IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- GHANA, A.D.2014

CORAM: WOOD, C. J. (PRESIDING)
ANSAH, J.S.C.
DOTSE, J.S.C.
ANIN YEBOAH,J.S.C.
BAFFOE - BONNIE, J.S.C.
BENIN, J.S.C.
AKAMBA, J.S.C.

REVIEW MOTION
NO. J7/8/2015

5TH NOVEMBER, 2015

CHARLES LAWRENCE QUIST - - - PLAINTIFF/ RESPONDENT
(SUBSTITUTED BY DIANA QUIST) /APPELLANT/APPLICANT
F727/2 15TH LANE, OSU RE ESTATE

VRS.

AHMED DANAWI - - - DEFENDANT/APPELLANT
AFRIDOM SUPERMARKET **/RESPONDENT/RESPONDENT**
OSU R. E. OSU, ACCRA**.**

RULING

DOTSE, JSC:-

By this application, the Plaintiff/Applicant, hereafter referred to as the Applicant is seeking a review of the decision of the ordinary bench of this court, delivered on 29th July 2015 wherein the Defendant/ Respondent, hereafter referred to as the Respondent, was adjudged as having been successful in the appeal launched by him which accordingly set aside the decision of the trial court and allowed the appeal of the Respondent herein.

In order to understand in proper context, the issues upon which the Applicant herein filed the instant review application, we have decided to set out in extenso, the relevant parts of the affidavit of the Applicant in support of the application for review as follows:-

The Applicant deposed to in paragraphs 8, through to 23 as follows:-

8. "Incidentally, after the denial of this title and my father had positively evinced an intention to eject them from the land, the respondent and his brother offered to appease him by sending a cheque by letter to his lawyer as rent advance for ten years, but my father refused to accept the cheque **to pay him rent so he did not cash the cheque and allowed it to go stale.**

9. As part of his case my father made reference in his statement of claim to this offer to pay him rent to induce him to get him to waive his right to forfeit the lease and contended that because he did not cash the cheque the forfeiture had not been waived.

10. In his statement of defence the respondent did not deny the offer of the cheque to induce my father **to waive his right to forfeit the lease and that the cheque rejected by not being cashed; rather the**

respondent relied on the offer of the cheque and the view that the denial of title was by their lawyer to plead that the court ought to grant him relief against forfeiture. He, however never contended that though the cheque was not cashed my father had nevertheless did something to waive the forfeiture.

11. Because of that the case proceeded on only two issues, namely, whether there has been a denial of my father's title and whether relief could be granted against forfeiture upon denial of a landlord's title, but in its judgment the court found the respondent and his brother guilty of denying my father's title but said nothing about the plea for relief against forfeiture.

12. The respondent appealed to the Court of Appeal against the decision that he and his brother had committed an act amounting to denial of their landlord's title and also **raised a technical point that the trial was a nullity because the court did wrongly adopt the prior proceedings in the case.**

13. The Court of Appeal allowed the appeal on the jurisdictional point and the case ordered to go back to the High Court for a retrial to deal with the issues raised on the pleadings.

14. My father had then died and I had been substituted for him, **so I appealed to the Supreme Court complaining against the decision of the Court of Appeal nullifying the trial court proceedings and the Supreme Court allowed the appeal.**

15. However, instead of returning the case to the Court of Appeal to deal with the merits of the appeal against the trial court

judgment so that, if I was dissatisfied I would be able to appeal to the Supreme Court against any judgment given against me, the Supreme Court itself assumed jurisdiction to hear the appeal against the trial court judgment.

16. The Supreme Court heard the appeal and gave judgment on 29th July 2015 allowing the appeal, not on the ground that the trial Judge was wrong in holding that the respondent and his brother had not denied their landlord's title; it agreed that they had denied his title but, to my surprise, it proceeded to decide that my father waived his right of forfeiture although waiver was never raised by way of a defence to my father's action and plead what my father did which constituted a waiver.

