IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: WOOD (MRS.) CJ, PRESIDING

ANSAH, JSC

DOTSE, JSC

YEBOAH, JSC

BENIN, JSC

CIVIL APPEAL

NO. J4/50/2014

DATE: 30TH JULY, 2015

1. KWASI OWUSU)
2. NII ACHIA FAMILY) …… DEFS/APPLTS/APPELLANTS

VRS

1. JOSHUA NMAI ADDO)
2. EMMANUEL K. Q. PAPAFIO) …… PLTS/RESPS/RESPONDENTS

JUDGMENT

WOOD (MRS.) CJ:-

On 5th September 2012, the Fast Track Division of the High Court, Accra, delivered judgment in favour of the Plaintiffs/Respondents (Respondents), inter alia, for declaration of title to a parcel of land at Achiaman, near Amasaman, damages for trespass, recovery of possession , and perpetual injunction restraining

the Defendant/ Defendants/Appellants (Appellants) "their grantees, licensees, workmen, servants, successors in title and privies whatsoever from entering, remaining on or in any way encumbering the land or any part thereof or undertaking any construction or other work thereon inconsistent with the absolute ownership, possession and / or enjoyment" of the Respondents."

Being dissatisfied with the decision, the Appellants promptly lodged an appeal against it to the Court of Appeal. Their applications for stay of execution of the said judgment to the trial High Court, and the subsequent repeat application to the Court of Appeal, were however dismissed by the respective courts. The 21st May, 2013 succinct ruling of the court of Appeal which has culminated in this instant appeal reads:

> *"The grant or refusal of an application for stay of execution is an equitable remedy and depends on the discretion of the court. He who comes to equity must do to equity. From the affidavit evidence and also from the annexures to these affidavits, it is clear to us that the Applicants have not come to this court with clean hands. The affidavit evidence before us show that the Applicants are currently facing contempt proceedings for allegedly ignoring the judgment to(sic) the trial court and the pendency of application for stay of execution and gone into the land to perpetuate acts on the land. In the circumstances, we do not feel disposed to granting the application. The application is accordingly dismissed."*

The Appellants question the correctness of the said ruling on grounds that:

1. "The Court of Appeal in exercising its discretion drew wrong inferences from the facts in dismissing the application for stay of execution pending appeal wherein occasioned a miscarriage of justice.

2. The Court of Appeal erred when it took into consideration matters which were not properly before it in dismissing the Defendants/Appellants application.

3. The ruling is against the weight of the affidavit evidence."

Judged in the light of the ruling complained of, these three grounds of appeal are clearly so interrelated, they would, for prudential reasons, be considered together. From that perspective, the central argument of the Appellants as relevantly expressed in their statement of case may be identified as the following:

> "At the date of ruling on 21/5/2013 the said contempt proceedings were still pending before the High Court for determination. The contempt application against the Appellants was finally dismissed on 13/1/2014. This was after the Appellants motion for stay of execution was dismissed on 21/5/2013 by the Court of Appeal.
>
> The Court of Appeal in dismissing the application for stay of execution relied on the contempt proceedings which was yet to be determined by the High Court when the court held in its ruling that "The affidavit evidence before us show that the Applicants are currently facing contempt proceeding for allegedly ignoring the Judgment of the trial court and the pendency of the application for stay of execution and gone into the land to perpetuate acts on the land."
> …the Court of Appeal took into consideration unproved and extraneous material in dismissing the application for stay of execution. This is so because the contempt proceedings which the Court of Appeal relied on were not pending before the Court of Appeal. They therefore constituted unproved or extraneous material at the time the application for stay of execution was decided. This, it is submitted occasioned a miscarriage of justice. More so as the contempt proceedings were themselves dismissed on 13/1/2014."

The Appellants garnered support for this line of argument pertaining to "unproved material" from the case of Blunt v Blunt [1943] AC517 at 518 HL, an English case which was cited with approval in the oft quoted case of Ballmoos v Mensah [1984-86] 1 GLR 724 at 730. Blunt v Blunt (supra) spelt out the principles governing an appeal against a discretionary relief in these terms:

> "An appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account, but the appeal is not from the discretion of the court to the discretion of the appellate tribunal."

