IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: WOOD (MRS.) C.J, (PRESIDING)
BROBBEY, JSC
OWUSU (MS.), JSC
YEBOAH, JSC
BONNIE, JSC

CIVIL APPEAL

№ J4/36/2011

13TH JANUARY,2012

1. DUODU AMOO ----- **PLAINTIFFS/RESPONDENTS/**
2. MADAM NAADU **RESPONDENTS**

VRS.

1. BERNARD NIMAKO AKOWUAH … **DEFENDANTS/ APPELLANTS/**
2. SAMUEL NII OTU ANKRAH **APPELLANTS**

J U D G M E N T

ANIN YEBOAH, JSC;

The facts of this appeal appear not to be in serious controversy. One Samuel Nii Otoo Ankrah commenced an action against one Joshua Kpakpo Allotey at the High Court, Accra. Before the case could be disposed of the plaintiff Samuel Nii Otoo Ankrah applied for absconding warrant against the said Joshua Kpakpo Allotey as he had information

that he was preparing to leave the jurisdiction. It was granted by Her Ladyship Justice Emelia Aryee.

The claim was for refund of an amount of US$8, 850. The defendant in that case was arrested with the warrant and was granted bail in the sum of ¢1,500,000.00 with two sureties.

Two persons namely: Eugene Darko Amoako and Benjamin Akwei Allotey executed bail bonds as sureties for Joshua Kpakpo Allotey. The two bail bonds were tendered in evidence at the trial court in this case. The two sureties were named in exhibits F1 and F2. Exhibit F was the bail bond while exhibits F1 and F2 were the justification of sureties' forms. Exhibit F2 which was executed on the 3/12/1987 the same day exhibits F and F1 were executed, was amended by the cancellation of the name and residential address of Benjamin Akwei Allotey and the insertion thereof of the name of ADJIN OKWABI with his residential address. There were other serious irregularities bordering on the thumbprint affixed to exhibit F2 and signature of Benjamin Akwei Allotey which was made before the purported amendment.

It was apparent that even though the name Benjamin Akwei Allotey was cancelled, his signature as one of the two sureties stood. Be that as it may, the case against the said Joshua Kpakpo Allotey ended with a

summary judgment by which the defendant in that suit Joshua Kpakpo Allotey was adjudged to pay an amount of ¢2,508,903.28 inclusive of interest and cost.

In the process of levying execution of the judgment against Joshua Kpakpo Allotey, H/№ B182/12 Odorkor, Accra owned by Adjin Okwabi at the time was sold at a public auction and purchased by one B.N.AKOWUAH who is the appellant in this appeal. The respondent herein who described herself as the beneficiary of the property sold at the auction brought an action at the High Court, Accra to set aside the writ of possession which culminated in the sale, declaration of title and recovery of possession of the auctioned house and other ancillary reliefs.

The statement of claim and the evidence led appeared to be very brief. In the statement of claim the respondent herein pleaded that in suit number 3626/87, one Samuel Nii Otu Ankrah as plaintiff was adjudged to recover a certain amount of money as judgment debt from Joshua Kpakpo Allotey as defendant in a suit at the High Court, Accra. It was further pleaded that the entire judgment debt was paid to the said Samuel Nii Otu Ankrah (defendant/judgment-creditor), nevertheless he proceeded to levy execution against the property of Adjin Okwabi ostensibly to satisfy the judgment debt.

The auction of the house numbered as B. 182/12 Odorkor, Accra took place and same was bought by one Bernard Nimako Ankowuah The evidence of the respondent sought to establish the relationship between her later father Adjin Okwabi and Joshua Kpakpo Allotey as uncle and a nephew. It does appear that the respondent herein is the cousin of Joshua Kpakpo Allotey. It was contended in her evidence that the entire judgment debt was paid before the auction sale was conducted out of which the appellant herein bought the house in dispute.

The defendant/judgment-debtor in the earlier suit one Joshua Kpakpo Allotey also gave evidence for the respondent herein and sated that he had to complete exhibits F, F1 and F2 in connection with the bail and was advised not to leave the jurisdiction until the said suit had been determined.

It was to secure his presence that his uncle Adjin Okwabi used his own house as security. According to him he had as at 31/1/1989 paid the entire judgment debt by sending money on regular basis from the United States of America for the defraying of the judgment debt as it appeared on the face of the entry of judgment filed on behalf of the judgment-creditor in that suit. Joshua Kpakpo Allotey (PW1) tendered exhibit M which is a statement of accounts of the payments made to the judgment/creditor in the earlier suit and claimed that he did not receive

any reaction from the judgment/creditor. His evidence on the satisfaction of the judgment debt was corroborated by PW1 who tendered exhibit N and the Entry of Judgment [exhibit E] and an amended Entry of Judgment subsequently filed as exhibit P which amended the judgment debt to ¢4, 413, 913.75 instead of the ¢2, 508, 903. 28.

