

**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE COURT OF APPEAL**

**ACCRA – GHANA AD - 2023**

**Coram: -**     *M. Welbourne (Mrs), J.A. (Presiding)*

*Bright Mensah, J.A.*

*Bartels-Kodwo (Mrs.), J.A.*

**Suit No. H1/42/2021**

**Date: 23<sup>rd</sup> March 2023**

**Omnibsic Bank Ghana Ltd.**

**=**     **Plaintiff/Appellant**

*Vrs*

**1. Unisecurities Ghana Ltd**

**(In Official Liquidation)**

**Accra**

**2. Hoda Properties Ltd.**

**No. 8 Airport Residential Area**

**Dodi Link, Accra**

**=**     **Defendants/Respondents**

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**JUDGMENT**

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**WELBOURNE, J.A**

This is an appeal against the ruling of the High Court dated 17<sup>th</sup> December, 2021.

In this appeal the Plaintiff/Appellant will be known as Appellant and the Defendant/Respondent as 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

### **The Background**

The Plaintiff/Appellant began the suit against Unisecurities Ghana limited and 2<sup>nd</sup> Defendant/Respondent by issuing a writ of summons and accompanying statement of claim on the 3<sup>rd</sup> day of February, 2020.

Subsequently, the 1<sup>st</sup> Defendant/Respondent was liquidated and Plaintiff sought leave from the Court below to pursue the action against 1<sup>st</sup> Defendant/Respondent. The court granted leave for the action to continue. (See pages 84A to 85D of the record)

Whilst the matter was still pending, on 22<sup>nd</sup> October, 2020, a winding up order was made by the High Court (differently constituted) against 1<sup>st</sup> Respondent. Consequently, the Official Liquidator was substituted as 1<sup>st</sup> Respondent. Also, an application to proceed with the suit and to realize security, which was filed by Appellant pursuant to Section 93 of the Corporate Insolvency and Restructuring Act, 2020 (Act 1015), was heard and granted by the trial High Court.

The Plaintiff/Appellant then applied for Summary Judgment. The application was dismissed by the High Court on 17<sup>th</sup> December, 2021.

This appeal was mounted on the basis of the refusal to grant Summary Judgment by the High Court Judge.

The grounds of appeal are as follows:

- a. The learned trial judge erred in dismissing the application for summary judgment on grounds that there was no evidence of registration of the Mortgage Deed at the Lands Commission.
- b. Having ordered Plaintiff/Appellant to address the court on the issue of registration of the mortgaged property, the learned trial judge erred in holding that Plaintiff/Appellant did not seek leave to file a supplementary affidavit in support evidencing the Land Certificate issued by lands Commission in respect of the Mortgaged Property.
- c. The learned trial judge failed to appreciate that the relief for Judicial Sale relating to the Mortgaged Property was an alternative relief.
- d. The judgment is against the weight of evidence.
- e. Additional grounds of appeal may be filed upon the receipt of the record of appeal.

## CONSIDERATION

**Grounds a, b and d will be considered together.**

The duty of this court in cases which the Applicant alleges that the judgment is against the weight of evidence, is that an appeal is by way of rehearing, particularly where the Appellant alleges in his notice of appeal that the decision of the trial court is against the weight of evidence. In such a case it is incumbent upon an appellate court, in a civil

case, to analyse the entire record of appeal, take into account pieces of evidence in his favour which would have tilted the judgment in his favour or misapplied certain pieces of evidence against him that made the judgment go against him. See the cases of **Owusu Domena vrs Amoah [2015] SCGLR 790** and **Marian Obeng Mintah vrs Francis Ampenyin**, Civil Appeal No. J4/18/2013, 25<sup>th</sup> March, 2015.

What are some of the pieces of evidence which go to buttress the Appellant's assertion? One of the pieces of evidence is the fact of the registration of the Mortgaged Property.

The Appellant pleaded the Registration of the Mortgaged Property in paragraph 11 of its Amended Statement of Claim in the following terms:

*"Additionally the restructured facility was secured with a mortgage dated February 11, 2019, over a 1.19 acre piece or parcel of land situate at Asylum Down and known as Plot No. 9767 Block 3028 with Land Title Certificate No. 48225 belonging to 2<sup>nd</sup> Defendant (the "Property"). The deed of mortgage has been duly registered at the Collateral Registry, Lands Commission and the Registrar General's Department."*

In paragraph 2 of the joint Statement of Defence, the Respondent did not deny the averments in paragraph 11 of the Amended Statement of Claim.

The 2<sup>nd</sup> Respondent on the other hand averred that it was not in a position to deny the averments as it was not aware of the transactions described by the Appellant in the Statement of Claim involving the Mortgaged Property.

