IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2011

CORAM: ATUGUBA, J.S.C. (PRESIDING)
ANSAH, J.S.C.
OWUSU (MS), J.S.C.
GBADEGBE, J.S.C.
A. BAMFO (MRS), J.S.C.

CIVIL MOTION
J8/38/2011
29/ 3 /2011

MERCHANT BANK GHANA LTD. - - - PLAINTIFF/APPELLANT/

VRS

SIMILAR WAYS LTD. - - - DEFENDANT/RESPONDENTS

ATUGUBA, J.S.C:

The plaintiff/Appellant/Appellant/Applicant sued the Defendants/Respondents in the High Court, Accra claiming:

"a) The recovery of $30,808.30 or its cedi equivalent being the balance of the Pre-Export Facility account as at 1st December, 2000.

b) Interest on the said sum at the current bank rate from 1st December 2000 till date of final payment.

c) In addition to or in the alternative the judicial sale of the mortgage property used by the 2nd Defendant to secure the Pre-Export Facility."

After the conclusion of the hearing judgment, after several adjournments was delivered on the 8th day of January 2009, for inter alia, $80,000 or its cedi equivalent and Gh¢5,000.00 costs on the defendants' counterclaim.

The applicant, claiming non service on it of any notice of the date for judgment first moved the High Court on 10/9/2009 to set aside both the delivery of judgment and its entry and for interim stay of execution of the same. This application was dismissed on 21/1/2010. On 29/1/2010 the applicant filed an appeal against the Ruling dismissing its said application and also against the judgment dated 8/1/2009 aforesaid. It thereupon as a second step, applied to the High Court for stay of execution but same was dismissed. The applicant's third step was to repeat its application for stay before the Court of Appeal, but withdrew the same.

Its forth step was to file on 15/4/2010 an application for interlocutory injunction pending appeal. In the meantime it obtained, (having earlier failed in the High Court), leave of the Court of Appeal on 16/6/2010 to amend its notice of appeal by deleting that part thereof relating to the original judgment dated 8/1/2009.

When its application for interlocutory injunction in the High Court was dismissed on 28/7/2010 the applicant repeated its application for the same at the Court of Appeal. The Court of Appeal dismissed the application, holding per Akamba J.A as follows:

> "The only appeal referable to the present application is that filed on 29th January 2010 which, at best, is an appeal against the ruling of His Lordship Abdullah Iddrisu J, delivered on 21st January 2010 refusing to stay execution of the decision of the High Court dated 8th January 2009. *Incidentally this ruling of 21st January 2010 is not executable and could not ground the interlocutory application before us*. The present application being an application for interlocutory injunction pending appeal should properly be premised upon an appeal before us. *As would be observed the applicant failed to file an appeal against the decision of the High Court sought to be restrained i.e the decision delivered on 8th January 2009*. We have no option than observe that in the absence of such an appeal the present application for interlocutory injunction is not

properly premised. As indicated supra, the peculiar jurisdiction of the Court of Appeal demands that this court's jurisdiction be invoked upon the filing of an appeal, properly so called."

Pursuant to this Ruling the applicant on 21/12/2010 appealed to this court. The applicant then unsuccessfully repeated in the Court of Appeal its application for interlocutory injunction pending appeal. Hence the present application before this court "for an *order of interim injunction to restrain the Defendants/Respondents/Respondents and the Deputy Sheriff from enforcing the judgment of the High Court irregularly delivered by Her Ladyship INKUMSAH* ABBAN dated 8th January, 2009..." (e.s)

The applicant relies particularly on the decision of this court in *In Re Yendi Skin Affairs; Yakubu II v. Abdulai* (1984-86)2 GLR 231 S.C **in which this court granted a stay of execution pending appeal subject to terms including injunctions**. This court held as stated inter alia in holding (1) of the headnote that "Where, however, an appeal had to delay from one cause or another, *either party was entitled, by applying to the court, to seek such interim remedies as would protect his interests, if he should eventually win the appeal*."

It is to be observed however that this court did not in the *In re Yendi* case seek to overthrow the statutory framework for stay of execution of judgments. Indeed the applicant's application for stay of execution was based on rule 20 of CII3.

