IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2013

CORAM: DR. DATE BAH, J.S.C. SITTING AS A SINGLE JUSTICE OF THE SUPREME COURT

CIVIL MOTION

No. J8/29/2013

27TH MARCH,2013

ASHANTI GOLDFIELDS COMPANY LTD - - - DEFENDANT/APPELLANT/APPLICANT

(NOW ANGLOGOLD ASHANTI GHANA LTD)

AND

AFRICORE GHANA LTD - - - PLAINTIFF/RESPONDENT/RESPONDENT

BETWEEN

ASHANTI GOLDFIELDS COMPANY LTD - - DEFENDANT/APPELLANT/APPLICANT

(NOW ANGLOGOLD ASHANTI GHANA LTD)

AND

WESTCHESTER RESOURCES LTD - - - PLAINTIFF/RESPONDENT/RESPONDENT

RULING

DR. DATE-BAH JSC:

The defendant/appellant/applicant has brought a motion on notice for directions from this Court seeking the following orders: "(i) that the sum of US $ 4,000,000 paid into court for investment pursuant to the order of the Court of Appeal dated 24 October 2011 remain in investment pending the final determination of the appeal herein; (ii) that each Plaintiff continue to hold the sum of US$1,000,000 paid by the Defendant pursuant to the said order dated 24 October 2011; (iii) that pending the final determination of the appeal, the balance of the judgment debt be not enforced by the Plaintiffs and other orders as to this Honourable Court it may seem fit."

The jurisdictional basis for this application is not expressly stated, except that the applicant claims to be invoking "the ample powers" of this Court. This is where the problem is. This Court does not have indeterminate and limitless power to straddle the judicial system dispensing orders right, left and centre from its ample powers. Its powers are derived from the Constitution, statute and practice (including settled rules as to inherent power). Counsel, therefore, owes an obligation to identify which of this Court's powers he is relying on.

Counsel for the applicant has admitted that this motion is not a repeat application made under rule 20 of the Supreme Court Rules, 1996 (CI 16). That admission implies that he is skating on thin ice. The respondent has challenged the jurisdiction of this court on the ground that, since the record of appeal in this case has not yet been prepared and transmitted to the Supreme Court, it is not seised with jurisdiction to hear the applicant's motion for directions.

This jurisdictional issue deserves to be addressed before any other issues in this case. Rule 16 of CI 16 provides as follows:

"16. (1) After the transmission of the record of appeal from the court below to the Court, the Court shall be seized of the appeal and any application relating to the appeal shall subsequently be made to the Court.

(2) Any application filed in the court below after the transmission of the record of appeal shall be transmitted to the Court."

On the face of this provision, before the transmission of the record of appeal to the Supreme Court, it does not have jurisdiction to deal with interlocutory matters relating to a particular appeal, unless an application can be grounded on any of its other bases of jurisdiction, such as its supervisory jurisdiction. The problem with the present application before this Court is that it signally fails to identify any such alternative jurisdictional basis.

The applicant's argument in support of this Court's jurisdiction in this matter is as follows (in paras 5 and 6 of its "Arguments in support of the application"):

> "5. This court is posited in the pinnacle of justice. It has the jurisdiction to entertain an appeal from the Court of Appeal. Article 131(1)(a) of the Constitution 1992 grants the applicant the right to appeal to this court "as of right". A purposive interpretation of the constitutional provision would concede to this court all requisite powers that would ensure the right of appeal, if exercised, is not rendered nugatory.
>
> 6. Mindful of the ample powers vested in this court, this court held in *Merchant Bank Ghana Ltd. v Similar Ways Ltd* Civil Motion J8/38/2011 dated 29/3/2011 that in deserving cases, it would entertain an application for which no express provision is made under the Rules. Said His Lordship Atuguba JSC in that case:
>
> > **"Remedies not expressly provided for**
> >
> > Nonetheless the Rules of Court cannot cover every conceivable situation that may arise pending the determination of an appeal. Clearly, for example, the judgment creditor who has had a stay of

execution granted against him may, like his counterpart in the *In re Yendi case*, be faced with certain serious detriments from the judgment-debtor's activities. Yet there is no provision in CI.16 offering him relief. In such a situation as was held, it is reasonable to grant an injunction to protect his interests pending the determination of an appeal even though no express rule in CI.16 warrants such a course.""

In considering this dictum of Atuguba JSC, one ought to bear in mind his earlier observation in the same judgment acknowledging that the *In re Yendi Skin Affairs, Yakubu II v Abdulai* case [1984-86] 2 GLR 231 on which counsel relied in the *Merchant Bank* case *(supra)* had not sought to overthrow the statutory framework for determining stay of execution and other similar applications. He said:

"It is to be observed however that this court did not in the *In re Yendi* case seek to overthrow the statutory framework for stay of execution of judgments. Indeed the applicant's application for stay of execution was based on rule 20 of CII3."