The Respondents mounted a two pronged attack against the arguments advanced in support of this appeal the first, being what they described as a preliminary point of law, and which we had very little difficulty in dismissing as totally lacking in merit. It was urged on their joint behalf that since the Court of Appeal's order of dismissal of their application for stay of execution is not an order executable by any of the known execution processes, this appeal is wholly incompetent and the same ought to be dismissed in limine, without subjecting it to a merit based hearing. Counsel relied on the case of N.B. Landmark Limited v Kishini Lakiani [2001-2002] SCGLR 318 at page 320 to propound this theory. Acquah JSC (as he then was), had observed in the N.B. Landmark Limited case that:

"Now it is trite learning that an application for stay of execution presupposes that the order or decision in respect of which the stay is sought is capable of being executed by any of the known processes of execution. If the order or decision is incapable of being executed, an application for stay of execution cannot be applied in respect of it."

Appellants' counsel had further expatiated upon the argument as follows:

> "… the Court of Appeal's ruling and order refusing to grant the order for stay of execution is not an order executable by any of the known processes of execution. The same therefore cannot be stayed by this subtle, nicodemus approach of veiling their true intent and clothing it in the form of an appeal.
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> In the final analysis, therefore, the substance of the appeal is nothing but frivolous, vexatious and wholly without merit, and the Respondents submit that the same should be dismissed.

But, as already noted, we found this preliminary argument completely flawed. This matter is an ordinary appeal against the Court of Appeal's order of dismissal of the application for stay. Procedurally and substantively, it is clearly not an application for a stay of execution of the court's order of dismissal. The principle in NB Landmark Limited v Kishini Lakiani (supra) would have applied in toto if it were; that is, if this matter were an application for a stay of execution of the dismissal order.

It is trite learning that our jurisprudence allows an appellant who intends to apply for a stay of execution of a judgment, or order of a court, to apply first to the court which rendered the decision complained of and proceed to repeat same at the appellate court if the application is explicitly denied or granted under such onerous or harsh terms that would amount to a refusal, the relevant rules applicable to the Court of Appeal, being rules 27 and 28 of the Court of Appeal Rules, 1997, CI 19. The relevant rules pertaining to the Supreme Court are provided under rule 20 of the Supreme Court Rules, C.I. 16.

Also, an appellant whose repeat application for stay of execution to the Court of Appeal is dismissed, has a constitutional right to appeal to this apex appellate court, in terms of article 131 of the 1992 Constitution and s.4 ss. (2) of the Courts Act 1992, Act 459, provided of course he meets the rather stringent requirements of the relevant laws. A resort to this appeal process, under such circumstances, cannot therefore by any stretch of imagination be construed as a ploy or a veiled attempt to obtain a stay of execution of the dismissal order. It is a legitimate invocation of this court's appellate jurisdiction, by an aggrieved party, to have the repeat application, which was first submitted to the Court of Appeal, re-heard by way of an appeal. Admittedly, this process would give an appellant yet another shot, indeed what essentially appears to be a third shot at the stay of execution application, but that is the state of the law to which we in this jurisdiction are committed. Therefore, irrespective of one's personal views on the soundness or propriety of this right conferred by law, it is a constitutional entitlement which all

appellants, including the appellants before us, who are desirous of obtaining a stay of execution of orders made against them, cannot be denied.

However, it is the procedural imperatives that govern appeals of this kind that has engaged our minds. We had in the past glossed over a critical legal gateway that all appellants must first satisfy and assumed jurisdiction without questioning the competence of appeals filed which have not fulfilled this important pre-condition which we are about to discuss. We did so in the case of Djokoto & Amissah v BBC Industrials Co (Ghana) Ltd & City Express Bus Services [2011] 2SCGLR 825, which shares commonality with this instant appeal, in terms particularly of the relief sought and the procedure adopted. We overlooked this essential legal requirement and proceeded to clothe ourselves with jurisdiction and determined the appeal on the merits, implying that such appeals against decisions of the Court of Appeal is, unquestionably as of right. As a court, which per article 129 (3) of the 1992 Constitution is not bound by its previous decisions on questions of law, and may, for just reasons depart from same, we would on this occasion jettison our previous decision given per incuriam and state the law correctly as follows.

