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

CORAM: J. DOTSE JSC PRESIDING
ANIN-YEBOAH JSC
P. BAFFOE-BONNIE JSC

SINGLE JUDGE REVIEW MOTION

NO. J7/11/2014

29TH MAY 2014

1.	**KMK LTD**	**-**	**PLAINTIFFS/APPELLANTS/**
2.	**KWABENA ADUTWUM**		**RESPONDENT/RESPONDENTS/**
3.	**SELINA OWUSU**		**RESPONDENTS**

VRS

1.	**AGRICULTURAL DEVELOPMENT BANK LTD**	**-**	**DEFENDANT/RESPONDENT CO-DEFENDANT/RESPONDENT**
2.	**KUMESH (GH) LTD**	**-**	**APPELLANT/APPLICANT/APPLICANT**

AND

1.	**AGRICULTURAL DEVELOPMENT BANK LTD.**	**-**	**PLAINTIFF/RESPONDENT**

VRS

1.	**K.M.K LTD**		
2.	**KWABENA ADUTWUM**	**-**	**DEFENDANTS/APPELLANTS**

3. SELINA OWUSU

RULING

DOTSE JSC;-

This is an application at the behest of the Co-Defendant/Respondent/Applicant hereafter referred to simply as the Applicant seeking an order varying the decision of a single Judge of this Court rendered on the 1st day of April 2014. This application is made pursuant to article 134 (b) of the Constitution 1992.

Even though the issues raised in this application are in a very narrow compass, i.e. whether there are any special circumstances to warrant the review of the order made by the single Judge on the said 1st day of April 2014, we will set out the historical context of this application for a full understanding of the ruling.

On the 15th June 2007, the High Court, Accra delivered a judgment in favour of the Co-Defendant/Respondent/Applicant and held that the said Applicant was the lawful purchaser of H/No. 5 Airport West. The High Court specifically held as follows:-

> "*The co-defendant claims to be a bondafide purchaser for value without notice. Their evidence was that, there was notice of sale by Auction of the property. They attended the sale, bidded for it* ***and as the highest bidder, they won.***
>
> *They subsequently paid for it, through their Bank, they now await the issuance of a Certificate of Purchase to them. They only knew that the property was being sold to settle the indebtedness of the judgment debtor, namely the plaintiffs herein. They had no notice of any impediment to the sale which was concluded regularly.* ***I accept the evidence of the Co-Defendant and hold that they were bondafide purchaser for value without notice."***

A copy of the said judgment has been attached to the instant application as exhibit A. It must also be noted that, the reference to the Plaintiff therein is a reference to the Plaintiffs/Appellants/Respondents referred to simply as the Respondents.

Aggrieved by the decision of the High Court, the Respondents lodged an appeal against the decision of the High Court referred to supra to the Court of Appeal. In the

meantime, pursuant to the said High Court decision, the Applicants took possession of the premises, the subject matter of that judgment and also of the instant application.

The Court of Appeal on 6th February 2014 delivered judgment in the said appeal lodged against the High Court judgment referred to supra and ordered the Applicant's to vacate the said disputed property with immediate effect.

The Applicants, also this time feeling aggrieved with the Court of Appeal decision have also appealed the said decision to this court.

The Court of Appeal subsequently dismissed an application for Stay of Execution at the behest of the Applicants, to stay the Court of Appeal decision.

Undaunted, the Applicants filed yet a further application to this Court which was heard by our respected brother, Akamba JSC as a single Judge in a brief but incisive ruling dated 1st April, 2014 to the following effect:-

> ***"I am of the view that no exceptional circumstances have been urged upon me to warrant a grant of the application. Also having read the judgment of the Court of Appeal I find the issues complained by the Applicant dealt by the Court. In the event, the application is hereby refused."***

The above are the orders that the Applicant urges this review panel of three to vary upon the following grounds that have been forcefully submitted before us by learned Counsel for the Applicants, Bobie-Banson.

