IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, AD-2018

CORAM: ATUGUBA, JSC (PRESIDING)
ADINYIRA, JSC
DOTSE, JSC

CIVIL MOTION
NO. J7/1/2018

31ST JANUARY, 2018

MARTIN ALAMISI AMIDU ..... PLAINTIFF

VRS

1. THE ATTORNEY-GENERAL ..... 1ST DEFENDENT/RESPONDENT
2. WATERVILLE HOLDINGS (BVI) LTD. ..... 2ND DEFENDANT
3. ALFRED AGBESI WOYOME ..... 3RD DEFENDANT/APPLICANT

RULING

DOTSE JSC:-

This ruling has been premised upon an application filed at the instance of the 3rd Defendant/Applicant herein seeking orders from this court, pursuant to Article 134 (b) of the Constitution 1992 and Rule 73 of the Supreme Court Rules C. I. 16. This rule has actually been amended by Supreme Court (Amendment) Rules 2016 C.I. 93. The application seeks to reverse orders granted at the instance of the 1st Defendants/Respondents herein made by Benin JSC, presiding as a single Judge of this Court dated 8th June 2017 and 24th July 2017 respectively.

In order to put the nature of the orders granted by our respected brother Benin JSC in proper perspective, we have decided to quote in extenso the relevant and applicable proceedings and orders as made by the court on 8th June 2017 and captured per Applicants exhibit AAW1 as follows:-

> "Upon reading the affidavit of Victoria Adotey, Assistant State Attorney at the Attorney-General's Department filed on 2nd day of June, 2017 praying that 3rd Defendant be orally examined regarding
>
> i. Whether there are any debts owing to the 3rd Defendant/Judgment/Debtor.
>
> ii. Whether 3rd Defendant has any property for satisfying the judgment of this court dated 29th July 2014.
>
> iii. Whether 3rd Defendant has any means of satisfying the judgment of this court dated 29th July 2014 and
>
> iv. The manner 3rd Defendant used the money paid to him by the Republic of Ghana.
>
> Upon hearing Dorothy Afriyie Ansah (Mrs) (Chief State Attorney) with her Victoria Addotey (Assistant State Attorney).
>
> IT IS HEREBY ORDERED THAT the Application be granted as prayed. Let the Judgment/Debtor, **Alfred Agbesi Woyome be served with a copy of the order as drawn up with a hearing notice to appear before this court on Thursday 29th June 2017 to be examined by the Judgment/Creditor by virtue of order 46 r. 2 of C. I. 47".** Emphasis

In view of the reference and reliance of both learned Counsel, Osafo Buabeng for the 3rd Defendant/Applicant and the Deputy Attorney-General, Godfred Yeboah Dame for the 1st Defendants/Respondents on the provisions of order 46 rules 1 (1) and (2) and 2 of the High Court (Civil Procedure) Rules, 2004 C. I. 47, we deem it really expedient to set out the entire rule as follows:-

"Order 46

Examination of Judgment Debtor

1(1) For the purpose of garnishee proceedings under Order 47, where a person has obtained a judgment or order for the payment of money by some other person, hereinafter referred to as "the judgment debtor" the court may, on an application made ex-parte by the person entitled to enforce the judgment or order, order the judgment debtor or, if the judgment debtor is a body corporate, an officer of it, to attend before the court and be orally examined on the questions

(a) Whether any debts are owing to the judgment debtor,

(b) Whether the judgment debtor has any property or other means of satisfying the judgment or order,

and the court may also order the Judgment debtor or officer to produce any books or documents in the possession of the judgment debtor relevant to these questions at the time and place appointed for the examination.

(2) An order under this rule shall be served personally on the judgment debtor and on any officer of a body corporate, ordered to attend for examination.

Examination of party liable to satisfy the judgment

2. Where any difficulty arises in or in connection with the enforcement of any judgment or order, other than a judgment as mentioned in rule 1, the court may make an order under that rule for the attendance of the party liable to satisfy the judgment or order and for the examination of that party on such questions as may be specified in the order and that rule shall apply accordingly with the necessary modifications." Emphasis

SUMMARY OF ARGUMENTS OF LEARNED COUNSEL FOR THE APPLICANT

Learned Counsel for Applicant, Mr. Osafo Buabeng's submissions in support of his arguments for the reversal of Benin JSC's orders dated 8th June 2017 can be summarised briefly as follows:-

i. Learned Counsel took the court on a historical excursion by referencing the 1970 Supreme Court Practice Rules, (known as the white book) as well as the 1995

and 2012 editions as well. Then reference was also made to the repealed High Court (Civil Procedure) Rules LN 140A, particularly rules on discoveries in aid of execution of judgments.