The right to appeal to this court in respect of an order of the Court of Appeal, dismissing a repeat application for stay of execution, is not an automatic right but one carefully circumscribed by article 131 (2) of the 1992 Constitution and s.4 (2) of the Courts Act, 1993, Act 459. It is a right exercisable by special leave, as the appellants counsel honourably conceded when at a further hearing, we invited him to address us on whether the right to appeal is of right or subject to the grant of this court's special leave as pertinently provided under s. 4 (2) of Act 459. It would be prudent to produce in extenso the relevant, s. 4 of Act 459. It provides:

> 4. Appellate jurisdiction
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> (1) In accordance with article 131 of the Constitution, an appeal lies from a judgment of the Court of Appeal to the Supreme Court
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> (a) as of right, in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of

the High Court or a Regional Tribunal in the exercise of its original jurisdiction;

(b) with the leave of the Court of Appeal, in a cause or matter, where the case was commenced in a Court lower than the High Court or Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or it is in the public interest to grant leave of appeal;

(c) as of right, in a cause or matter relating to the issue or refusal of a writ or order of habeas corpus, certiorari, mandamus, prohibition or quo warranto.

(2) Notwithstanding subsection (1), the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in a cause or matter, including an interlocutory matter, civil or criminal, and may grant leave accordingly.

(3) The Supreme Court has appellate jurisdiction, to the exclusion of the Court of Appeal to determine matters relating to the conviction or otherwise of a person for high treason or treason by the High Court.

(4) An appeal from a decision of the Judicial Committee of the National House of Chiefs lies to the Supreme Court with the leave of Judicial Committee or the Supreme Court.

(5) Subject to subsection (2), the Supreme Court shall not entertain an appeal unless the appellant has fulfilled the conditions of appeal prescribed under the Rules of Court.

An even cursory examination of this instant appeal and indeed others that have arisen from orders flowing from repeat applications to the Court of Appeal, particularly dismissal orders, demonstrates clearly that these decisions, or orders, are neither judgments of the High Court nor Regional Tribunal in the exercise of their original jurisdiction. And so the appellants before us did not proceed under s. 4 (1) ss. (a). Similarly, this appeal did not fall under s. 4 (b) of Act 459, since this matter is not an appeal in a cause or matter which was commenced in a court lower than the High Court or Regional Tribunal. But, even if it were, on the clear provisions of s. 4 ss. b of Act 459, the appellants would have no direct access to this court without first satisfying the leave requirement.

It follows that appellants ought to have first obtained special leave, per s. 4 ss (2) of Act 459 before proceeding to submit their appeal to this forum. Understandably, this places on them a rather onerous burden, given that they have to convincingly argue the likely success of their intended appeal within the special leave application process. Anything short of this will not meet the just demands of the law, a sound judicial policy, intended to weed out unnecessary, frivolous and vexatious applications for stay, when obviously at this point in time, the potential appellant would have had two bites at the legal cherry. It therefore comes as no surprise that counsel conceded that their appeal is not properly laid before this court. Consequently, this appeal is incompetent, it having being filed without the special leave of this court, and therefore without following due process. On this score alone, the appeal must suffer an in limine dismissal on this legal point. But there is yet another substantive reason why we declare that this appeal cannot succeed even on the merits.

The argument that the court's primary finding that the appellants did not approach the court with clean hands, constituted extraneous matters is clearly untenable. Undoubtedly, that finding related directly to the undisputed fact per se of the pendency of the contempt proceedings and not the service of court documents. Our understanding of the matters that were laid before us is that the Court of Appeal had no jurisdiction to delve into the merits of the pending contempt proceedings. And so we find the extensive submissions made in relation to the service of court documents wholly irrelevant to the key issue raised in that simple appeal. We would thus, limit our views to appellant counsel's contention that, in any event, the subsequent outright dismissal of the contempt proceedings on which the appellate court rested its decision, renders it erroneous.

The Respondents counsel's answer to the submissions is reproduced hereunder:

> *"2.5 ...the contempt issue placed before the Court of Appeal was neither extraneous nor irrelevant...*
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> *We submit that the Appellants could not get the proper appreciation of the ruling and order of the Court of Appeal because they placed the civil*

jurisdiction exercised by the Court of Appeal with respect to the stay of execution in the same basket as the exercise of the High Court's quasi criminal jurisdiction over the contempt application. The two different jurisdictions required different standards of proof for those matters pending before them, stay of execution before the Court of Appeal and contempt applications before the High Court.

The Court of Appeal carried out a civil and not a quasi-criminal determination in the matter before it to which the contempt application papers were filed as exhibits. The Appeal Court did not determine the issue of contempt and, in accord, made it clear in its ruling at page 81 of the Record that Appellants were "…currently facing contempt proceedings for ALLEGEDLY ignoring the judgment of the trial High Court and the pendency of the application for stay of execution.."

