IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: YEBOAH CJ (PRESIDING)
OWUSU (MS.) JSC
TORKORNOO (MRS.) JSC
ACKAH-YENSU (MS.) JSC
ASIEDU JSC

CIVIL APPEAL
NO. J4/09/2023

18TH MAY, 2023

EMOS CONSULTANCY LIMITED ….. PLAINTIFF/JUDGMENT CREDITOR/ APPELLANT/APPELLANT

VS

MECHANICAL LLOYD COMPANY LIMITED …... DEFENDANT/JUDGMENT DEBTOR/ RESPONDENT/RESPONDENT

JUDGMENT

TORKORNOO (MRS.) JSC:-

What should have been the pleasant enjoyment of the fruits of justice has turned into a merciless round of litigation in the suit that has brought this appeal before the Supreme Court.

Background

In October 2012, the plaintiff/appellant/appellant (hereafter referred to as plaintiff) obtained judgment in the high court against the defendant/respondent/respondent (defendant) in the sum of GBP 26,689.00 or its cedi equivalent, damages of GHC 6,000 with costs of GHC5000

The defendant thereafter appealed and applied for stay of execution of the judgment. On 11th February 2013, the trial judge ordered the defendant to pay 50% of the judgment sum and stayed execution of the other 50% of the judgment sum pending appeal.

The defendant repeated the application for stay of execution pending appeal in the court of appeal. The court of appeal dismissed that application in March 2013 and affirmed the high court order to pay 50% of the judgment sum. The plaintiff thereafter paid GHC 45,105.55 as 50% of the judgment sum ordered.

Since the appeal was filed in November 2012, the appeal records have not been transmitted to the court of appeal for the appeal to be heard. In October 2019, the plaintiff applied to the high court for leave to issue a writ of fifa against the defendant/judgment debtor for execution of the outstanding 50% judgment sum. The application was resisted by the defendant.

The high court judge ruled inter alia that '*where a court gives a decision and a party is dissatisfied, that party may appeal or in the case of a stay of execution, repeat the application at the appellate court. Where the appellate court dismisses the appeal or the repeat application, the effect is that the decision of the trial court persists, unless specifically set aside or reversed. In the*

instant case, the repeat application filed by the respondent was dismissed by the court of appeal…The court of appeal did not reverse or set aside the order made by the trial judge. It is my view that the said decision of the trial judge is binding on the parties. The Respondent having paid 50% of the judgment debt to the Applicant, which said payment was confirmed by the plaintiff's counsel in the garnishee proceedings and in his letter dated 7th February 2019, it should not lie in the mouth of the applicant that the defendant has not paid the 50% of the judgment debt ordered by the court. By their own admission and acknowledgment, the plaintiff/judgment creditor has confirmed and accepted the payment of 50% of the judgment debt…. It is my considered opinion that the defendant/judgment debtor has satisfied the terms and conditions of the partial grant of stay of execution made by the trial judge. In the circumstance, I refuse the application for leave to file a writ of fifa'

The plaintiff appealed this ruling on six grounds:

1. The Judge erred in treating a repeat application for stay of execution in the Court of Appeal as an appeal of a decision of the High Court.

2. The Judge erred in failing to recognize the distinction between the effect of an appellate decision and the effect of a decision in respect of a repeat application of the Court of Appeal.

3. The Judge erred in holding that where the appellate court dismisses the repeat application, the effect is that the decision of the trial court persists, unless specifically set aside or reversed.

4. The Judge erred in failing to follow judicial precedent
5. The Judge erred in holding that the Defendant/Judgment-Debtor/Respondent had fully complied with the terms of the conditional grant of stay of execution.

6. The Judge erred in holding that the amount paid by the Defendant/Judgment-Debtor/Respondent amounts to 50% of the total judgment debt.

In his submissions before the court of appeal, counsel for the plaintiff cited the decision of the Supreme Court in **Joseph v Jebeile [1963] 1 GLR 387 at 388** in support of the position that the high court opinion was erroneous in law because '*when an application for stay of execution is repeated in the court of appeal, the court of appeal does not exercise its appellate jurisdiction but rather a concurrent jurisdiction with the high court*'.