Further, in the application filed by the Appellant seeking leave to proceed with the suit after an official liquidator had been appointed over 1<sup>st</sup> Respondent's affairs, Applicant repeated the due registration of the mortgage in paragraph 5(b) of its Affidavit in Support of the application. The 1<sup>st</sup> Respondent initially opposed the application, but subsequently informed the court that it would no longer oppose it. 2<sup>nd</sup> Respondent also

opposed the application in a filed Affidavit in Opposition. Significantly, it did not deny the fact that the mortgage had been duly registered.

In delivering her ruling on 29<sup>th</sup> July, 2021 granting Appellant's application for leave to proceed with the suit and realize the security, the learned trial judge stated as follows:

*"The claim between the Applicant and the 2<sup>nd</sup> Respondent is a straightforward debt recovery action under the Borrowers and Lenders Act 202 Act 1052. The 2<sup>nd</sup> Respondent willingly created a security interest in favour of the Applicant and must be bound by the arrangement. See section 3(1) of the Borrowers and Lenders Act. The definition of a debt in the circumstance of a third party is governed by the Borrowers and Landers Act. The Act defined a debtor as "a person who owes payment or other performance of a secured obligation, whether or not that person is the borrower who granted the security interest, including a secondary obligor such as a guarantor of a secured obligor."*

*"The 2<sup>nd</sup> Respondent as a surety is not in receivership or in liquidation and the erstwhile insecurities debt is a secured debt under Act 1052 and under this Act the application is entitled to the realization against the 2<sup>nd</sup> Respondent. Having satisfied myself that that application is a secured creditor and has complied with the relevant laws regarding a charge, I am not prevented from granting this application and same is granted as prayed." (See page 84A-85D of the record)*

It is interesting to note that the finding of the trial judge was not appealed against by any of the Respondents.

We agree with the submission of the Appellant that having so found that the Appellant is a secured creditor, who had complied with the relevant laws regarding the registration of a charge, the Appellant was no longer required to provide evidence in the application for Summary Judgment.

The Respondents had raised issue with the registration of the Mortgage Property at the Registrar of Companies. That issue was laid to rest when Appellant produced the order of the court granting Appellant extension of time within which to register the charge at the Registrar of Companies. The trial judge stated as follows:

*“In his submissions, counsel for 2<sup>nd</sup> Respondent raised a number of legal arguments against the application. One of his contentions is that the charge was registered at the Registrar General after the period of 28 days required by law rendering the charge created void.*

*Counsel for Applicant in response, indicated that leave was applied for before the registration of the charge and furnished the court with copies of same by a notice filed on 13<sup>th</sup> July, 2021. That argument is therefore moot.”*

During the hearing of the application to proceed with suit and to realize security, the 2<sup>nd</sup> Respondent sought to discredit the registration of the Mortgage Property at the Collateral Registry by contending that the registration at the Collateral Registry had expired at the time of commencing the action. This argument was shot down as there was evidence that Appellant had notified the Collateral Registry of the default in payment by the 1<sup>st</sup> Respondent. This notification can be found at page 51 of the Record of appeal.

In the application for Summary Judgment neither 1<sup>st</sup> Respondent nor the 2<sup>nd</sup> Respondent disputed the existence of the registration of the Mortgage Property at the Lands Commission. In paragraph 10(b) of the application for Summary Judgement, the Appellant once again deposed to due registration of the Mortgage Property. In a six-paragraph Affidavit in Opposition, 2<sup>nd</sup> Respondent did not mention one word on the Mortgage Property, neither did it challenge the fact that it was registered.

Counsel opined that it was therefore very strange indeed that the trial judge, having already determined the efficacy of the mortgaged document and the issue of whether or not Appellant was a secured creditor of the Appellant, would now “suo motu” on 30<sup>th</sup> November, 2021 claimed that there was no evidence on record of the registration of the Mortgaged Property at the Lands Commission and therefore Appellant should address the court on that issue.

According to counsel, the trial judge had no jurisdiction to surreptitiously amend her earlier ruling on the point. In any event, further to the court’s directions, the Appellant filed a supplementary written address. (See Pages 130 to 131 of the record) and a Supplementary Affidavit in December 2021 to which it attached the proof of registration.

In spite of the fact that the Appellant attached the Land Title Certificate as proof, the learned trial judge held that there was no registration of the Mortgaged property and therefore dismissed the application.

Having perused the record of appeal, we are of the opinion that the trial judge erred in this instance particularly having made an earlier determination of the fact that the mortgage had been duly registered in one breath, could not turn round in another breath and say that she did not have the evidence before her. The fact of the matter is that even if the evidence as filed by the supplementary affidavit was not properly laid before her, she had it within her discretion to accept same in the quest for substantial justice.