This is an appeal against the exercise of a court's discretion. The ground upon which an appellate court may interfere with the exercise of a court's discretionary jurisdiction is too well settled to admit of any argument. Osei-Hwere JA, as he then was, in the case of Ballmoos vrs Mensah (supra) outlined the principles as follows:

"*it was observed by the predecessor of this court in* ***Crentsil v Crentsil*** *[1962] 2 GLR 171 at 175 that:*
As to appeals from the exercise of the courts discretion, it is a rule of law deep rooted and well established that the Court of Appeal will not interfere with the exercise of the court's discretion save in exceptional circumstances."

The Supreme Court has also set out the circumstances under which an appellate court would disturb the grant or refusal of a stay of execution in such cases as *Appiah v Pastor Laryea-Adjei* [2007-2008] 2 SCGLR 863 and Djokoto v BBC Industrial Co (Ghana) Ltd. (supra).

We are in complete agreement with the argument that in applications which seek to invoke a court's discretionary jurisdiction, such as applications for stay of

execution, unproven matters or facts constitutes extraneous material, and cannot thus form the basis of a grant or refusal of the discretionary relief sought. Failure to adhere to this simple and sound principle of law constitutes one of the most basic grounds on which an appellate court would, without hesitation interfere with the grant or refusal of the order, as was clearly observed in Blunt v Blunt (supra).

Therefore the question of whether or not the Court of Appeal relied on unproven matters to deny the appellants the remedy sought is very central to the just determination of this instant appeal. Having regard to the thrust of their argument, the important issue is what qualifies as unproven matters, as contextually understood in Blunt v Blunt (supra) and which the law strictly discounts in applications for stay of execution.

Applications for stay of execution are predicated on the facts deposed to in the accompanying affidavits and annexures, if any. In like manner, challenges to such applications are via the factual depositions contained in opposing affidavits, including annexures if any. And it is precisely on the basis of the supporting or opposing facts that the application for stay of execution is judged. Consequently, a challenge to any of the material facts on either side of the legal divide triggers the full panoply of the evidentiary rules related to the burden of proof provided under ss. 10 and 11 of the Evidence Act, 1975, NRCD 323. Thus, if a party challenges a material fact as deposed to and the party on whom the burden of persuasion is cast fails to discharge the legal burden that fact may, properly be classified as an unproven fact and cannot ground a grant or refusal of the order for stay. And so clearly, whether or not a matter constitutes an unproven fact, material or matter is a mixed question of law and fact, which issue is decided on a case by case basis.

The reference to unproven facts is thus limited to those disputed factual depositions either in support of or in opposition to this instant application for stay of execution, which the party on whom the evidentiary burden rests fails to discharge and is consequently unable to avoid losing the application. Thus for example, if it is alleged per the affidavit evidence that a party is facing criminal charges in a court of competent jurisdiction, what would qualify this as an unproven fact is not the fact that the person had not yet been tried, found guilty and

convicted. Notwithstanding the clearly well-known entrenched constitutional principle that a person is deemed innocent until proven guilty, what would qualify the fact alleged, namely, that the party is facing criminal charges as unproven, is where the fact alleged is denied and the party asserting it fails to provide sufficient evidence in proof of the disputed fact. Similarly, where as in this instant case, it was alleged that the applicants were at the material time facing contempt proceedings, the court was not entitled to demand proof of their conviction. The essential matter for the learned justices of appeal was the fact that the assertion was neither disputed nor challenged and consequently that it was proven. In the context of this case, the matter alleged to be "unproved" was, on the contrary, from the available affidavit evidence proved. The court below rightly judged the application on the basis of the evidence before them.

This analysis settles the issue of whether or not the appellant's deposition that the applicants were indeed at the date of the hearing of the application facing contempt proceedings was in fact proven and a fortiori, whether the court relied on extraneous matters to judge the appealed decision, his subsequent acquittal notwithstanding. The available evidence conclusively proved the essential fact, and hence no unproven or extraneous matters influenced the decision. It bears emphasis that if the appellants truly believe that they are now by their subsequent acquittal, entitled to a reverse order, which evidence was unavailable at the date of the hearing of the application for stay, it certainly cannot be obtained through this appeal process in this present form. In the result, we find no merit in this appeal on dismiss same. On both procedural and substantive grounds this appeal fails.

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

(SGD) **J. ANSAH**
(JUSTICE OF THE SUPREME COURT)

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

(SGD) **ANIN YEBOAH**
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