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

CORAM: ADINYIRA (MRS.) JSC (PRESIDING)
YEBOAH JSC
BONNIE JSC
BAMFO (MRS.) JSC
AKAMBA JSC

CIVIL APPEAL
NO.J4/18/2014

30TH JULY 2014

CHARLES OSEI BONSU - - PLAINTIFF/APPELLANT/RESPONDENT
(TRADING UNDER THE NAME
& STYLE "C.C.B BROTHERS")

VRS.

1. DOROTHY ABOAGYE - - DEFENDANTS/RESPONDENTS
2. ABENA KONADU /APPELLANTS

JUDGMENT

SOPHIA ADINYIRA (MRS.) JSC (PRESIDING):

Facts

The parties entered an agreement on 20 March, 2008, under which:

1. Plaintiff was to construct a two-storey building on Defendants' land on No. Plot 25, Block 11, Asokwa Residential Area, Kumasi, containing:
    a. 25 storerooms on the ground floor,
    b. 25 storerooms on the first floor,

c. A residential apartment on the second floor.

2. Plaintiff was to enjoy 2/3 of the building for 30 years from the date of completion of the ground and first floors. Defendants were to enjoy 1/3 of the building for 30 years, and the whole building after 30 years from the date of completion.
3. Plaintiff was to apply his own financial resources, labor, materials and equipment.
4. Plaintiff was to complete the ground and first floors within 2 years from March 20, 2008, and the second floor within 1 year from the completion of the ground and first floors.

Pursuant to the agreement, Plaintiff demolished an old structure on the premises and partially constructed a building, at an alleged cost of GHc400, 000 and US$1,000. Plaintiff was however unable to complete the building within the period agreed, leading to an abrogation of the agreement by the Defendants in May 2010. Plaintiff brought an action against the landowners to recover costs of construction, with interest, for the partially completed two-storey building Plaintiff continues to lease and collect rental income from the completed portions of the building, and possesses the keys to the storerooms. Its reasoning was that the Plaintiff seeks a purely financial remedy, thereby admitting that Defendants have the right to ownership of the disputed property.

The High Court referred to dictum in *American Cyanamid Co. v. Ethicon Ltd [1975],* All ER 504 HL that:

> *"If damages in the measure recoverable at common law would be adequate remedy and the defendants would be in a financial position to pay them, no interlocutory injunction would normally be granted, however strong the plaintiff's claim appeared to be at that stage."*

The High Court therefore concluded that the Defendants must have the right to control and manage the property, to derive maximum financial income from the property so as to be able to satisfy Plaintiff's demands at the end of the trial. Further the High Court was of the view that it is premature at that stage of the proceedings to determine that Defendants are incapable of refunding the Plaintiff's financial investments.

On April 23, 2013, the Court of Appeal granted the Plaintiff a Stay of Execution of the orders of the High Court as it was of the view that the

status quo of the parties must be maintained pending the final determination of the suit. It held that the trial court should have exacted an undertaking from the Defendants, which is mandatory under Rule 9, Order 25 of the High Court Civil Procedure Rules (C.I. 47) as the circumstances of this case, having arisen out of an appeal, is distinguishable from *The Republic v. High Court, Ex-parte Ansah-Otu* [2009] SCGLR 141.

Appeal to the Supreme Court

The Defendants being dissatisfied appealed on the sole ground that the Court of Appeal's grant of Stay of Execution was a wrongful exercise of judicial discretion.

Defendants/Appellants' submissions
The Defendants submits that the High Court properly exercised its discretion, and the Court of Appeals should not have substituted its own discretion when reviewing the decision of the High Court. The Plaintiff's appeal will not be rendered nugatory as the Plaintiff admits to having no property interest and seeks only a reimbursement of the cost of construction; with interest up to the date of reimbursement. They submit that on the facts no exceptional circumstances exist. Stay of Execution will work untold hardship on Defendants and their families. While an undertaking may be required, it is not necessary. They urged the Court to adopt a purposive interpretation of Rule 9 Order 25 of C.I 47 as the rationale behind the rule is to protect the rights and prevent any injury or damage to a party. In this case, the Plaintiff has no right to the property worthy of protection. The Court of Appeals erred in focusing on the question whether the interlocutory injunction was properly awarded.

Plaintiff/Respondent's submissions

The Plaintiff submits that the circumstances warrant the grant of a Stay of Execution as he has not yet recovered the cost of investment, and the Defendants should not be allowed to benefit from the project without making any contribution. The Plaintiff submits the Defendants and their family members will be unable to offer adequate financial compensation, should the Plaintiff be successful in the suit. Plaintiff submits he has contracted a loan from a bank to construct the building, with interest, and would be required to raise money elsewhere to offset the loan and he will suffer greater hardship if the order of the Court of Appeal is reversed. The

Plaintiff further contends that the High Court has failed to extract an undertaking which is mandatory under Rule 9, Order 25 of the High Court Civil Procedure Rules (C.I. 47).

Consideration

Whether the injunction would render the Plaintiff's appeal, if successful, nugatory

Standard for Stay of Execution

The principle for considering an application for a Stay of Execution is well settled. As stated in *Livingstone Djokoto v. BBC Industrials* [2012] 36 MLRG 107*, NDK Financial Ltd. v. Yiadom Construction and Electrical Works Ltd.* [2007/08] SCGLR 93*, and Mensah v. Ghana Football Association and Others* [1998-90] 1 GLR 1-13 and *Joseph v. Jebeile and Another* (1963) 1 GLR 387-392 SC; the injunction must be shown to make the applicant's appeal, if successful, nugatory.