On the part of the appellant herein his case was very simple. In his pleadings and the evidence led at the trial, he contended that H/№ B182/12 Odorkor, Accra was purchased by him at a public auction authorized by a curt of law and had no notice of any interest in the property. He further contended that the judgment debt for which execution was levied had not been paid and called a witness to give evidence of several unsuccessful attempts to set aside the sale.

Given the nature of the pleadings, few issues emerged for determination. The learned trial judge in her judgment entered judgment in favour of the respondent herein declaring the sale unlawful and further, there was no liability incurred by the respondent as regards the bail bond, as to her, the said Joshua Kpakpo Allotey attended court up to the finality of the case. Another point on which the respondent's claim was upheld was that there were serious irregularities apparent in exhibit F2 (Justification of Sureties) which according to the learned trial

judge was not executed by Adjin Okwabi as it did not bear his thumbprint as an illiterate as required by law. She also found that the cancellation of the name of Benjamin Akwei and substitution thereof of Adjin Okwabi amounted to “definite irregularities in the whole execution” to hold Adjin Okwabi liable. The learned trial judge was of the view that the liabilities of the sureties was to the tune of ¢1,500,000.00 which they offered to pay upon default on the part of Joshua Kpakpo Allotey as spelt out in the bail bond executed by the sureties. Lastly, the Amended Entry of Judgment out of which the execution was levied was declared void by the trial judge.

The appellant herein lodged an appeal at the Court of Appeal on several grounds. The Court of Appeal on 29/07/2010, in a judgment which virtually sought to endorse all the fact findings and the law applied by the trial judge unanimously dismissed the appeal. This appeal before this court is the second appeal. Learned counsel for the appellant has filed three grounds of appeal to seek the reversal of the judgment of the Court of Appeal which affirmed the judgment of the High Court.

In arguing the first ground of appeal, learned counsel for the appellant disputed the concurrent finding by the two lower courts that the judgment debt was not fully paid. He attacks the Court of Appeal and the High Court’s judgments on the grounds that the two lower courts did not

address their minds to the fact that contrary to their finding that the whole judgment debt had been paid, paragraph 3 of the statement of claim in this case stated expressly that the judgment debt was paid during the pendency of this case at a time when the appellant had already bought the house. In as much as I agree with counsel that a party is bound by his pleadings the evidence led which in this case was basically documentary, established conclusively by reference to the payment made as per exhibits “G”, “H”, “J”, “K”, “L” and “M” that as at 31/1/89 the amount of ¢2,508,910.00 had been paid.

If indeed the whole amount of the judgment debt had not been paid before the execution was levied the sale would on that ground be regular and the appellant would have obviously raised this in the statement of defence. It was an issue set down in the summons for directions after close of pleading which was resolved in favour of the respondents based on the uncontroverted documentary evidence on record. As the trial judge found as a fact based on the evidence, which was concurred by the Court of Appeal, this court can only reverse the concurrent findings if the appellant demonstrates convincingly that the findings were not supported by the evidence. See ACHORO V AKANFELA [1996 – 7] SCGLR 209 and OBRASIWA II & ORS V OTU & ORS [1996-7] SCGLR 618.

As this court concurs in the two lower courts finding that the judgment debt had been fully paid before the execution, the learned trial judge was right to declare the sale to the appellant void. In KARIMU V GHASSOUB [1970] CC 104 CA, a judgment debt of £1,816.00 in a previous suit was left unpaid and the judgment-creditor sought to levy execution by fi.fa for the unpaid amount. The house was sold at a public auction. Unknown to the purchaser, the entire judgment debt had been paid two days before the auction sale, the money having been paid in two installments to the judgment-creditor's solicitor. The High Court set aside the sale. On appeal, the defence of the appellant was that he was a bona fide purchaser for value without notice and that the sale was not void ab initio. In dismissing the appeal, the Court of Appeal held that the purpose of issuing a writ of fi.fa is not necessarily to sell the property of the judgment-debtor but to compel the judgment-debtor to pay the judgment debt and as the judgment debt had been paid in full before the sale, the execution was not void ab initio but was void ex post facto and passed no title to the purchaser. The Court of Appeal proceeded to lay down the law that the legal right to seize the property by way of writ of fi.fa ceased to exist after payment of the judgment debt in full. On this ground the court below was right in holding that the sale was void. In this case the judgment debt had been paid in full as at 31/1/89 and the "Notice of filing of Accounts pursuant to Order" of the court was filed on 2/3/89 before the sale took place on 12/06/1989, more than three

months after the payment of the entire judgment debt. It stands on the authority of the above-cited case that the sale was obviously void and passed no title to the appellant who claims to be purchaser for valuable consideration. See KWABENA V ANINKORA & OR [1964] GLR 299 SC