1. That, even though the High Court as at 30th July, 2003 had granted an application for Stay of Execution in the original suit between the Agricultural Development Bank (hereafter referred to as ADB) and the Respondents, wherein they were ordered to pay the judgment debt by instalments, Counsel submitted that the property had already been attached by sale, to be sold by auction. He submitted further that it was only the post-executory processes that had been put on hold by the order of30/7/2003 Counsel referred to the case of ***Fiakuma v Cobbina [1991] 2 GLR 369.***

2. The second submission of learned Counsel for the Applicants was that the contention by the Respondents that they had fully paid the judgment debt had

not been well made out, especially by reference to their own attachments which did not support their prayer that they had fully paid the judgment debt

Learned Counsel for the Applicant's therefore submitted that considering all the above circumstances a lot of hardship will be caused them, (the Applicants) if they should be made to vacate the premises per the Court of Appeal judgment and the decision of the single Judge.

On his part, learned Counsel for the Respondents, Mr. Kizito Beyuo, in his brief but incisive submissions stated to the contrary as follows:-

Learned counsel submitted that the appeal lodged against the Court of Appeal decision has no chance of success due to the following reasons:-

i. That the Applicant must first establish that the auction sale at which they purchased the disputed property was validly conducted.

ii. That, the Applicants herein are not the judgment creditors and that if the contention of the judgment creditors (ADB) at all material times that they obtained leave of the Court before going into execution which has now been proven to be false, then their bonafides falls flat and has no credibility.

In this respect, learned Counsel referred to the orders made by the High Court on 30th July 2003 between ADB and the Respondents herein in suit No. C1106/2000 as follows:

"By Court:-

Application to pay judgment debt by instalment of ¢50 million a month until the whole judgment debt is liquidated. Granted as prayed in court.

The usual default clause applies. Payment starts at the end of August 2003. Registrar to take note.".

iii. Thirdly, it was demonstrated that the Applicants were not the highest bidders at the auction sale.

iv. Finally, it was submitted that there being no special circumstances to warrant a variation of the orders made by the single Judge on 1st April 2014, same need not be varied.

On the basis of the above contentions, learned Counsel urged this court to dismiss this review application.

We will now discuss the issues in detail.

1. NO LEAVE WAS OBTAINED BEFORE EXECUTION

From the processes made available to us in this court, it is clear that no leave was obtained by the judgment creditors, ADB, before and when they proceeded to attach and auction the disputed property contrary to the orders of the High Court, dated 30/7/2003.

Learned counsel for the Applicant has urged this court to come out with clear guidelines as to the principles applicable when there is a usual default clause in applications for grant of stay upon payment by instalment and there is a default. What is the attitude of the courts in Ghana on this aspect of the law.

We have perused the processes put before us in this court which includes the judgment of the Court of Appeal dated 6th February 2014. We have observed that the Court of Appeal has dealt extensively with the said issue in detail that it is pointless on our part to re-visit the issue. For purposes of emphasis, we will only reiterate what the Court of Appeal stated by referring to it as follows:-

> " *We are satisfied that the existing and effective order was the latter one dated 30th July 2003. Nothing in the contents of this order shows that there was a directive that the plaintiffs could or were to go into execution without leave should the Defendants default again with their payments. The High Court being a court of record would have already stated so if that had been its intention. Certainly the expression "usual default clause applies" does not on the authorities mean a judgment creditor can go into execution without leave. See the case of* ***Fia Kuma v Cobbina [1991] 2 GLR 369."***
>
> *The plaintiff in the circumstances cannot have an answer for the Defendants position that no leave was sought before the execution was carried out even if given an opportunity to answer as required by rule 8 (8). This puts this case squarely into one of those "special or exceptional circumstances" envisaged in the Akufo-Addo case.*

We are satisfied that the plaintiffs failed to seek leave before going into execution and having failed to seek leave, the execution in question which include or consisted of the auction sale of the Defendants house was illegal and void and ought to be set aside. See the case of Kwabena v Aninkora and Anor.[1964] GLR 299. "

We are quite comfortable with the proposition of the law by the Court of Appeal. We do not see the need to make any different pronouncements of the law other than what has been ably stated by the Court of Appeal except to state that the references to the plaintiff was reference to ADB and to Defendant, the Applicant herein

Our decision is that, since the execution by attachment and sale of the Respondents House Number 5, Airport West was irregularly done, and same is void at all times, the contention that there are arguable points of law to canvass on appeal is only wishful thinking.

