IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

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

BROBBEY, J.S.C

DATE-BAH (DR), J.S.C

ANSAH, J.S.C.

GBADEGBE, J.S.C

CIVIL APPEAL

NO. J4/45/2010

8TH DECEMBER, 2010

SGT. OFOSU ADDO - - - PLAINTIFF/RESPONDENT/APPELLANT

VRS

GRAPHIC COMMUNICATIONS GROUP LTD. - - - DEFENDANT/APPELLANT/ RESPONDENT

J U D G M E N T

GBADEGBE JSC:

In the action out of which this appeal arises, the plaintiff obtained judgment against the defendant for defamation and was awarded damages as well as an order directed at the defendant to publish a retraction of the publication on which the action turned. The

defendant claiming to be aggrieved by and dissatisfied with the judgment of the trial High Court appealed there from to the Court of Appeal. Pending the determination of the appeal, the defendant applied to the trial Court for an order of stay of execution of the orders of the Court. The application having been refused by the High Court, the defendant filed a repeat application that was authorized under the rules of the Court of Appeal. In its ruling dated 3rd March 2010, the Court of Appeal granted the application for stay of execution of the judgment of the High Court pending the determination of the appeal. The instant proceedings arise as a result of the appeal by the plaintiff from the order of stay of execution that was granted by the Court of Appeal.

In the notice of appeal on which these proceedings are based, the plaintiff raised several grounds of complaint against the delivery of the Court of Appeal. The delivery herein is sequential to the submission to the court by the parties of their respective statements of case. In considering the appeal herein, we propose to examine the grounds in the order in which they were argued in the plaintiff's statement of case filed on 7th July 2010. This being the position, we commence with the ground that was formulated as follows:

> "*The court erred in granting an application that was manifestly incompetent*."

The above ground, in our opinion is expressed in vague or general terms contrary to the provisions of rule 6.5 of the Supreme Court rules, CI 16 which is in the following words.

> *"A ground of appeal which is vague or general in terms or does not disclose a reasonable ground of appeal is not permitted, except the general ground that the judgment is against the weight of the evidence and a ground of appeal or part of it which is not permitted under this rule, may be struck out by the Court on its own motion or on application by the respondent."*

This rule permits the court to strike out offending grounds of appeal but since we allowed the parties to address us on the said offending ground and in order not to deny the parties of the benefit of the submissions made there under, we would take it into account in the consideration of the appeal herein. It is hoped, however that this indulgence be not construed as a relaxation of the requirement of the rule on the content of grounds of appeal and that in the future the Court would apply the provisions of the rule strictly in order to achieve the purpose for which they were expressly made namely regulating the practice and procedure of the Court. In our

opinion, it is not unreasonable to say that all persons who appear before this Court are of the expectation that the processes and steps that they take in any action or matter before the Court must, to be competent conform to the provisions of the Supreme Court Rules, CI 16.See: DAHABIEH v S A TURQUI [2001-2002] SCGLR 498.

In his arguments under the first ground, the plaintiff contended that since the application whose refusal is the subject-matter of this appeal was a repeat application under rule 28 0f the Court of Appeal Rules CI 19, the applicant ought to have provided in the affidavit supporting it that a previous application to the trial High Court had been made and refused. The plaintiff cited no authority to support his contention but suffice it to say that even if the said position were correct his conduct in swearing to an affidavit on the merits as well as exhibiting to his affidavit in answer to the application the ruling of the High Court on the application for stay have the effect of waiving what was a mere irregularity. Therefore, in our view this ground fails. See: Re MCRAE (1883), 25 Ch.D. 16

We then pass to a consideration of the next ground which was expressed thus:

> *"The Court of Appeal erred in interfering with the exercise of discretion by the trial High Court judge in the absence of any indication that the trial judge's discretion was not judicially exercised."*

In support of this ground several cases were referred to on the principle that where a court below exercises a discretion on a matter before it, an appellate court should not substitute is own discretion for that of the court from which the appeal is mounted. A careful reading of the cases on which great reliance was placed by the plaintiff informs us that none of them deals with a repeat application but were pronouncements made in cases where the appellate courts were exercising the jurisdiction by way of an appeal from the exercise of discretion in a Court below. I think that although the application before the Court of Appeal involved the exercise of a discretion, to constrain the court in such matters to cases in which the jurisdiction to determine a discretionary matter is one primarily for the trial court which may only be reheard following an appeal lodged therefrom is to miss the difference between the two jurisdictions. While in one case the jurisdiction is primarily that of the trial court for example in an application for interlocutory injunction made to the trial court in the exercise of its jurisdiction and not consequent upon an appeal; in cases where an appellate Court exercises a repeat jurisdiction following a previous refusal by the trial court as for example in applications for stay of execution pending the determination of an appeal that is specifically provided for by the rules of Court the nature of the jurisdiction exercised by the appellate court though is in relation to the same relief is independent and enables the

appellate court to determine the matter with a view to doing justice to the parties. We make reference to rule 28 of the Court of Appeal Rules, CI 19 that provides as follows:

> " *Subject to these Rules and to any other enactment, where under an enactment an application may be made to the Court below or to the Court, it shall be made in the first instance to the Court below, but if the Court below refuses to grant the application, the applicant is entitled to have the application determined by the Court*."

