IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- AD 2008

CORAM: AKUFFO,(MS) J.S.C (PRESIDING)

DATE-BAH, J.S.C

ADINYIRA, (MRS) J.S.C

OWUSU(MS) J.S.C.

DOTSE, J.S.C

SUIT NO CM J8/44/2008

10th December, 2008

ATTORNEY GENERAL & ANOR.

VRS.

APAADE LODGE LIMITED

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RULING

ADINYIRA (MRS),J.S.C:

The facts briefly are that on 3 March 2006, the Plaintiff/respondent (hereinafter respondent) commenced an action at the High Court Accra against the Attorney General as 1st defendant and the Ghana Football Association as the 2nd defendant (hereinafter applicant) jointly and severally, for the recovery of the sum of ¢422, 148,026 with interest being debt owed in respect of hotel and restaurant services provided by the plaintiff to the Ministry of Education, Youth and Sports and the applicant. The 1st defendant entered appearance but failed to file a defence, and the applicant herein did not enter any appearance. On 4 April 2006, upon an application by the respondent, the High Court entered judgment against the defendants, jointly and severally,

in default of defence and appearance respectively. The respondent took steps to execute the judgment, and then the applicant applied to the High Court to set aside the default judgment on the main ground that it was not liable for the debt, as the understanding was that it was the 1st defendant who was to settle the bills. The High Court refused to set aside the judgment. The applicant therefore appealed to the Court of Appeal against this refusal but was again unsuccessful by a judgment dated 22 May2008. The applicant filed an appeal against the judgment of the Court of Appeal and then applied for a stay of execution of the default judgment of the High Court dated 4 April 2006. The Court of Appeal refused the application on the ground that the applicant had not appealed against the said judgment.

The applicant has now brought a repeat application before us and has urged upon this Court to stay the judgment of the High Court dated 4 April 2006. Counsel for the applicant conceded in his submissions that the judgment of the Court of Appeal dated 22 May 2008 against which he had lodged an appeal was non-executable and therefore cannot be stayed. He further conceded that he had not appealed against the judgment of the High Court dated 4 April 2006 but argued that this failure does not mean this Court has no jurisdiction to entertain his application. The basis of his argument is two fold, namely : 1) The Supreme Court has jurisdiction under Article 129(4) of the 1992 Constitution and the Courts Act 1993 (Act 459) to stay the judgment and 2) that procedurally one cannot legitimately appeal against a default judgment and therefore in the interest of justice and pursuant to the inherent jurisdiction of the Court, a stay of execution against a default judgment could be granted to ensure that there is no failure of justice in the likelihood event that the appeal is successful.

We will now deal with these points seriatim..

1. The Inherent Jurisdiction of the Supreme Court under Article 129 (4) of the 1992 Constitution

The applicant has brought a repeat application before us and has urged upon this Court to stay the judgment of the High Court dated 4 April 2006 by the exercise of our inherent jurisdiction under Article 129(4) of the 1992 Constitution (similar provision under section 2 (4) of the Courts Act 1993, Act 459), which provides as follows:

“For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law.”

This invitation by the applicant is in effect asking this Court to depart from well-laid rules and procedures with regard to application for stay of execution pending appeal. It is beginning to become a fashion for applications to be brought to this Supreme Court ingeniously inviting us to depart from well laid rules and procedures clearly defined under the Constitution and other enactments as well as case law, to assume concurrent jurisdiction with the High Court and other adjudicating tribunals under the ambit of our

inherent jurisdiction and /or in the exercise of our supervisory jurisdiction, where in those instances the applicants are met with difficulties arising from wrong procedural steps they have taken. It is worthwhile to refer to a few instances.

In the case of Edusei (No.1) v. Attorney General and Anr. [1996-97] SCGLR 1, the Supreme Court by a majority decision dismissed an action brought by the applicant for the enforcement of his fundamental right to freedom of movement. The brief facts are that, in 1992, the applicant who was said to have engaged with others in espionage on behalf of the United States of America was allowed to leave the country. But before he left his Ghanaian passport was seized. In 1994 he wanted to return to the country he therefore wrote to the Minister of Foreign Affairs for the return of his old passport to enable him to apply for a new one. He received no response. He therefore instituted an action in the Supreme Court and claimed inter alia that as a citizen of Ghana by birth he had the constitutional right to enter Ghana and a fortiori to a passport to enable him exercise and enjoy that right. In their statement of case the defendants contended inter alia that since the plaintiff was seeking an enforcement of his right of freedom of movement- a fundamental human right, the court has no jurisdiction to determine the claim because under articles 33 (1) and 130(1) of the 1992 Constitution, it was the High Court and not the Supreme Court that had the exclusive jurisdiction to entertain that suit. The Supreme Court by a majority decision upheld the submission by the defendants and dismissed the plaintiff's action. Subsequently, in an application for a review reported in the case of Edusei (No.2) v. Attorney General [1998-99] SCGLR 753 the ambit of Article 129(4) of the 1992 Constitution was considered in the respective judgments of their Lordships Kpegah and Atuguba JJSC.

