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

CIVIL APPEAL
No.J4/60/2013

9TH APRIL 2014

CORAM: ANSAH JSC (PRESIDING)
ADINYIRA (MRS) JSC
DOTSE JSC
YEBOAH JSC
AKAMBA JSC

GHANA COMMERCIAL BANK - **PLAINTIFF/RESPONDENT**
TAKORADI **RESPONDENT/RESPONDENT**

VRS

1. J. K. ACKAH ENTERPRISE LTD
2. JOSEPH KWEKU ACKAH - **2ND DEFENDANT/APPLICANT/**
(SUBSTITUTED WITH MRS ACKAH) **APPELLANT/APPELLANT**
3. KOFI ABAIDOO

JUDGMENT

ANIN YEBOAH JSC;

This is an appeal, the facts of which fall within a narrow compass and raises a procedural issue which deals with execution of judgments. The facts, however, are completely devoid of any controversy whatsoever.

The plaintiff which is the respondent herein is a well known financial institution carrying out banking business in Ghana. It offered facilities to the first defendant a limited liability company. The facilities were secured by the properties of the managing director who was the second defendant and the third defendant who also offered his property as security for the facility granted by the plaintiff to the first defendant. When the period of repayment became due the first defendant defaulted and the plaintiff commenced an action at the High Court, Sekondi, for the recovery of the outstanding balance and other reliefs as apparent on the indorsesment of the amended writ of summons as follows:

a. Payment of ¢1,130,945.24, being principal and interest as at 05/12/2006, representing balance of facilities granted to the 1st defendant by the plaintiff at the 1st defendant's own request which is outstanding and owing despite repeated demands for due settlement.

b. Interest at 27% from 06/12/2006 up to and inclusive of date of final payment

c. Recovery of an overdue overdraft facility in the sum of ¢715,540,632.35

d. Interest on the sum of ¢715,540,632.35 at the rate of 27% per annum from 06/12/2006 to date of final payment

e. AND/OR in the alternative, judicial sale of properties mortgaged by the 2nd and 3rd defendants to the plaintiff to secure the facilities granted to the 1st defendant.

After entering appearance to the writ, the plaintiff applied for summary judgment. It appears on the record of proceedings that by consent of both counsel, summary judgment was entered against the appellant on 10/3/2009 for all the reliefs referred to above. As the judgment debt was not satisfied by the appellant, the respondent on 28/07/2009 issued a writ of fi:fa to levy execution against the property of the appellant which is described as № 16C Anaji/Effia Residential Area renumbered as H/№ 20 PT 186 used as security for a loan contracted by the first defendant from the respondent herein. In course of the proceedings, the original second defendant, (one Joseph kweku Ackah) died and was substituted by his widow Mrs. Agnes Ackah who became second defendant and the only appellant in these proceedings. On the 3/02/2012, the property referred to above which was used as security for the loan was sold in execution to satisfy the judgment debt. The appellant herein filed an application at the High court to set aside the sale of the property on grounds that the sale was a nullity.

The appellant contended that as the writ of fi:fa was issued on 28/07/2009 and under the rules of court it expired on 28/07/2010, there was in law no valid writ of fi:fa existing to warrant the attachment and subsequent sale of the property on 7/03/2013. According to counsel for the appellant, the writ of execution should not be in existence for more than one year before the sale.

The High Court, Sekondi refused to set aside the sale. The appellant lodged an appeal at the Court of Appeal, Cape Coast, and repeated the same argument but the court dismissed the appeal as unmeritorious. This is the second appeal in this case which has been argued on two main grounds, namely:

1. The Court of Appeal, Cape Coast, held wrongly that there was a writ of fi:fa legally and validly subsisting as at the time of the judicial sale of the 2nd defendant/judgment debtor's property in issue and erred thereby in holding that the sale aforesaid was proper.

2. The writ of fieri facias issued in the suit was for the attachment of movables and could not be used for the purpose of the attachment of the immovable property of the 2nd defendant/judgment – debtor.

In arguing the first ground, learned counsel for the appellant relied on Order 44 rule 9 (1) and (2) of the High Court Civil Procedure Rules CI 47 of 2004 which reads as follows:

"Order 44 rule 9 (1). For the purpose of execution, a writ of execution shall be valid in the first instance for twelve months beginning with the date of its issue.

