IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: PWAMANG, JSC SITTING AS A SINGLE JUDGE

CIVIL MOTION
NO. J8/1O9/2017

13TH JULY, 2017

SKYLIMIT STRUCTURE BUILDERS LTD

TEMA LIGHT INDUSTRIAL AREA
COMMUNITY 9, TEMA ..... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

TULLOW GHANA LTD

PLOT. NO. 70
GEORGE BUSH HIGHWAY
NORTH DZORWULU, ACCRA ..... DEFENDANT/APPELLANT/APPLICANT

RULING

PWAMANG, JSC:-

Before me is an application pursuant to section 4(2) of the Courts Act, 1993 (Act 459) praying for special leave to appeal against the interlocutory decision of the Court of Appeal refusing a repeat application for stay of execution pending appeal dated 24th May, 2017.

The background to this application is as follows. On 14th December, 2016 the High Court, after a full trial, gave judgment against the Plaintiff/Appellant/Applicant/Applicant, to be referred to as the Applicant, to pay various sums of money to the Defendant/Respondent/Respondent/Respondent, hereafter referred to as Respondent. The High Court found the amounts due on account of the applicant's cancellation of a tender process in which the respondent participated.

Applicant being aggrieved by the judgment appealed against it and applied for an order for stay of execution pending appeal to the High Court which gave the judgment. By a reasoned ruling dated 9th February, 2017 the High Court dismissed the application for stay of execution. Applicant filed another motion praying the High Court to review its refusal of the application for stay but that too was dismissed for reasons stated in the court's ruling dated 7th March, 2017. Thereafter, Applicant repeated its initial motion on notice for stay of execution pending appeal before the Court of Appeal and it was listed before a single Judge. Respondent vehemently opposed the application. The applicant filed a supplementary affidavit and offered to post a bank guarantee as security to satisfy the judgment debt if it lost the appeal but the single judge in a reasoned ruling dated 27th March, 2017 did not consider that offer equitable and rather granted the application for stay on terms by directing that only fifty percent of the judgment debt be paid to the Respondent. Being dissatisfied with the conditions of the grant, applicant applied to the regular panel of the Court of Appeal to vary the decision of the single Judge. On 24th May, 2017, the Court of Appeal duly constituted gave its ruling dismissing the application. The Court held as follows:

"The essence of what the applicant wants us to do is to substitute our discretion for that of the single judge. We do not think that was the intendment of article 138 (b) of the Constitution. In our view article 138(b) is only applicable when the applicant is able to demonstrate that the single judge either abused or misused his/her power of discretion under this article. The applicant failed to demonstrate this. Besides the applicant put before us an (sic) application that seems to be quite different from what was put before the

single judge. That being the case the application does not conform to the law and is therefore incompetent. The application is therefore hereby dismissed."

It is against this decision that the applicant is seeking special leave to appeal to the Supreme Court. Section 4 (2) of Act 459 is a repetition of Article 131 (2) of the 1992 Constitution and has been considered in a number of decision of this court which in sum state three grounds upon which the court may grant special leave to appeal. These are;

(a) where there was a prima facie error of law on the face of the record; or

(b)A general principle of law had risen for the first time; or

(c) A decision of the Supreme Court on the point sought to be appealed against would be advantageous to the public.

Apparently with these grounds in mind, the applicant based its application on a number of alleged errors of law set out in the motion paper and supporting affidavit. In arguing the application counsel for applicant relied on a number of cases decided by this court on the scope of article 138(b) of the Constitution.

At the outset, let me point out that the applicant has made references to alleged errors of law committed by the Court of Appeal duly constituted with regard to C.I 100 and section 123 of the Companies Act, 1963 (Act. 179). However, in the ruling of the court which I have reproduced above, those statutes were not considered by court so they do not quality for consideration here as prima facie errors apparent on the face of the record. The relevant legal point in the application and submissions before me is the contention that the Court of Appeal misconstrued its jurisdiction under article 138 (b) or section 12 (b) of Act 459 pursuant to which the application for the order of variation was made. Paragraph 20 of the affidavit in support sums up applicant's submissions on this point. It states;

"20. That I am advised and verily believe same to be true that the misconception of the nature and scope of the substantive special power of

variation, discharge or reversal in a bundled-up form as a review by the duly constituted court respectfully disabled His Lordships from applying the appropriate test in determining the application before them on the day that it was moved."

The respondent has opposed the application and filed a lengthy affidavit in opposition which contained among others depositions on matters of law contrary to the well known rules of court on the contents of affidavits. This conduct which was indulged in by applicant as well does not conform to the rules and ought to stop. In the submissions of counsel for respondent, he also referred the court to a number of relevant decided cases and prayed the court to dismiss the application.

In the unreported judgment of the Supreme Court dated 30th July 2015 in the case of **Kwasi Owusu & Anor v John Nmai Addo & Anor, Civil Appeal No J4/50/2014, Wood CJ** said as follows;

"It follows that appellants ought to have first obtained special leave, per s. 4 ss (2) of Act 459 before proceeding to submit their appeal to this forum. Understandably, this places on them a rather onerous burden, given that they have to convincingly argue the likely success of their intended appeal within the special leave application process. Anything short of this will not meet the just demands of the law, a sound judicial policy, intended to weed out unnecessary, frivolous and vexatious applications for stay, when obviously at this point in time, the potential appellant would have had two bites at the legal cherry."