In the *Yendi* case Adade JSC, delivering the ruling of the Supreme Court, had stated the applicable principles as follows ([1984-86] 2 GLR 231 at 235-6):

"As to the applications themselves, it is relevant to observe that these courts have consistently operated on the principle that where two parties are litigating, every care must be taken to ensure that the party who eventually wins does not find his judgment useless in his hands. Hence, at first instance, there are rules for interim preservation of the subject of litigation, and for injunctions to prevent waste. At the same time the courts try to hold the balance evenly between the parties so that one does not take undue advantage of the other during the course of the litigation. These

principles are applied, subject to the balance of convenience in a particular situation and to the hardship which the making or the refusal of an order may have on one or other of the parties.

The same considerations apply when appeals are pending. The ideal situation will be to have the appeal heard quickly and disposed of so that one party, be he the appellant or the respondent as the case may be, does not have much opportunity to turn a delay into an advantage. Where, however, an appeal has to delay from one cause or another, either party is entitled, by applying to the court, to seek such interim remedies as will protect his interests if he should eventually win the appeal".

These principles are not predicated on the Supreme Court assuming jurisdiction which the relevant rules of court do not confer on it. They are principles applicable to all courts. Accordingly, if the rules of court indicate that the court seised with jurisdiction over a pending appeal is still the court below, it is from that court that relief should be sought.

The two main cases relied on by the applicant in this case, namely, the *Merchant Bank case (supra)* and *Golden Beach Hotels (Gh)Ltd. v Packplus International Ltd.*(unreported decision of the Supreme Court delivered on 7th March, 2012; Civil Motion No. J8/23/2012) do not rescue this case from its jurisdictional quandary. Those two cases are distinguishable from the current case. In both cases, the issue of whether, as of the date of application to this court, the record of appeal had been transmitted to this court from the court below was not raised and no arguments were made on that issue.

The focus of the Supreme Court in the *Merchant Bank case* was on the issue of whether a non-executable order of the court below could nevertheless legitimately trigger the intervention of the Supreme Court to halt the enforcement of the substantive judgment appealed from. Atuguba JSC had this to say in the course of delivering the ruling of the court:

"In this case the applicant applied to the High Court to set aside the delivery (rather a novel idea, instead of the judgment itself), of the judgment on the ground that it was not served with any hearing notice for the same. It has appealed from the High Court's dismissal of that application and pending its determination applied unsuccessfully to the High Court and Court of Appeal for an interim injunction to restrain the execution of the judgment. It has sought that relief from this court pending its appeal from the adverse ruling of the Court of Appeal. All along, it is obvious that its applications and appeals do not relate to any executable order. That however does not mean that it has no interest in holding off the enforcement of the substantive judgment to which its processes relate.

If a stay of execution cannot lie other remedies may lie. One of such remedies can be the suspension of the entry of judgment. In that event the effect of the judgment itself is temporarily frozen and incidental processes such as execution can't fly not because execution thereof is stayed but that the life of the judgment itself is in coma. This measure will prevent the eventual success of the applicant's appeal being rendered nugatory.

This measure will protect the applicant from being injured by the prima facie default of the trial court having delivered its judgment

without notice to the applicant, pending the determination of its appeals."

From this passage, it is clear that the facts of the *Merchant Bank* case involved a possible nullity. It is my understanding that all courts have jurisdiction to set aside nullities, irrespective of specific statutory jurisdictions. The *Merchant Bank* case is thus distinguishable from this present case, as already mentioned, and is not authority for overriding the rule of court which provides that the Supreme Court's jurisdiction to hear interlocutory applications on stay of execution and allied orders, pending appeal, vests only after the transmission of the record of appeal to this Court. When the Supreme Court thus asserted a power to suspend a judgment whose nullity was in issue, there may not have been a need for the record of appeal to be transmitted to it before it could exercise that power.

In any case, this power to suspend the enforcement of judgments was subsequently limited to only exceptional circumstances by *Golden Beach Hotels Gh.Ltd. v Packplus International Ltd (supra).*

I am inclined to follow the highly persuasive authority of a decision of the Supreme Court of the First Republic in *Ampong v Frempong* [1965] GLR 350, where Mills-Odoi JSC delivering the ruling of the Court said (at p. 352):

> "The question which arose for our consideration involves the proper application of rules 15 and 21 of the Supreme Court Rules, 1962, and the determination as to what stage in the proceedings it can be said that an appeal has been entered under the aforesaid rules.
>
> Rule 15 reads as follows:

"(1) The Registrar of the Court below shall transmit the record when ready together with-

(a) a certificate of service of the notice of appeal;

(b) a certificate that the conditions imposed under rules 12 (4) and 13 have been fulfilled;

(c) five or three copies as the case may be of the record for the use of the Judges;

(d) the docket or file of the case in the Court below containing all papers or documents filed by the parties in connection therewith.

