distilleries [2018-2019] 1 GLR 887 that where a first appellate court had confirmed the findings and conclusions of the trial court, the second appellate court would not interfere with the concurrent findings and conclusions unless the findings and conclusions were not supported by the evidence on record, or that the two lower courts committed an error of law resulting in a miscarriage of justice in the way in which the lower courts had dealt with the facts. In the instant appeal, there is no doubt that both the trial court and the first appellate court, the Court of Appeal dealt with the facts well and their concurrent conclusions were clear and not perverse having regard to the law and the evidence on record as explained above.

In conclusion, the appeal fails and it is hereby dismissed. The judgments of the High Court and the Court of Appeal dated the 9th day of May, 2018 and the 20thday of February, 2020 respectively are hereby affirmed.

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

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