Remedies not expressly provided for

Nonetheless the Rules of Court cannot cover every conceivable situation that may arise pending the determination of an appeal. Clearly, for example, the judgment creditor who has had a stay of execution granted against him may, like his counterpart in the *In re Yendi case*, be faced with certain serious detriments from the judgment-debtor's activities. Yet there is no provision in CI.16 offering him relief. In such a situation as was held, it is reasonable to grant

an injunction to protect his interests pending the determination of an appeal even though no express rule in CI.16 warrants such a course.

Some other examples of interlocutory reliefs granted though not expressly covered by the Rules of Court are, a suspension of a disciplinary sanction imposed on a lawyer pending the determination of his appeal - see *Republic v. General Legal Council Disciplinary Committee; Ex parte Aboagye da Costa* (1989 – 90) 2 GLR 164 C.A. or the suspension of a fine for contempt pending appeal, see *Republic v High Court, Tema; Ex parte Kofi* (1999-2000) I GLR 61 C.A., *Lee v. Walker* (1985) 1 All ER 781 C.A. Further examples are a suspension of execution pending the determination of an application for review of an order granting leave to levy execution see *Baiden v Ansah* (1973) I GLR 33, a registrar's suspension of execution pending the hearing of a pending motion for stay of execution, see *Joseph v Jebeile* (1963) I GLR 387 SC and *Republic v Circuit Court Registrar; Ex parte Arthur* (1980) GLR 309 C.A at 312, 315 or even stay of proceedings pending appeal in another case, the outcome of which is relevant to the case at hand, see *Vanderpuije v. Akwei* (1971) I GLR 242.

Settled Powers of the Courts

The foregoing instances of power of suspension of execution or of proceedings can be justified in several ways. They maybe settled practices of the court. They may be inherent powers. They may be determined or justified under the residual powers of the court under r.7 of CI. 19 in the case of the Court of Appeal or under r.5 of CI.16 of this court. Furthermore they are covered by article 126(2) of the 1992 Constitution which provides thus: "(2) The Superior Courts shall be superior courts of record *and shall have* the power to commit for contempt to themselves *and all such powers as were vested in a court of record immediately before the coming into force of this Constitution*." (e.s). It is such powers as have been referred to strongly by judges of high authority in such cases as *Secretary of State for Trade and Industry v Bannister* (1996) 1 All ER 993 C.A.

As was bluntly put by Lord Wilberforce in *A v. Liverpool City Council* (1982) AC 363 at 372 concerning a local authority's statutory powers over children's welfare:

> "In cases (and the present is an example) where the court perceives that the action sought of it is within the sphere of discretion of the local authority, it will make no order and the wardship will lapse. *But in some instances, there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court.* Then the wardship may be continued with a view to action by the court. *The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority*: what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority."

Court Lapses

One of the most settled and fundamental principles of justice is that no one should be prejudiced by a default of a court. Thus in *R v. Criminal Injuries Compensation Board* (1977)1 All ER 171 C.A at 174 Denning M. R forcefully said: "It is a general principle of our law that no one should suffer by the delay of the court or its officers. The maxim is: ***actus curiae nemini facit injuriam***" (e.s) See also *Ameyibor v. Komla* (1980) GLR 821 C.A. Consequently when a court has by itself, for example, made an invalid order no rule of law or constitution of the court can prevent it from setting aside such an order. See *Mosi v. Bagyina* (1963) 1 GLR 337 S.C. In the common law world the non service on a party of proceedings affecting him gravely affects the pursuant decision, even as a matter of discretion, such as under the new O.81 of the High Court Civil Procedure Rules, CI 47 and in most cases will result in its being set aside. See *Republic v. High Court, Accra; Ex parte Allgate Co. Ltd (Amalgamated Bank Ltd Interested Party)* (2007-2008) SC GLR 1041.

In this case the applicant applied to the High Court to set aside the delivery (rather a novel idea, instead of the judgment itself), of the judgment on the ground that it was not served with

any hearing notice for the same. It has appealed from the High Court's dismissal of that application and pending its determination applied unsuccessfully to the High Court and Court of Appeal for an interim injunction to restrain the execution of the judgment. It has sought that relief from this court pending its appeal from the adverse ruling of the Court of Appeal. All along, it is obvious that its applications and appeals do not relate to any executable order. That however does not mean that it has no interest in holding off the enforcement of the substantive judgment to which its processes relate.

If a stay of execution cannot lie other remedies may lie. One of such remedies can be the suspension of the entry of judgment. In that event the effect of the judgment itself is temporarily frozen and incidental processes such as execution can't fly not because execution thereof is stayed but that the life of the judgment itself is in coma. This measure will prevent the eventual success of the applicant's appeal being rendered nugatory.

