IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: ANIN YEBOAH, JSC (PRESIDING)

BAFFOE BONNIE, JSC

GBADEGBE, JSC

SINGLE JUDGE REVIEW MOTION
NO. J7/22/2014

18TH DECEMBER 201

1. REV. ROCHER DE-GRAFT SEFA – PLAINTIFFS/RESPONDENTS

2. ERNEST KWASI NYAME ASIEDU /RESPONDENTS/APPLICANTS

VRS.

BANK OF GHANA -- DEFENDANT/APPELLANT
/APPLICANT/RESPONDENT

AND

SAMUEL GYAMFI – PLAINTIFF/RESPONDENT
/RESPONDENT/APPLICANT

VRS.

BANK OF GHANA -- DEFENDANT/APPELLANT

/APPLICANT/RESPONDENT

RULING

GBADEGBE JSC:-

We have before us a notice of motion at the instance of the Applicant herein that invites us to reverse or discharge the decision of a single Justice of this court dated 29 July 2014. Although at the hearing both parties proceeded with the matter as though it was brought under our review jurisdiction, it appears that the matter before us relates to the exercise of the power conferred on us under article 134(b) of the Constitution, which is expressed in the words that follow:

> **"A single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the decision of a cause or matter before the Supreme Court, except that in civil matters, any order, direction or decision made or given under this article may be varied, discharged or reversed by the Supreme Court, constituted by three Justices of the Supreme Court."**

In our view the form of the application which refers to our review jurisdiction should not prevent us from dealing with the matter as one which substantively seeks our interference with the order of this court presided over by a single Justice dated 29 July 2014 by which the Respondent herein obtained an order in her favour to adduce further evidence in the appeal herein. Indeed, subsequent to the said order of the court, the Respondent on or about 04 August 2014 filed an affidavit by way of further evidence in terms of the order of 29 July. The

circumstances in which the application for leave to adduce further evidence had arisen have been adequately dealt with in the judgment of our worthy brother at pages 3 – 4 of the said delivery that is exhibited to the application herein as IGIST-3 and accordingly in our ruling we would not detain the precious time of this court by referring to those matters except in so far as any such fact is relevant for the purpose of our decision.

We think that the application herein presents us with an opportunity under article 134(b) to reconsider the application of the Respondent that resulted in the ruling of 29 July which gave accession to her prayer that she be enabled to lead further evidence under rule 76 of the Supreme Court Rules, CI 16. In this regard, since the application is derived from a constitutional power vested in us by article 134 (b) of the Constitution and involves the exercise of a discretionary power by the court acting by a single Justice thereof, what we have to consider is whether in reaching his decision, the learned justice acted in accordance with settled principles of the court in the grant and or refusal of an application to adduce further evidence in the interlocutory appeal herein. We think that although the conditions that are prescribed by rule 54 of the Supreme Court Rules in regard to our review jurisdiction might in appropriate cases enable the court to reach a decision within the scope and extent of article 134 of the Constitution, the simple question which calls for our decision in these proceedings is whether in making the order of 29 July 2014 the learned Justice of this court acted in accordance with the settled practice of the court in applications that seek leave to adduce further evidence in appeals. We think that article

134 recognises the common law position of a court being in control of interlocutory orders made in the course of a pending case and therefore provides us with the power in appropriate cases following a reconsideration of the order previously made by a single Justice of the Court to reverse, discharge or vary orders made by a single justice. Reference in this regard is made to the case of **ALABAMA HOTEL Co v J. L. MOTT IRON WORKS,** 98 So. 825, 826 decided by the Supreme Court of Florida in 1924, wherein the court deemed it **"well settled that interlocutory judgments or decrees made in the progress of a case are always under the control of the court until final disposition of the suit, and may be modified or rescinded upon sufficient grounds, shown any time before judgment…."**. The availability of this power in the court is in our opinion, a useful tool particularly when one takes note of the fact that the decisions of the Supreme Court are not subject to appeal.

As earlier on said in the course of this delivery, our task in the application before us is to determine whether in reaching the decision dated 29 July, the learned Justice of the Supreme Court acted on the wrong principle or took into account irrelevant matters or did not take into account matters which ought to have been taken into account or had come to a conclusion which no court properly instructing itself on the law would have reached. See: **RE REED** [1979] 2 All ER 2 at 25 per Goulding J. Having stated what in our view are the principles which should guide us, we commence by saying that although the decision that we are reconsidering was made by a single Justice of the Supreme Court, it is entitled to be treated with respect and interfered with by a

discharge, reversal or variation only when we reach the conclusion on the processes before us that the order in respect of which our jurisdiction has been invokedwas an injudicious exercise of discretion. We venture to add that by the application herein, we are not authorised to substitute our discretion for that of the learned Justice who determined the application resulting in the order being reconsidered by us.