9 (2). Where a writ has not been wholly executed the court may by order extend the validity of the writ from time to time for a period of twelve months at any time beginning with the date on which the order is made, if an application for extension is made to the court before the day on which the writ would otherwise expire"

Counsel contended that as the writ was issued on 28/07/2009 it expired on 28/07/2010 and had therefore ceased to be a writ for it to be valid. He submits that as the property was sold on 7/3/2012 after more than the life period of the writ, the sale was void and ought to be set aside. This contention was urged on the Court of Appeal. Her Ladyship Ackah-Yensu JA delivered in answer to this submission as follows:

"The position of the law clearly is that once the property of the judgment debtor is seized or attached by the sheriff within the twelve months the writ of fi:fa is duly executed under Order 44 rule 9"

The above delivery at the Court of Appeal has been subjected to serious criticism by counsel for the appellant. Counsel is of the opinion that once execution is not completed within a year the writ of execution has no validity.

Counsel for the appellant relied on the local cases of ASIEDU v TIMBER & TRANSPORT CO. LTD [1978] IGLR 351 and CHAHIN & SONS v EPOPE PRINGTING PRESS [1963 GLR 163 to submit that as the writ of fi:fa was in existence for more than one year when the execution was not complete it called for a renewal of the writ of execution. The Court of Appeal tried to draw an anology between writ of summons and a writ of execution which learned counsel for the appellant found as flawed.

The settled practice in execution of judgments is that the issue of a writ of fi:fa takes place on it being sealed at the registry of the court which is executing the judgment on behalf of the judgment-creditor. Execution of the writ by a sheriff involves the attachment of the property the subject matter of the execution. If during the period of twelve months the sealed writ of execution has not been used to attach a property, the rules of court would require that the writ of execution must be renewed. In the delivery of the Court of Appeal the law was clearly stated in Her Ladyship Ackah-Yensu's judgment as follows:

> "The fact is that a writ of fi:fa does not expire once the property in respect of which it is issued is attached or execution levied within twelve

(12) months from the date the writ is issued. Execution is a process, and the procedure is trite learning. However because of the arguments professed in this appeal I shall go into some detail. Execution commences with the filing of the Entry of Judgment. A writ of fieri facias being a writ of execution is part of the execution process used to seize or attach the property of a judgment debtor. Hence once the property in question is seized the writ of fi:fa is executed"

The effect of the writ of fi:fa in law is to bind the property of the judgment debtor. If the writ is in force within the twelve months when the property is attached the implementary processes like valuation of the property, application to the court for reserved price under the Auction Sales Law of 1989, PNDCL 230 and other advertisement would follow. If the property is attached beyond the twelve months without any valid renewal, the writ would not be valid in law and the argument from counsel for the appellant would certainly be valid. The interpretation being placed on Order 44 rule 9(1) and (2) by counsel for the appellant is certainly flawed. A passage from Atkins Encyclopedia of Court Forms in Civil Proceedings (Second Edition) page 30-31 on Execution of Writ and return to writ states the practice as follows:

"The effect of the writ is to bind the property in the goods of the execution debtor from the time of delivery to the sheriff for execution

and upon receipt of the writ the sheriff must, without fee, indorse on the back of the writ the hour, a day, month and year when he received it. At the request of the person delivering the writ to him for execution the sheriff must give a receipt for it stating the day of its delivery. The writ will then be executed by a bailiff to whom a warrant for the purpose should be directed by the sheriff in writing and the bailiff must have a warrant in his possession at the time of execution".

In our opinion, the execution of a writ of fi:fa is done by the sheriff through a bailiff. The other implementary processes set out in the Auction Sales Law of 1989 which enjoins the execution creditor to value the attached property, asking the court for reserved price, advertisement and auction are left in the hands of the execution creditor. If a writ of fi:fa is executed by a bailiff by attaching the property within a year of its issue from the registry, it is valid. The other procedural formalities referred to above may take years but the writ of fi:fa would not be invalid as contended by counsel.

It is a fact of notoriety that after a property is attached and valued for reserved price, an execution debtor may under the rules of court apply to pay the judgment debt by stated installments which the courts may oblige. This may run into a period of more than twelve months yet the writ would be deemed as valid provided it was executed within the twelve months.

In Atkin's book, supra, at page 31 the learned authors further states the duties of a sheriff upon execution as follows:

> "The writ in terms requires the sheriff to indorse on the writ immediately after execution of a statement of the matter in which it has been executed"

Under the rules of court, it follows that the writ of fi:fa is executed upon the attachments of the property and not after the sale as counsel for the appellant is seeking to press on us. The implementary steps under the law governing auction sales are strictly reserved for the execution creditor. The interpretation placed on the rules by the Court of Appeal by treating the life of a writ of summons like a writ of fi:fa is not outside the rules of interpretation as a writ of summons is governed by the same Civil Procedure Rules CI 47 of 2004.

