IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- GHANA A.D. 2016

CORAM: ATUGUBA, JSC (PRESIDING)
BAFFOE- BONNIE, JSC
BENIN, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL MOTION
NO. J5/20/2016

19TH MAY 2016

THE REPUBLIC

VRS.

HIGH COURT, COMMERCIAL DIVISION, ACCRA

EX PARTE: IVORY FINANCE COMPANY LTD.

1. **ITALCONSTRUCT INTERNATIONAL LTD.)** **INTERESTED**
2. **KWESI BAIDOO)** **PARTIES**
3. **JAMES KWEGYIR AGGREY)**
4. **SIC INSURANCE COMPANY LTD.**

RULING

BENIN, JSC:-

This is an application seeking to invoke the supervisory jurisdiction of this court by way of certiorari to quash the decision of Buadi J. presiding over the High Court, Commercial Division, Accra. The said decision was given on the 25th day of February 2016. It is pertinent to set out in detail the chronological events giving

rise to the decision under attack, in order to appreciate the grounds for this application. It all began with the issuance of a writ of summons by the applicant herein against the interested parties herein jointly and severally seeking the specific sum of GH₵19, 303,800.00 and also interest at stated rates. The applicant applied to the court for summary judgment but this was opposed. Whilst that application was pending, the applicant and the 4th interested party herein, the State Insurance Company Ltd., filed terms of settlement which the court adopted as consent judgment.

The 4th interested party issued a fresh writ at the High Court number ACC/02/15 seeking to set aside the consent judgment mainly on ground of fraud, particulars of which were pleaded. One of the particulars pleaded was that the Managing Director of the SIC Insurance Co. Ltd., Mrs. Nkani, acted on her own without recourse to, and without the approval of, the company's Board of Directors.

Whilst that action was pending, the 4th interested party applied to the court to stay execution of the consent judgment pending the determination of that case. The High Court, presided over by Koomson J., granted the application on terms that the 4th interested party should pay the principal sum, a little over GH₵19 million within a given period. These conditions were duly satisfied so the stay was in place for the duration of that case before the High Court.

The applicant herein applied to the High Court to dismiss the writ seeking to set aside the consent judgment, the reason being that it disclosed no reasonable cause of action. In a reasoned ruling dated 17th April 2015, the High Court, presided over by Asiedu J., allowed the application to dismiss the action seeking to set aside the consent judgment. In short the court held there was no reasonable cause of action disclosed by the writ of summons.

The 4th interested party filed an appeal to the Court of Appeal against the dismissal of their writ, and this appeal is still pending before that court. The 4th interested party subsequently filed an application to the High Court for a stay of execution of the consent judgment pending appeal against Asiedu J's decision of 17th April 2015. This application was placed before Koomson J. On 27 May 2015, Koomson J. delivered a ruling which has become a bit problematic as to its interpretation and

import. Thus for its full force and effect, we would reproduce the relevant part here:

"*Application for stay of execution is refused. It has no merit. Court earlier on granted stay of execution of Consent Judgment entered for plaintiff based on terms of settlement of parties. Applicant subsequently issued a writ to set aside the consent judgment in Commercial Court. Based on that action application for the motion for stay of execution.(sic) Said motion was dismissed by brother Asiedu J. Applicant informs the court that they have lodged an appeal against the decision of Asiedu J. If that application is not executable then there is nothing to stay here. As a matter of fact, the consent judgment has already been stayed. For that reason application has been dismissed."*

Though this decision was clear that the application has been refused, yet the reasoning suggests that it was refused because an order of stay was already in force, meaning it was unnecessary to grant the application. There appeared to be some confusion here, in the sense that there was no such order in place following the dismissal of the 4th interested party's writ. The order granting the stay lapsed following the dismissal of the writ of summons. So it was unfortunate that Koomson J. relied on a lapsed order as the underlying reason for dismissing the application to stay execution.