See: Twum JSC (as he then was) in the case of Ex-parte Ghana Cable Ltd [2005-2006] SCGLR 107 at 109.

We think that to reach any other conclusion on the nature of the jurisdiction conferred on the Court of Appeal under rule 28 (supra) is to leave parties who lose their cases before trial Courts and whose application for stay of execution have been denied even wrongfully with no other remedy as in most cases such applications find no favor with the Court whose decision is on appeal. This, no doubt would undermine the integrity of the appellate process and render appeals not worth the while. We are of the opinion that no rational judicial system would give effect to the substance of the urgings on us by the plaintiff. Accordingly, this ground also fails. This leaves us with the next ground of appeal that was formulated thus:

"The *ruling was against the weight of the affidavit evidence*."

The substance of the arguments submitted under this ground is that a consideration of the rival cases of the parties in terms of the affidavit evidence before the Court of Appeal did not warrant the grant of the application and that the application ought to have been dismissed. We have examined the record of appeal and attended to the very brief submissions made on this point and say without any hesitation that having regard to the orders made by the trial High Court particularly that of a retraction of the publication on which the action was planked, there was the need for the court to judiciously balance the respective rights of the parties in the matter pending the determination of the appeal, and it would have been unreasonable for the plaintiff to publish the retraction only to be adjudged successful on appeal. Then there is also the question of the refund of the judgment debt and costs that were awarded by the trial Court by the plaintiff in the event of the appeal succeeding. We think that the Court of Appeal must have taken these factors into consideration in allowing the application. In particular, we think that the learned justices of the Court of Appeal acted rightly in avoiding what might turn out to be an obvious embarrassment if the plaintiff were to publish the retraction ordered under the judgment only to be adjudged victorious on appeal. The effect is that this ground like those preceding it fails.

We now turn our attention to the fourth ground. The said ground was expressed as follows:

> " *The court erred in basing itself on a material not before it and not being part of the evidence led and goading the Defendant| Respondent's counsel on to claim a defence of qualified privilege which was not part of the defendant's case at all."*

The argument on this ground was briefly expressed and it was this. That the defendant did not raise the defence of qualified privilege at the trial but was enabled to have it argued as part of his case at the hearing of the application for stay of execution before the Court of Appeal. In our thinking since the said assertion was challenged by the respondent in his statement of case in answer to the plaintiff's submissions, the obligation was on the plaintiff to demonstrate that his version of the matter was true and in particular making available to the Court the relevant pleadings and the arguments made at the hearing of the application for stay of execution pending the determination of the appeal in the Court of Appeal. Not having sought the inclusion of the relevant documents in the record of appeal at the stage that the record was settled, his version of the record is not borne out by the record of appeal before us and taking into account section 37 of the Evidence Act (NRCD 323) on the presumption of regularity of official acts, this ground fractures and must fail. We now turn to the remaining ground, which is expressed in the following words:

> "The *defendant neither established that the appeal had a reasonable prospect of success nor that irreparable harm will be occasioned by the defendant by a refusal of the application"*

We observe in regard to this ground that although an application for stay of execution pending appeal may be granted in the discretion of a Court when the judgment on which based is shown by the applicant at the hearing to suffer from an erroneous statement of law or that a refusal would occasion irreparable harm or inconvenience to the applicant these are not the only reasons for which a court may make a grant. The Court in granting or refusing an application for stay of execution pending the determination of an appeal acts according to well settled principles that enables it to bridge the gap in the intervening period between the delivery of the judgment in the court below and the time that the appeal is finally determined in order to deal with the rights of the parties in the pending appeal by the grant of interim or provisional remedies, which among others ensure that a successful appeal is not rendered nugatory by the making of orders such as that in respect of which the instant proceedings was launched by the plaintiff. We do not think that it is necessary for our decision in this application to embark upon the discussion of the reasons for which a

Court may accede to an application for stay of execution. It is sufficient for the purpose of this decision to say that an examination of the ruling the subject-matter of these proceedings reveals that it was delivered taking into account settled principles in such cases and appears to us taking into account the processes on which the application was based that there were sufficient materials before them that justified their conclusion. Consequently, this ground of appeal also fails.

For these reasons, the appeal herein is dismissed and the ruling of the Court of Appeal dated 3 March 2010 is affirmed.

N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

S. A. BROBBEY

JUSTICE OF THE SUPREME COURT

DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT

J. ANSAH

JUSTICE OF THE SUPREME COURT

COUNSEL:

KWASI AFRIFA FOR THE PLAINTIFF/RESPONDENT/APPELLANT.

STEPHEN AGYEMANG FOR THE DEFENDANT/APPELLANT/RESPONDENT.