17. I am very much aggrieved by how the Supreme Court itself raised for the respondent the defence of waiver to my father's action when the respondent himself never raised that defence without giving my counsel the opportunity to address it on waiver, which is a question of mixed fact and law.

18. I am informed by counsel that if he had had fair notice that waiver was going to be relied on by the Supreme Court in giving its judgment although it was not part of the case at the trial court nor set out as ground of appeal against the trial court judgment, he could have presented tangible arguments to the effect that the cheque was not tendered upon demand by my father but was volunteered, that a cheque is not a legal tender like cash and that the refusal to cash the cheque was an implied rejection of it by my father, so that no unequivocal act was done by my father between 1992 and 1994 clearly indicating that he still regarded the

lease as still continuing after his title had been denied and that the mere delay in returning the cheque till had it expired did not mean that my father did receive the amount of rent represented by the cheque because my father was not obliged to accept the cheque by presenting to the bank to cash it personally or through his bank.

19. I could easily have appealed to the Supreme Court against such a decision if the appeal had been allowed to go back to the Court of Appeal to be heard on its merits and the Court of Appeal had decided that my father waived the forfeiture because, according to my lawyer, according to law waiver by taking rent consists of either the landlord demanding the rent after knowledge of the act of forfeiture in case or by cashing a cheque tendered for payment of rent.

20. In my father's case, he did not demand any rent from the respondent and his brother who rather volunteered to pay his rent by cheque, yet the cheque was never cashed but returned before he exercised the right of forfeiture, not by means of peaceable re-entry but by issuing a wriit of summons

21. I am advised by counsel and verily believe that the circumstances under which the Supreme Court came to give its own ruling and thereby deprived a fair hearing by not giving my counsel the opportunity to contest the appeal on the question of waiver and so caused substantial miscarriage of justice to me.

22. As matters stood on the pleadings and during the trial no issue of waiver was raised as a defence to my father's claim so the Supreme Court should have left the case alone after it had agreed with the trial Judge that the respondent and his brother denied my father's title.

23. If the Supreme Court was minded to give judgment in favour of the respondent, the only thing it could have done was to look at the question of relief against forfeiture which was raised and fought at the trial court but that court failed to deal with, but not the question of waiver of forfeiture which was never raised at all." Emphasis supplied

From the above depositions, it appears that, the misconception working in the mind of the Applicant stems from her inability to comprehend the procedure that was adopted by the Supreme Court to adjudicate the issues raised once and for all to finality. The procedure adopted by this court cannot be faulted, as this court has by article 129 (4) of the Constitution 1992, all the powers of other courts established under the Constitution 1992. See also section 2 (4) of the Courts Act, 1993, Act 459. This means that, this court can exercise, all the powers of the trial High Court and the Court of Appeal in order to completely, and effectually adjudicate all issues in controversy.

It is also to be noted that the review jurisdiction of this court has been stated in Article 133 of the Constitution, 1992, section 6 of the Courts Act, 1993, Act 459, and Rules 54 - 60 of the Supreme Court Rules C.I. 16. This means that, the said review jurisdiction is statutory and it is to those provisions that we must turn attention to in order to determine the fortunes of this application.

Rule 54 of the Supreme Court Rules, C. I. 16 provides as follows:-

"The Court may review a decision made or given by it on the grounds of

(a) Exceptional circumstances which have resulted in a miscarriage of justice.

(b) The 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 provided by the applicant at the time when the decision was given."

We believe that it is because of the above that the respondent deposed to as follows in the affidavit sworn in opposition to the instant review application by Counsel on his behalf as follows:-

5. "That there is no legal basis for the present application.

6. That no exceptional circumstances have been laid forth by the applicant.

7. That all the legal points raised in the application have been dealt with already in the judgment of the Supreme Court.

