IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA AD 2015

CORAM: ANSAH JSC (PRESIDING)
BAFFOE-BONNIE JSC
GBADEGBE JS
AKOTO-BAMFO (MRS) JSC
BENIN JSC

CIVIL MOTION
NO.J5/6/2015

4TH JUNE 2015

THE REPUBLIC

VRS,

HIGH COURT(COMM. DIV. A) TAMALE

EXPARTE:- DAKPEM ZOBOGUNAA HENRY KALEEM

(SUBSTITUTED BY ALHAJI ALHASSAN I. DAKPEMA) - APPLICANT

DAKPEMA NAA ALHASSAN MOHAMMED DAWUNI - INTERESTED PARTY

RULING

BENIN, JSC:-

The High Court (Commercial Division) in Tamale presided over by Noble Nkrumah J. heard and granted an application for an order of interlocutory injunction on 29th April 2014 in case number E1/8/2014 titled DAKPEM ZOBOGUNAA HENRY A. KALEEM v. 1. LANDS COMMISSION

2.ATTORNEY-GENERAL 3 DAKPEMA NAA ALHASSAN MOHAMMED DAWUNI. Whilst Noble Nkrumah J. who made that order was temporarily out of the jurisdiction, another High Court Judge namely Ayisi Addo J. heard an application for review of the earlier order and granted same on 29th September 2014.

The application that was brought before the High Court to seek review was dated 12th September 2014 and it was served on Counsel for the respondent therein, who is the applicant herein, the same day. The motion on notice read:

MOTION ON NOTICE FOR REVIEW OF AN ORDER OF INTERIM INJUNCTION

PLEASE TAKE NOTICE that the Honourable Court will be moved by Mohammed Alhassan Esq. on behalf of the Applicant herein praying this Honourable Court for an order reviewing an order of interim injunction restraining Applicant in relation to the Plaintiff/Respondent's writ issued on 24/2/2014…….upon the grounds as contained in the supporting affidavit.

In the affidavit in support the deponent recounted the facts from the issuance of the writ to the grant of the application for interlocutory injunction. He then recounted the change in circumstances since the grant of the order of injunction which were causing hardships and injustice to them and this in their view justified them in coming back to the court for a review of the order. The respondent, now applicant, did not file any affidavit in answer; he rather filed an application to stay proceedings the return date of which post-dated the hearing of the application for review.

The High Court presided over by Ayisi Addo J. granted the application for review in these words: "…..I hereby do order that the injunction order granted against the 3rd defendant and his agents is hereby reviewed and vacated forthwith."

The applicant herein by this application is invoking this court's supervisory jurisdiction to quash and vacate the above order. The reliefs sought are these:

a. That His Lordship G. Ayisi Addo J. sitting as a vacation Judge in the High Court (Commercial Division A) Tamale on 29th September 2014 wrongly assumed jurisdiction under rule 42 of the High Court (Civil Procedure)

Rules, (2004) C.I. 47 when he reviewed and vacated the order of interlocutory injunction dated 29th April 2014 granted by the regular High Court Judge, Jerome Noble Nkrumah J. when the said order is/was not void or plain nullity.

b. That His Lordship Justice Ayisi Addo, sitting in the High Court (Commercial Division A) committed a fundamental error of law apparent on the face of the record when he heard and granted an application for review against the plaintiff/applicant herein when there is/was a pending motion for stay thereby denying the plaintiff/applicant an opportunity to be heard on his motion.

Order 42 of the High Court (Civil Procedure) Rules, 2004 C.I. 47 provides in part that:

1(1) A person who is aggrieved

(a) by a judgment or order from which an appeal is allowed, but from which no appeal has been preferred, or
(b) by a judgment or order from which no appeal is allowed,

may upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within that person's knowledge or could not be produced by that person at the time when the judgment was given or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, apply for a review of the judgment or order.

(2) A party who is not appealing against a judgment or order may apply for a review of that judgment or order notwithstanding the pendency of an appeal by any other party, except where the ground of the appeal is common to the applicant and the appellant, or where, being the respondent, he can present to the Court of Appeal the case on which he applies for the review.

The rule just quoted seems at first blush to grant the right of review to a party in litigation before the High Court. When the application came before the court for hearing, the Court asked Counsel to address us under what enactment the right of review is granted to the High Court. Counsel was given time to file a supplementary statement of case in order to address the question raised by the

court since it went to the root of jurisdiction. The court was concerned that the High Court has been exercising the review jurisdiction since the coming into force of the 1992 Constitution and the passage of the new Courts Act, 1993 (Act 459) but it appears none of these grants the High Court the right or power to review its own decisions, hence the invitation to Counsel to address us on the question.

