IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA,J.S.C.(PRESIDING)

BAFFOE BONNIE,J.S.C

AKOTO BAMFO, J.S.C

BENIN, J.S.C

AKAMBA, J.S.C

CIVIL MOTION
No. J5/32/2014

5TH NOVEMBER 2014

IN THE MATTER OF:-

THE REPUBLIC

VRS.

THE HIGH COURT JUDGE ,KUMASI

BANK OF GHANA **INTERESTED PARTY**

EX-PARTE:- REV. ROCHER DE-GRAFT SEFA **APPLICANT**

AND

CIVIL MOTION
No. J5/33/2014

IN THE MATTER OF:-

THE REPUBLIC

VRS.

THE HIGH COURT JUDGE ,KUMASI

BANK OF GHANA **INTERESTED PARTY**

EX-PARTE:- SAMUEL GYAMFI **APPLICANT**

RULING

BENIN, JSC:-

The application before us raises a very small issue which should not have travelled this far if the rules of this court had been properly appreciated as we shall shortly demonstrate. The issue is whether a party who has appealed to this court following a dismissal of his appeal by the Court of Appeal should make an application for a stay of execution to the High Court from which the case originally emanated.

The facts are not in dispute. The plaintiff, applicant herein, obtained a default judgment against the defendant Bank of Ghana, interested party herein. The defendant applied to the High Court to set aside the default judgment but the court refused the application. The defendant then appealed against the refusal to set aside to the Court of Appeal. At the same time the defendant invoked the supervisory jurisdiction of this court to vacate the default judgment dated 12th July 2012. In a reasoned ruling delivered on 10th April 2013, this court rejected the application for certiorari, but made an order staying execution of the said

judgment pending the hearing and determination of the appeal then pending before the Court of Appeal.

The present record shows that the Court of Appeal has since heard and dismissed the appeal. Following the dismissal of the appeal the defendant went back to the High Court and filed an application for a stay of execution and for an order to set aside the default judgment. It is to prevent the High Court from hearing the application that the plaintiff, applicant herein, has brought this application invoking this court's supervisory jurisdiction by way of an order of prohibition against the High Court.The ground for the application is this:

'The High Court Judge is completely '*functus officio'*….and therefore legally lacks jurisdiction pursuant to Rule 21 of the Court of Appeal Rules, 1996 (C.I. 19) to entertain the Interested Party's repeated motion for stay of execution and for a further order setting aside the substantive default judgment of the High Court dated the 16th day of July 2012 when the Supreme Court…….had previously granted a stay of execution of the same judgment of the High Court pending the final determination of the Interested Party's appeal at the Court of Appeal and the Court of Appeal had heard the said appeal and had unanimously and finally dismissed the appeal upon determination.'

The issue of setting aside the default judgment has been dealt with by both the High Court and the Court of Appeal and is on further appeal to this court. It cannot therefore be re-opened by the High Court since it has become *'functus officio'*.

The other issue is the stay of execution filed before the High Court. We fail to appreciate the rule under which the application was made. The matter had gone to the Court of Appeal and then to the Supreme Court. There is thus no rule of law or practice which entitles the defendant to go and file an application for a stay of execution at the High Court in respect of a matter which was on appeal to this court.

Counsel for the plaintiff cited rule 21 of C.I. 19 to support his argument that the application should have been made to the Court of Appeal. The said rule 21 provides that:

'After an appeal has been entered and until it has been disposed of, the Court shall be seised of the whole of the proceedings as between the parties and every application shall be made to the Court and not to the court below, but any application may be filed in the court below for transmission to the Court'.

With due respect to learned counsel for the Applicant this provision is inapplicable for the simple reason that the appeal was no longer pending before the Court of Appeal at the time the defendant, interested party herein, applied to the High Court.

The relevant provision is rule 16 of the Supreme Court Rules, 1996 (C.I.16) which reads:

(1) After the transmission of the record of appeal from the court below to the Court, the Court shall be seized of the appeal and any application relating to the appeal shall subsequently be made the Court.

(2) Any application filed in the court below after the transmission of the record of appeal shall be transmitted to the Court.

The court below as stated in rule 16 supra refers to the court from which the appeal was brought to this court.