According to the 4th interested party, before they had received the full ruling of Koomson J., they filed a notice of appeal against the said ruling of Koomson J. dated 27th May 2015. And they followed it up with an application to suspend the execution of the consent judgment pending the appeal against Boadi J's judgment dismissing the 4th interested party's writ to set aside the consent judgment and against the said ruling. However, upon receipt of the full ruling of Koomson J. they realized that the learned judge had actually confirmed that there was a stay in place meaning execution could not be carried out so long as that stay remained in force. On the strength of that discovery they applied to the court and withdrew the application for stay. As soon as the application was withdrawn, the applicant took steps to execute the consent judgment by attaching the properties of the 4th interested party. The 4th interested party said they were compelled to go back to court with a fresh application to suspend the enforcement of the consent judgment since their notice of appeal against the ruling of Koomson J., was still pending.

That application which was filed on 9th July 2015 was placed before Buadi J. and it is the ruling of Buadi J. in respect of this last application which has given rise to these proceedings before this court. Indeed the court decided that its inherent jurisdiction was appropriately invoked. This conclusion by the court is important to note:

"In the circumstances of what seems to be the parties misconstruction of the order of Koomson J. coupled with events happening after the entry of the consent judgment particularly as regards undisputed allegations of fresh attempts of execution by the plaintiff, I believe enough justifying grounds exist to entertain the application within its inherent jurisdiction……I favourably consider the application by nothing more or less other than affirming the orders of Koomson J. which is that execution of the consent judgment has already been stayed.

I cannot fail to appreciate the apparent desperation and frustration of the plaintiff, but the fact remains that the courts exist to do justice by fairly and evenly balancing interests. If there is doubt, uncertainty or ambiguity with regards to orders of Koomson J. the proper thing is to seek clarification and possibly variation and not to embark on attempts at levying execution."

Following the High Court's decision, the applicant seeks an order of certiorari on these grounds:

i) That the High Court, Commercial Division, Accra, acted in excess of its jurisdiction when it varied the ruling of Koomson, J. dated the 27th day of May 2015 which dismissed the 4th interested party's application for stay of execution pending appeal of Asiedu J. ruling dated 17th of April 2015 in Suit No. ACC/02/15 and consequently set aside the execution process.

ii) The High Court, Commercial Division, Accra presided over by Buadi J. acted in excess of its jurisdiction when it substituted the order for stay of execution pending the determination of suit no. ACC/02/15 filed at the High Court, Commercial Division granted by Koomson J. on 26th of February 2015 with an order for stay of execution pending the appeal after the said suit no. ACC/02/15 had already been determined.

iii) The High Court Commercial Division, Accra acted in excess of its jurisdiction when it assumed jurisdiction over the 4th interested party's

application for suspension of the enforcement of the consent judgment and stayed execution, after it had earlier dismissed the interested party's application for stay of execution pending appeal.

The applicant's case was focused on the fact that Buadi J. had varied the decision of Koomson J. Counsel for the applicant cited the case of RE GM HOLDINGS LTD (1941) 3 All ER 417 which decided that a judge of coordinate jurisdiction was not entitled to vary an order refusing a stay of execution which had been passed and entered; this could only be challenged on appeal. Thus he stated in paragraph 19 of the statement of case that:

The ruling of Buadi J. did not only vary Koomson J ruling of 26th February 2015 for stay of execution pending the determination of Suit No. ACC 02/2015 before Asiedu J but further granted an order for stay of execution in perpetuity when in fact he had no jurisdiction and had become functus officio and proceeded to set aside the applicant's execution and reinstate the order which had elapsed.

The case cited, supra, by counsel for the applicant should be read subject to the court's right to vary a decision by way of review under Order 42 of CI 47 which does not depend on whether the order has been passed and entered or not. To begin with, it is clear Buadi J. also fell into the same error as Koomson J. in thinking that the order of stay granted during the pendency of the 4th interested party's action no ACC/02/15 was still subsisting and valid. But as pointed out earlier that order lapsed the very moment that action was dismissed by Asiedu J in his decision given on 17th April 2015. The result was that Koomson J. was called upon to determine the application for a stay pending appeal on its own merits without regard to the lapsed order. His decision saying the application was refused because there was a subsisting order was thus not supportable by the factual situation. The effect of that confused state of affairs was what has engulfed the subsequent proceedings. For whereas the applicants believed the application had been dismissed and were thus entitled to proceed to execution for the balance of some GH₵77 million on the consent judgment, the interested parties thought otherwise because the judge had affirmed there was an existing order of stay.

