IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT ACCRA

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

CIVIL MOTION NO: J8/94/2014

20TH NOVEMBER 2014

GHANA COMMERCIAL BANK - - - APPLICANT

VRS

1. BULKSHIP AND TRADE LTD - - - RESPONDENTS

2. CHRIS CHINEBUAH

3. DZIFA FRENCH CUDJOE

RULING

AKAMBA, JSC:

The application before me is for a 'stay of execution and proceedings or suspension of the entry of judgment pending appeal' and is a repeat application of a similar one dealt by the Court of Appeal on 14th May 2014.

This application was made by motion and supported by a fifty-nine (59) paragraph affidavit as well as forty-seven (47) exhibits. As if that was not enough, the applicant filed his legal arguments in support of the motion. The respondents filed their joint seventy-seven (77) paragraph affidavit to which they attached five exhibits in opposition to the motion. Counsel for the respondents sought to rely on a preliminary objection, citing reference thereto, in the closing paragraphs in their affidavit in opposition.

The rules of this court do not require the filing of legal arguments in an application of this nature for stay of execution. All that is required is the motion application supported by an affidavit deposing to the facts sought to be relied upon. On the part of the counsel for the respondents it is worth noting that rule 17 of CI 16 regulates the issue of a respondent intending to raise a preliminary objection to the hearing of an appeal as distinct from the hearing of a motion. This application being a motion and not the hearing of an appeal is not covered by the rule. At the hearing of a motion, it is sufficient for the proponent to raise the objection when the motion is about to be moved. In the case of **Osei Bonsu II v Mensah and Ors (2003-2005) 1 GLR 141, CA**, I had occasion to deal with rule 16 of CI 19, the Court of Appeal Rules, which is in pari materia with rule 17 of CI 16, the Supreme Court Rules, which reasoning I adopt in this instance. Rule 16 of CI 19 enacts as follows:

"16. Notice of Preliminary Objection.

(1) A respondent who intends to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice before the hearing of the preliminary objection, setting out the grounds of objection, and shall file the notice specified in Form 8 in Part 1 of the schedule together with five copies of the appeal with the Registrar within the same time.
(2) If the respondent fails to comply with this rule, the court may refuse to entertain the objection or may adjourn the hearing at the cost of the respondent or may make such other order as it thinks fit"

Rule 17 of CI 16 on the other provides as follows:

"17 (1) Where a respondent has not indicated in his statement that he intends to rely upon a preliminary objection at the hearing of a civil appeal he shall, before raising such objection at the hearing, give fourteen clear days notice to the appellant in the Form 9 set out in Part 1 of the Schedule to these Rules, setting out in full the grounds of objection and the arguments in support of his objection.

(2) The appellant shall, within seven days of the service of the notice on him, file any reply he may have to the grounds of objection and the arguments in support of the reply.

(3) Where a respondent or an appellant fails to comply with this rule the court may refuse to entertain the objection or the reply or may adjourn the hearing and may make any other order as it considers fit."

As stated in the Osei Bonsu case supra 'a preliminary objection is in the nature of a legal objection on stated legal, procedural or technical grounds and not based on the merits of facts of the case. The objection in most cases had to be argued with reference to only decided cases or rules of procedure. Moreover, the default or issue raised had to be apparent on the face of the motion."

The contention of counsel for the respondents is that the decision of the Court of Appeal was not executable hence this court could not entertain the present application. Against the back drop of the above, I decided to hear the motion and to determine all issue in my ruling which I here do.

GENESIS

The genesis of this application is as follows. The plaintiff/applicant (hereinafter simply applicant) is a reputable Commercial Bank in Ghana. The 1st defendant/respondent (hereinafter simply 1st respondent) is a limited liability company in Ghana carrying out the business of oil trading, supply of petroleum products and bunkering. The 2nd and 3rd defendants/respondents (hereinafter simply 2nd and 3rd respondents) are directors of the 1st respondent. The 1st respondent is the beneficiary of business overdraft/credit facilities from the applicant for the conduct of the former's oil business. Repayment of the overdraft/credit facilities is jointly and severally guaranteed by the 2nd and 3rd

respondents. The applicant filed a claim against the respondents jointly and severally for a sum outstanding under the overdraft facility extended to the 1st respondent as at 1st October 2011. Included in the claim was a demand for interest as well as penal interest of 10% on the sum claimed. The respondents denied the claims and counterclaimed against the applicants for several reliefs endorsed in their paragraphs 1 (a) to (g) which include declaratory reliefs and other judicial reliefs as well as recovery of various sums of money endorsed therein. The trial High Court (Commercial Division) Accra dismissed the Applicant's claims against the Respondents wholly and granted in part the latter's counterclaim.