According to Atuguba JSC at page 798, the applicant in his statement of case had in substance submitted that:

"Once the jurisdiction of the Supreme Court has been properly invoked... that court has power under article 129(4) of the Constitution to exercise 'all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law.' This we submit includes the power to enforce the human rights provisions of the Constitution"

However according to his Lordship Atuguba:

"I have come to the conclusion that this court indeed has a concurrent jurisdiction with the High Court in the enforcement of the Fundamental Human Rights by a process of reasoning that is not quite the same as the applicant. It seems to me that if one goes by the applicant's route alone, it is workable only where the issue of fundamental rights is incidental or ancillary to the main original action before this court. In other words article 129(4) cannot by itself confer jurisdiction ab initio. But this has all along been the core ratio decidendi of such cases as Tait v. Ghana Airways Corporation [1970] 2 G & G 527 and Yiadom Boakye v. Amaniampong [1981] GLR 3."(Emphasis mine.)

On his part, Kpegah J.S.C. at page 775 in a more expansive manner reflected on Article 129(4) in the following words:

"There is some talk of this court assuming jurisdiction under article 129(4) of the Constitution which provides as follows:

“For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law. (The emphasis mine)”

The above provision of the Constitution does not permit the Supreme Court to claim concurrent original jurisdiction with all adjudicating tribunals created by the Constitution or under any law. The influential condition is that the Supreme Court must first be determining a matter “within its jurisdiction” before it can have all the powers, authority and jurisdiction vested in any court”

We agree with his lordship that:

“A distinction must therefore be made between “jurisdiction” properly so-called and “judicial power.” The two concepts are often confused as meaning the same thing. As stated in Halsbury’s Laws of England, Vol. 9, (3rd ed.) at pp 350-351:

“Jurisdiction in its accepted connotation is often defined as the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means.”

And perhaps the most distinguishing factors between “jurisdiction” and “judicial power” lies in the fact that judicial power is often exercised by all the courts in the exercise of their legitimate jurisdiction, but none of the courts possesses all the jurisdiction to enable it exercise judicial power.”

As his Lordship explained further:

“Unless this distinction is maintained, it can be argued that the Supreme Court has original jurisdiction in chieftaincy matters under Article 129(4) of the Constitution. But it could however be said that when the Supreme Court is properly seised with an appeal from the judicial committee of the National House of Chiefs in a chieftaincy matter under article 131(4), it has all the powers and jurisdiction of the lower court or adjudicating tribunal. I am therefore of the firm view that before article 129(4) can be resorted to by this Court, the matter for determination must be “within its jurisdiction”. I dare say that article 129(4) will be more relevant and visible when the Supreme Court, being the final appellate court of the land, is exercising its appellate, review and supervisory jurisdictions rather than its exclusive original or reference jurisdictions. I am not to be taken to mean that this article can never be invoked in the exercise of the two latter jurisdictions.”

In another case of Accra Recreational Complex Ltd. vs. Lands Commission Supreme Court , dated 20th June 2007, unreported, this time the case turned on the issue whether the Supreme Court should extend its powers under the prerogative orders. The relief the applicant was seeking was a stay of

proceedings at the High Court [Fast Track Division] Accra pending the final determination of his appeal in this Court. This was clearly a relief appropriately covered by rule 20 of the Supreme Court Rules, CI.16. The applicant in his statement of case stated inter alia that: "the considerations for stay under Article 132 of the Constitution should involve considerations that go beyond special rules relating to stay of proceedings. It involves the exercise of general supervisory jurisdiction over proceedings of all courts, being the final and highest court of the land."

The Supreme Court firmly refused this subtle invitation to expand its supervisory powers. His Lordship Date Bah JSC succinctly said:

"The purpose of this application is not really to seek supervision of the court below in relation to an error of law, but rather to freeze the status quo pending the hearing of the appeal. This is not a proper subject matter for the exercise of this Court's supervisory jurisdiction, but rather for the usual process of interlocutory application for stay of proceedings pending an appeal, which is provided for in rule 20 of the Supreme Court Rules (supra)."

We now turn our attention to the application before us. Following the above discourse, it is quite clear that the Supreme Court can properly entertain this application only if it has jurisdiction in this matter. Ordinarily the Supreme Court in the exercise of its appellate jurisdiction can only stay executable judgments or orders of the court or body from which the appeal emanated. See the oft cited cases of Eboe v. Eboe [1961] 1GLR 432, Mensah v Ghana Football Association [988-89] 1GLR 1, and NB. Landmark Ltd. v. Lakiani [2001-2002] SCGLR 318. The statutory framework governing interlocutory application for stay of execution pending appeal is by rule 20 of the Supreme Court Rules, C.I 16, which provides that:

"20. Effect of Appeal

(1) A civil appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed against except in so far as the Court or the court below may otherwise order. (The emphasis mine.)

(2) Subject to the Rules and to any other enactment governing appeals, an application for stay of execution or of proceedings shall first be made to the court below and if the court refuses to grant the application, the applicant may repeat the application before the Court for determination."

