IN THE CIRCUIT COURT (8) HELD IN ACCRA ON THE 1ST DAY OF JUNE, 2023, BEFORE H/H JOJO AMOAH HAGAN

Suit No. C11/25/2023

BETWEEN

NII ASROY HANSEN I……APPLICANT/RESPONDENT
AFIENAA MANTSE
JAMES TOWN, ACCRA.

AND

1.NII SAMPAH KOJO IX……RESPONDENTS/RESPONDENTS
2.NII OTOKUNOR V
3.GYASE ASAFOATSE BANOR

AND

NII AYITEY KONKO……...APPLICANT

RULING

1. The applicant herein filed a motion for a stay of execution of a ruling delivered on 28 February 2023 by this Court differently

constituted. In that ruling the Court dismissed a motion filed by the applicant on 14 December 2022 to set aside an order of the Court [in the nature of a consent judgment] dated 3 October 2023 wherein the Court enforced a customary arbitral award made by Numo Akwah Mensah III, Nae Wulomo at Nae We, Gbese-Accra. The order for enforcement of the customary arbitral award was made pursuant to a motion filed by Nii Asro Hansen I on 26 September 2022 for the registration and enforcement of the award under sections 110 and 111 of the Alternative Dispute Resolution Act, 2010 (Act 798).

2. In his affidavit in support of the motion for a stay of execution, the applicant advanced two grounds for his application: firstly, that he had appealed against the ruling of the Court which stood a very good chance of success, and secondly, that if the ruling was not stayed and the respondents were allowed to go into execution, his appeal would be rendered nugatory should he succeed. The respondents opposed the motion for a stay of execution by an affidavit in opposition wherein they restated some of the arguments advanced by the applicant in his motion to set aside the order for registration and enforcement of the customary arbitral award. Additionally, they submitted that the applicant's motion for a stay of execution was an attempt to "obfuscate the court process and also aimed at denying

Respondents' the fruit of the judgment…" (sic). The respondents averred further that the applicant's appeal had no chance of success given that it had no factual and legal bases.

3. At the hearing of the motion for stay of execution counsel for the applicant argued that the applicant was not a party to the arbitration whose award was registered and adopted by this Court. Prior to the application to set aside the consent judgment, counsel argued that there was another application which was made to the Kaneshie District Court but the said court quashed the said award because the applicant was not a party to the arbitration. This, in his estimation, created an estoppel *per rem judicatam* between the parties herein. He submitted further that it was offensive to natural justice that the applicant as custodian of the Stool Room key and who performed all rites in the stool room was not given a hearing. According to counsel, the applicant only got wind of the application after the consent judgment had been entered. Beyond not having been given a hearing, counsel argued that the subject matter of the arbitration was a matter affecting chieftaincy because the Stool Room key was the property of the Ngleshie Alata Stool and the respondents aimed to get access to the Stool Room key to install their choice of chief. Therefore per

section 76 of the Chieftaincy Act, the matter should have been determined by the Traditional Council and not the Nae Wulomo.

4. Counsel for the respondent vehemently opposed the application. He reminded the Court that the motion before the Court was for a stay of execution in which counsel for the applicant had canvassed similar arguments in his motion to set aside the consent judgment given by this Court and which had been dismissed. He argued further that the matter before the Kaneshie District Court involved different parties and was about the validity of an Alternative Dispute Resolution (ADR) process. He disagreed with counsel for the applicant that the arbitral award touched on chieftaincy matters and argued that the Court only sought to give effect to an arbitral award pursuant to sections 110 and 111 of the ADR Act. As far as counsel was concerned the motion for stay was intended to frustrate the process and therefore was without merit, incompetent and irregular.

5. Before I proceed to deal with the relevant issue before the Court, I shall deal with the red herrings—estoppel *per rem judicatam* and a cause or matter affecting chieftaincy. In respect of the former, I have examined the ruling of the Kaneshie District Court which was

exhibited in the affidavit in support of the motion to set aside the consent judgment. Although all the parties herein but Nii Aroy Hansen I were parties to that suit, nowhere did that Court consider the merits of the arbitral award which was the subject matter of that suit. This leaves me in the dark as to what the arbitration and the arbitral award were all about. Consequently, the issue of estoppel *per rem judicatam* does not arise and assuming it did, a motion is not the right procedure to adopt to set aside the consent judgment of the Court.

6. On the allegation that the cause before the Nae Wulomo was a matter affecting chieftaincy which ought to have been determined by a Traditional Council, it would seem counsel for the applicant did not advert his mind to section 1 of the ADR Act which does not consider chieftaincy matters as one of the causes that cannot be dealt with by ADR. Chieftaincy matters may be resolved by ADR and this is exactly what took place before the Nae Wulomo. Having disposed of these two red herrings, I shall comment briefly on the nature of an arbitral award and the motion for the registration and enforcement of the customary award.