This measure will protect the applicant from being injured by the prima facie default of the trial court having delivered its judgment without notice to the applicant, pending the determination of its appeals.

We have already, ***ut supra***,set out the legal basis for such an order. But its plenitude need not be curtailed. Apart from powers of stay of execution the Court of Appeal has other interlocutory powers under r.31 of the Court of Appeal Rules C.1.19 which could cover the kind of order made herein. This court can also exercise those powers of the Court of Appeal by reason of article 129(4) of the 1992 Constitution. Thus in *Secretary of State for Trade and Industry v Bannister*, supra, at 996-997 Morritt L.J (Sir John May and Glidewell L.JJ concurring) lucidly stated thus:

> "The only case to which we were referred in which these and related questions have arisen is *Re Auto Electro and Powder Finishers, Secretary of State for Trade and Industry v Price* (5 May 1995, unreported) in which Chadwick J gave judgment. In that case *a disqualification order had been made and suspended pending an*

application for leave to act as a director of a specified company under s 17. That company went into liquidation, so that the application was not pursued. Chadwick J was concerned with an application for a further disqualification in relation to that company. *At the conclusion of his judgment he made a number of comments on the suspension of the earlier disqualification order*. First, *he doubted whether the court had had jurisdiction to make it*. Second, *he expressed the view that it was not an order which should have been made, since as the court could not alter the date at which the disqualification order commenced the effect of the suspension was to shorten the period of the disqualification*. He suggested that an interim order giving leave to act as a director would have been more appropriate.

It is not disputed that an appeal lies to the Court of Appeal from a disqualification order made in the High Court or the county court. *As with any appeal, the Court of Appeal has power to make any order which the court below might have made*. Thus the period of *the disqualification may be extended or reduced or discharged altogether*. In those circumstances *it would be surprising if the court did not possess the lesser power to stay or suspend its order pending the appeal*.

It is true that the court has power to alleviate the effect of the order pending appeal by giving leave to act as a director pending appeal as permitted by ss 1 and 17. But although this power may be sufficient in the normal run of cases it is not necessarily adequate for dealing with the extreme case in which the court below went badly wrong and the very existence of the disqualification order causes irreparable harm to the person apparently disqualified. In such hard though rare cases the power conferred by s 17 would not be sufficient to achieve justice. Accordingly, in my view this question must be approached on the basis that *clear words are needed to exclude the usual and necessary power to stay or suspend an order pending appeal*.

In form the words said to have achieved this effect are part of a definition of a disqualification order, for they follow the words 'that is to say'. I do not accept the submission for the Secretary of State that the definition ends with para (d), for the period is necessarily part of the definition as the court has no power to disqualify for an unlimited period. *It would be surprising if a definition had the effect of excluding the inherent jurisdiction of the court in the way contended for. In my view it does not. The definition, without more, cannot exclude the jurisdiction to stay or suspend the order being defined*. Thus the words 'beginning with the date of the order' do not preclude the suspension of that order. Accordingly, *that effect must be derived, if at all, from the use of the words 'and under section 6 shall'. But again, these words cannot be sufficient to exclude the usual power to stay an order pending appeal, for a statutory duty to make the order in prescribed circumstances has never, without more, been considered sufficient to exclude or restrict the powers of the Court of Appeal in respect of the order made* " (e.s)

We have not unnoticed the procedural meanderings indulged in by the applicant, but we are here confronted with an originating vice of a court which in a suit ***inter partes*** has delivered its judgment ***ex parte*** thereby infringing the hallowed principles of natural justice as to fair notice and hearing (here even if as to the issue of costs) and that justice must not only be done but must also manifestly and undoubtedly be seen to be done. In such compelling situations procedure takes a back seat see *Jonesco v. Beard* (1930) A.C. 298 H.L.

It is trite law that when a judgment is passed and entered it becomes the final operative judgment of the court, see *Republic v. Court of Appeal, Ex parte Ghana Commercial Bank Pensioners Association* (2001 – 2002)1 GLR 502 S.C.

In the special circumstances of this case the entry of judgment in the High Court filed on 28/7/2009 dated the 8th day of January 2009 is hereby suspended pending the determination of the applicant's appeal to this court from the Ruling of the Court of Appeal.

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPEME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU(MS.)
JUSTICE OF THE SUPREME COURT

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