Counsel filed the supplementary statement of case on 12th March 2015. We are appreciative of the effort by counsel for the applicant for his assistance in this regard. Counsel made reference to Article 140 of the 1992 Constitution which sets out the jurisdiction of the High Court. He went on to cite section 15 of Act 459 which literally reiterates the High Court's jurisdiction as stated in article 140 of the Constitution. Counsel then stated that "certainly there is no provision in the Constitution and the Courts Act which vests the High Court with the jurisdiction to review its decisions, orders and judgments. There is no substantive law which vests the review jurisdiction in the High Court". Counsel also cited Article 157(2) of the 1992 Constitution which empowers the Rules of Court Committee to regulate the practice and procedure before the courts in the country and said this provision does not empower the Committee to grant or alter substantive rights.

Article 140 sets out the general jurisdiction of the High Court and it provides:

(1) The High Court shall, subject to the provisions of this Constitution, have jurisdiction in all matters and in particular, in civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by this Constitution or any other law.

(2) The High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution.

(3) The High Court shall have no power, in a trial for the offence of high treason or treason, to convict any person for any offence other than high treason or treason.

(4) A Justice of the High Court may, in accordance with rules of court, exercise in court or in chambers, all or any of the jurisdictions vested in the High Court by this Constitution or any other law.

(5) For the purposes of hearing and determining an appeal within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any appeal, and for the purposes of any other

authority, expressly or by necessary implication given to the High Court by this Constitution or any other law, the High Court shall have all the powers, authority and jurisdiction vested in the Court from which the appeal is brought.

Article 141 grants the High Court supervisory jurisdiction in these terms:

The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority, and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers.

From even a cursory reading of Article 140(1) and (4) it is clear that the jurisdiction of the High Court is conferred upon it only by the Constitution or any other law, which is meant a law duly enacted by Parliament, as distinct from the rules of practice and procedure enacted by the Rules of Court Committee. By a combined reading of Articles 140(2) and 157(2) of the Constitution, the Rules of Court Committee is required to formulate rules to guide the High Court, among other courts, in the exercise of its jurisdiction conferred by the Constitution or an Act of Parliament. Article 157(2) provides that:

The Rules of Court Committee shall, by constitutional instrument, make rules and regulations for regulating the practice and procedure of all courts in Ghana.

Since the coming into force of the 1992 Constitution, Parliament has passed some substantive laws granting different types of jurisdiction to various courts in the country. For our present purposes we will recall sections 15 to 21 of Act 459 setting out different types of jurisdiction that the High Court could exercise. Sections 15 and 16 do reiterate Articles 140 and 141 of the Constitution respectively. Sections 17 to 20 of Act 459 have granted jurisdiction to the High Court over piracy matters, infants, persons of unsound mind and maritime matters respectively. And section 21 deals with the High Court's jurisdiction in appeals from the lower courts.

It is clear that in neither the Constitution nor Act 459 and subsequent amendments thereto namely Act 464, Act 620 and Act 674 was the High Court granted the review jurisdiction. There have been numerous authorities, both local and foreign,

which have decided that jurisdiction of a court could only be granted by substantive legislation, and not by a body charged with the duty to make rules to regulate the conduct of cases before the courts. See these cases: **MORNAH v. ATTORNEY-GENERAL (2013) SCGLR (Special Edition) 502; SAFEWAY PLC v. TATE (2001) TLR 64; MALGAR LTD. V. R. E. LEACH ENGINEERING LTD. (2000) TLR 109 Ch. D; REPUBLIC v. HIGH COURT, KUMASI; EX PARTE ABUBAKARI (No. 1) (1998-99) SCGLR 84 at page 90b, citing AMPONSAH v. MINISTER OF DEFENCE (1960) GLR 138, CA.**