8. That applications for review are not meant to be attempt at a second "bite of the cherry".

We have perused the statements of case filed by learned counsel for both parties. Unfortunately, learned counsel for the Applicant Mr. James Ahenkora spent a considerable portion of his statement of case and the continuation statement, as if this case was an appeal, and not a review. In review applications, it is not permissible to an Applicant to refer copiously again to the proceedings before the trial High Court and the Court of Appeal. The authorities are quite settled that the review application is not a process for which a losing party in the Supreme Court may seek to have another bite of the cheery. Instead, an applicant in a review application has to point out from the judgment

reviewed from the exceptional circumstances which have resulted into a miscarriage of justice. None was however offered by the applicant in this case.

See cases like

1. ***Afranie v Quarcoo [1992] 2 GLR 561 at 591-959*** *where Wuaku JSC had this to say*

   "There is only one Supreme Court. A review court is not an appellate court to sit in judgment over the Supreme Court"

2. ***Mechanical Lloyd Assembly Plant Ltd. v Nartey [1987-88] 2 GLR 598***

3. ***Quartey v Central Services Co. Ltd [1996-97] SCGLR 398*** *per Abban C. J., at 399 where he stated thus:-*

   "A review jurisdiction is a special jurisdiction and not an appellate jurisdiction conferred on the court, and the court would exercise that special jurisdiction in favour of an applicant only in exceptional circumstances."

4. ***Pianim (No. 3) v Ekwam [1996-97]***

5. ***Koglex (GH) Ltd. v Attieh [2001-2002] SCGLR 947***

6. ***Attorney-General (No. 2) v Tsatsu Tsikata (No. 2) [2001-2002] SCGLR 620***

7. ***Internal Revenue Service v Chapel Hill School Ltd. [2010] SCGLR 827, at 850 per Dr. Date-Bah JSC***

We have observed that, quite often, counsel and their clients have resorted to the review jurisdiction in much the same way as they resort to appeals from one

level of court to the other. However, it is important to emphasise the fact that the principle of finality of judgments of courts, especially of the final appellate court such as the Supreme Court, must be respected by all.

This principle is expressed in it's latin maxim as follows:-

> "Interest res publicae ut finis sit litium" meaning it is the function of the final court of the land to bring finality to the resolution of disputes. "

The above principle was expressed in it's narrow context by Date-Bah JSC in his opinion in the case of ***GIHOC Refrigeration and Household Products (No. I) v Hanna Assi (No. I) 2007-2008 SCGLR 1, at page 12***.

In the instant review application, learned counsel for the applicant, Mr. James Ahenkora has not shown by any credible arguments why the decision of the ordinary bench should be reviewed. Instead, counsel appeared to have been unsettled by the procedure used by this court to expeditiously deal with the appeal.

For instance, learned counsel for the applicant has not established or shown that the decision of the ordinary bench was given per incurriam, or that it is void and or contains a fundamental and inadvertent error. In short, the instant application is one that has been employed just to test the resilience of the court.

In dismissing this review application as devoid of any merit, we wish to endorse the words of our distinguished brother, Dr. Date-Bah JSC, in his seminal book, titled "Reflections on the Supreme Court of Ghana" page 110 where the learned author observed as follows:-

> *"In sum, the review jurisdiction of the Supreme Court is one held in reserve by the court to be deployed in exceptional circumstances to correct fundamental error committed by the ordinary bench"*

Since no such exceptional circumstances have been proven to exist, this review application must fail.

The common thread running through all the cases referred to is that, a review panel must not countenance an applicant's case being that of a losing party seeking to re-argue it's appeal under the garb of a review application.

Unfortunately, this is exactly what the applicant has sought to do by the instant review application. We have already referred to in extenso the affidavit of the applicant in support of the review application. In substance, what the applicant has anchored her case on is the fact that the ordinary bench considered the appeal on the ground of waiver of forfeiture instead of relief against forfeiture. However, a quick reference to paragraph 23 of the affidavit in support shows that, at the trial High Court, the question of relief against forfeiture was raised and contested during the trial, but the court did not make any pronouncement on the issue.