Consequently, applicant herein is required in this application for leave to demonstrate convincingly that its interlocutory appeal is likely to succeed.

The applicant has taken issue with the lower court for saying that in order for it to vary the discretion exercised by the single Judge, there must be prove that the Single Judge misused or abused his discretion. But that is the effect of this court's interpretation of the jurisdiction under article 134(b) which is *in pari materia* with article 138(b). In the case of **Sefa & Asiedu (No 2) v Bank of Ghana (No 2) [2013-2014] 1 SCGLR 530,** relied

upon by Counsel for Applicant, Gbadegbe JSC commenting on the jurisdiction of the Supreme Court under article 134(b) when called upon to vary, discharge or reverse the exercise of discretion by a single judge said as follows at pages 535/536; "...since the application is derived from a constitutional power vested in us by article 134(b) of the Constitution and involves the exercise of a discretionary power by the court acting by a single Justice thereof, what we have to consider is whether in reaching his decision, the learned justice acted in accordance with settled principles of the court in the grant and/or refusal of an application to adduce further evidence in the interlocutory appeal herein." Again, in **Mearskworld Co Ltd (No 2) v Zoomlion (No 2) [2013-2014] 1 SCGLR 327**, Anin Yeboah JSC said as follows at page 337 of the Report; "..as the single judge did not, with due respect to him, consider the limits of his jurisdiction in dealing with the application (for interlocutory injunction) as he went beyond it to consider a very serious matter which the parties themselves never raised in the substantive appeal. The submission of counsel for the applicant on this point has not already been canvassed at the lower courts. He seeks to draw this court's attention to an apparent error which if not corrected would lead to a miscarriage of justice." So what the Court of Appeal duly constituted said they required applicant to demonstrate in order for them to vary the decision of the single judge is clearly supported by the decisions of the Supreme Court and I do not find any error they have committed.

The next point learned counsel for Applicant, J. K Minka Premo, fastened his case on was the last leg of the court's ruling in which it implied that under article 138 (b) an application filed for the consideration of the court duly constituted ought to be the same as that placed before the single Judge. Counsel contended that the lower court was wrong since the provision did not contemplate a refilling of the same application. This ground was not raised in the processes he filed in court and in any case the court duly constituted did not rest its decision on that point so it cannot be said that there has been a failure of justice on account of that. Article 131(2) is intended to address matters of failure of justice and not to deal with perceived inconsequential slippages by the Court of Appeal. See **Dolphyne (No 2) v Speedline Stevedoring Co Ltd [1996-97] SCGLR 373.**

Counsel then argued in the alternative that the application for variation was premised on changed circumstances so there was even no need to prove abuse of discretion by the single Judge. This ground was also not made part of the application he filed in court and there was no evidence by way of deposition or the affidavit in support of that application before me. I am bound by the record before me which is to the effect that the application made to the court duly constituted was in essence praying them to substitute their discretion for that of the single Judge. That being the record, the Court of Appeal cannot be said to have committed an apparent error in demanding proof of abuse of discretion by the single Judge.

From the above discussion of the arguments of the applicant, I am of the opinion that it has failed to discharge the burden placed on an applicant seeking special leave to appeal against a decision of the Court of Appeal.

In concluding the unanimous judgment of this court in the case of **Klomega (No 2) v AG & GPHA (No 2) [2013-2014] SCGLR 581,** the respected jurist, Dr Date-Bah JSC stated as follows at page 605 of the Report;

"This is the sixth case in which the Supreme Court has had to interpret article 181(5) of the 1992 Constitution. It is hoped that this court's elucidation of the provision through the case law.....has laid the foundation for determining the provision's meaning predictably. With the determination of this case, it is now our expectation that article 181(5) would lend itself to application by the High Court, rather than to further interpretation by this court."

These comments of the court apply with equal force to the interpretation by this court of article 138(b) and 134(b) in the several decisions cited by both counsel in this case. The Court of Appeal have sufficient guidance from this court on the scope of its jurisdiction under article 138(b). It is for that reason that I reject applicant's last minute argument that there is a public interest element in this court's further interpretation of article 138(b) of the Constitution. As has been stated by this court in **Dolphine (No 2) v Speedline Stevedooring Co Ltd (No 2) (supra) and Kwasi Owusu v Joshua Nmai Addo**

(supra), the constitutional requirement for special leave is intended to sieve appeals that do not lie as of right so as to ensure that only those that raise clear failure of justice patent on the face of the record are admitted for determination. From the facts of this case plaintiff through this application is seeking to have a sixth bite at the legal cherry. In my considered opinion, the matters relied on by the applicant do not meet the conditions for special leave in section 4(2) of Act 459. I accordingly dismiss the application.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

MINKAH PREMO FOR THE DEFENDANT/APPELLANT/APPLICANT
THADDEUS SORY FOR THE PLAINTIFF/RESPONDENT/RESPONDENT