We are mindful that even this court has decided some cases applying some of the provisions under rule 42 of C.I 47 without questioning the review jurisdiction of the High Court. But it could be seen from those decisions that the issue was not raised. See cases like **REPUBLIC v. HIGH COURT (COMMERCIAL DIVISION) ACCRA; EX PARTE DOUBLE CROWN INVESTMENT LTD. (GRANADA HOTEL LTD INTERESTED PARTY) (2009) SCGLR 520; SUMANI MUNJI v. ALHASSAN ADAMU IDDRISSU and 2 Others Civil Appeal no. J4/20/2012** dated 24th May 2013, unreported. Whatever the arguments may be on merits, we are tempted not to delve into this question in this decision, for whatever we say will be obiter only and will not create a judicial precedent. It should be reserved for future proceedings in which it becomes an issue whereupon the court will have the benefit of full arguments from both sides. Besides we have come to this decision because upon a critical examination of the application before the High Court, we have come to the conclusion that what was before the court was not for review per se but just an application to vary the court's earlier order of interlocutory injunction due to change in circumstances since the earlier order was made. The inherent jurisdiction to vary its interim or interlocutory orders is vested in every court during the pendency of the substantive case. It can do so in order to make the meaning and intention clear; it may also do so if the circumstances that led to the order being made have since changed and is having a negative effect; or if it is working unexpected or unintended hardship or injustice. The only limitation is that the order must not be the subject of a pending appeal.

The relevant parts of the affidavit in support of the application read thus:

9. At the time the injunction order was obtained I was of the view that the matter was for mediation by the overlord of Dagbon and could come to an amicable resolution within a short time.

11. Since the grant of the injunction order, the plaintiff/respondent has not taken any step to fast track the hearing of the matter. Plaintiff/respondent was satisfied with the injunction order he obtained and sat back while the investors and I are reeling under the dire economic realities.

13. In recent times we have experienced increasing prices of building materials…..which is going to affect the budget and plans of investors, developers and myself.

14. At the time of the injunction order, the cost of a bag of cement in Tamale was GH¢20.00,it is now between GH¢35.00 and GH¢38.00. The dollar was GH¢2.00 now it is GH¢3.00. This certainly will put us to extra expenses thus increasing the cost of our respective projects.

15. The question is: who bears the extra cost? In fairness it should be the plaintiff/respondent if he loses the case.

16. If the plaintiff/respondent loses the case, the extra cost would be huge and he will not be able to pay and the court would have been used to inflict hardship on me and the developers and investors.

17. In the light of the foregoing it has become necessary for me to apply to have the interim injunction order reviewed to either vacate the order or make it conditional requiring plaintiff/respondent to deposit into court substantial amount of money to compensate the investors, developers and myself in the event of the plaintiff/respondent losing the substantive matter.

20…….the review would ensure that justice is done to protect the interest of all those targeted by the order of injunction.

It is our view that the court was called upon to consider the changed circumstances since the order was made and the hardship that they had brought upon the applicant therein and his assigns. The court was also to take into consideration the fact that the Applicant herein was not in a position to repair the harm by way of expenses

that would have been incurred if the case were to go against him. Thus the court was to either vary the order by imposing conditions or to set it aside altogether in view of the changed circumstances that had caused hardship to them. The applicant was alleged to have gone to sleep since the order was made and was said to be in such a financial situation that would not enable him to pay damages should he lose the case. These facts called for a response from the applicant herein but he chose not to react. The import of his failure to respond was that the allegations were correct. The court was therefore justified in setting aside the order of injunction. The vacation judge had every right to deal with the application notwithstanding that it was made by another judge. It was wrongly assumed that this was a review application hence the reliance on rule 42(4) of CI 47, but it was not. It was an application to vary an order made in ongoing proceedings so every competent judge who presided over the case could exercise the court's inherent jurisdiction to vary it even to the extent of vacating the order. It is a discretion that is vested in the court as distinct from a judge as an individual person, thus it cannot be personal to only the judge who made the order to be the one to vary it. We note that there is a very thin line between the power to vary an order which the court exercises under its inherent jurisdiction and the power of review which is conferred by an enactment. Interim orders made by the court are temporary and can thus be revisited by the court as the circumstances and justice of the moment dictate. Sometimes the court can act on its own motion if need be especially in cases involving infants or wholly or partially illegal and void decision or order.

In the English case of **MULLINS v. HOWELL (1879) 11 Ch. D. 763**, the court made an interlocutory order by the consent of the two parties. Subsequently one of them applied to the court to vary its terms because he had discovered that one of the terms was included by mistake. The court decided that even in a case like this where the order was made by consent it was possible to vary it whilst the substantive case was still pending before the court.Per Jessel M.R. at page 766:

"I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent…….the court having a sort of general control over orders made on interlocutory applications……the court has jurisdiction over its own orders, and there is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments."