We have verified from the record of proceedings and confirmed that the pleadings infact attest to these depositions. That being the case, the ordinary bench of this court was clearly within its jurisdiction when it decided to raise the issue of waiver of forfeiture which is a legal issue arising from the pleadings and deal with it. This is because, as a legal issue, it can be raised before this court for the first time and dealt with.

We have perused the judgment of the ordinary bench of this court delivered on the 29th of July 2015 and are satisfied that the issue of forfeiture and the circumstances under which it could be waived had been adequately dealt with.

From the authorities referred to supra, it is clear that, instead of the applicant, indicating the exceptional circumstances in the decision of the ordinary bench which have resulted into a miscarriage of justice, learned counsel for the applicant spent considerable time dealing with the application as if it was an appeal from both the trial High Court, and the Court of Appeal to this court.

In this respect, learned counsel for the respondent, Ekow Kum Amuah-Sekyi was spot on when he stated in his statement of case as follows:-

> *"The Supreme Court per Baffoe Bonnie JSC had fully examined the law on forfeiture of a lease and its attendant consequences. It is not open to the applicant to seek to re-argue the legal principles of forfeiture and camouflage same as an application for review."*

From the facts of this application, we are certain that the applicant has not shown the existence of any exceptional circumstances which if not addressed would perpetuate a miscarriage of justice. And since a review application is not an avenue for an applicant to re-argue an appeal that has failed, the application herein is dismissed.

On the basis of the above analysis, we hereby dismiss the applicant's review application of the judgment of the ordinary bench delivered on 29/7/2015.

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

CONCURRING OPINION

BENIN, JSC:-

I am in entirely agreement with both the decision and reasoning expressed by my able brother Dotse, JSC. However, in view of the fact that I had formed an opinion which I had committed to paper before I received my learned brother's opinion, I would like to say a few words to express my thoughts on the issues raised by this application for review. The grounds for the application have been set out extensively in the lead opinion so I will not repeat them.

It is true, as stated by Counsel for the applicant, that the case was contested on two issues before the trial High Court namely whether the defendant had denied the plaintiff's title and if so whether the defendant should be relieved against forfeiture. It is significant to note that the summons for directions was filed by the plaintiff and he added what I may term an omnibus issue, for want of an appropriate expression, namely 'any other issue raised by the pleadings' What this omnibus issue means is that it enables the court to deal with every conceivable issue that the pleadings throw up especially those on which admissible evidence has been led by the parties. But even in the absence of this omnibus issue the court should nevertheless be at liberty to examine any issue that arises on the pleadings directly or by necessary implication or inference, whether it has been agreed upon or not. The only caution is that there must be credible and legally admissible evidence on the record to support the court's decision.

Therefore what should engage the court's focus is whether on the state of the pleadings the issue of waiver of the right to forfeiture was raised either directly or by necessary implication. Thereafter the court would have to find out whether evidence was adduced on the record on the issue. If these two conditions are satisfied, this court would be at liberty to decide without any further recourse to Counsel under rule 6(8) of the Supreme Court Rules (1996) C.I 16, contrary to the position taken by counsel for the applicant.

First of all let us look at the pleadings. The issue of waiver of the right to forfeiture is ordinarily one for the defendant to raise it in his pleadings, in other words waiver is a defence to a claim for forfeiture. But curiously in this case it was the plaintiff himself who first raised it in his statement of claim. Paragraph 7 reads:

The plaintiff says that he has not waived the forfeiture as he refused to accept overtures by the defendant and his late brother to appease him by tendering a cheque for £12,000 in a supposed payment of rent for the property covering a period of ten years……

In the statement of defence, the defendant referred to a letter written by his lawyer to the plaintiff through his (plaintiff's) lawyer in which he "enclosed a cheque in recognition of your client's title….." The defendant went on to plead that on these facts the court should grant him relief against forfeiture and also denied that the plaintiff was entitled to any of his reliefs.

On these pleadings it is very clear that the waiver of the right to forfeiture was raised as a triable issue, although admittedly it was not set down by the trial court. It was clear from the pleadings that the waiver was founded on the presentation by the defendant of a cheque for rent advance with the declared object of recognizing the plaintiff's title for the relationship of landlord and tenant to continue.

