IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2013

CORAM: ATUGUBA, JSC (PRESIDING)
ANSAH, JSC
ANDINYIRA[MRS],JSC
OWUSU [MS], JSC
DOTSE, JSC
GBADEGBE,JSC
AKAMBA,JSC

REVIEW MOTION.
No. J7/7/2012

5TH MARCH,2013

AXEX COMPANY LIMITED ... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. KWAME OPOKU ... DEFENDANTS/APPELLANTS/APPLICANTS
2. SYLOP COMPANY LIMITED
3. UNIQUE COMPANY LIMITED

R U L I N G

AKAMBA, JSC:

This review application lies from the unanimous decision of this court rendered on 19th July 2012 dismissing an appeal from a decision of the Court of Appeal dated 31st July 2008.

The material facts giving rise to the present application are as follows:

The plaintiff/respondent/respondent (Axes Company Ltd) herein after simply referred to as the respondent issued a writ of summons in the High Court claiming as plaintiffs for an order of interim injunction restraining the 1st Defendant/Appellant/Applicant from disposing of a building at the Tema end of the Motorway (Tema); an order freezing the accounts of the 1st , 2nd and 3rd Defendants/Appellants/Applicants at Ecobank, Tema; an order freezing the accounts of the 1st Defendant/Applicant at Barclays Bank, Tema; an order compelling Barclays Bank, Tema to furnish the court with the statement of accounts of the 1st Defendant/Appellant/Applicant from January 2004 to date; an order compelling Ecobank to furnish the court with the statement of accounts of the 2nd and 3rd Defendants/Appellants/Applicants from January 2004 to date. Attached to the writ was an 18-paragraph statement of its claims. The Defendants/Appellants/Applicants are hereinafter simply referred to as Applicants.

The writ was immediately followed with an application for interim injunction on 9/01/07 which application was heard on 12/01/07. Mr. Amua Sekyi who appeared as counsel for the Applicants had no objection to the application except that they be given time within which a statement of account be furnished of the period so as to advise themselves. Mr Amua Sekyi appears to have made the

above concessions without any formal filing of appearance that day. He eventually entered appearance on 2/02/07. The application was granted and certain consequential orders made, including that:

"5. The managers of the above banks (i.e. Barclays Bank, Tema and Ecobank, Tema) are to prepare and submit before this court statement of the respective accounts from January 2003 to date on 30/1/2007."

The two banks complied with the court's directive and duly submitted statements on accounts being kept by the Applicants.

Subsequent to the filing of the accounts by the affected banks, the respondents herein, filed an application for Summary Judgment for the sum of $3,042,000.00 relying on grounds deposed to in a 27-paragraph supporting affidavit.

In an affidavit in opposition sworn to by one John Cobbina Buabeng, Managing Clerk at the law firm of Amua Sekyi & Co., the Applicants conceded owing $1,475,330.

On the day of the application Mr. Amuah Sekyi again made the following intervention:

"My Lord, we admit owing the plaintiff the sum of $1,475.330 as contained in our affidavit in opposition"

In a swift reaction to the intervention, the court on 14th March 2007 ordered as follows:

"By Court: Based on the process before me as well as learned counsel's submissions, summary judgment is entered for the plaintiff for the recovery of the sum of $1,475,330……The outstanding balance of $1,467,000 is set down for hearing. Suit to take its normal course."

The respondent thereafter set the execution processes in motion for the payment of the judgment debt of $1,475,000 and agreed costs of $100,000. A writ of Fi Fa

was issued and certain properties were attached and valued for auction. Three (3) months after these events and while the execution process was still in motion, the applicant changed solicitors.

The change in solicitors appears to have brought a new drive in the conduct of the case. The new solicitors initiated an appeal against the judgment of the court on 18/6/07 and also applied to the court for stay of execution pending appeal. The trial High Court judge ruled that the appeal was filed out of time and therefore the application for stay of execution was not properly before the court and could not be entertained. Undaunted by the ruling, the Applicant applied for an extension of time within which to file appeal which was granted on 13th August, 2007. The Applicant's subsequent appeal was heard by the Court of Appeal which dismissed same on 31st July 2008. The Applicant appealed against that decision to this court on the following grounds:

(i) The judgment is not warranted by law.

