

**IN THE CIRCUIT COURT OF GHANA HELD IN ACCRA ON FRIDAY, THE 19TH
MAY, 2023 BEFORE HER LADYSHIP ROSEMARY BAAH TOSU (MRS)- HIGH
COURT JUDGE SITTING AS AN ADDITIONAL CIRCUIT COURT JUDGE**

SUIT NO. C2/123/2022

CUBICA ENERGY COMPANY LTD. -- PLAINTIFF/JC/RESPONDENT

*16 BLOHUM STREET
PEHCAN HOUSE
DZORWULU, ACCRA*

VS

EXCEL OIL COMPANY LTD. -- DEFENDANT/JD/ APPLICANT

*PLOT NO A13/SAK/MKT
OPP. REGIMANUEL GREY ESTATE
OFF SAKUMONO/NUNGUA BARRIER ROAD*

**RULING ON MOTION ON NOTICE FOR STAY OF
EXECUTION PENDING APPEAL**

On the 28th July, 2022, this Honourable Court granted Plaintiff/ Judgment Creditor hereinafter referred to as Respondent's application for summary judgment in the sum of GHS1,189,882.85 together with interests.

The Defendant Judgment Debtor hereinafter called the Applicant being dissatisfied with this ruling filed a Notice of Appeal attached to this application as exhibit EE1 and is seeking to stay execution of the said judgment in this Court pending Appeal.

The Applicant contends in this application that there are triable issues which are to be determined this Court therefore ought to have allowed the matter to go through trial for a determination and not to truncate the action summarily through the granting of a summary judgment.

The Applicant says primarily that the document in which Applicant allegedly admitted liability for the said sum was challenged by the Applicant as having been obtained by the fraud of its former employee. Applicant submits that for the issue of fraud raised by it, the matter ought to have been set down for full trial and determination.

Applicant submits that there are exceptional circumstances for which the Court ought to exercise its discretion in its favour. According to Applicant the exceptional circumstances are as follows

1. Not only was the issue of fraud raised but Applicant alleged in its pleadings that Respondent was involved in this fraud which led to the admissions made in the said letter
2. That the issue of fraud if not probed and Respondent's is allowed to go into execution would lead to the unwarranted demise of Applicant company
3. Justice would be buried at the altar of expediency if there is no judicial examination of the case.
4. Since the defence of Applicant has not been tested for its probative value to be concluded on, and the business relationship and the breaches of contract of Respondent have all not been considered by the Court, execution of the judgment will therefore deny Applicant substantial justice.

Applicant relies on the case of **Joseph vs Jebeille 1963 1GLR @ 387** which sets out the conditions for a stay of execution pending Appeal. Applicant says that it raised the issue of fraud in the substantial matter and it is trite that fraud being insidious, when it is raised it ought to be put to some judicial scrutiny.

Applicant relies on the case of **Dzotope vs Harhomene III (No.2) 1984-86 Volume 1 GLR 294.**

Applicant further submits that its appeal stands a good chance of success and it is not frivolous in order not render the appeal nugatory, the execution ought to be stayed.

Applicant denies Respondent's allegation that this application is not only meant to deny Respondent the fruits of its victory but also to obstruct the course of justice. Applicant says that this assertion is not borne out by the facts.

Applicant further says that the substantial hardship that it stands to suffer should this application be refused is such that its whole existence would be obliterated since there are numerous other judgment creditors on its tail.

The Plaintiff/ Judgment Creditor/ Respondent opposes this application for stay pending appeal. Respondent also relied on the same case of **Dzotope vs Harmonene** referred to supra, where the Court of Appeal decried how Appellants who obtained stay of execution usually went to sleep and failed to pursue the appeal.

Respondent also relied on the case of *Alex Adu vs Commissioner General Ghana Revenue Authority, Civi Appeal No. J4/2/2014*, where the Supreme Court also observed that applications for stay of execution are being used as delay strategies by Applicants to prevent and or delay judgment creditors from enjoying the fruits of their judgments.

Respondent submits that this is the same strategy being employed by the Applicant in this matter. Counsel for Respondent drew the Court's attention to the Applicant's unwillingness or inability to serve Respondent with the Notice of Appeal and motion for stay of execution after the processes were filed.

