IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)

DOTSE, JSC

BAFFOE-BONNIE, JSC

GBADEGBE, JSC

AMEGATCHER, JSC

CIVIL MOTION
NO. J8/65/2019

2ND JUNE, 2021

NDK FINANCIAL SERVICES …….

PLAINTIFF/APPELLANT/

RESPONDENT-JUDGMENT CREDITOR/RESPONDENT

VRS

1. AHAMAN ENTERPRISE LIMITED
2. ATTORNEY-GENERAL ……. DEFENDANT/RESPONDENT/

APPELLANT-JUDGMENT DEBTOR/APPLICANT

3. ALEX A. ADUKO

RULING

GBADEGBE JSC:-

This matter comes before us in the exercise of our inherent jurisdiction at the instance of the execution- debtor-applicant (hereinafter described as the applicant) who alleges that it has fully paid up its indebtedness under the process of execution issued

pursuant to the judgment of this Court dated November 28, 2014 and accordingly further processes directed at execution by the execution-creditor -respondent (hereinafter described as the respondent) are wrongful. Initially, when the application came before us, we were of the view that it was unusual, but after giving anxious consideration to the question raised for our decision whether the continuous levying of execution under the judgment of the Court is lawful, we came to the opinion that it properly arises within the inherent jurisdiction of the court-that which enables the court to fulfil itself properly by doing justice between the parties in so far as what is sought from it has not been expressly taken away by statute. Summing up the nature of the inherent jurisdiction, the learned authors of Halsbury's Laws of England, 4th Edition, volume 37 write at paragraph 14 of page 23 as follows:

> "In **sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to do justice between the parties and to secure a fair trial between them**."

The application having been fully heard subsequent to which the parties submitted their closing arguments on July 15, 2020, we now direct our attention to the determination of the question whether indeed, the applicant has fully satisfied the judgment debt under the judgment of this Court dated November 28, 2014.

Such was the disputation concerning the total amount owed under the judgment that on 27 the March 2019, we directed that accounts be inquired into between the parties. In making the order appointing a referee, we adopted the prevailing practice in the jurisdiction as set out in Order 28 of the High Court (Civil Procedure) Rules, 2004, CI 47. The referee, who was appointed by consent of the parties was to ascertain whether the exact amount owing by the respondent under the judgment of the court dated

November 28, 2014 has been fully paid. Whiles the applicant contended that there was no amount owing from it to the respondent under the said judgment, the respondent on the other hand contended that there is an outstanding amount of GHS 56,745.80. The referee, PWC, an accounting firm undertook its task and submitted its report, which is in evidence as Exhibit CE1 and was cross-examined by the parties. At the end of the hearing, it is patent that the only question for our determination is whether indeed, the applicant has paid up the entire judgment debt. The said question may be formulated alternatively whether there is any outstanding amount owing from the applicant to the respondent.

From the report, the referee proposed three different scenarios for our consideration in determining whether the amount duly owing from the execution debtor (applicant) to the execution creditor (respondent) under the judgment of the Court has been satisfied. The various scenarios presented the Court vary in their conclusions on the state of accounts between the parties to the application herein. In our thinking, the referee has by the nature of the report placed us in a position that requires us to make a choice between the various scenarios submitted contrary to the terms of its mandate as set out in the order of reference. In the circumstances, but for the residual power in us under the appropriate rules of the court contained in Order 28 rule 4 (3) (e) of the High Court (Civil Procedure) Rules, CI 47 of 2004 by which we are authorized to determine the question submitted to the referee, we would have been compelled to remit the whole question to it for further consideration. Having regard, however to the affidavits and other processes before us, we are of the opinion that there is ample power in the Court under the rule just referred to *"decide the question or issue originally referred to the referee on the evidence taken before the referee, either with or without additional evidence*."

In the affidavit of the applicant dated 09 July 2019 filed in answer to an application made in the course of the proceedings herein, it was unequivocally deposed in

paragraph 14 that there was an outstanding balance of GHS 14, 699.74 owing from the applicant to the respondent being the difference in the payment made to the respondent herein by the Government of Ghana under the judgment with which we are concerned in this matter. The said deposition, we note is significant in the determination of the task before us notwithstanding indications to the contrary by the applicant in its submissions before the Court and has the effect of a partial admission of indebtedness on the part of the applicant. It is instructive to say that despite the applicant's strenuous denial of owing any sum under the judgment, the said deposition not having been withdrawn by the deponent remains an effective process before us. It being so, we are enabled on the practice and procedure relating to admissions to take it into account in our determination. See: Technistudy Ltd v Kelland [1976]3 All ER 632. As the respondent alleges an amount higher than what has been admitted by the applicant in the affidavit referred to, it assumes the burden of proof relating thereto. However, there has been no attempt made by it to prove that it is actually owed the amount which it alleges.