Order 1 Rule 2 of C.I. 47 enjoins the court to interpret and apply its rules; *“so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible all matters in dispute between parties may be completely effectively and fairly determined and multiplicity of proceedings concerning any such matters avoided”*. Flowing from the above reasoning, we find that these grounds have merit and therefore allow grounds a, b, and d.

### **Ground C**

The learned trial judge failed to appreciate that the relief for Judicial Sale relating to the mortgaged property was an alternative relief.

The reliefs sought by Appellant as per the endorsement on the writ of summons were as follows:

- a. An order for the recovery of the sum of Ghs17,327,783.25;
- b. Interest on the said sum of Ghs17,327,783.25 till the date of final payment; or in the alternative
- c. An order for the judicial sale of the mortgaged piece or parcel of land in Asylum down known as Plot No. 9767 Block 3 028 with Land Title Certificate No. GA 48225 belonging to 2<sup>nd</sup> Defendant;
- d. Cost, including Solicitor's fees;
- e. Further or other reliefs

Counsel for the 2<sup>nd</sup> Respondent submitted that the alternative relief for judicial sale of the property could not be granted because there was no evidence indicating that the said Deed of Mortgage covering the property was duly registered a failure of which rendered the whole mortgage process void. See section 24 of the Land Registry Act. In



the case of **Asare vrs Brobbey [1971] 2 GLR 331** this court held that in view of the non-registration of the mortgage the subsequent sale of the Defendants' house by auction was invalid.

Counsel further stated that the court below noticed the anomaly in the Plaintiff's case and asked for further addresses on the issues of the non-registration of the Deed of Mortgage in question.

Counsel further stated that since the Plaintiff/Appellant filed a supplementary affidavit without leave, the judge was right in disregarding the said supplementary affidavit in the written address.

The Black's law dictionary define alternative reliefs as "Judicial relief that is mutually exclusive with another form of judicial relief". Thus, an alternative relief, being mutually exclusive, would not be dependent on the other. As its first relief, Appellant sought an order for the recovery of the principal amount owed it in the sum of GH17,327,783.25, plus interest of the Mortgaged Property.

Going through the record of appeal, we find that at page 16 of the record, paragraph 1 of Statement of Defence, the Respondent admitted owing the Appellant and on page 64A of the record, counsel for the 1<sup>st</sup> Defendant agreed that: *"The Plaintiff can proceed against the property sell same but should all-time material put the Official Liquidator on notice in all the steps to be taken in realizing proceeds from the sale. Accounts on the sale should also be provided to the Official Liquidator. In the circumstance, thereof, it is our prayer that the application by the Plaintiff filed on 24<sup>th</sup> March, 2021, be granted"*.

Indeed we agree with learned counsel for the Appellant that the trial judge erred in refusing to grant Summary Judgment over a debt which was admitted by the primary obligor.

Looking at the statement of claim and the Statement of Defence filed, the 1<sup>st</sup> Respondent has admitted that it owes the debt and is willing to have the Appellant proceed to sell the Mortgaged Property to defray the debt or a portion thereof. As such we do not find any triable issues in this case and the ruling is an unfortunate instance of poor case management and a contradiction to Order 1 Rule 2 of C.I. 47. The appeal is therefore allowed in its entirety.

Rule 32 (1) of C.I 19 provides as follows:

*“The court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs.”*

By virtue of the above rule we enter summary judgment for the Appellant for the sum claimed in his application for summary judgment as follows:

- a. An order for the recovery of the sum of Ghs17,327,783.25;
- b. Interest on the said sum of Ghs17,327,783.25 till the date of final payment; or in the alternative;
- c. An order for the judicial sale of the mortgaged piece or parcel of land in Asylum down known as Plot No. 9767 Block 3 028 with Land Title Certificate No. GA 48225 belonging to 2<sup>nd</sup> Defendant;
- d. Cost, including Solicitor’s fees.

Cost of Ten Thousand Ghana Cedis (GH¢10,000.00) awarded to the Plaintiff/Appellant

*(SGD)*

MARGARET WELBOURNE (MRS.)

(JUSTICE OF APPEAL)

*(SGD)*

I AGREE

PHILIP BRIGHT MENSAH

(JUSTICE OF APPEAL)

*(SGD)*

I ALSO AGREE

JANAPARE A. BARTELS-KODWO (MRS.)

(JUSTICE OF APPEAL)

- Henry Acquaye with Adwoa Frema Asare for Defendants/Respondents
- Nancy Amateifio for Plaintiff/Appellant