As pointed out by Buadi J. one way to resolve this question of construction of the decision was to go back to the court. That was why when the application for a stay

came before Buadi J. he thought it wise to give a proper construction of Koomson J's decision of 27th May 2015. The court has an inherent jurisdiction to explain its decision if it causes confusion in the mind of the parties and to vary same to make the intention clear, see RE I. (children) (abduction declaration) (2001) 2 FCR 1. But that jurisdiction is ousted once an appeal has been lodged against the decision and has not been withdrawn; see this court's decision in the case of THE REPUBLIC V. HIGH COURT (COMMERCIAL DIVISION, TAMALE); EX PARTE DAKPEMA ZOBOGUNAA HENRY KALEEM & ORS; DAKPEMA NAA ALHASSAN MOHAMMED, INTERESTED PARTIES; Civil Motion JS/6/2015, dated 4th June 2015, unreported. The party may also apply for variation by way of review application if the error is apparent on the face of the record, inter alia, so long as an appeal has not been lodged against the decision complained of, see Order 42 of the High Court (Civil Procedure) Rules, 2004 C.I. 47. For that reason Buadi J. acted in excess of his jurisdiction when he purported to construe the ruling of Koomson J. and adopt it as dispositive of the application before him when Koomson J's ruling was on appeal. And even if that ruling was not on appeal, the only jurisdiction available to Buadi J. was to deal with the application on its merits which he failed to do. He was neither called upon to construe or to vary Koomson J's ruling.

Buadi J had every right to determine the application on merit. The reason is that an application for stay of execution seeks the court's discretionary intervention and such an application could be made as of right once no decision on it has been given by a court of coordinate jurisdiction. Therefore there was no need for Buadi J. to have had recourse to Koomson J's decision and to affirm same. The effect is that Buadi J. misconstrued his role in the application before him and did not deal with it as he was called upon to do. Buadi J., by saying that Koomson J. had granted a stay, fell into error because as pointed out, the underlying reason for Koomson J's decision was factually incorrect. In short Buadi J. failed to consider the 4th interested party's application and thus defaulted in his duty to determine it on its merits.

But in assuming jurisdiction to hear the application, Buadi J. did not per se act in excess oif jurisdiction, but fell into error of law apparent on the face of the record since Koomson J's ruling was the subject of an appeal and in that process exceeded his jurisdiction. It is clear the judges below committed apparent procedural

blunders and both parties seek to take advantage to their benefit. The applicants think Koomson J. dismissed the application so they seek to rely on it to go into execution; whilst the interested parties seek to rely on Buadi J's ruling which seems to favour them. But both were based on a wrong premise, thus none should be made to take advantage of the errors committed by the court. We therefore have to ensure that justice prevails under our supervisory jurisdiction. We feel obliged to end all this confusion by assuming the powers conferred on this court under Article 129(4) of the Constitution, 1992 and under our supervisory jurisdiction to determine the application for stay of execution which the order of Buadi J. dated 25th February 2016 addressed on wrong footing.