(ii) The judgment is against the weight of the evidence.

The regular panel of this court having also dismissed the appeal, the Applicant filed the present review motion.

The application for review is premised on rule 54 (a) of CI 16 the Supreme Court Rules as deposed in the affidavit of Kwame Opoku in support of the application filed on 26/07/2012 as follows:

"8. That I am advised and verily believe same to be true that this court on the basis of introspection and by virtue of Rule 54 of the Supreme Court Rules. C.I. 16 has the constitutional mandate to review its decisions and that this application is brought pursuant to Rule 54 (a) of CI 16."

Rule 54 of the Supreme Court Rules, CI 16 provides parameters within which review applications may be determined. These parameters or grounds are:

"(a) exceptional circumstances which have resulted in miscarriage of justice;
(b) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given."

This court has in numerous cases expounded on the extent of its review power as firmly provided in article 133 (1) of the Constitution 1992. Suffice it to state that the review jurisdiction of this court is exercised at the discretion of the court in exceptional circumstances where a fundamental and basic error might have been inadvertently committed by the court resulting in a grave miscarriage of justice. **Adade JSC in Mechanical Lloyd Assembly Plant v Nartey, SC [1987-88] 2 GLR 598**, relying on such cases as **Yanney v African Veneer Mahogany Exporters Ltd [1960] GLR 89, CA; Swaniker v Adotei Twi [1966] GLR 151 and Penkro v Kumnipah ii [1987-88] 1 GLR 558, SC,** explained that:

"*But the mere fact that a judgment can be criticized is no ground for asking that it should be reviewed. The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances. It is not an appellate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where a fundamental and basic error must have occasioned a gross miscarriage of justice."*

The court further stressed that there were no definitions as to what constituted *'exceptional circumstances'* or sufficient grounds and that it was for the court to determine the matter on the facts and circumstances of each case and as dictated by the ends of justice. This court has per **Atuguba JSC** in the case of **Tamakloe v The Republic [2011] 1 SCGLR 29 at 38** elaborated on what constitutes a *'palpably serious error'* based upon which an application for review can be described as '*a mere re-arguing of'* an original application. The obvious question or test is that, if despite argument on the matter a court arrives at a decision that is so palpably

unsustainable as to be described as perverse, could this not constitute an exceptional circumstance? Another segment worthy of discussion is that, a decision may be the product of very serious inadequate consideration of the case presented so as to be a ground for review. Here again at page 39 to 43 of Tamakloe vs The Republic supra, this court considered instances amounting to serious inadequate consideration of a case. These include the serious overlooking of very material and practically decisive matters. Examples are the cases of **Benneh v The Republic [1974] 2 GLR 47 at 59 CA** where the court omitted to consider certain issues in the appeal; **Swaniker vs Adotei Twi II [1966] GLR 151 @ 162** in which *'none of the reasons which the trial court gave for its judgment received any attention in the judgment which is now sought to be reviewed*'; **In re Gomoa Ajumako Paramount Stool (No 2) ; Application for substitution, Acquah Applicant; Kwa Nana v Apaa [2000] SCGLR 394,** where this court considered it sufficient to grant a review when the registrar of this court issued a notice to strike out and directed the said notice for service on Kwa Nana who was already dead and could not have taken any step in the case. Another case worth mentioning is that of **Republic v High Court, Kumasi; Ex parte Abubakar (No 3) [2000] SCGLR 45** in which this court reviewed its earlier decision mainly because it had overlooked certain basic facts relating to the election of a '*Moshiehene'.* In this case the undisputed evidence as found by the trial judge made it obvious that the head of the Moshie community in Kumasi did not fall within the definition of 'chief' under article 277 of the 1992 Constitution.