Another ground which was argued touches on exhibits "F", "F1" and "F2" out of which the learned judge at the High Court found as a fact that the said Adjin Okwabi was not a surety in the case in which his nephew Joshua Kpakpo Allotey was arrested. The Court of Appeal also concurred on this and stated that exhibit "F2" stood contradicted and it was void as it did not in any case create any legal obligations on the said Adjin Okwabi. The two lower courts both advanced convincing reasons to support this finding. This was what the Court of Appeal said:

> "Now on the question of the sureties, from the evidence and exhibits F,F1 it is clear the plaintiff's deceased father was not one of the sureties. However, on exhibit F2 one of the names on the Justification of Sureties was cancelled and the name of Adjin Okwabi written at the top and the address again at the top of the cancelled one. Here the crucial point is at the bottom of the form, and in place of the signature of Benjamin Akwei Allotey one of the original sureties, there is the writing "thumbprint" but indeed there was no thumbprint, (Adjin Okwabi being illiterate) which in effect

meant he had not executed it an it also still had the signature of the surety who had earlier executed it. There were definite irregularities in the whole execution process which proved to be fatal"

It is settled on authorities like ZABRAMA V SEGBEDZI [1991] 2 GLR 221, CA, BOAKYEM V ANSAH [1963] 2 GLR 223 and WAYA V BYROUTHY [1958] 3 WALR 413 that to bind an illiterate to a document evidence must be led to prove that same was read and interpreted to the illiterate in the language he understands before he made his mark or thumbprint. The onus is always on the party who wants to bind the illiterate to the document.

In this case, both courts from the evidence found as a fact that the cancellation of a court process and the serious irregularities associated with document like non-execution of the bond by Adjin Okwabi makes the document bad in law as Adjin Okwabi never was not a surety as he never executed the bail bond or the justification of sureties. These findings are supported by the evidence and I think no convincing reasons have been urged on this court for us to set aside those findings.

An official court process or document like bail bond or Justification of Sureties should be free from irregularities to leave no one in doubt that

the surety executed the bond. Cancellations and lack of signature or thumbprint or mark apparent on the face of the document as happened in this case would create serious doubts as to its authenticity in the minds of jurists as it occurred in this case.

The last ground of appeal which was argued was the finding by Court of Appeal that the appellant was not entitled to the sum stated on the Amended Entry of Judgment. In practice, judgment –creditors seeking to levy execution file Entry of Judgment and serve same on the judgment-debtor as a prelude to execution. It is a formal notification to the judgment-debtor of the reliefs granted by the court which the judgment-creditor may seek to enforce. Under the rules of court as it then stood after the judgment was delivered the judgment-creditor was enjoined by Order 41 rr 1,3 and 5 to officially notify the judgment-debtor the terms of the judgment and what was due to be paid. See NORA STORES V UNION INDUSTRIES (GHANA) LIMITED [1969] CC 123 and OTU & ORS V SOKODE [1969] CC 66 CA. In this case the judgment-debtor paid what he was requested to pay as per the Entry of Judgment served on him and subsequent to the payment in full filed a Statement of Account Pursuant to the order of the court on 21/3/1989 and same was tendered as exhibit “M” at the High Court. The Entry of Judgment filed later by the judgment-creditor in that suit was an Amended Entry of Judgment (exhibit “10”) which computed interest on

the judgment debt which according to the learned High Court judge was almost double the original amount on the first Entry of Judgment. The learned trial judge did not find out when it was served. It is not clear on record whether it was indeed served on the said judgment-debtor Joshua Kpakpo Allotey to make him officially aware of the new amount he was supposed to pay, even if he was to pay same.

It is not on record whether the judgment-creditor sought leave of the court to amend such a vital process in execution. Under the then existing rules, the Supreme [High] Court Civil Procedure Rules LN 140 A, 1954, Order 28 rules 11 and 12 required accidental slips and omissions to be amended by motion or summons. Indeed learned counsel for the appellant in his written submissions in this appeal stated as follows:

> "There is no doubt that the ruling of Miss Aryee J found at RA/221-223 contained an error affecting the quantum of the judgment-debt"

Assuming without admitting, that here was an error in the initial Entry of Judgment, such error should be corrected by the judicial process. In my respectful view, a judgment-creditor who discovers his error in filing such a vital process should not be permitted to amend the process on his own

motion without resort to the judicial process by invoking the court's jurisdiction to correct the slip or omission through amendment with notice to the judgment-debtor who is the affected party. Unilateral step to amend the entry of judgment as it happened in the case should be frowned upon. Another vital point raised by the trial court was that there was no evidence of service. Indeed learned counsel for the appellant has not been able to point out when the said Joshua Kpakpo Allotey was served with the Amended Entry of Judgment.

I find to miscarriage of justice in any manner or form in this appeal to warrant the reversal of the judgment of the Court of Appeal which affirmed the judgment of the High Court. I therefore proceed to dismiss the appeal.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) G. T. WOOD (MRS.)
CHIEF JUSTICE

(SGD) S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

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