Thus where, as in this case, the appeal came from a decision of the Court of Appeal, every application is to be made to that court in the first place unless the record of appeal has been transmitted to this court in which case all applications shall be made to this court. Under no circumstances is a party entitled to go back to the High Court with an application for a stay of execution.

A prohibiting order will lie against a wrongful assumption of jurisdiction, inter alia. Or as stated by the author Benjamin J. Shipman, in his Handbook of Common Law Pleading para. 341 at page 542, Henry W. Ballantine ed. 3rd ed. 1923, it 'arrests the proceedings of any tribunal, board, or person exercising judicial functions in a manner or by means not within its jurisdiction or discretion.'

The High Court has no jurisdiction to entertain the application for stay of execution; it was a wrong forum. It is thus proper to issue a prohibiting order to restrain the High Court from hearing the application.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

ATUGUBA , JSC:-

The facts of this matter have been admirably stated by my brother Benin JSC.

The interested party's motion for stay of execution pending the determination of his second application to set aside the default judgment against him was not brought under any pending appeal so as to be governed by the rules for stay of execution under the appellate process.

However the said motion infringed the rule against piecemeal litigation.

Assuming that the Ruling of the High Court dismissing his first application to set aside the applicant's default judgment against him was interlocutory, that does not mean that he is at unrestrained liberty to re-agitate the same matter by a second application based on a different ground. A similar vice was dealt with by this court in Republic V. High, Court, Accra (Commercial Division) ;Ex-parte: Hesse (Investcom Consortium Holdings SA & Scancom Ltd. Interested parties) [2007-2008] 2 SCGLR 1230. ThIs court held as stated in Holding (3) thus :

'**The right of the trial court to hear a repeat application, was dependent on the grounds on which the new application were proceeding.**

The rule was that if there was *a new matter or a fresh point which had altered the position of the parties or the dynamics of the particular course or matter*, the court of first instance was bound to look into those new facts or circumstances.

To succeed, an applicant must satisfy those criteria, viz, that *new facts or circumstances had arisen, which obviously were not within his or her contemplation at the date of the previous application, and which had caused a change in the position of the parties. The change must be reasonably substantial, not minor or immaterial or inconsequential.* These were all matters for the court 's determination, not dependent on an applicant's mere say so. However, *parties would not be entitled to break up their defenses into parts or segments only to present them as and when they wished. Parties must therefore be beheld accountable to presenting all of their known and conceivable claims or defenses at a go, not piece meal, for an effectual resolution of all matters in controversy between them so as to bring an end of litigation. In the instant case, the court would reject the argument of the first defendant (the first interested party) that the first motion for an order to set aside the default judgment had been based on the arbitration clause in the contract, while the repeat motion was on the ground that it had intended or was ready to file a defense to the action. In the circumstances, the trial court fell into grave error in treating the motion filed on 27 April 2008 as a first time application, deserving of a grant and not an outright refusal.* Green Halgh v. Mallard [1947] 2. ER 255: Dahabieh v. SA Turqui and Bross [2001-2002] 2 SCGLR 498 and Gyimah and Brown v. Ntiri William Claimant [2005-2006] SCGLR 247 cited . '

Long before this decision the Court of Appeal had decided that much in Vanderpuye V. Nartey [1977] 1 GLR 428 C.A as per holding (1) thereof thus:

'if there was a new matter which changed the positions of the parties, a court should look at it to determine whether the prayer in a motion for interlocutory relief ought to be granted despite the fact that a similar motion had already been disposed of in relation to the same question. In the present case, the court was satisfied that the learned judge ought not to have shut out the appellant on the preliminary objection that he had already brought a similar application unsuccessfully on the issue, thus treating it as res judicata. *The appellant has raised fresh points* which appeared genuine enough and which, if true, might on a fair examination induce a court to grant him the relief that he sought'.

The ground of nullity relied in the interested party's second application could have been discovered and relied on by it in its first application to set aside the said default judgment against it.

It is therefore clear that the said second application to set aside the said default judgment is oppressive and an abuse of the process.

For these reasons I would also grant this application

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) J . B. AKAMBA

JUSTICE OF THE SUPREME COURT

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