The only appeal properly pending before this Court is the one against the judgment of the Court of Appeal dated 22 May 2008. Consequently, it is only in respect of that judgment that has been appealed against that this court can properly be invited to exercise its discretion to grant a stay if there is an executable order and the application is with merit. It is in the exercise of that jurisdiction then that article 129(4) is applicable.

The applicant did not appeal against the said default judgment; Counsel however argues that the proper practice and procedure is not to appeal against a default judgment but to set it aside. We will therefore consider the other leg of Counsel's submissions

2. Practice and Procedure -Appeal -Default Judgment-Refusal to Set Aside Default Judgment

As just been mentioned it is Counsel's submission that the proper practice and procedure is not to appeal against a default judgment but to set it aside. We quite agree with this as this is what is provided for under Order 10 rule 8, Order 13 rule 8 and Order14 rule 9 respectively of the High Court (Civil Procedure) Rules C.I. 47, in respect of default judgment obtained by default of appearance, pleadings or by summary judgment respectively. However with due respect to Counsel, this does not mean that you cannot appeal against a default judgment. You may legitimately appeal against a default judgment only after a prior application to have the said default judgment set aside has been refused. So where a High Court refuses to set aside a judgment given in default of appearance or defence, the proper practice is that the applicant or judgment debtor has to file an appeal to the Court of Appeal, against both the refusal and the default judgment. This proposition is made clear in the cases of NB. Landmark Ltd. v. Lakiani [2001-2002] SCGLR318 and Morkor V. Kuma [1998-99] SCGLR620.

In the NB. Landmark Ltd. v. Lakiani supra the judgment debtor appealed to the Court of Appeal against the refusal to set aside a default judgment by the Circuit Court. It then applied for a stay of execution of the default judgment and it was granted by the Court of Appeal. On appeal to the Supreme Court, by the judgment creditor, the Court per Acquah JSC (as he then was) held inter alia at page 321, that:

"The appeal was not in respect of the main judgment of 2 November 1998 which ordered the defendant to give up vacant possession of the premises. A stay of execution can of course be applied to stay the substantive judgment if an appeal had been filed against it and the relevant application for stay is filed"

(The emphasis mine)

In the Morkor v Kuma case supra an appeal was actually filed against the default judgment after the refusal to set the same aside by the High Court. At the Court of Appeal one of the issues for determination centered on the date from which to compute time within which to lodge an appeal against a default judgment after the refusal by the High Court to set aside same. The Court of Appeal held that the computation of time within which to appeal must be from the date of the default judgment and not from the date of refusal to set same aside. The appeal was consequently dismissed as statute barred as it was filed out of time, among other grounds. On appeal to the Supreme Court, this Court was of the view that the time of computation for appeal to the Court of Appeal was after the refusal to set aside the judgment, as that was when the judgment became final. Her Ladyship, Sophia Akuffo J.S.C. delivering the lead judgment of the court held at page 629 that:

"In the light of the foregoing, it appears that where summary judgment had been obtained in the absence of the defendants and for an amount greater than what was in fact due (as acknowledged by the respondent), the summary judgment could not be treated as final once the application was filed to set the same aside. Consequently, the proper date from which to compute the time within which an appeal could be made to the Court of Appeal was 15 July 1992, the date of Sampson's ruling rather than the date of summary judgment. The appeal was therefore within time and not statute-barred. For us to conclude otherwise would be to neutralize the effect of Order 14 r11 since, in the event the court does not dispose of an application within 6 months from the date that a

summary judgment is entered, an applicant would also have lost forever, any chance of appeal."

The Morkor v Kuma case supra was in relation to a summary judgment under Order 14 of the then High Court (Civil Procedure) Rules, 1954 as amended, but in our respectful view, the same sound principle applies to judgments in default of appearance and defence under Orders 10 and 13 of C.I. 47 respectively

The applicant before us did not appeal against the said default judgment, the Court of appeal did not make any executable orders in respect of the said judgment, where then lies our jurisdiction to entertain an application for stay of execution of a judgment which is not on appeal? Though this Court in the exercise of its appellate jurisdiction has power to grant stay of execution pending appeal, such power is only exercisable in relation to executable orders of the Court from which the appeal emanated. It is in the exercise of such jurisdiction that it is clothed with all the judicial powers conferred by Article 129 (4) of the Constitution. As Atuguba J.S.C. puts it in the case of The Republic v. Dr. Kwame Dufuor Ex parte: Nicholas Edwards Asare, Supreme Court, Civil Motion No. J8/13/2008, dated 20 February 2008 unreported:

"Article 129 (4) is auxiliary to the Supreme Court but is not the fons et origo of jurisdiction over a matter over which it has no jurisdiction".

We wish to emphasise that Article 129(4) cannot be used as a springboard to cloth us with jurisdiction where there is no appeal pending against the judgment sought to be stayed.

We must preserve the integrity of the appeal process. The applicant cannot seek to take advantage of the difficulties created by his omission to file an appeal against the said judgment of 4 April 2006. Counsel for the applicant has not advanced any sufficient reasons to persuade us to depart from well-laid rules and procedures and precedents. This application is without merit and ought to be dismissed and is hereby dismissed.

S. O. A. ADINYIRA, (MRS)

(JUSTICE OF THE SUPREME COURT)

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