It is important to say that although the application herein is at the instance of the applicant, its purpose may be likened to a shield directed at the processes of execution issued against it by the respondent challenging the right of the execution-creditor-respondent to levy execution against it. Therefore, in terms of the evidentiary rules, the application herein is a challenge by the applicant to the demand by the respondent to the applicant to pay further outstanding sums under the judgment, so the processes of execution are based on the factual existence of the applicant being indebted to the it under the judgment proof of which is essential to the validity of the demand contained in the writ of fifa. The existence of the indebtedness is a fact that is governed by sections 10(1) and 11 (1) of the Evidence Act, NRCD 323 that:

10 (1). "**For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.**

11(1) **For the purposes of this Act the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue."**

In the course of the proceedings, the respondent only asserted the existence of an amount in the sum of GHS 56,745.80 as outstanding under the judgment of the Court but unfortunately neither in the processes before us nor in the course of cross-examining the referee was any attempt made to show that indeed, the said sum of money was outstanding. The mere assertion of the existence of the said outstanding amount is merely repeating what the applicant by the nature of its case is required to prove and cannot suffice to make us reach the view as provided in section 12 of the Evidence Act, NRCD 323 that the existence of the asserted fact "**is more probable than its non-existence.**" Reference to the cross-examination of CW1, the representative of the Referee by counsel for the respondent is supportive of the conclusion reached by us regarding the outstanding debt of GH₵56,745.60.The following is an extract from the proceedings of June 25, 2020 in the matter.

"Q. **Documents you received from NDK includes computation from NDK represents Government of Ghana indebtedness to NDK at page 15 of the report.**

A. Yes

Q. I am putting it to you that the outstanding sum payable by the Government by this Court's judgment is GH₵56, 745.60.

A. I did not recognise those numbers beyond what is in the report.

Q. I am putting it to you that the conclusions in your report only relates to an aspect of the Government's liability and not the entire liability.

A. To the best of my knowledge we have considered the entire liability in the report."

As said previously relating to the proof of the amount alleged by the respondent as owing under the judgment, its proof requires evidence that would establish the existence of the debt by for example reference to the payment or payments made in breach of the undertaking, the total of such payments as against payments received from the Government to establish that the said amount is truly outstanding. The cross-examination referred to was just repeating the assertion of the existence of a debt without any effort being made to prove how the asserted debt came about.

The failure by the respondent to prove its right to further payments beyond that which has been admitted by the applicant compels us to apply the effect of such failure as provided in section 11 of the Evidence Act that no such sums are owing under the judgment. See: **Rhesa Shipping Co SA v Edmunds** [1985] 1 WLR 948 @ 955. As the said deposition constitutes an admission against interest, we think that in the absence of any other evidence to the contrary, the execution debtor (applicant herein) must be held strictly to its effect on the issue before us by being required to pay up the said amount to the execution creditor. Accordingly, the applicant is to pay to the respondent the said sum of GH₵14,699.74 as admitted in paragraph 14 of the affidavit of 9/7/2019.

Without disregarding the provisions of Order 23 rules 6 (1) and (2) of the High Court (Civil Procedure) Rules, CI 47 of 2004 by which a party is required to apply to the Court for any order that it is entitled to by virtue of an admission made in an affidavit filed by a party, we are of the opinion that where the admission is contained in a process filed by a party which is part of the evidence placed before a Court in a matter, the Court on its own may in so far as the said admission is clear and free from any objection act on it for the purpose of reaching its decision in the matter. In so proceeding, we are not without authority as our courts have acted on admissions in

the course of judgments without any application in that behalf by a party to the proceedings. Several instances exist within the jurisdiction, one such instance being in the case of **Agbosu and Others** v **Kotey and Others** [2003-2005]1 GLR 685. In the said case, the Court considered the failure by a party to deny the description of the disputed land pleaded by his adversary as constituting an admission ,which relieved the proponent from leading evidence to prove the identity of the land. The judgment of Wood JSC (as she then was) on the question of the effect of an admission contained at pages 701-704 of the judgment is clearly supportive of the position taken by us in this matter. See also**: IFC v Shangri-La** [2003-2005]2 GLR 59.