In AKWAA II v HAGAN [2007-08] SCGLR 200 this court per Atuguba JSC said at page 211 as follows:

> "It is trite principle of construction of statutes that have the same or similar words which have received construction, in a superior court, have been repeated in a subsequent statute in pari materia, the presumption is that they are so used with the same meaning as in a prior statute"

In this case, the life of writ of summons has been defined by the same statute, that is CI 47, and it would reinforce the principles of statutory interpretation if in the same rules the same definition or interpretation is placed on the life of writ of fi:fa.

If a writ of summons should be served within twelve months, by analogy, the writ of execution which is to be executed within the same twelve months by the same bailiffs should be in operation till the execution is levied to finality. The literal interpretation which counsel for the appellant sought to place on the life of a writ of fi:fa was rejected by the two lower courts.

Assuming counsel for the appellant's argument is the right approach, we are faced with a situation whereby if the process of execution takes over a year or more, leave of the court to extend time would be sought by execution creditors on regular basis till the property attached is entirely sold. Given the procedural hurdles under the rules of court and the Auction Sales Law PNDCL 230, the literal interpretation advocated by counsel would obviously work injustice and bring more harm than blessing to any execution creditor who has been declared victorious by a court of law to recover money by sale or other process. In the modern day administration of the law, jurists have veered away from other canons of statutory construction towards the purposive approach.

In the case of REPUBLIC v HIGH COURT, ACCRA; EX PARTE YALLEY (GYANE & OR INTERESTED PARTIES) [2007-2008] SCGLR 512. Wood, CJ in construing S104 of Courts Act, Act 459 of 1993 said at page 519 as follows:

> "Indeed, the purposive rule of construction is meant to assist unearth or discover the real meaning of the statutory provision, where the application of the ordinary or grammatical meaning, produces or yields some ambiguous, absurd, irrational, unworkable or unjust result or the like"

We think that the ordinary grammatical interpretation placed on Order 44 (9) (1) and (2) of CI47 by counsel for the appellant obviously would be absurd and irrational in its application in the modern day administration of justice when execution of a judgment by fi:fa to finality may take more than the twelve months as advocated by counsel . The interpretation placed on the rules by the learned justices of the Court of Appeal was therefore right.

The second ground of appeal was also based on the construction of Order 44 rule 3 of CI 47. According to counsel for the appellant the respondent's resort to attaching the immovable property when there were movables made the execution wrongful. It was not clear in his written statement of case whether counsel wanted to carry this line of argument very far to convince this court.

Under the repealed High Court [Civil Procedure] Rules LN 140 A of 1954, Order 42 rule 46, the judgment creditor must attach movables first before resorting to immovables. The rule states as follows

> "If the judgment debtor has sufficient movable property within the judicial division in which the judgment was issued to satisfy the debt, damages and cost recovered, his immovable property shall not be levied upon; but if he has not sufficient movable property within the judicial division it shall be optional to the execution creditor to levy upon his immovable property within the same judicial division before levying on his movable property elsewhere or to levy upon the movable property such judgment debtor wherever it may be found within the Gold Coast, before having recourse to his immovable property"

It was based on this simple and unambiguous provisions in the repealed LN 140 A of 1954 that cases like ANOKYE & ORS v TUFFOUR [1984-86] I GLR 42, YEBOAH v KRA [1974] I GLR 247 and BADU v ATTA KWADWO & ORS [1971] 2 GLR 346 were decided. As pointed out by the Court of Appeal, CI 47 of 2004 has radically changed the rules regulating the attachments of movables before immovable. Under the current rules of court, that is, CI 47 of 2004, Order 44 rules 3 & 4, the judgment/execution debtor must demonstrate that he has sufficient movables which ought to be attached first before resort to immovable. The rules state as follows:

"44(3) - The immovable property of a judgment debtor shall not be levied in execution if the judgment debtor shows that the judgment debtor has sufficient movables within the jurisdiction to satisfy the judgment or order and costs.

44 (4) - Where the execution is levied against immovable property, there shall be indorsed on the writ of execution a statement that there was not sufficient movable property to satisfy the judgment debt"

In these proceedings the judgment debtor has not demonstrated that she complied with Order 44 r 3 of the CI 47 as she was enjoined by law to do. Another matter worth considering is the fact that the security offered for the facility was the one sold in execution. The indorsement was clear that the respondent bank was asking for the judicial sale of the mortgaged property. The trial judge by consent of the parties granted the summary judgment whereupon the respondent proceeded to sell the mortgaged property to satisfy the judgment debt.

We are of the opinion that this ground of appeal based on repealed law has no foundation in law whatsoever.

The appeal is therefore dismissed as without any merits.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

J. ANSAH
JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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