He also referred to the decision of this court in **Republic v Court of Appeal, Accra ex Parte Ghana Cable Ltd [2005-2006] SC GLR 107 at 118** to the effect that once an application is properly filed in an appellate court, it must consider the application on the merits afresh and come to an independent decision. In the nature of things, unless an appellate court confirms the decision of a high court below, the decision of the appellate court prevails.

The submission of counsel for plaintiff was that from the directions of these cases, the position of the law is that a repeat application for stay of execution to the court of appeal is in essence a fresh application for stay of execution, and therefore the result of the court of appeal dismissing the defendant's application for stay of execution in March 2013 was that there was no prevailing order of stay of execution against the October 2012 judgment.

In 2019, the high court judge should therefore not have found the parties or himself bound by a 'prevailing order' of stay of execution of the outstanding 50% of the judgment sum as he held.

The court of appeal dismissed the appeal and expressed the following opinion on page 9 to 10 of its ruling

'When the repeat application is dismissed as in this case, the earlier decision which has not been affected by the repeat application ought to subsist. There is nothing suggesting that the court treated the repeat application for stay of execution in the court of appeal as an appeal of a decision of the high court. Or that the court misunderstood the effect of either. In any case, the effect of the court of appeal refusing to uphold the defendant's contentions during the hearing of the repeat application for stay of execution pending appeal, and so dismissing same, is that the status quo maintained. In dismissing the repeat application the court of appeal in effect confirmed the decision of the court below. The parties were put in the position prior to the dismissal order of the court (of appeal). We are satisfied that the dismissal by the court of appeal did not operate to set aside the high court conditional stay of execution. The decision of the trial court which granted the conditional stay of execution has not been reversed or set aside or varied in any way, by any court, and remains the subsisting judgment of the court pending the determination of the substantive appeal. The conditional stay of execution therefore endures, until the appeal has been dealt with and formally terminated…

The court properly came to the conclusion that there being a stay of execution, the plaintiff could not go into execution'

The appeal to this court is once again on six grounds. They are

1. The learned Justices of Appeal erred in failing to follow judicial precedent.

2. The learned Justices of Appeal erred in holding that there was nothing suggesting that the trial court treated the repeat application for stay of execution in the Court of Appeal as an appeal of the decision of the High Court.

3. The learned Justices of Appeal erred in holding that the effect of the Court of Appeal refusing to uphold the Defendant's contentions during the hearing of the

repeat application for stay of execution pending appeal, and so dismissing same, is that the status quo is maintained.

4. The learned Justices of Appeal erred in holding that in dismissing the repeat application of Court of Appeal, in effect confirmed the decision of the Court below.

5. The learned Justices of Appeal erred in holding that since the decision of the trial Court which granted the conditional stay had neither been reversed, set aside nor varied in anyway by any court, it remains the subsisting judgment of the court pending the determination of the substantive appeal.

6. The learned Justices of Appeal erred in holding that "since there was no definitive decision or finding by the Court below, as to the specific sum, outstanding to make the 50% payment, the 5th and 6th grounds of appeal cannot be upheld".

Reliefs being sought from the Supreme Court are:

1. An order setting aside the judgment of the learned Justices of Appeal dated 15th April 2021.

2. An order granting leave to the Plaintiff/Appellant/Appellant to issue a writ of *fieri facias* against the Defendant/Appellant/Appellant.

In his submissions, counsel for appellant has urged substantially the same positions that the court of appeal refused to accept.

Consideration of appeal to the Supreme Court

An application for stay of execution invites the court of first instance to exercise its discretion regarding halting the due execution of the judgment that the applicant is obliged to discharge, because of the circumstances grounding the application. Where the application for stay of execution is grounded on a pending appeal, such an application for stay of execution may be repeated in the court of appeal if refused by the high court, pursuant to Rule 27(1) of Court of Appeal Rules 1997 (CI 19) the prevailing rule in 2013, which has been amended by Court of Appeal (Amendment) Rules, 2020 CI 132.

An applicant to a repeat application for stay of execution in the court of appeal whose application was refused in the high court does not proceed on the premise that the high court's decision on his first application for stay of execution contained an error of law that requires the appellate court to correct. He invites the court of appeal to exercise its own discretion regarding the circumstances of the case to stay execution of the judgment pending the hearing of the appeal, and he does that because the high court had refused to grant his application. Thus while considerations on appeal are premised on the grounds of appeal, considerations on a repeat application for stay of execution are premised on the independent exercise of discretion by the higher court.