The present application is premised on two main issues. The first is the issue of fraud. On this issue, it is the argument of Applicant counsel that this court erred fundamentally when it failed to consider the material fact that the respondents relied on fraud for the purposes of its claim for the summary judgment and

thereby occasioned a grave miscarriage of justice. The next issue concerns the writ issued by the respondents which according to Applicant counsel was null and void and could not even be cured by the conduct of the respondents for that matter. According to counsel, a writ spawns a statement of claim and that a statement of claim can only cure a defective writ by altering, modifying or extending any claim in the writ. Thus the court erred fundamentally when it held that the statement of claim had cured the writ against the background that the writ disclosed no cause of action or claim. What is worthy of note in this review application is whether or not the ordinary bench did consider the issues subject of complaint and a demonstration, if any, of any resultant exceptional circumstances occasioning a miscarriage of justice.

What consideration, if at all, did the ordinary bench give to the material fact that the respondent relied on the claim of fraud for its claim for the summary judgment?

The ordinary bench at page 8 of the judgment stated the following:

"After giving much consideration to the proceedings at pages 140-141 of the record of proceedings, I have arrived at the conclusion that it was based both on the affidavit sworn on behalf of the respondent and the oral submission of learned counsel for the appellant. As they were both unequivocal admissions of liability, the learned trial judge of the court below was right in accepting them and basing his decision thereon. The decision of the court is one commonly referred to as "judgment on admissions", that our courts are authorized to enter in appropriate cases, under the rules of court. Indeed, Order 23 rule 6 of the High Court (Civil Procedure) Rules, CI 47 explicitly provides for the exercise of this jurisdiction. The rule is expressed thus:

"Where an admission of the truth of a fact or the authenticity of a document is made

(a) In an affidavit filed by a party,

(b) In the examination for discovery of a party or a person examined for discovery on behalf of a party; or

(c) by a party on any other examination under oath or affirmation in or out of court

Any party may apply to the court or judge in the same or another cause or matter for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the court or judge may make such order as is just."

The admission made in the affidavit that was sworn to by the law clerk, as well as the oral submissions made by counsel in open court, in my thinking were in their nature clear admissions of part of the claim contained in the application for summary judgment, and as they were made in the course of proceedings before a judge seized with jurisdiction to determine the cause in which they were made, there can be no legitimate complaint against the learned trial judge acting on them within the intendment of the rules. See: (1) Ellis v Allen [1914] 1 Ch. 904 @ 909; (2) Adjavon v Ghana Industrial Holding Corporation [1980] GLR 135 @ 140; (3) Technistudy Ltd v Kelland [1976] 3 AER 632 @ 634.

The judge before whom an application for summary judgment is made is entitled under rule 5 (1) of order 14 to give such judgment to a plaintiff on the claim partly or wholly as may be just having regard to the remedy or relief sought except the defendant shows that there is an issue to be tried or for some other reason there ought to be a trial."

On the specific issue of fraud the court rendered at page 11 as follows:

"Lastly, there is the point made that the claim was based on fraud and therefore the court erred in entering summary judgment in the matter. Unfortunately for the appellant, a careful reading and consideration of the writ and statement of claim is not supportive of this assertion. I think the appellant must have misapprehended the difference between an allegation that a party has acted fraudulently in the sense of dishonourably or without conscience which sounds in equity and fraud at common law. The latter, which is a term of art that refers to certain types of conduct which by their cumulative effect, are such as to constitute facts on which a party to an action may rely either to sustain an action or defend it. Regarding this latter category, the requirements of practice and procedure demand particulars of the alleged fraud to be provided by the party who relies on it as provided for in Order 11 rule 8 of CI 47. There is no such pleading before us and accordingly the point sought to be made on it is unmeritorious and like the others before it crumbles."

I have quoted quite extensively from the decision of the ordinary bench of this court to trace the path treaded by the court and to highlight their conclusions. It thus becomes clear from the above rendition that the two points canvassed before us were argued before the court and pronounced upon. The fact that Appellant counsel can criticize that decision is no ground that the same should be reviewed.[See **Mechanical Lloyd vs Nartey (1987-88) 2 GLR 598 @ 604].** The review jurisdiction avails an applicant where there are exceptional circumstances which if unredressed would perpetuate a miscarriage of justice. It is not another avenue for re-arguing or repeating or refashioning previous arguments as in an appeal. Nor is it an opportunity for a party to revisit and come out with more ingenious arguments which he believes will find favour with the tribunal. Simply