7. Arbitral awards, including customary arbitral awards are decisions binding on the parties to the arbitration and are akin to a

judgment of a court except that, depending on the jurisdiction concerned, they ought to be adopted by a court or registered for purposes of execution given that arbitrators or arbitral panels and centres do not have the powers of execution. In our jurisdiction and with particular reference to customary arbitration, an arbitral award is binding on the parties thereto notwithstanding that it is not in writing or registered—see section 109 of the ADR Act. It ought, however, to be in writing for purposes of registration—see subsection (2) of section 110 of the ADR Act. By the combined effect of subsections (1) and (2) of section 110 of the ADR Act, a customary arbitral award must be in writing for purposes of registration, and enforcement. Once it is duly registered, such an award may be enforced in the same manner as a judgment of the Court—see section 111 of the ADR Act.

8. In my opinion, what these provisions quoted supra mean is that once a written customary award is registered, it may be enforced in the same manner as a judgment of the Court. Therefore, it ought not to be formally adopted as a consent judgment by the Court as a precondition for its enforcement. A fortiori, the enforcement of such an award cannot be by the consent of the parties because they cannot resile from the award—they cannot resile from the customary

arbitration proceedings once they have submitted themselves to the same—see 105 of the ADR Act.

9. Admittedly, the procedure for the registration of a written customary arbitral award is not provided in the ADR Act but I should think that it suffices if it is registered at the Registry of the Court although a party may, *ex abundanti cautela,* move the Court for same to be registered. I shall now proceed to deal with the substantive issue which is whether, from the circumstances of this case, the Court ought to grant the motion for a stay of execution.

10. The principles a Court is required to consider in a motion for a stay of execution are fairly settled. In *Djokoto & Amissah v. BBC Industrials Co (Ghana) Ltd & City Express Bus Services Ltd [2011] 2 SCGLR 825* the Supreme Court held that in deciding the application the Court must firstly carefully examine the judgment appealed against and the orders or decrees sought to be executed to consider whether the appeal would not be rendered nugatory should the Court refuse it only for the applicant to win appeal. Secondly, the applicant has the burden of demonstrating that the appeal discloses arguable points of law to

be decided by the appellate Court. Thirdly, the Court might in appropriate cases, grant a stay where the balance of hardship would

be against the applicant. And fourthly, in applying those principles, each case must be determined on its own merits. These are the general principles I am obligated to consider in the exercise of my discretion on whether to grant or refuse the motion before me. In a variation of *Djokoto* above, the learned author Mr Justice S.A. Brobbey, relying on the case of *Nana Kwasi Agyeman VIII v. Nana Hima Dekyi XIII [1982-83] GLR 453* at page 433 of his book, *Practice & Procedure in the Trial Court and Tribunals of Ghana (2nd edn Advanced Legal Publications Accra)*, posited the following factors for consideration in motions for stay of execution:

a) *if the court is satisfied upon any affidavit or facts proved of the conduct of the defeated party that he was bringing the appeal not bona fide to test the rightness of the judgment but for a collateral purpose the application should be refused;*

b) *a court should not stay execution unless there were exceptional circumstances warranting a stay because it is well established that a successful party should not be deprived of the fruits of his victory;*

c) *where the court was satisfied that the appeal was frivolous because the grounds of appeal contained no*

merit and therefore there was no chance of it succeeding, it should refuse an application for stay;

d) *whether the grant of refusal of an application would work greater hardship on either party; and*

e) *that the appeal, if successful, would not be rendered nugatory.*

11. Applying these principles to the facts of the instant case, it would be recalled that the plaint of the applicant [which is also a ground of appeal] was that orders were made in the arbitral award that affect him in an arbitral proceeding of which he had no notice and it is this arbitral award that has been enforced by the Court in the impugned consent judgment. I have examined the said customary arbitral award [exhibit A exhibited in the affidavit in support of the motion for registration and enforcement of the award] and it unequivocally affects the applicant who was not a party thereto.