We are therefore clear in our minds that the decisions of the courts below upholding the binding nature of the high court decision of 11th February 2013 that stayed execution of 50% of the judgment sum are logically and legally sound. They are logically and legally sound simply because the high court decision of 11th February 2013 has not been set aside on appeal, neither was it varied by the court of appeal when it reconsidered it. And as long as a valid decision of a court has not been set aside on appeal, it is binding. This is the simple position of the law. See **Republic v Moffat; Ex parte Allotey** [1971] 2 GLR 391 which notes that:

"An order or judgment from the Superior Courts of Judicature, unlike those from inferior courts, is presumed to be valid until the contrary is proved. A person who wilfully disregards such orders

does so at his own risk being brought up for contempt. What a party affected by the order can do is to take steps to have the order discharged or set aside"

A reiteration of this position can be found in **Republic v High Court; Ex parte Afoda** [2001-2002] SCGLR 768, **Republic v Brew** [1992] 1 GLR 14; and **Kumnipah v Ayirebi** [1987-88] 1 GLR 265@ 270. As stated in **Ex parte Afoda**, it is important, as a matter of public policy, that the authority of the court and the sanctity of its process and orders be maintained at all times.

Our understanding of the submissions of counsel for plaintiff is that the February 2013 decision of the high court can not in any way be reckoned as subsisting and valid even if the court of appeal refused to vary or substitute the high court's orders with new orders following the hearing of the repeat application for stay of execution by the court of appeal.

This proposition is strange because it must lead to the necessary question: if the court of appeal refuses to vary or substitute the high court's orders with new orders and dismisses a repeat application for stay of execution, is the high court decision obliterated by the simple reason that the court of appeal considered the application for stay of execution afresh?

That certainly cannot be a legally sound position because as a matter of public policy, the decision by any competent court is valid and binding unless reversed or varied by a higher court, whether on appeal, or on a fresh consideration of the application by the appellate court as provided for by CI 19 when there is an appeal pending. Once a higher court has not set aside any part of a valid decision, it remains binding on parties.

It is not too clear to us why counsel for plaintiff finds the decisions reviewed in **Ex Parte Ghana Cable Ltd** and the ratio of **Ex Parte Ghana Cable Ltd** helpful in resolving the case he is making to us.

The controversy that had arisen regarding the two tier consideration of applications for stay of execution pending appeal has raged around whether the jurisdiction of the court of appeal to consider an application for stay of execution is exercised concurrently with and independently of applications to the high court, or only on refusal of the application in the high court.

Another level of the controversy had centered on when an order following an application for stay of execution can be considered as amounting to a refusal of the application. Where the application was granted subject to terms, does that render the decision a grant of the application, without more? Or where the applicant finds the terms of the grant so onerous and harsh as to make it difficult to comply with the decision, and they consider it to amount to a refusal of the application for stay of execution, can that give them the grounding as of right to invoke the jurisdiction of the court of appeal to consider the application afresh?

These controversies were examined and resolved in **Ex Parte Ghana Cable Ltd** cited supra. The application in **Ex Parte Ghana Cable Ltd** was for an order of certiorari to quash a court of appeal order on the grounds that the court of appeal had committed an error apparent on the face of the record by interpreting a high court order as amounting to a refusal of stay of execution, and exceeded their jurisdiction under **Rule 28** of CI 19, because the jurisdiction of the court of appeal should be deemed not to arise unless there has been a refusal to grant the application in the high court.

This court, speaking through Twum JSC, dismissed the application for certiorari. It traced the controversies under discussion from the decisions in **Joseph v Jebeile [1963] 1 GLR**

271, CA; **Ghassoub v Bibiani Wood Complex Ltd [1984-86] 1 GLR 271**, **Oppan v Frans Co Ltd [1984-86] 1 GLR 281**, **Republic v Court of Appeal, Accra; Ex Parte Sidi [1987-88] 2 GLR 170**

This court's decision clarified that where the grant of stay of execution is hedged with such difficult or onerous or stringent or burdensome or unreasonable conditions, the 'so-called' grant could be regarded as a refusal. Second, where the orders of the high court raise questions as to whether the order was a grant or refusal of the application, the court of appeal is seised with jurisdiction to consider whether the order of the high court was a grant or refusal.