The question that arises then is whether in view of the above , there is still any amount owing from the applicant to the respondent under the judgment? We are of the view that as the proceedings herein seek to inquire into the legitimacy of the continuing demands for payment under a writ of execution issued under a judgment of the Court, the parties are required to place before us all the evidence in support of their rival contentions in order that we may completely and effectually determine the question on which the application turns without resort to multiplicity of proceedings. We say so because the controversy relating to the true state of the execution debtor's indebtedness under the judgment ought to be determined once and for all in the application herein as it is not the practice of courts to have issues in contention before them determined piece meal as emphasized by the related principles of cause of action estoppel and issue estoppel. The failure of the respondent to prove that there is any further amount outstanding beyond that which was admitted in the affidavit filed on behalf of the applicant must be construed against it in accordance with the rules of evidence.

There is from the proceedings had in this matter, a procedural issue that is troubling and requires to be dealt with for the purpose of future guidance. It relates to the entry of judgment filed by the respondent under the judgment of the Court , which was filed

on 04 July 2016 . In paragraph 9 of the said process, the respondent sets out the terms of the judgment of the Supreme Court relating to relief (2) that was allowed in its favour. Pausing here, we observe that the order made by the Court was subject to the submission of accounts by the Chief Director and the Principal Accountant of the Ministry of Energy. In the absence of the submission of the accounts ordered by the Court, the respondent without applying to the Court for a consequential order cannot on its own start demanding payments which belong to the category itemized in paragraph 9 of the entry of judgment. Without the Court's sanction, such demands are clearly without authority. Those payments have commonly been described by the parties herein as "unascertained payments", a description which indicates that they are at the date of the filing of the entry of judgment not capable of being known. Unfortunately, however, the said payments were openly demanded from the applicant without the slightest resort to the Court. We note that the failure of the designated officials of the Ministry of Energy to render the accounts ordered placed the applicant to whom some payments might be owing from the defendants in some difficulty but that did not with respect entitle them to make demands for payments without reference to the Court. The proper thing to have been done by the respondent upon the failure of the designated officers to submit the account to the Court was to apply to the Court for a consequential order as provided in Order 43 rule 10 of the High Court (Civil Procedure) Rules, 2004, CI 47. Not having applied to the Court for a consequential order , demands made relating to the relief granted as (2) were without legitimacy as their existence was dependent on the order directing accounts granted under relief (1) of the judgment of the Supreme Court. We do not think that the respondent was without resort to the court right in demanding payment of sums of money paid to the 1st defendant in breach of the undertaking which is the foundation of the action between the parties herein. It is difficult to understand how such a fundamental step under the judgment of the Court was not pursued and yet the demands were expressed to be under the order of the Court. Looking at paragraph 9 of the entry of judgment, it was so vague and indeterminate that it could not be

the authority for payments under the judgment which are described as " unascertained payments". As the Court rightly observed in its judgment, the order for accounts is to enable it to determine which payments were made in breach of the undertaking as the respondent admitted that some payments had been made to them jointly with the 1st defendant, Ahaman Enterprises Ltd. In the speech of Dotse JSC who delivered the judgment of the Court, he observed as follows:

> " **In coming to this conclusion, we have noted that the Plaintiffs admit some of the payments were made in its name jointly with that of the 1st defendant (Ahaman Enterprises). The controversy that culminated in the instant action arose because the Ministry of Energy paid some of the monies due under the haulage contract to Ahaman Enterprises Limited alone."**

Quite clearly, the Court made the order for accounts to enable it to determine the payments made to the 1st defendant in breach of the undertaking and the right of the plaintiffs (respondent herein) to an order for any payment made in breach of the undertaking was dependent upon the submission of the accounts. Therefore, the right of the plaintiff to payments under paragraph 9 of the entry of judgment previously referred to in this delivery was premature and lacked legitimacy. The said default notwithstanding, the parties have acted on the assumption that the order made under relief (2) of the judgment of the Court entitled the respondent without the sanction of the Court to demand payment of sums of money paid in breach of the undertaking. In acquiescing to such demands, the applicant herein is deemed to have admitted that those payments were made in breach of the undertaking. Accordingly, we do not desire to undo the payments which have been made under the category described as "unascertained payments" but hope that in future parties will resort to the Court in the event of non-compliance with an order for such consequential order or orders as the court may deem just.

The Plaintiff herein is adjudged to recover from the Defendant herein an amount of GH₵14,699.74 as the outstanding balance owed by the Defendant to the Plaintiff. The said amount to be paid by the Defendant is to attract the statutory rate of interest under rule 4(1) of Court (Award of interest and Post Judgment Interest Rules, 2005, that is C.I 52), from the 28th of November, 2014 to date of final payment with the rate being the rate as at 2nd June 2021.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
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