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through a private security guard at his office premises is wrongful since the court did not order for the service to be done by substitution. And further prays per his paragraph 18 for execution to be stayed until the final determination of this application on grounds that if he is evicted before this present application is heard, his rights would have been trampled on.

The plaintiff/J.Cr/Respondent filed an affidavit in opposition to the application on the 8/12/22. The affidavit was sworn to by the 3rd plaintiff on behalf of the 1st and 2nd respondents and claimed per their paragraph 11 that they shall raise a preliminary legal objection to the competency of the suit during the hearing. No such preliminary legal objection was raised at the hearing of the application.

They argued that the bailiff who served the formal decree attempted service on the judgment debtor at her workplace but she refused service insisting that she be served at her residence. That the bailiff without any option threw the process at the judgment debtor and this constitute good service.

BRIEF HISTORY.

This court notes the procedural meanderings indulged in by the applicant after the judgment of the court. Applicant had earlier filed a motion to set aside the judgment of the court given on the 9/5/22 differently constituted. The grounds for the application was that the 3rd plaintiff lacked capacity to initiate the suit against the defendant. The court

differently constituted gave a ruling on the 21st October 2022 dismissing the application

Consideration of Application

The principles a court ought to consider in granting or refusing an application for stay of execution have been stated in a plethora of judicial decisions some of which will be discussed below: In ***NDK Financial Service v Yiadom Construction & Electrical Work [2007 – 2008] 1 SCGLR 93***

Holding (1) the supreme court stated the principles for the consideration of stay of execution as follows;

" the principles for considering an application for stay of execution pending appeal were well-settled: the main principle adopted by the courts was what the position of the appellant would be if the judgment were to be enforced and the appeal was successful. In effect, the essential point in considering such applications was whether the application would be returned to the status quo ante should the appeal succeed. Another determining principle was which of the parties would suffer greater hardship should the application be granted or refused..."

The above holding has been quoted with approval in a number of cases including the case of ***Djokoto & Amissah V BBC Industrials Co (Ghana) Ltd & City Express Bus Services Ltd (2011)2 SCGLR 825*** Where His Lordship Anin Yeboah JSC as he then was, excellently put the principles thus:

"the applicable principles for granting stay of execution were, first, in deciding the application, both the trial court and an appellate court must carefully examine the judgment appealed against and the orders or decree sought to be executed to consider whether the appeal would not be rendered nugatory should the court refuse it and the appellants won on appeal. His lordship further stated in holding 2 that the appellant had the burden of demonstrating that the appeal had disclosed arguable points of law to be decided by the appellate court"

Also in the celebrated case of **Joseph v Jebeile [1963] 1 GLR 387** it was held in holding two as follows:

"it is the paramount duty of a court to which an application for stay of execution pending appeal is made to see that the appeal, if successful, is not nugatory"

Form the above stated settled principles, there must be in existence an appeal or some of challenge against the decision sought to be stayed. This court notes that the applicant herein has not filed any notice of appeal or any process challenging the rightness of the judgment given by this court differently constituted on the 9th of May 2022.

Further principles for the consideration of a stay of execution were discussed in **Nana Kwasi Agyeman VIII v Nana Hima Dekyi XIII** [1982-83] GLR 453 as follows;

- i. Where the court is satisfied upon an affidavit of facts that the defeated party was bringing the appeal not bona fide to test the rightness of the judgment for some collateral purpose.
- ii. A court should not stay execution unless there were exceptional circumstances
- iii. Where the grounds of appeal contained no merit, the application should be refused.

The other principles the court must also consider in an application such as this includes the existence of exceptional circumstances which depends on the nature of the case and where the balance of hardship will fall should the court grant or refuse the application. ***Aboagye & Konadu v Osei-Bonsu [2015-2016]1 SCGLR 302, Amissah v BBC Industries Co (Ghana) Ltd & City Express Bus Services Ltd [2011]2 SCGLR 825*** cited.

In all these principles, the burden is on the applicant to demonstrate the existence of some exceptional circumstance, some right in law, an appeal against an executable judgement of the court in addition the principles mentioned above.

Counsel for applicant did not refer the court to any authority to support his application for stay of execution. Respondent however argued that in the absence of an appeal, applicant cannot apply for an order for stay of execution as the filing of a notice of appeal was a precondition to determination of an application for stay of execution.

The court of the opinion that the rules of court provides for instances where judgment of the court may be stayed in the interest of justice, even though there is no appeal in existence. One such instance will be an application for stay of execution and payment of judgment debt by instalment.

In *S. Kwame Tetteh's black book "Civil Procedure A Practical Approach page 1051* he explains this under the topic:

"Stay of execution or relief from judgement- post judgement occurrences ; a party may apply for a stay of execution or other relief on account of matters that have transpired since the delivery of the judgment or order, and the court may grant the application and relief, on such terms as it thinks just the rule empowers the court to stay execution of the judgment , not to create an opportunity for a party to launch an attack on the validity of the judgment. The applicant may allege in support of the application only such facts as would or might have led to a stay of execution if they had occurred at the date of the judgement or order"

The erudite author referred to order 43 r 11 of C.I. 47 which provides as follows:

Matters occurring after judgment, stay of execution

11. without prejudice to order 45 rule 15, a party against whom a judgement or order has been given or made may apply to the court for a stay or execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant the relief, on such terms as it thinks fit

Despite the above, this court finds that the applicant failed to demonstrate to the court the exceptional circumstances warranting the grant of this application in his favour.

On the issue of setting aside the formal decree on grounds that the first plaintiff is deceased this court finds that the plaintiffs in the suit initiated the action in their individual capacities and not a representative capacity, thus the death of the 1st plaintiff does not abate the action nor subsequent execution of same. The 1st plaintiff gave evidence in the suit and the trial was concluded before his death. It was during execution that he passed on.

It is the opinion of the court that even if plaintiff was not substituted in the suit after his demise, it's effect is only to the extent that execution cannot be carried out in relation to first plaintiff only. The other plaintiffs in the suit have capacity to continue with the execution of the judgment of the court.

The cause of action does not abate since the other 2 plaintiffs are duly active and can carry out the execution of the judgment of the court in their own individual capacity. The death of the 1st plaintiff therefore does not invalidate the formal decree issued, as the plaintiff/ judgment creditors did not sue in a representative capacity but in their individual capacities.

From the foregoing, the application is dismissed.

Cost of 1000 against the applicant

**[SGD]
BENEDICTA ANTWI (MRS)
DISTRICT MAGISTRATE**

COUNSEL:

**EFUA BENTIL HOLDING JOHN NDEBUGRI'S BRIEF FOR PLT/
RESPONDENT
ANTHONY ADU NKETIA FOR DEF/APPELLANT/APPLICANT**

PARTIES:

3RD PLAINTIFF PRESENT

DEFENDANT ABSENT