Respondent submits again that based on the previous conduct of Applicant, they are likely to go to sleep if the application for stay of execution is granted.

Respondent further submits that there is a plethora of cases which emphasize that a stay of execution would only be granted upon proof of extraordinary circumstances. Respondent refers to the case of *Sethi Brothers Ghana Limited vs Regency Alliance Insurance Limited, Civil Appeal JS/68/2019*.

Respondent says that the Applicant's only proof of extraordinary circumstance is a claim of fraud. The Applicant relied on the Dzotepe case (supra) to show that where there is a claim of fraud, a Court ought to go into the merits of the case. **However, Counsel for Respondent submits that the case has been misapplied because the Dzotepe case rather establishes that where fraud is a collateral issue the Court ought not to go into the merits of the case.**

Respondent further submits that even though Applicant pleaded that Respondent had a hand in the fraudulent activity of its former employee, when prodded, Counsel for Applicant could not show where exactly this fact was pleaded.

Respondent contends that in all processes filed, the Applicant, has not denied the Sale and Purchase Agreement and it has also not denied that the said products were supplied to it. Their only contention is that the products supplied were substandard.

Respondent submits that the defence filed by Applicants shows no triable issues and Applicant has also not demonstrated any exceptional circumstance which should warrant the Court exercising its discretion in its favour.

Respondent finally says that a just debt was proven by it and to all intents and purposes.

Both Counsel for the parties have relied on the case of *Dzotepe vs Hahomeme III (No.2)* on the effect of fraud in a case. My takeaway from the case though is that there must be credible evidence to support an allegation of fraud before a Court can act with it.

Counsel for Applicant says that the Applicant has pleaded Respondent's alleged involvement in the fraudulent behaviour of its former employee. I have gone through the Statement of Defence filed by Applicant and the affidavit in support of this Application for stay of execution and I have found nowhere any averment that Respondent was somehow fraudulently involved in the production of exhibit E, the letter from Applicant admitting that it owes Respondent for the petroleum products supplied.

Let us also not forget that a party is bound by his pleadings and ordinarily must not depart from them. This also means that even in the situation of an appeal, that fact, not pleaded will not form part of the record of Appeal and an appellate court would be under no obligation to consider it.

Considering the present Application for Stay of Execution, affidavit in support and submissions by Counsel for Applicant, the issue of fraud it appears is the main ground being canvassed as exceptional circumstances together with the Applicant's apprehension that the said company would go under since it has other creditors on its back.

In the case of **Republic vs Stephen Kwabena Opuni & 2 Ors (2019) DLCA 6373**, Tanko JA (as he then was) gave some insight into what exceptional circumstances mean.

'The meaning and scope of the word 'exceptional' is imprecise. Suffice it to say that it admits of a circumstance or situation which is unique and beyond the ordinary course of events. It will involve the consideration of some collateral circumstances and to some extent inherent matters which may, unless a stay is granted paralyze one way or the other the Applicant's constitutional or statutory rights in the pending appeal.'

Therefore, where the situation is embellished in such terms to appear as though there is restriction on legal avenues albeit within acceptable judicial practice, that situation cannot be said to be exceptional.

In my view for a situation to be exceptional, it must be specifically tied up to an imminent development in the judicial proceedings which if not stayed would irreparably prejudice the case of the Applicant...in other words, the Applicant has a duty to demonstrate that if a stay is not granted, it would overwhelmingly suffocate the tenets of justice while the interlocutory appeal is pending.'

I have gone through all the processes filed and I am not convinced that what is listed as exceptional circumstances by the Applicant would pass the test. It is also trite that the mere fact that an appeal is pending and also together with the possibility of its success is not enough grounds to stay execution. I therefore dismiss the Applicant's motion for Stay of Execution pending appeal. Costs of GHS5000 in favour of Respondent.

(SGD)
H/L ROSEMARY BAAH TOSU (MRS)
HIGH COURT JUDGE SITTING AS AN
ADDITIONAL CIRCUIT COURT JUDGE

REPRESENTATION

Kennedy Darko representing Plaintiff.

Emmanuel Denyo representing Defendant.

Selom Yao Macauley for Dennis Adjei Dwomoh for Plaintiff.

Emmanuel Kenu for Christopher King for Defendant/Applicant.