We have looked at the contexts in which these rules of procedure have been applied in the circumstances of this case. We however satisfied that, these provisions have no relevance whatsoever to the instant application of Order 46 rule 2 as applied by the learned single Judge of this Court.

2. Secondly, learned counsel for the Applicant argued that, Order 46 of C. I. 47 provided for the examination of a Judgment/Debtor on examination under garnishee proceedings. It was in this respect that learned counsel made historical references to the old English and Ghanaian Rules of procedure on the subject. He further submitted that orders 46 and 47 must be read and or construed together.

3. Thirdly, learned counsel for the Applicant argued that, under Order 46 as referred to supra, it is only the Judgment/Debtor who is to be examined, and that there is no provision for any third party examination as has been done with a subpoena being served on other 3rd parties. He stated that, this has given the impression that a full blown trial is being contemplated contrary to the Rules of Procedure. Here again, the historical references were made to the 1970, and 1995 White Books on the Supreme Court Practice.

4. Learned counsel for the Applicant next argued that since garnishee proceedings embarked upon earlier by the Respondent herein had been concluded, the order for the oral examination of the Applicant and proceedings aimed at sale of his immovable properties are not supported by the current rules. Learned counsel further argued that, the questions set down by the single Judge are irrelevant to the execution processes embarked upon by the Respondents herein.

5. Finally, learned counsel argued that the order for oral examination of the Applicant infringes and or violates the Applicant's right to privacy as provided for under the Constitution reference article 18 (2) thereof.

ARGUMENTS BY LEARNED DEPUTY ATTORNEY-GENERAL IN RESPONSE

1. Learned Deputy Attorney General contended that, the Applicant has clearly misconceived the breadth and extent of Order 46. He argued that, Order 46 which generally permits the oral examinations of judgment/debtors covers two distinct and separate scenarios.

a. The first is dealt with under Order 46 (1) – which deals with garnishee proceedings. He argued that, that was not the rule the Respondents invoked, and indeed as can be seen supra, that was not the rule under which Benin JSC made the order of 8th June 2017.

b. The second scenario, according to the incisive submissions of the learned Deputy Attorney-General is what has been clearly set out in Order 46 r. 2 of C. I. 47, supra. This is where a judgment creditor encounters any difficulties in the execution of any judgment or order. Reference to Applicant's own exhibit AAWI which makes it quite clear that, this was the order invoked upon by the Respondents and the order under which Benin JSC granted the order.

2. Learned Deputy Attorney-General, next argued that the contention that the issues or questions set down by the learned single Judge are irrelevant and should be struck out are not well made out. Learned counsel argued that, Order 46 (2) expressly provided that in making an application under the rule, the application ought to be treated as if same is made under Order 46 (1). In other words, Order 46 (1) should apply **mutatis mutandis** to an application brought under Order 46 (2). A reference to Order 46 (1) would reveal that, the rule specifically stipulates the questions that should be asked should be referable to the following:-

    a. Whether any debts are owing to the judgment debtor,

    b. Whether the judgment debtor has any property or other means of satisfying the judgment or order.

Learned Deputy Attorney-General, therefore argued that the arguments made by learned Counsel for the Applicant in this regard are not supported by the Rules of Procedure.

3. Learned Deputy Attorney-General, next contended that it is wholly untenable and unmeritorious to argue that the oral examination of the Applicant violates his rights to privacy as provided for in article 18 (2) of the Constitution.

In this respect, learned Counsel for the Respondents argued that, all such rights provided for in the Constitution are by themselves subject to any interference *"in accordance with law and as may be necessary in a free and democratic society."*

Learned Counsel further submitted that, in addition to the above, relevant constitutional and statutory provisions in article 126 (3) of the Constitution and Section 102 (1) & (2) of the Courts Act, 1993, Act 459 provide that, "***all court proceedings unless directed by specific legislations are to be held in public."***

He also made reference to publications that are normally made in respect of substituted applications and published in national dailies.

4. Learned Deputy Attorney-General argued that, the Applicant has been making piecemeal arguments throughout this execution process by the Respondent. This is premised upon the fact that this Court has made various Rulings and pronouncements upon the execution processes embarked upon by Respondents against Applicant. Learned counsel urged this court to treat as estoppel the said Rulings and hold that the Applicant is estopped from re-arguing matters already dealt with.