I will next examine the material or relevant evidence. I do not think I have to go into the details of the evidence. Suffice it to say that the plaintiff actually took hold of the cheque and was aware that it was intended as a rent advance with the object of continuing the relationship of landlord and tenant. The plaintiff did not cash the cheque neither did he return it to the defendant by rejecting his offers. He rather kept it for some nine months, precisely from April 1992 to February 1993, before purporting to return it to the defendant. All these facts are not in dispute.

The legal position

As already stated, where there is evidence available on the record sufficient to satisfy the evidential burden of proof, this court as a court of last resort will apply

the law to the facts in order to bring litigation to a close. The issue of waiver was directly linked to the relief against forfeiture so parties are not taken by surprise. With the evidence on record it was a matter of what inference to draw from same which the court was able to do and give the decision which the courts below failed to do, by virtue of Article 129(4) of the Constitution, 1992. The legal position is that where money is accepted, it is a question of fact whether it is tendered and accepted as rent; if it is so tendered and accepted, then it is a principle of law that, so long as the landlord then knew of the breach, the acceptance constitutes a waiver. See the case of ***Windmill Investments (London) Ltd v. Milano Restaurant Ltd. (1962) 2 QB 373; (1962) 2All ER 680.*** The law is quite strict on this; it may be so because it seeks to protect the tenant who is often regarded as the weaker party in landlord-tenant relationship. Thus in the case of ***Central Estates (Belgravia) Ltd v. Woolgar (No. 2), (1972) 1 WLR 1048, CA*** where a managing agent's clerk accepted rent in error, it was said to be binding on the landlord and constitute a waiver. Counsel for the applicant cited another relevant case, namely ***Matthews v. Smallwood (1910) 1 Ch 977; (1908-10) All ER Rep 536; 102 LT 228.*** The court decided inter alia that waiver was a defence to a claim for forfeiture.

The facts constituting a waiver by conduct, deed, action or in action depend on the facts and circumstances of each case. The court has concluded that the act of the plaintiff in keeping the cheque for a considerable length of time without any indication to the defendant that he was rejecting the offer amounted to an acceptance and consequently a waiver of the right of forfeiture. It is common knowledge that a cheque is valid for clearance within a period of six months from the date it bears. Therefore it is reasonable to expect that a beneficiary of a cheque who desires to reject it for whatever reason should do so within the six months period to enable the issuer to have the benefit of the cheque if he so desires. If he keeps the cheque for more than six months the issuer would be entitled to believe that it has been accepted without any equivocation or reservation. For without communication from the beneficiary that he does not intend to accept the cheque, the issuer would have no opportunity to know his thoughts. The fact that the plaintiff subsequently returned the cheque to the

defendant at his own pleasure did not revive the waiver which had occurred in the circumstances. Time was thus of the essence in this case and a clear decision to reject the cheque was required in the circumstances of this case.

It must be pointed out that the defendant's decision to re-write another cheque did not resurrect the waiver either, for as a tenant the defendant was obliged to pay rent for the unexpired term of the lease and that is the only reasonable inference to be drawn from the second cheque that the defendant issued. The facts as well as the law justified the conclusion of the court. And even if for the sake of argument the court erred this per se would not ground a review unless as pointed out in the lead opinion a miscarriage of justice had resulted therefrom. And in the absence of any exceptional circumstances which have occasioned a miscarriage of justice this is not a fit case to review.

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

(SGD) G. T. WOOD (MRS)
CHIEF JUSTICE

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

COUNSEL

JAMES AHENKORAH ESQ. FOR THE PLAINTIFF/RESPONDENT /APPELLANT/APPLICANT.

E. K. AMUA SEKYI ESQ. WITH HIM ELEEN LADY ERSKINE (MRS.) ESQ. FOR THE DEFENDANT/APPELLANT/ RESPONDENT/RESPONDENT.