12. The complainant in the arbitration, Nii Asroy Hansen I acting through his agent, alleged that the respondents in that arbitration who apart from Nii Asroy Hansen I are all respondents herein were

custodians of the keys and managers of the Stool Room. It was alleged that the respondents had locked up the said Room for the past four

(4) years thereby preventing ingress therein for the performance of the necessary rites and rituals. The complainant, therefore, requested the respondents therein to explain why they had undertaken that course of action. In their response, the respondents alleged that the keys to the Stool Room were in the custody of the applicant herein. Additionally, Nii Otukunor [the second respondent therein who is also a respondent herein] alleged *that "despite being the rightful custodian*

of the keys to the Stool Room, Nii Ayite Konko [the applicant herein] *without recourse to him or any traditional authority whatsoever, had for the past four (4) years had refused to release the keys to him as the custodian despite the arrangement he had with him to keep the keys because of his proximity to the Stool Room at Jamestown"* (sic). He further alleged that the applicant herein had been preventing the respondents therein *"from entering the Stool Room to perform the necessary customary rites and rituals."* The second respondent additionally accused the applicant herein for being intransigent in his position because he was aligned to a faction of some chief in Ngleshie Alata Paramount Stool, *"who were sowing seeds of discord stemming from illegal installation of chiefs in flagrant violation of section 57(1) of the Chieftaincy Act, 2008 (Act 759) regarding procedures for installation of a chief"* (sic).

13. Based on these testimonies the Nae Wulomo's panel found, inter alia, that the second respondent therein had given the applicant the keys to the Stool Room; and that the applicant had refused to release the keys to the respondents. Consequently, the panel decided, inter alia, that the *"Respondents, as customary custodians of the keys and managers of the Stool Room should, as a matter of urgency, collect the keys to the Stool Room from Nii Ayite Konko* [the applicant] *in view of the fact that they (Respondents) have no mandate to release the keys to him."*

14. These claims, finding and determinations made in the impugned arbitral proceedings as I have shown above, directly affect the applicant and seek to compel him to undertake a course of action in an arbitral proceeding to which he was not part and presumably did not voluntarily submit. By its nature, customary arbitration is voluntary: see *Budu II v Caesar [1959] GLR 410*. According to the United Nations Conference on Trade and Development, an *"arbitration agreement provides the basis for arbitration. It is defined as an*

agreement to submit present or future disputes to arbitration … an agreement by which the parties to a dispute that has already arisen

submit the dispute to arbitration."[1] To buttress the voluntary nature of arbitration, sections 89 and 90 of the ADR Act puts the matter beyond doubt that a party ought to submit to customary arbitration voluntarily and cannot thereby be compelled. It is, therefore, a party who voluntarily submits to customary arbitration, and persons claiming through that person who are bound by the decision of a customary arbitrator or panel in respect of the dispute brought before them. The corollary to this is that an award in such a proceeding cannot be enforced against a person who is not voluntarily submitted to the jurisdiction of the customary arbitrator or who is neither a party to such a proceeding nor a successor in title or a person claiming through a party to such a proceeding.

15. In the instant case, the award was duly registered and enforced, and an entry of judgment has been filed with the chief aim of enforcing the award against the applicant who was not a party. This in my estimation may be prejudicial to the interest of the applicant and without seeking to appropriate the jurisdiction of the appellate court, may be unenforceable against him. I am therefore satisfied, being guided by the parameters laid down by Justice Brobbey above that the

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[1] Dispute Settlement<https://unctad.org/system/files/official-document/edmmisc232add39_en.pdf> accessed 28 May 2023

applicant is *bringing the appeal bona fide to test the rightness of the* order enforcing the arbitral award against him*;* that the applicant has shown *exceptional circumstances warranting a stay; that the appeal* is not *frivolous because the grounds of appeal contains merit and therefore* may have a *chance of* success*;* that to refuse a stay *would work greater hardship* on the applicant against whom execution of the arbitral award would be levied when the validity of the arbitral proceeding was in question and his right to natural justice may have been violated; and *that the appeal, if successful, would be rendered nugatory* if a stay is not granted because the applicant would be compelled to give up the keys to the Stool Room and that would be prejudicial to his interest.

16. I am not unmindful of the fact that the applicant does not by his motion seek to stay the consent judgment entered by the Court but rather the non-executable ruling of the Court which dismissed his motion to set aside the consent judgment. That would have been fatal to his motion in the past. Now the Court must look at the effect of the refusal on the execution process to determine whether a refusal of the non-executable decision would in effect remove any bar to execution

which would in essence render a victory on appeal nugatory: see the

unreported case of *Ogyeadom Obranu Kwesi Atta VI v Ghana*

Telecommunications CO. LTD & Lands Commission civil motion no. J8/131/2019 dated 28 April 2020. In the instant case, the practical effect of refusing to grant the motion for a stay of execution of the ruling which dismissed the motion to set aside the consent judgment would be the execution of the impugned consent judgment against the applicant. Accordingly, I hereby grant a stay of execution of the consent judgment entered by this Court on 3 October 2022 which purported to enforce the arbitral award of the Nae Wulomo, Gbese, Accra dated 4 July 2022. Cost of GHC2,000.00 is awarded against the respondents jointly.

JOJO AMOAH HAGAN
JUDGE, CIRCUIT COURT.