

IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL - A C C R A

CORAM - ABBAN, JA [MRS] PRESIDING
MARIAMA OWUSU, JA
I.D. DUOSE, JA

H3/379/07
9TH NOVEMBER, 2007

DAVID ANDREAS HESSE

... PLAINTIFF/RESPONDENT

V E R S U S

**1. INVESTCOM CONSORTIUM
HOLDING S.A.**

2. SCANCOM LTD.

... DEFENDANTS/APPLICANTS

R U L I N G

DUOSE, JA:- On the 2nd day of April, the Commercial Division of the High Court, Accra, entered interlocutory judgment against the 1st Defendant in default of defence. Subsequently on the 26-04-07, the same court refused to set aside the interlocutory judgment stating “No new issue is raised in this application to set aside that Order.” The 1st Defendant/Appellant being dissatisfied with the ruling of the Commercial Court Accra dated 2nd April 2007, filed an appeal against it on 07-05-07 simultaneously with application for stay of proceedings pending appeal.

Mr. F. Ntrakwa submitted that this application had a great chance of success for the following reasons.

- (1) That the Defendants were sued jointly and severally and therefore the proceedings cannot be severed Order 13 r 6 of CI 47.
- (2) That the Defendants brought an application for stay of proceedings pending arbitration which was refused.
- (3) The Judge suo moto ordered the 2nd Defendant to file his defence within a specified period. Before that period expired the Defendants

appointed new Solicitors who promptly filed appropriate notice.

- (4) The Court and the Plaintiff agree to allow the new Solicitors to study the brief thereby creating an estoppel by convention.
- (5) Yet the Plaintiff proceeded to file for judgment in default of defence.
- (6) The Defendants filed application for extension of time to appeal against the earlier ruling of the court refusing to stay proceedings pending arbitration to be heard on 10-04-07 same was served on the Plaintiff on 26-03-07.
- (7) The Plaintiff filed application for judgment in default of defence on 27-03-07 fixed for hearing on 3rd April subsequently brought forward by the court to 2nd April. In effect the application for default judgment which was filed later in time was heard earlier and granted, whereas the application for extension of time to appeal against the ruling of the court dated 02-04-07 was refused.
- (8) By hearing the application of the Plaintiff filed later before the one filed Earlier by the Defendant manifest injustice was caused to defendant.
- (9) That the failure to file the statement of defence within time was in Pursuance of a legal right under S. 8 of the Arbitration Act 1961 Act 38 and Order 64 r 1 of CI. 47. The law required that a party who wished to rely on or to enforce an arbitration provision in a contract or agreement must first apply for stay of proceedings after entry of appearance.

That to file a defence in the circumstances would constitute a new step in the proceedings after notice of an irregularity and thereby be deemed to have waived his right to arbitration. He cited the following legal authorities. **SKANSKA JENSEN INTERNATIONAL VRS.**

KLIMATECHNIK ENGINEERING LTD. 2003/04 SCGLR 698.

- (j) That the defendants at the time they filed for the court to set aside the default judgment exhibited a proposed statement of defence to impress the court that the defendants had a good defence to the action.
- (k) The defences of the 1st and 2nd Defendants are similar almost the same and

continuing action against one while the other cannot be heard in defence because of the interlocutory judgment in default of defence will produce an incongruous legal result and may lengthen litigation should the 1st defendant eventually succeed in setting aside the default judgment.

- (l) Prays for a conditional stay for a definite period as the records have been settled for the appeal to be heard. The court's attention was drawn to the following legal authorities – **BMC GHANA LTD. VRS. ASHANTI GOLDFIELDS BIBIANI LTD. 2005/06 SCGLR 602** – which require the courts to encourage arbitration in particularly in commercial conflicts or disputes.

For the Respondent (Plaintiff) it was submitted that the request of the Applicant (Defendants) is not sustainable and it is unwarranted by law. That this court differently constituted laid down the applicable principles in **TSATSU TSIKATA VRS. THE REPUBLIC** unreported Court of Appeal 28-04-06 therefore this court as presently constituted can not depart from its own decision. He also referred to a sister case of **RICHMOND AGGREY VRS. INVESTICOM CONSORTIUM HOLDINGS** on the same issue; **REPUBLIC VRS. COMMITTEE OF INQUIRY EX-P.R.T. BRISCOE 1976 1 GLR 166: APPAH VRS. BARNOR (CA) 1981/88 1 GLR 489 at 492. BRUTU VRS. AFERIBA 1979 GLR 66 at 570.** Prays for the application to be dismissed.