We proceed firstly to examine the grounds for the making of the application which resulted in the order of 29 July 2014 to determine if it was right. We have examined the processes before us in these proceedings and in particular the depositions exhibited as IGIT-1 wherein the deponent named therein at the instance of the Respondent at paragraphs 4-8 thereof gave the backdrop to the application to adduce further evidence and proceeded in paragraphs 9-11 to make the following crucial depositions of fact:

> "**9 That in April, 2014, we commenced hearing in another suit entitled suit number AC647/2012, <u>Frempah Moses and 179 others v Onwards Investment Limited and Others.</u> This action was filed by another group of investors in Onward in the High Court, Accra against 9 persons in which we (Applicant) are the 9th Defendant. At the hearing, Plaintiffs in the said case tendered booklets issued by Onwards to all its investors, together with a brochure, which they stated was given by Onwards to**

every investor as proof of their investment. Attached hereto as BOG 3 and BOG 4 are copy of the said booklet and brochure respectively.

10. That the booklets clearly show that Plaintiffs were not candid with the court and that Onwards was never a bank nor claimed to be a bank. What is clear from the booklets is that Onwards claimed to be an investment company and paid profits on investment and never "interest" on saving. They very basis of the action by Plaintiff against us (Applicants) is therefore misconceived, in that the body in charge of Investments is the Securities and Exchanges Commission established under the Securities Act as amended by Act 590.

11. That the information was not available to us and could not have been obtained by us in that we had nothing to do with the set up and operations of Onwards. We only had notice of this information when this was tendered in evidence in the Frempah case."

As the Respondent made these depositions subsequent to the application which it had previously filed in the High Court to set aside the default judgment obtained against her whose refusal resulted in the appeal herein in respect of which leave to adduce further evidence was

filed, it repays in our thinking to pause at this stage to consider the deposition made by the respondent (then Applicant) in the application to persuade the trial High Court to yield to her invitation to set aside the judgment obtained in default of appearance. In her bid to satisfy the court that she had a good defence to the action on the merits, the Respondent herein deposed in paragraphs 6 and 7 of the supporting affidavit sworn to by one of its counsel therein named as Edem Penty as follows:

> "**6. That we have a very genuine defence to the action which we state is without any basis whatsoever and when given the opportunity we would establish that our clients are not liable whatsoever.**
> **7. That we state further that whilst the writ of summons discloses no reasonable cause of action against 1st Defendant, 2nd and 3rd Defendants are employees of the 1st Defendant and are not proper parties to the suit and at the appropriate time we would establish same in court."**

It seems to us upon a careful consideration of the paragraphs to which reference has been made above that at the date the application to set aside the default judgment was made by the Respondent the facts which in its opinion disclosed no cause of action against her were quite well available to herand actually within the knowledge of her lawyers. That construction is quite plain from the affidavit evidence placed before the court and we hasten to say that we do not think that the persons

who made those solemn depositions would have positively sworn to those facts if they lacked such knowledge. As these depositions were made in a cause pending before a court of competent jurisdiction, they must have been intended by the makers thereof to be acted upon by the Applicants herein for the purpose of determining the applications in respect of which they were filed. It being so, the Respondent herein is bound by the ordinary meaning of the said paragraphs 6 and 7 of the supporting affidavit that they were not under any disability as to the facts which rendered in their opinion the said original action into one that disclosed no cause of action against her and indeed one in respect of which as was deposed to on her behalf, she had a very genuine defence. By the operation of the effect of the depositions made in the application before the High Court, the applicant is caught by section26 of the Evidence Act which is commonly referred to as estoppel by own statement or conduct that is provided for in NRCD 323 in the words that follow:

> "**Except as otherwise provided by law, including a rule of equity, when a party has by his own statement, at or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such a belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest."**

Since the said paragraphs give rise to a conclusive presumption within the scope of section 24 of the Evidence Act, NRCD 323, the court which heard the application for leave to adduce further evidence ought to have come to the conclusion that the facts in respect of which leave was sought for evidence thereon to be led in the appeal had long been available to the Applicant since the making of the application to set aside default judgment in the matter on 18 July 2012. The said section is expressed thus:

> **"Where the basic facts give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of fact."**