put a review is not an opportunity to have another bite at the cherry. [**See Afranie II v Quarcoo (1992) 2 GLR 561 per Francois JSC; In re Krobo Stool (No 2);Nyamekye (No 2) v Opoku (2000) SCGLR 567 @ 570 per Wiredu, JSC].** In the instant application, the ordinary bench performed its triage role by determining the nature of the fraud as being more of dishonourable conduct sounding in equity than dishonesty hence could not in that vein be accused of overlooking the issue. The only obvious conclusion to be drawn is that the court acted decisively on the issue.[See **Barclays Bank, Ltd v Cole (1966) 3 AER 948**]. The court also refused the invitation to strike out the writ as disclosing no cause of action an undertaking that should always be done with utmost circumspection. The stark reality about the invocation of this court's review jurisdiction in such instances as presented before us, is as stated in this court's report per **Date-Bah, JSC** in the case of **Internal Revenue Service v Chapel Hill School Ltd [2010] SCGLR 827** thus: "*Even if the unanimous judgment of the Supreme Court on the appeal in this case were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error. This is an inherent incident of the finality of the judgments of the final court of appeal of the land. The brutal truth is that an error of law by the final court of the land cannot ordinarily be remedied by itself, subject to the exceptions discussed below. In other words there is no right of appeal against a judgment of the Supreme Court, even if it is erroneous…"*

In the light of the foregoing, it is obvious that the Applicant has failed to urge any special circumstances to warrant a review. Applicant merely sought to re-argue his appeal, in more passionate eloquence and perhaps with greater emphasis, but these are no sound basis for the grant of a review. The application lacks merit and it is hereby dismissed.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

GBADEGBE, JSC:

My Lords, I agree with the judgment just delivered in the matter herein by my brother Akamba JSC that the invitation pressed on us by the applicant in these proceedings be dismissed. But, in view of the frequency in the rate at which review applications continue to be filed before us, I think it desirable to add a few words of my own. As the authorities have reiterated in a collection of cases on the point, to be a fit subject for review, an applicant must show not only that he is not in agreement with the decision the subject matter of the application but also demonstrate the existence of exceptional circumstances which have resulted in a miscarriage of justice. The decided cases to which reference have been made by my worthy brother, Akamba JSC have spelt out with sufficient clarity what would suffice for the court to exercise what has been described rightly in my thinking as a "**special jurisdiction**" conferred on us firstly by article 133 of the 1992 Constitution and section 6 of the Courts Act, (Act 459) of 1993 as circumscribed by rule 54 (b) of the Supreme Court Rules, CI 16. Accordingly, I shall not detain the precious time of this court by referring to any of those circumstances but quickly comment on some aspects of the matter herein by way of future guidance.

In my opinion, when a party placed in the position of the applicant at whose instance the instant proceedings were initiated has had a full hearing of an appeal to this court but seeks under the guise of the jurisdiction conferred on us under article 133 of the Constitution to embark upon what is plainly a rehearing of the appeal that was determined against him, the court must not shy away from

terminating the proceedings at the very first opportunity based only on the application itself and without the matter proceeding to the reception of oral arguments as was unfortunately done in the instant application. Such a course of procedure was contemplated by the makers of CI 16 and indeed, provided for in rule 59(2)(a). In my view the emerging practice of the court by which nearly all applications for review are heard without reference to the said rule has the effect of relaxing the strict test that an application for review should pass through before further arguments are taken in the matter. I refer to rule 59 (2) (a) of CI 16 that provides as follows:

"The Court after considering the statement of the applicant's case and of the respondent's case and the arguments of law may decide to determine the application and give ruling in open court on a fixed date without further arguments…"

It is only when the application reveals some matter of substance that the court may proceed to the reception of further arguments but as it seems most applications are considered under rule 59 (2) (b) even though they raise no serious issues for the consideration of the court. A clear reading of rule 59 of CI 16 shows that applications that should receive further arguments must be those that raise points worthy of our consideration in terms of the requirements of rule 54 of CI 16. Turning to the application before us the record of appeal on which the decision, which is the subject-matter of this application was based reveals that the summary judgment that was entered against the applicant in the trial High Court was based on a clear admission by the applicant. It being so, one is at great loss to understand in the absence of the slightest attempt to falsify the record of proceedings at the hearing of the application that resulted in the judgment with which we are presently concerned with how the only two grounds of appeal that were launched against the judgment could be expressed as follows:

(a) The judgment is not warranted by law.
(b) The judgment is against the weight of the evidence.