(2) The Registrar of the Court below shall also cause to be served on all parties mentioned in the notice of appeal a notice that the record has been forwarded to the Registrar, who shall in due course enter the appeal in the cause list mentioned in rule 3 (1)."

Rule 21 also reads as follows:

"After an appeal has been entered and until it has been finally disposed of, the Court shall be seised of the whole of the proceedings as between the parties thereto, and every application therein shall be made to the Court and not to the Court below, but any application may be filed in the Court below for transmission to the Court."

A party who intends to appeal to the Supreme Court in any cause or matter, against the judgment or decision of the High Court, hereinafter referred to as "the court below," shall file in the court below a notice of appeal which shall contain, inter alia, the names and addresses of all the parties who will be directly affected by the appeal: see rule 8. The notice of appeal must be filed within the time limit for appealing as prescribed by rule 10 of the aforesaid rules. Thereafter "the Registrar of the court below shall ... cause to be served a true copy thereof upon each of the parties mentioned in the notice of appeal": see rule 11. He shall also summon the parties before him to settle the record of appeal, in the course of which he is empowered, inter alia, to lay down conditions which the would-be appellant must fulfill within a limited time, e.g. to deposit with the registrar

"a sum fixed to cover the estimated expense of making up and forwarding the record of appeal": see rule 12(4). Within such time as the registrar of the court below shall fix, the would-be appellant is also called upon to furnish sufficient security "for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid" by him: see rule 13. When all the requirements above referred to are complied with, the registrar of the court below transmits the record, together with all the documents mentioned in rule 15 (1) supra, to the Supreme Court whose registrar "shall in due course enter the appeal in the cause list." (The emphasis is mine.)

In our opinion the appeal is entered, or is deemed to have been entered, the moment the registrar of the Supreme Court receives the record and all the accompanying documents listed in rule 15 (1) of the aforesaid Rules. It will be observed that the docket or the file which contains all relevant materials for the due prosecution of the appeal would have, at that stage, been transmitted from the court below to this court. On the receipt of these documents the court below becomes functus officio; the Supreme Court then becomes seised of the whole of the proceedings as between the parties thereto and, until the appeal is finally determined "every application therein shall be made to the court and not to the court below, but any application may be filed in the court below for transmission to the court."

However, from the date of filing the notice of appeal and before the appeal is entered in the cause list any application which may be made either to the court below or to this court "shall be made in the first instance to the Court below, but if the court below refuses the application the applicant shall be entitled to have the application determined by the court": see rule 28. In the instant case the record and all the relevant documents mentioned in rule 15(1) supra were received by the registrar of this court on 18 November 1964. The motion and the accompanying affidavit by the applicant were filed on 8 February 1965, some two-and-a-half months after the court had been seised of the whole of the proceedings between the parties. In our view therefore this court was competent to entertain the application under the jurisdiction conferred upon it by rule 21 supra.”

The rules of court discussed by Mills-Odoi JSC are *in pari materia* with the current rules. However, the facts of the current case are in contrast with those of *Ampong v Frempong (supra)*, since, at the time of the filing of the application before this Court, the record of appeal had not been transmitted to this Court. Accordingly, this application would appear to have been brought before the wrong forum. The application for directions should, therefore, in principle be struck out *in limine.*

The applicant, however, strongly disagrees with this interpretation of the Supreme Court's jurisdiction in this matter. It contends that not all applications for interlocutory reliefs pending the determination of an appeal can be brought under rule 20 of CI 16 and that its application before this court is an example of an interlocutory application outside rule 20 which should be permitted. In its Response to the Preliminary Objection raised by the Respondents, filed on 20th March 2013, it rests its argument on article 129(4) of the 1992 Constitution which provides that:

> "(4) For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and Jurisdiction vested in any court established by this Constitution or any other law."

It contends that since its appeal against the decision of the Court of Appeal was properly filed within the time limits set out by CI16, the appeal is properly within the jurisdiction of the Supreme Court and therefore the Supreme Court may validly make the interlocutory orders or directions prayed for by the applicant herein. It further argues that the constitutional provision in article 129(4) overrides any statutory provision or any practice direction previously made by this Court before the coming into force of the 1992 Constitution.

I am afraid I am not persuaded by this ingenious argument. The jurisdiction conferred by the Constitution on the Supreme Court to hear appeals from the Court of Appeal is exercised in accordance with rules of court formulated pursuant to the Constitution itself. Those rules of court have fashioned rules on when interlocutory applications may validly be made to this court and when they

are to be made to the court below. Those rules are not a clog on the right of appeal and thus in no way unconstitutional. Accordingly, the preliminary objection is upheld and the application struck out.

(SGD) DR. S. K. DATE BAH

JUSTICE OF THE SUPREME COURT

COUNSEL

OSAFO-BOABENG FOR THE APPLICANT.

OPOKU-AGYEI FOR THE RESPONDENT