In *Livingstone Djokoto v. BBC Industrials Co. Ltd* [2011] SCGLR 825 at 830, this Court held per Anin Yeboah JSC that:

> "*In deciding applications for stay of execution, both trial court and an appellate court must carefully examine the judgment appealed against and the order or decree sought to be executed to consider whether the appeal would not be rendered* ***nugatory*** *should the court refuse it and the appellant wins on appeal… Secondly, the court must also consider the* ***exceptional circumstances****, which depend on the nature of the case… This court may in appropriate cases grant stay where balance of hardship will fall on the appellant."*

In *NDK Financial Services Ltd. v. Yiadom Construction and Electrical Works Ltd* [2007/08] SCGLR 93 in a majority decision the Supreme Court held as by head note 1

> *"The principles for considering an application for stay of execution pending an appeal were well-settled: the main principle adopted by the courts is what the position of the appellant would be if the judgment were to be enforced and the appeal is successful…In effect the essential point in considering such applications was whether the applicant would be returned to the status quo ante should the appeal succeed… Another determining principle was which of the parties*

would suffer greater hardship should the application be granted or refused. On the facts of the instant case, it was obvious that the position of the applicants would never be the same if the security were to be sold and they were to win the appeal; that would render the appeal nugatory. Furthermore the respondents would lose nothing other than the delay in having their money while the appeal was being pursued; that could not be said to be greater hardship than the position of the applicants who would stand to lose their property to a bona fide purchaser if the stay were to be refused and execution were to take place."

In *Mensah v. Ghana Football Association and Others* (1998-90) 1 GLR 1-13. SC, this Court held:

"If the enforcement would make the appeal, if successful, nugatory then the proper order to make was one staying execution."

Earlier in the celebrated case of *Joseph v. Jebeile and Another* (1963) 1 GLR 387-392 SC, this Court held:

"[I]t is the paramount duty of a court to which an application for stay of execution pending appeal is made to see that the appeal, if successful, is not rendered ***nugatory****".*

Stays were granted in the above cases where an injunction would cause an irreparable loss, such as the sale of property to a third party (in the case of *NDK Financial v. Yiadom,* ***supra***) and disrupt an ongoing national football tournament (in the case of Mensah v. Ghana Football Association, ***supra*****)**. Applying the above principle to the facts of this case, an injunction prohibiting the Plaintiff from further benefiting from the property would not render his appeal nugatory, where the Plaintiff's claim is purely financial. The Plaintiff's ability to recover his costs is unaffected, if not improved by the injunction. As the High Court stated, it is premature to determine that Defendants would not be capable of refunding the Plaintiff's financial investments. Accordingly we hold that the injunction granted by the High Court would not render the Plaintiff's appeal nugatory.

Whether there are exceptional circumstances that warrant a Stay of Execution

Counsel for Plaintiff asserts that there were exceptional circumstances to warrant a Stay of Execution. In particular, it is argued that: (1) the lack of recovery of costs by the Plaintiff, (2) the lack of contribution by the Defendants, and (3) the low likelihood of compensation by the Defendants, constitute exceptional circumstances. The first and second arguments, in our view, do not amount to exceptional circumstances as on facts the Defendants contributed their land for the project and the Plaintiff was to bear the cost of the project and is in any event suing for the recovery of his costs… The third appears premature, as per the High Court's opinion. We therefore find that the Plaintiff has not demonstrated any exceptional circumstances in his favor.

Whether the failure to order an undertaking does not, by itself, warrant a Stay of Execution

While Rule 9 of Order 25 of the High Court Procedure Rules, CI 47 requires the High Court to order an undertaking by the applicant in the event that an application for an interlocutory injunction is opposed, a failure to comply is a mere irregularity curable under Order 81, rr 1 and 2 and so does not nullify the grant of an injunction. In *The Republic v. High Court, Ex-parte Ansah-Otu*, (2009) SCGLR 141, an application for *certiorari* was denied by the Supreme Court; in holding that a failure to order an undertaken though a mandatory requirement under the said rule, was an error of law and was apparent on the face of the record, the error did not go to the jurisdiction of the court in the sense that it did not emanate from a wrong assumption of jurisdiction or in violation of a constitutional provision nor was it a nullity by any standard. The Supreme Court held:

> *"[T]he circumstances of the case must be looked at in considering the grant or refusal of the application for Interlocutory injunction… Even though rule 9(1) and (2) of Order 25 requires an applicant to give an undertaking, it is procedural and should not be interpreted to limit the jurisdiction imposed on the courts… It is therefore not the case that in all interlocutory injunction applications before the courts, where rule 9(1) and (2) of Order 25 is applicable, the refusal or failure of the court to make an order for undertaking should nullify the grant of interlocutory injunction."*

However in the interest of justice due to the economics of the construction business, we will order the High Court Kumasi, to extract an undertaken from the Defendants.

Subject to the above order, the appeal is allowed.

The ruling of the Court of Appeal, Kumasi, and dated 23 April, 2013 is hereby reversed.

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

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

(SGD) **V. AKOTO BAMFO (MRS)**
JUSTICE OF THE SUPREME COURT

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

COUNSEL

PAAPAH DADSON ESQ. WITH HIM MISS HILDA ADDO FOR THE DEFENDANTS/RESPONDENTS/APPELLANTS.

WILLIAM KUSI ESQ. FOR THE PLAINTIFF/APPELLANT/RESPONDENT.