In the case of REPUBLIC V. HIGH COURT, KUMASI; EX PARTE BANK OF GHANA & 2 OTHERS ETC CONSOLIDATED MOTIONS NOS. JS/14/2013 and JS/15/2013, dated April 10, 2013, unreported, this court, whilst dismissing the applications for certiorari, nonetheless, granted a stay of execution of the judgment pending appeal having regard to the justice of the matter, relying upon the inherent powers conferred upon it in the exercise of its supervisory jurisdiction. The court cited with approval the previous decisions of this court in these cases: REPUBLIC V. HIGH COURT (FAST TRACK DIVISION), ACCRA; EX PARTE ELECTORAL COMMISSION (METTLE NUNOO & OTHERS-INTERESTED PARTIES) (2005-2006) SCGLR 514; BRITISH AIRWAYS V. ATTORNEY-GENERAL (1996-97) SCGLR 547. Reading the opinion of the court, Dotse JSC stated at page 29 of the judgment thus: "As a result, despite the fact that these applications are dismissed as untenable, this court on the principle of ensuring fairness and justice hereby grants a stay of execution of all processes aimed at executing the judgments of the High Court, Kumasi……..until the final determination of the appeal currently pending before the Court of Appeal." That was a case in which the High Court in Kumasi had entered judgment in default of appearance in two suits against the applicant and had refused to set same aside upon application to that effect. An appeal was lodged against the refusal to the Court of Appeal and an application for a stay of execution was also refused by the High Court. A repeat application to the Court of Appeal was also refused by the said court. In their effort to prevent the successful party from going into execution, the applicant brought an application before this court for certiorari to quash the decision of the High Court refusing to set aside the default judgment. Obviously

that was a wrong move, yet the court realizing that it would be unfair and unjust to allow execution to be levied against the applicants before their appeal had been heard granted a stay. For the cardinal principle of law is that a party should be heard unless he has displayed such conduct as to evince an intention that he does not want or deserve to be heard. In that case the applicant had made serious attempts to be heard on merits but the courts below had applied technical objections to block their path. It would be plainly unjust for this court of last resort to have also closed its eyes and allow execution to proceed in these circumstances. Hence the court decided that it was in the interest of justice to grant the stay whilst dismissing the application before it. It is in the light of these authorities that we proceed to consider this matter on hand, and to ensure that no party suffers from procedural blunders committed by the lower court. We have a duty to do justice when we discover that the procedural blunders have led to a failure of justice.

The 4th interested party is saying that the consent judgment was obtained by fraud, inter alia. The High Court presided over by Asiedu J summarily dismissed the writ as disclosing no cause of action. We do not intend to delve into the merits of the case which is pending before the Court of Appeal. It suffices, however, to say that when a judgment is being attacked on grounds of fraud and facts have been raised in the pleadings, which facts have not been rebutted by evidence apparent on the face of the record, it would seem that the party alleging the fraud is entitled to be heard on merits. Secondly, the amount involved is huge, about GH₵77 million and thus even if the court is minded to refuse a stay it should be on stringent conditions, lest a successful appeal should be rendered nugatory. Thirdly, the applicant has been paid the principal sum that they claimed by the writ which is over GH₵19 million and cannot be said to have been deprived of the use of their money. It is just fair and right that the 4th interested party be allowed the opportunity to contest the balance of the claim since they claim the consent judgment was agreed upon on their blind side. The Court of Appeal will have the opportunity to determine whether or not Asiedu J was right in his decision. On the other hand, the court should also consider that in order that the party who succeeded at the trial court should not be permanently shut out of the fruits of their victory, the applicant for stay should be ordered to speed up the appeal process.

Thus whilst we think that Buadi J. had jurisdiction to entertain the application but acted in excess of jurisdiction in construing Koomson J's decision which was on

appeal, we cannot gloss over the obvious underlying factual error that informed his decision to confirm that a stay was in place. Therefore having regard to the facts of the case and considering the relative hardships on both parties, and the fact that the applicant has been paid over GH₵19 million already, we consider it just to order a stay of execution pending the determination of the appeal against the decision of Asiedu J given on 17th April 2015 dismissing suit no ACC/02/15. The 4th interested party is ordered to ensure the compilation of the record of appeal within three months from this day. The Registrar of the Commercial Court, Accra, is hereby directed to co-operate with the parties and ensure compliance with this order.

Application is accordingly allowed in respect of reliefs I and ii but it is dismissed in respect of relief iii. We also order a stay of execution pending the determination of the appeal before the Court of Appeal in respect of Asiedu J's decision of 17th April 2015.

(SGD) A, A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE – BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) YAW APPAU

JUSTICE OF THE SUPREME COURT

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

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