HIGH COURT RULING ON STAY OF EXECUTION

The applicant, who was dissatisfied with the decision of the trial High Court which was given on 14th November 2013, filed a notice of appeal on 8th April 2014 against the decision. The applicant subsequently filed a motion before the same trial court for a stay of execution of its decision. The court on 5th February 2014 ruled as follows:

"Going through the cases, the guiding principle in an application of this nature can be summarized as follows:

(i) Where the judgment is sought to be stayed pending appeal the main consideration should not be such that the victorious party is being deprived of his victory as what position of a defeated party would be who had to pay up or surrender some legal right only for him to be successful on appeal.

(ii) If the position is that the victorious party is unlikely to be able to refund any money paid under the judgment or the defeated party may not be able to be restored to the status quo ante in the event of a successful appeal, then when the application for stay of execution is refused, it would be prudent to order the judgment creditor to provide the requisite guarantee to refund the judgment debt.

In order to achieve a balance in the competing rights of the plaintiff/applicant on the one hand and the defendants/respondents on the other I have taken into consideration the nature of the primary businesses of the plaintiff/applicants and the 1st defendant/respondent both of whom deserve all the necessary liquidity they can pull together for their businesses. I shall in the circumstances grant a stay of execution of the judgment appealed from in part and conditionally as follows:

(1) The plaintiff/applicant shall pay to the 1st defendant/respondent the sum of equivalent to 25% of the entire judgment debt as set out in the Entry of Judgment AfterTrial filed by the defendants/respondents.
(2) The 2nd and 3rd defendants/respondents shall file an undertaking in the same terms as they provided to the plaintiff/respondent during the transaction which gave rise to the action to (sic) that they shall refund fully any monies the plaintiff/applicant shall pay to the 1st defendant/respondent in partial satisfaction of the judgment debt in this suit should the appeal from the said judgment be successful.
(3) For the avoidance of doubt the sum equivalent to 25% of the judgment debt ordered to be paid shall be exclusive of the costs awarded to the defendants/respondents by the court.

COURT OF APPEAL RULING ON STAY OF EXECUTION

The Applicant filed a fresh application under rule 28 of CI 19 before the Court of Appeal for a stay of execution pending appeal. The Court of Appeal in its ruling of 14th May 2014 refused the application in the following terms:

"Having heard counsel for the parties and upon examining the processes so far filed by the parties in this question, it appears that the 1st respondent is a reputable company and we consider that she can refund the said 25% of the judgment debt in the event of the appeal succeeding. To allay the fears of the Applicant that the respondents may suffer a set back in business due to contingencies of life, and thus be unable to refund any sum of money recoverable if the appeal is successful, the trial court ordered two Directors of the 1st Respondent company (2nd & 3rd Respondents herein) to file undertaking

with that court, to pay back any such sum in such as (sic) event. We think that to preserve the substance of the decision in the court below until the appellate view of the matter is pronounced, the order by the trial court for two Director of the 1st Respondent company provide security in the form of undertaking as stated above is fair, just and reasonable in the circumstances. See **The Republic vs Court of Appeal, Accra, Ex Parte Sidi (1987-88) 2 GLR 170-per Francois, JSC.** In the result we shall refuse the application. The application is accordingly refused. No order as to cost."

The Applicant filed a notice of appeal on 21st July 2014 against the ruling of the Court of Appeal dated 14th May 2014. This was followed with a motion for stay of execution and proceedings pending appeal under rule 20 of CI 16 which application the Court of Appeal did not hesitate in dismissing, considering it to be an abuse of process.

APPLICATION BEFORE SUPREME COURT

By their present repeat motion filed on 11th August 2014, the Applicant is praying for a stay of execution and proceedings or suspension of the entry of judgment pending appeal under rule 20 of CI 16. Rule 20 of CI 16 is couched as follows:

"16. (1) A civil appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed against except in so far as the Court or the Court below may otherwise order.

(2) Subject to these Rules, and to any other enactment governing appeals, an application for stay of execution or of proceedings shall first be made to the court below and if that court refuses to grant the application, the applicant may repeat the application before the Court for determination." (Underlined for emphasis).