Further in our view, as the application to the trial court was prior in making to that made to the Supreme Court for the purpose of obtaining leave to adduce further evidence in the appeal herein, the inconsistency between the two depositions must adversely affect the credit to be placed on the subsequent deposition. We do not speaking quite frankly think that the subsequent deposition can have the effect of superseding the previous deposition; on the contrary it speaks to the inherent improbability of the facts therein recited. It being so, the Respondent was unable to satisfy, one of the conditions that an applicant who seeks leave to adduce further evidence on appeal should satisfy as is discernible from a collection of cases on the point which is legislatively

recognised in rule 76 (2) of the Supreme Court Rules, CI 16. Indeed, in the decision before us for reconsideration, the learned justice referred to that requirement as one of the hurdles that the Respondent (then Applicant) was required to surmount. Rule 76 (2) requires the Court not to accede to any such application in very mandatory terms as follows:

> **" Evidence shall not be allowed unless the Court is satisfied that with due diligence or enquiry the evidence could not have been, and was not, available to the party at the hearing of the original action to which it relates."**

We think that the effect of the processes proffered by the Applicant in support of her case in the High Court are the very critical matters of fact to be taken into account by a court under rule 76 of the Supreme Court Rules for the purpose of deciding whether to grant or refuse the application to adduce further evidence and it not having been satisfied, the application crumbled and the further evidence sought to be led should not have been allowed as the allegation of unavailability of the facts relates to that point in time and not subsequently thereafter. In the circumstances, we are of the opinion that the decision of 29 July 2014 suffers from a wrong conclusion on the effect of the evidence placed before the learned Justice by the applicant in support of the requirement regarding the non-availability of the further evidence. That evidence in our view had long since 18 July 2012 been in the knowledge of the Applicant and if she did not make use of it at the hearing of the application to set aside the default judgment in the original action, it

cannot by reason only of such default acquire the attribute of facts which were neither available nor could by the exercise of due diligence have been made available. We think that a fair reading of the rule requires us when considering an application under rule 76 of the Rules not to inquire whether the applicant had actual knowledge of the facts sought to be introduced into evidence but whether from a careful reading of the processes placed before it, the party seeking to be granted leave may be presumed to have been aware of the facts in respect of which the application has been made and in this regard the existence of constructive knowledge would operate to defeat such an application.

As the crucial facts were in the possession of the Respondent at the time of making the application in the original action before the High Court, the contrary assertion which formed the basis of its prayer in the application before the Supreme Court that resulted in the order of 29 July 2014, with which we are concerned in these proceedings was with respect to the Respondent not truthful and therefore the evidence in respect of which the leave was sought was not likely to be credible. See: **LADD v MARSHALL** [1954] 3 All ER 745. We are of the view that if the learned Justice had given due consideration to the conflicting depositions made by the Applicant in the application made to set aside the default judgment in the original action and that subsequently filed in the application under rule 76, he would have reached the conclusion that one of the preliminary requisites to be satisfied by an applicant at the hearing of an application for leave to adduce further evidence, which he correctly expounded at the opening of his judgment as IV namely

"**Such as is presumably to be believed, in other words evidence of a sort which is inherently not improbable",** he would probably have refused the application on this ground also.

The above reasons are sufficient in our view to decide the application herein. But, before we end our delivery, we wish to say that it appears to us from the nature of the appeal in respect of which the application for further evidence in the matter was granted being interlocutory; rule 76 of the Supreme Court Rules is inapplicable. In coming to this view of the matter we have been guided by the pronouncement of Denning LJ in the English case of **KRAKAUER v KARTZ** [1954] 1 ALL ER 244 in which the court at the hearing of an interlocutory appeal upheld a preliminary objection to the making of an application to lead further evidence. In his ruling on the said objection, the learned Justice said at page 245:

> **"A preliminary point has arisen whether this court can or should admit further affidavits on behalf of the defendant. It was suggested that an appellant on an interlocutory matter has a right in this court to adduce further evidence by affidavit. I am clearly of opinion that he has no such right".**

We think that there is good sense in limiting applications for further evidence to appeals from full scale trials and even if the said position were to be in error, in regard to an appeal from which no evidence was taken, we find it difficult to accept the contention that it was open to the applicant to seek leave to adduce further evidence in the matter.

For these reasons, we allow the application of the Applicant and reverse the order of this court dated 29 July 2014 by which the Respondent herein was granted leave to adduce further evidence in the matter herein. The result is that the said order made on 29 July 2014 is hereby discharged together with any processes founded thereon and in place thereof we substitute an order dismissing the application to adduce further evidence.

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

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