As a matter of law, whenever a court's jurisdiction is challenged, that court must assume that it has jurisdiction and proceed to examine the merits of that challenge. Further, in the particular arrangements created by **rule 27 of CI 19, (**now amended by **CI 132)**, and **rule 28 of CI 19** (now revoked), a separate, distinct and independent jurisdiction is given to the court of appeal to consider the application for stay of execution, simply on application to it. Rule 28 merely postponed the time that the court of appeal could consider an application for stay of execution.

Thus the ratio decidendi from **Ex Parte Ghana Cable Ltd** cited supra was that as long as an applicant considers that a grant of stay of execution on terms by the high court is not the answer to his prayer for stay of execution, he is entitled to repeat the application in the court of appeal. The court of appeal has jurisdiction to consider the merits of the application and come to its own independent decision.

So what is the effect of the court of appeal's independent decision? This is the crux of the current submissions before us. And the answer was clearly provided on page 118 in **Ex parte Ghana Cable Ltd**. '*In the nature of things, unless the Court of Appeal confirms the decision of the court below, its own order prevails*'.

Conversely, when the court of appeal confirms the decision of the court below or refuses to vary it, the decision of the high court prevails. This was precisely the opinion of the two courts below us. This is why we say that the decisions of the courts below upholding the binding nature of the high court decision of 11th February 2013 that stayed execution of 50% of the judgment sum are both logically and legally sound.

Grounds 1 to 5 of the appeal before us are dismissed on account of the foregoing. Ground 6 of the appeal is also dismissed because the true quantum of the outstanding part of the judgment sum can always be dealt with as part of the substantive appeal which is yet to be heard.

Comment

We think that the fact of the subsisting and valid order of the high court in 2013 could not have prevented the high court from exercising discretion to re-consider the order of 2013 when the application was made in 2019, if there were changed and fresh circumstances that merited the exercise of that discretion. We find the need to draw attention to this position so that judges do not hold themselves disenabled from considering fresh applications, as the two lower courts inferentially did in their opinions. This is especially so when a failure to consider a fresh application will affect the delivery of substantial justice.

It is settled law that when an application to invoke discretionary interlocutory remedies from a court pending a final determination of a suit is refused, that application may be repeated in the same court if the circumstances of the parties or the matters in issue require a fresh consideration of an application of the same nature. The decision of the court of appeal in **Vanderpuye v Nartey [1977] 1 GLR 428** is of great assistance in this matter.

In that suit, the appellant had sought an order of interim protection of assets pending the final determination of a case. The application had been dismissed on the ground that the appellant failed to show a reasonably fair or strong prima facie case in support of his application. He repeated the same application on the ground that he had discovered material which entitled him to move the court anew on the same issue. This second application was dismissed on the ground that the appellant had already brought a similar application unsuccessfully on the same issue.

On appeal, the complaint of the appellant was that the high court had treated the first decision as res judicata. The court of appeal rightly considered that although there is justification in seeking an end to interlocutory applications on the same point, there is nothing preventing the presentation of a fresh motion if fresh material on an issue becomes available.

It pointed out that though an applicant may not have an unrestricted right to bring any number of motions on the same subject before a court, the dimensions of the discretionary power of a court to take a fresh look at an application that had already been dealt with previously is wide enough to control any applicant who seeks to abuse the court's discretionary jurisdiction over interlocutory applications.

In this appeal before us, we are satisfied that the existence of 'fresh or changed circumstances' was not an argument before either court below and so cannot be considered. Essentially, the problem the parties seem to be facing and which has led to delay in the final resolution of the dispute is the failure of the registry to transmit the record of appeal.

The issue of delays in preparation and transmission of appeals is one of the perennial and difficult problems for administration of justice. This court has confronted this issue boldly in **Tetteh Samadzie v The Republic [2017-18] 2 SCLRG (ADAARE) 378**, and **Bonuah**

alias Blay v The Republic [2015-2016] 2 SCGLR 1494, thus making available judicial directions for resolving delays in determination of appeals owing to lost or incomplete records. In the circumstances, even if there has been inordinate delay in putting the appeal together, the duty of both parties is to follow the clear directions of this court in all relevant cases and ensure the disposal of the appeal. The appeal is dismissed in its entirety.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

B. F. ACKAH-YENSU (MS.)
(JUSTICE OF THE SUPREME COURT)

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