Undoubtedly an application such as the present one can only be repeated in this court if a similar such application has been made to the court below and same refused. The fact that the applicant has deemed it necessary to repeat his application in this court is an indication that it considers the outcome of

the earlier application at the 1st appellate court a refusal. That position is made possible when a grant by the court below is considered onerous and thus amounting to a refusal. The classic pronouncement of this position has been rendered in numerous decisions of this court. Noteworthy of these decisions are **Republic v Court of Appeal, Accra; Ex Parte Sidi (1987-88) 2 GLR 170, SC; Republic v Court of Appeal, Accra; Ex Parte Ghana Cable Ltd (Barclays Bank Ghana Ltd Interested Party (2005-2006) SCGLR 107.**

In the *ex parte Ghana Cable Ltd* case (above), this court delivered itself on the issue thus:

"The age-old principle was that an application for stay of execution pending the hearing and determination of an appeal could be granted on terms. The grant could be hedged about with such difficult or onerous or stringent or burdensome or unreasonable conditions that for all practical purposes, it would be sheer sophistry or an 'abuse of language' to say that the application had been granted. In other words, where an alleged grant had attached to it conditions which effectively stultified the reasonable expectations (not fanciful ones) of an applicant, the so called grant could be regarded as refusal. However, in determining whether a grant on terms should be regarded as refusal, the personal circumstances of the applicant should not be a crucial factor."

ANALYSIS

The applicant urges the point that when the Court of Appeal stated in dismissal of their application for stay of execution that it merely confirmed the earlier grant of the stay on terms by the High Court, the same was incorrect because the Court of Appeal was not sitting on appeal over the matter. It is true to say that when the Court of Appeal sits in exercise of the repeat powers, the court does not do so in exercise of its appellate jurisdiction as on appeal. However what is important is to determine the parameters within which the court exercises its powers under the repeat application mandate. It is simply to ascertain whether the court below had refused to grant the application for the stay. If the court below refused to grant it, then only would it be ripe to hear

and determine the application. Within the context of a refusal however, as illustrated by the decisions of this court cited above, includes a grant of stay of execution on terms considered to be so onerous as to amount to a refusal. It is in this same context that the outcomes of both the High Court and the Court of Appeal have to be juxtaposed as to whether their ratios are any different as advocated by the applicant. The rulings of the trial High Court and the Court of Appeal (respectively) have been set out above. The same conditions itemized under (1), (2) and (3) by the High Court have merely been summarized in the ruling of the Court of Appeal. The terms given by the High Court that the applicant considered onerous and therefore a refusal are the same that the Court of Appeal duly determined under the repeat application jurisdiction and came to the conclusion that the conditions imposed were not onerous and therefore refused or dismissed the application. I am of the view, after considering all the material before me and hearing arguments of both counsel that the conclusion arrived by the Court of Appeal was a tacit refusal and a dismissal of the application before it. Being a dismissal thereof, that decision is not executable and thus not amenable for a grant of a stay of execution. This being my understanding the present application falls foul of our rules. It lacks any merit and is dismissed.

There is a second segment of the application which seeks a suspension of the entry of judgment pending appeal.

In my ruling on **30th April 2014 in Civil Motion No J8/51/2014 in Lawrence Boakye v Yaw Boakye (unreported)** I quoted reliance on this court's decision per Date-Bah, JSC in **Golden Beach Hotels (Gh) Ltd v Pack Plus Int. Ltd (2012) 1 SCGLR 452 at 459,** in similar circumstances such as the present application, as I hereby do, as follows:

"According to the argument we earlier advanced in this ruling, the criterion for suspending an order of a lower court should not be identical with the criterion summarized by Akufo Addo JSC in the Jebeille case in relation to applications for stay of execution, but should embody an additional element or requirement. The precise nature of this additional element or requirement we

would leave to subsequent cases to develop. However, subject to fine-tuning in the light of the facts of subsequent cases, we would propose that a possible test could be the nugatory effect referred to in the Jebeille case (supra) combined with the need for exceptional circumstances. If this test of a 'nugatory effect plus more' is not insisted upon, there would be no point in maintaining the distinction between the two kinds of orders, namely stay of execution and suspension of orders of lower courts"

In the instant application and going by the test enunciated above, I find nothing that meets the requirement of the test of a 'nugatory effect plus more' advanced in support of the applicant's motion to warrant an interference with the status quo. I will in these circumstances dismiss the alternative relief sought which I hereby do, as the same has not been made out.

I allow costs of two thousand Ghana Cedis (GH₵2000) for the Respondents. Costs to be taxed.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

COUNSEL

MR. KWESI FYNN ESQ. FOR THE APPLICANT.

MR. CLARENCE TAGOE ESQ WITH HIM MR. KOFI TWUMASI ANOKYE FOR THE RESPONDENTS.