Finally, learned Deputy Attorney-General urged this court to refuse the application and dismiss same as it is unmeritorious, mischievous and without any basis whatsoever.

REPLY BY COUNSEL FOR APPLICANT

By leave of the Court, learned Counsel for the Applicant replied that applicability of Order 46 rule 2, clearly excludes a judgment for the payment of money other than Order 46 rule 1. He contended that, it was in respect of carrying out Fi-Fa proceedings that the Applicant raised issues, hence the resort to the oral examination which according to learned counsel is not warranted under the Rules of Court.

ANALYSIS

In our estimation, the following two issues stand out for resolution from the processes filed by the parties and their submissions in court. These are:-

1. Whether the Applicant's rights to privacy have been violated or infringed by the orders made by the learned single Judge of this court dated 8/6/2017.

2. Whether the invocation of Order 46 r. 2 of C. I. 47 in the manner applied by the single Judge is appropriate.

ISSUE 1

Whether the Applicant's rights to privacy have been violated or infringed by the orders made by the learned single Judge of this court dated 8/6/2017.

Article 126 (3) of the Constitution 1992 provides as follows:-

> *"Except as otherwise provided in this Constitution or as may otherwise be ordered by a court in the interest of public morality, public safety or public order, the proceedings of every court shall be held in public."*

The same provision has been re-emphasied in Section 102 (1) of the Courts Act 1993, Act 459 supra. It must also be noted that, the Applicant has not referred to any legislation which prescribes the oral examination of a judgment Debtor in open Court and in terms as provided for in order 46 r. 2.

As a matter of fact, unless otherwise directed, court proceedings in Ghana are generally held in public because of the constitutional provisions referred to supra. It is in this respect that order 7 rules 6 (1) (2) (3) (4) and (5) of C.I. 47 provides that where a court document or process is required to be served personally, but cannot be served for any reason, the party may apply to the court ex-parte to have that process served by substituted service and this can extend in some cases to advertisement in the media within the jurisdiction of the court. See Order 7, rule (4) (e) of C. I. 47.

We are therefore of the opinion that the orders made by the single Judge for oral examination of the Applicant has not infringed and will not violate the Applicant's constitutional rights to privacy as provided for in article 18 (2) of the Constitution.

Besides, it should be noted clearly that the enjoyment of the rights of privacy like the other rights mentioned in article 18 (2) are all subject to an important rider to wit, ***"except in accordance with law and as may be necessary in a free and democratic society ...."*** Reference Article 18 (2) of the Constitution.

Be that as it may, the public hearing of court proceedings is a constitutional provision, and by constitutional directives in Article 11 (1) of the Constitution, provisions of the Constitution constitute the Grundnorm or Basic Law of the land and must be complied with at all times. There being no conflict with the operations of article 18 (2) and those provisions in Article 126 (3) of the Constitution, we hold that the order made by the learned single Judge of this Court, does not infringe or violate the constitutional rights to privacy of the Applicant in anyway whatsoever.

ISSUE 2

Whether the invocation of Order 46 r. 2 of C. I. 47 in the manner

applied by the single Judge is appropriate.

We have considered the arguments of both learned counsel on the applicability of Order 46 procedure in the instant application. After considering all the arguments, we are of the considered opinion that the procedure envisaged under order 46, is indeed set out under two distinct methods.

1. The first method is what is covered in order 46 r. 1 which is applicable to garnishee proceedings.

2. The second method is provided for under Order 46 r. 2 and this is applicable as the opening sentences of the order states as follows:-

   "Where any difficulty arises in or in connection with the enforcement of any judgment or order, other than a judgment or order as mentioned in rule 1, ..." *per Order 46 r. 2.*

   This immediately makes it clear that the procedure under Order 46 r. 2 is different from the procedure in Order 46 r 1 which as stated earlier is one specifically provided for garnishee proceedings.

   In our opinion, the provisions in order 46 r 2 under which undoubtedly the single Judge made the order is a progressive and proactive procedural rule. This is because, it envisages instances where difficulties may arise in the enforcement of any judgment or order, other than those provided for under Order 46 r. 1 supra. This procedure is to enable a judgment creditor who is frustrated and encounters difficulties in the execution of judgment to take advantage of this particular procedure and orally examine the party to find out why the judgment debtor is unable to satisfy the judgment or order. It is quite certain that, this was the procedure that the Respondent's herein applied and the learned single Judge also used when he granted the application for the oral examination of the Applicant.