A close reading of the application before us shows its essential nature it reads:

“MOTION ON NOTICE by counsel for and on behalf of the 1st Defendant Applicant herein praying this Honourable Court for an order to stay proceedings of the Fast Track High Court presided over by Her Lordship CECILIA SOWAH pending appeal against her ruling dated 2nd April 2007 refusing an application to set aside judgment in default of defence against the 1st Defendant Applicant and for.....in the affidavit in support.”

The Notice of appeal was exhibited as Exhibit B55 it reads “TAKE NOTICE that the 1st Defendant/Appellant being dissatisfied with the ruling of the Fast Track High Court presided over by her Lordship Justice CECILIA SOWAH delivered on 2nd April 2007

hereby appeals to the Court of Appeal upon the grounds set out in paragraph B herein and will at the hearing of the appeal, seek the reliefs set out in paragraph C herein.

- Paragraph 'C' reads "That the ruling of the High Court be set aside."

There is no doubting the fact that this application is about and concerns an interlocutory decision of a High Court. The Law applicable to appeals against interlocutory decisions to this court is set out in rule 9 of CI 19.

It states as follows: Subject to any other enactment governing appeals, an appeal shall not be brought after the expiration of (a) twenty-one days in the case of an appeal against an interlocutory decision."

- (b)is not relevant for the purposes of this application.
- (2) The prescribed period within which an appeal may be brought shall be calculated from the date of the decision appealed against.
- (3) An appeal is brought when the notice of appeal is filed in the registry of the court below.
- (4) -----

The appeal filed in this application is one dated 7-05-07 and Marked as Exhibit BS5. The decision appealed against is marked as Exhibit BS1, dated 02-04-07 . The law on the computation of time in the circumstances is S. 22(6) and 23 of the Interpretation Act 1960 CA 4. In **DWOKOTO STOOL & ANOR. VRS. KWAMANG STOOL & ORS.** GBR (1992 – 93) the Supreme Court in a razor edge decision held that a process filed on the last day of the time of computation was competent and did not offend against the rules.

See also **DARKE VRS. DARKE.**

Where it was held again by the Supreme Court that the filing of an appeal on the day following the final day of computation was incompetent. In the instant application it appears that instead of proceeding right on to appeal the Applicant spent time seeking to set aside the default judgment. The comments made by the trial judge in this respect in Exhibit BS 2 is on record. In our considered view it is incontrovertible that between 02-04-07 and 07-05-07 both days inclusive more than the statutory twenty-one days had elapsed. The appeal filed on 07-05-07 is therefore incurably out of time and for that reason incompetent to support the application for stay premised on it. We therefore dismiss same.

In any case and further more the provisions of Order 64 r 1 of CI 47 permits arbitration to proceed simultaneously with trial at the court so it provides that arbitration may be restarted to even at the point of judgment. To say therefore that the 1st Defendant strategically or tactically refrained from filing defence to avoid forfeiting its right to arbitration will not be tenable.

Again we are not moved by the complaint that a convention by estoppel was created when the court allowed or permitted new counsel for the 1st Defendant applicant to study the case at a time that the process being pursued was already out of time. This is so because under the Rules, there is no provision for extension of time to appeal against an interlocutory decision. See Rule 9(1) of C.I. 19.

I.D. DUOSE
JUSTICE OF APPEAL

I agree.

H. ABBAN [MRS]
JUSTICE OF APPEAL

I also agree.

MARIAMA OWUSU [MS]
JUSTICE OF APPEAL

COUNSEL - MR. NTRAKWAH FOR THE 1ST DEFENDANT/APPLICANT.

MR. BENSON NUTSUKPUIE FOR INTERESTED PARTY.

**MR. DAVID ANDREAS HESSE FOR THE PLAINTIFF/
RESPONDENT.**

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