WHETHER THE APPLICANTS WERE THE HIGHEST BIDDERS AT THE AUCTION

There appears some documentary evidence on record to support this contention that the Applicants were not the highest bidders at the auction. Indeed the Court of Appeal made excellent work of the said contentions when they delivered themselves thus:-

"*If indeed as stated by the Defendants in cross-examination the said Mrs Bartels had been the highest bidder then it meant that there had been a complete contract of sale between her and the auctioneer. The cheque which was allegedly dishonoured is also evidence of the fact that she made no attempt at payment. She could not retract her bid thereafter. The auctioneer had certain remedies available to him in such circumstances. See section 36 of the Auction Sales Act.*

These remedies do not include selling the property to the next highest bidder and indeed it is not the position of the Co-Defendants that they purchased the property as the next highest bidder.

The effect of Mrs. Bartel's inability to pay was that the sale was aborted and could only be resold at another auction sale. See the case of ***Zakari v Nkusum Mart [1992] I GLR 1.***

The Co-Defendant is not contending that he bought the property at another auction since he claims he bought the property on 7th October when the auction in question took place.

We are satisfied that the trial Judge's finding that the Co-defendant was the highest bidder is not borne out by the evidence led at the trial."

With the above statement, we are of the considered view that the Court of Appeal dealt adequately with this issue of whether the Applicants were the highest bidders or not.

The thrust of the Applicants appeal against the Court of Appeal judgment is summed up in their only ground of appeal to this court which is to the following effect:-

"*That the learned Court of Appeal Judges erred when they held that the execution was irregular for want of leave prior to the sale of the property."*

Assuming without admitting that the above ground of appeal succeeds, what about the other formidable issue which is that the Applicants were not the highest bidders at the auction?

We are of the considered opinion that our respected brother properly considered all the special circumstances in this case when he dismissed on 1st April 2014 the application for stay of execution of the Court of Appeal judgment. Under these circumstances, it will be pointless to stay execution of the judgment.

CONCLUSION

Having thus considered the merits of the instant application for review of the single Judge rendered on 1st April 2014, we are of the opinion that both on the facts of the case and the law no special circumstances exist that warrant the said rendition to be reviewed by variation.

It should thus be noted that, when an application for review of a decision or order of a single Judge pursuant to article 134 (b) of the Constitution 1992 is being considered especially when the order of the single Judge was on an application for Stay of Execution, the Court in delivering its ruling may consider the following:

1. The likely success or failure of the grounds of appeal. This lies in the Applicants ability to convince the Court that there are really serious, real and substantial points of law to be argued on appeal.

2. The Court must at all times consider the bonafide's of the applicant before considering the grant or refusal of such a review application.

3. The Court must also consider the relative convenience and or inconvenience/hardships of the parties before them. In the instant case, the Applicant who had purchased the Respondents property are seeking to be permitted to be allowed to stay in the said house to the exclusion of the Respondents who own the property, despite being ordered to take over possession.

4. The Court must also consider the equities in the case. For example, the Applicants did not give the Respondents time to stay in their own house during the appeal hearings, but now seek to be given time to vacate within a period of three (3) months.

5. The Court must also consider the steps that had been taken procedurally by an Applicant in the case to determine whether they merit a review of the single Judge decision.

On the merits of this case, since the Applicants appeared to be more zealous than ADB, through whom they derived title if any, then any irregularity or voidness associated with ADB, (the judgment creditors therein) would in law be passed on to them. Counsel for the Applicants should have advised the Applicants to follow the advice given by this court in the unanimous decision in the case of ***Muller v Home Finance Co. Ltd. [2012] 2 SCGLR 1234*** particularly at pages 1251.

In that case, the plaintiff successfully maintained an action against the Defendant/Bank who were the judgment creditors in an earlier suit resulting in the plaintiff purchasing a house at a public auction. Unfortunately, the sale was set aside and the plaintiff recovered not only his purchase price against the Bank, but also interest.

This being an interlocutory application and not a substantive appeal in which we could have done substantial justice to the applicant by ordering a refund of the purchase price of the property by ADB, pursuant to section 2 (4) of the Court's Act, 1993, Act 459 we are constrained to restrain ourselves from making any prejudicial statements to that effect.

For the above reasons, we hold that there being no exceptional/special and real circumstances to vary the order of 1/4/2014, this review application is dismissed subject to the Applicant being given three (3) months from the date of this ruling to vacate the premises.

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

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

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