In my thinking these grounds cannot be competent grounds for the following reasons. Firstly, the entire proceedings was one in which as ably recounted by my respectful colleague in his delivery read a little while ago in the matter herein based on the admission made in an affidavit on behalf of the applicant and confirmed orally by counsel acting on his behalf in open court. In the circumstances, I am in a great difficulty as to how such proceedings can be attacked under any of the above grounds of appeal. Secondly, and perhaps more fundamentally, the ground which seeks to attack the procedure by which the summary judgment was entered that is predicated on the formulation expressed as "**The judgment is not warranted by law**" is not a competent ground in view of the mandatory language of rules 6 (4) and (5) of the rules of this court to which reference is made as follows:

4. **The grounds of appeal shall set out under distinct heads the grounds on which the appellant intends to rely at the hearing of the appeal, without an argument or a narrative and shall be numbered seriatim and where a ground of appeal is one of law, the appellant shall indicate the stage of the proceedings at which it was first raised.**

5. A ground of appeal which is vague or general in terms or does not disclose a reasonable ground of appeal is not permitted, except the general ground that the judgment is against the weight of the evidence and a ground of appeal or a part of it which is not permitted under this rule, may be struck out by the court on its own motion or on an application by the respondent."

It appears to me that had the court taken advantage of the punitive power at its disposal in the course of the proceedings had on the appeal that lasted for a considerable length of time without any of the parties adverting their minds to what appears to be a well settled practice of the court the said grounds would have been struck out and being the only grounds of complaint the appeal would not have proceeded to a hearing. See: MULTICHOIC E GHANA LTD v IRS [2011] 2 SCGLR 783 at 789-790 per Georgina Wood CJ.As the record does not evince that the court exercising the powers conferred on it under rule 78 of CI 16 waived the said non-compliance with rule 6(5), that should have been the end of the matter.

See: AGYEKUM AND ALHASSAN v AMADU BABA [2003-2004] SCGLR60.The decision in the Multichoice case (supra) was in line with a long and settled line of cases that are to the effect that in order to render a ground of appeal effectual, it should be free from any of the statutory infractions that deprives it of validity**.** I have adverted to this aspect of non-compliance to demonstrate that the court was benignly indulgent to the applicant by giving the appeal a full hearing before deciding on the matter; for there is no right in this court to perfect an imperfect ground of appeal and allow arguments to be received thereon**.** It seems to me that in such circumstances the applicant cannot turn round to argue as indeed he has sought to demonstrate through his submissions that the instant application is one that is well made under our special jurisdiction. The instant application in my view, properly speaking belongs to the category under rule 59 (2) (a) of C.I 16 may be determined without the reason for further argument.

With regard in particular to rule 6(4) of CI 16, I think it is intended to shut out persons like the applicant who could have raised objections to any inappropriate procedure that is implicit in the expression "**The judgment is not warranted by law**" at the earliest opportunity as the failure so to do might be deemed in appropriate instances as a waiver. Indeed, the conduct of the applicant at the hearing of the application that resulted in the summary judgment is a clear evidence of waiver, a conduct that order 81 of the High Court Rules, C1 47 clearly does not sanction. In my opinion rule 6 (4) CI 16 is a clear endorsement of the provisions contained in Order 81 and render objections made subsequent to the hearing of the application wholly unmeritorious and devoid of merit. I am of the view that we need interpret and apply the rules with consistency and uniformity in order to bring about parity of treatment to parties and give credence to judicial precedent.

My Lords, permit me to say that the time has come for us in the exercise of the powers conferred on us under the practice and procedure of this court to ensure strict compliance with the conditions contained in the enabling rules such as I have just alluded to in order to give real meaning and substance to the purpose for which the rules were enacted and more importantly to give effect to the expectations of society that in the exercise of our jurisdiction we shall hold parties who appear before us to the clear words by which the rules are expressed. This,

in my thinking is the only way to give effect to the requirements of due process and the rule of law.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU [MS.]

JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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