In the case of **IN RE BLENHEIM LEISURE (RESTAURANTS) LTD. (No. 3), The Times, 9 November 1999**, the court gave several examples of cases where it might be just to revisit the earlier decision, including mistake, failure to advert to certain facts and so on and so forth. The Supreme Court of England took an extreme position in the case of **IN RE L AND ANOTHER (CHILDREN) (PRELIMINARY FINDING: POWER TO REVERSE)(2013) TLR 22** that a judge could even reverse his decision for good reason where no party's position has been altered since the delivery, especially when the order has not been drawn up. All these cases go to confirm the control a court has over its decision which is not on appeal and particularly when it is not the final decision of the court.

The High Court presided over by Ayisi Addo J. was therefore justified in hearing the application, for the court has wide discretionary powers to deal with interim or interlocutory orders during the pendency of a case before it. The first ground is accordingly rejected.

The second ground for this application is that the court below was bereft of jurisdiction to hear the application when there was another application for a stay of proceedings pending before the court as at the date it heard the application and that the Judge was made aware of the pendency of that application. Thus the question to be answered is this: is the pendency of an application to stay proceedings a bar to the hearing of the case or any other application in the case? Before discussing this question let us deal with an aspect of this ground which counsel addressed on. Counsel for the applicant stated that the applicant was denied a hearing in respect of the review application because of the court's failure to hear this application for a stay of proceedings. We do state that being separate applications, whatever answer the respondent (the applicant herein) had in respect of the other application should have been raised therein. If he failed to do that he could not complain that he was denied a hearing. What the applicant did amounted to selecting his own procedure and placing premium on his own application over the one filed by his opponent which was earlier in time. He has no right in law or under the rules to do that. He ought to have filed a response by way of an affidavit to the earlier application to address especially those matters of fact raised therein against him. Then he ought to have appeared at the hearing of the earlier application and pleaded with the Judge to postpone that application to await a determination of his own application to stay proceedings. The judge might accede to his request

depending on the sort of arguments he would put across. But having elected not to answer the factual allegations against him and having opted to stay out of that hearing, the court had no option but to proceed, and counsel's absence could even be interpreted as a mark of disrespect to the court. The applicant cannot rely on this in the second ground for this application much as we appreciate that the determination of the first application had undermined the purpose of his own application and rendered same otiose. But in court if you have a good cause you must follow appropriate procedures to have same vindicated, you do not just file an application and abstain from court with a view to compelling the court to postpone the hearing to await the date your own application has been slated for hearing. That is clearly not permissible in our legal dispensation. We accordingly reject this submission.

The applicant's prayer to the court below was to stay the hearing of the earlier application pending the return to the jurisdiction of Noble Nkrumah J. or in the alternative for the court to refer the matter to the Chief Justice for appropriate directions. The return date was fixed for 14 October 2014. Meanwhile the first application had been served on the applicant herein on 12 September 2014, but he waited until 26 September 2014 before filing his application to stay proceedings, three days before the return date of the earlier application. Readily one could see that the intention of the applicant was to prevent Ayisi Addo J. from hearing the earlier application. It is not uncommon that litigants, sometimes with the aid of legal practitioners, try to choose which Judge should hear their cases; this is not a commendable practice.

On the question posed above we must point out that unless restrained or prevented by any law or rule of practice, a High Court judge cannot be denied the right to hear the case or any application in the proceedings the way and manner he deems fit. The fact that an application for stay of proceedings was pending did not operate to stay proceedings, unless the court so directs in the interim or unless the court has heard and granted same. The High Court rules do not make specific provision for a stay of proceedings, so any such application can only be made under rule 19 thereof as the court has an inherent jurisdiction to stay proceedings for a variety of reasons, for instance to encourage a settlement. But even where specific provision is made in the rules, it will still not deny the court of its inherent jurisdiction to stay proceedings in various circumstances, for as stated by the authors of Halsbury's

Laws of England, 5th edition, paragraph 533 at page 422 '…..the two sources of the court's power continue to exist side by side and may be invoked cumulatively or alternatively'. See these cases: **RE WICKHAM, MARONY v. TAYLOR (1887) 35 Ch. D 272, CA; BLAIR v. CORDNER (No. 2)(1887) 36 WR 64; DAVEY v. BENTICK (1893) 1 Q.B 185, CA**. As stated earlier the bare fact that an application for stay of proceedings has been filed does not operate as an automatic stay, so no party has the priviledge to stay away from the proceedings, as the applicant did at the court below. This ground also fails.

Consequently we find no merit in the application and dismiss same accordingly.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

COUNSEL

MUSAH MOHAMMED ESQ. FOR THE APPLICANT.

NO APPEARANCE FOR THE INTERESTED PARTY.