   We have also critically examined the issues and or questions set out by the single Judge and are convinced that the Rule indeed has fortified and protected the learned single Judge of this Court in the orders he made. This is because, the concluding part of Order 46 r. 2 reads***;" and for the examination of that***

party on such questions as may be specified in the order and that rule shall apply accordingly with the necessary modifications." Emphasis

This means that, any Judge applying this Rule of Procedure has some level of flexibility in construing the extent of the orders made by applying necessary modifications as will bring out the best results***.*** In applying this Rule, reference is made to the provisions in Rule 1 of Order 46. This is the linkage that the drafters of the Rules made such as to maintain a delicate balance between the provisions in Rule 1, which deal specifically with garnishee proceedings, and in Rule 2, **which deal with any judgment or order other than garnishee proceedings, but does not preclude use of the provisions contained therein.**

In our opinion, the application herein is a red herring that learned counsel for the Applicant has just introduced as a further illustration of his delay mechanism.

CONCLUSION

The application fails and is accordingly dismissed in its entirety. The oral examination of the Applicant is to continue.

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

ATUGUBA, JSC:-

I've had the advantage of reading beforehand the ruling of my esteemed brother Dotse JSC

The orders made by Benin JSC sitting as a single Justice of this court dated the 8th day of June 2017, the submissions of counsel and the provisions of O.46 of the High Court (Civil Procedure Rules, 2004) have been set out by my esteemed brother Dotse JSC and I need not repeat them here.

It is clear that O.46 r.2 applies the provisions of O.46 r.1 *mutatis mutandis* to *non garnishee* proceedings, stemming from a judgment or order that does not involve the payment of money where difficulties of enforcement are encountered.

The application for the examination of the applicant in this case could not be made under O.46 r.2 since the judgment involved in this case was as deposed to by Mrs. Stella Badu (CSA) in her affidavit in opposition dated the 16th day of November 2017 on behalf of the 1st respondent herein, "*the judgment of this Court dated 29th July, 2014 ordering the applicant to refund to the State the amount of over Gh¢51 million*".(e.s) This is therefore manifestly a judgment for the payment of money which is excluded from being the basis of an application under O.46 r.2. See, by analogy *Republic v High Court ex parte PPE Limited* (2007 – 2008) SC GLR 188. It being a monetary judgment it comes under O.46 r.1. The questions that can be put to the judgment debtor are specified in that rule.

The full meaning and scope of O.46 r.1(b) is a question of construction. Though it appears that on a close scrutiny, the scope of questioning under O.46 r.2 may be wider than that of O.46 r.1 it cannot be readily said that on a purposive construction of O.46 r.1(b) a question as to how the applicant spent the money sought to be recovered is inconsistent with the drive of that rule to unravel the property or means of the applicant to satisfy the judgment debt. Having disallowed imprisonment for failure to pay up a

judgment debt under O.43 r.12(1), O.46 r.1 is out to allow a hunt for property or other means of satisfying such a judgment and must be construed to effectuate that purpose, otherwise a judgment for the payment of money can be rendered nugatory because of unenforceability.

Though the application which triggered Benin JSC's orders dated the 8th day of June 2017 could not be properly brought under O.46 r.2 it cannot be said that it cannot be treated as brought under O.46 r.1.

As to the subpoena to the Lands Commission it is meant to facilitate the effective oral examination of the judgment debtor as to his means and is therefore supplementary in that regard, see article 297(c) of the 1992 Constitution, which provides thus;

> "**297. Implied power**
>
> x x x
>
> (c) where a power is given to a person or authority to do or enforce the doing of an act or a thing, *all such powers shall be deemed to be also given as necessary to enable that person or authority to do or enforce the doing of the act or thing*;" (e.s)

Questions relating to privileges such as self-incrimination can be raised and ruled upon at the oral examination of the applicant.

For all these reasons I also dismiss the application.

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

ADINYIRA, JSC:-

I agree.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

OSAFO BUABENG FOR THE THIRD DEFENDANT/APPLICANT

GODFRED YEBOAH-DAME WITH HIM MRS AFRIYIE ANSAH, CHIEF STATE ATTORNEY, MRS STELLA BADU, CHIEF STATE ATTORNEY AND MISS ZEINAB AYARIGA, ASSISTANT STATE ATORNEY FOR THE IST DEFENDANT/RESPONDENT.