IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: BENIN, JSC SITTING AS A SINGLE JUDGE

CIVIL MOTION

NO. J7/10/2014

27TH JUNE, 2019

MARTIN ALAMISI AMIDU

VRS

1.THE ATTORNEY GENERAL

2.WATERVILLE HOLDINGS (BVI) LTD

3. ALFRED AGBESI WOYOME

AND

UT BANK LTD (IN RECEIVERSHIP) ……. CLAIMANT

RULING

BENIN, JSC: - The Attorney-General, the 1st Defendant, described as the judgment creditor, is the beneficiary of a judgment entered for the plaintiff in this case, reported as Amidu (No. 3) v. Attorney-General; Waterville Holdings (BVI) Ltd. &

Woyome (No. 2) (2013-2014) 1 SCGLR 606. The judgment creditor sought to go into execution against Alfred Agbesi Woyome the 3rd Defendant, described as the judgment debtor. In the process of execution, the judgment creditor attached two houses numbered 260 and 267 situate at Adjiraganor, Trassaco Valley, Accra, among others, which are said to be owned by the judgment debtor. Also attached are the plant and machinery of Anator Holding Company Ltd and its subsidiary Anator Quarry Company Limited, called the Companies. When the attachment got to the attention of the UT Bank (In Receivership) described as the Claimant, they put in a claim of interest, per the receivers in the following properties:

i. Residential property located at Trassaco Valley Estates, Accra described as plot no. 260.

ii. Residential property located at Trassaco Valley Estates, Adjiriganor, Accra described as plot no. 267.

iii. Residential property at Kpehe, Accra New Town, Accra, described as plot no 42, house no. 327/7.

iv. Plant and Machinery of Anator Quarry Ltd.

The judgment creditor filed a notice of dispute. The Claimant filed an affidavit of interest wherein they said those two houses situate at Trassaco Valley were sold to the bank by the judgment debtor; they also claimed the Kpehe house and the Companies' assets were secured with them for a loan facility by the judgment debtor and the Companies, for a consolidated loan in favour of Anator Quarry Ltd. The facility is still outstanding. They claimed to have purchased house number 267 situate at Trassaco Valley as per the title deed, exhibit 2. They also claimed to have purchased house number 260 also situated at Trassaco Valley as per the sale contract, exhibit 3.

The judgment creditor disputed these claims, saying in an affidavit that the Claimant was in collusion with the judgment debtor in that, having regard to the facts on the ground, the purported sale of the two houses at Trassaco Valley was a sham. The parties also offered viva voce evidence.

In this matter, the burden of producing evidence is on the Claimant, in the first instance. They ought to lead evidence, albeit prima facie, to satisfy the court that they have a real or proper claim over the properties they have listed. They do so

on a balance of probabilities. The burden then shifts to the judgment creditor to lead evidence on the acts of collusion which go to establish the sale of the Trassaco houses to be a sham. The burden of proof on the part of the judgment creditor is much higher, that of proof beyond reasonable doubt, in line with section 13(1) of the Evidence Act, 1975, NRCD 323. This is so, because collusion as raised in these proceedings borders on criminality thus requiring a higher standard of proof. The view of the law the court has taken is contrary to the judgment creditor's position as stated in their statement of case, that Order 48 rule 4(1)(b) of the High Court Rules, 2004, C. I. 47 places the burden of proving collusion on the party interpleading. The UT Bank is a Claimant to the properties as of legal right and does not purport to be holding same on behalf of another person. The provision cited is therefore inapplicable. These proceedings come under Order 44, rules 12 and 13 of C. I. 47.

Burden of proof of Collusion

Let me go into a little detail in respect of the scope of Order 48 and Order 44 rule 12, which often creates some amount of confusion to the practitioners and court officials as well. Counsel for the judgment creditor stated his view of proof of collusion as follows: “In our respectful view, the fuss made by claimant about the allegation of collusion between claimant and judgment debtor is pointless. Order 48 rule 4(1)b of the High Court (Civil Procedure) Rules, 2004, C. I. 47 clearly anticipates collusion between a claimant and a judgment debtor or other parties, as a basis for the commencement of interpleader summons, and thus places the burden of showing that there is no such collusion, on the person intervening or the applicant. This is because the primary essence of interpleader proceedings is to show that the intervenor is not motivated or actuated by a desire to collude with the judgment debtor.....That is why Order 48 rule 4(1)b of C. I. 47 places the duty to show that the intervenor or applicant is not in collusion with the applicant” He then cited what he said was the provision contained in Order 48(4)(1)(b).

In the first place, Order 48 rule 4 has no sub-rule 1, it only has sub-rules numbered a, b and c. What counsel cited is Order 48, rule 4(b). I think the wording of this particular rule cited by counsel ought to have put him on inquiry that it is not the applicable provision in the instant matter. The rule talks about an

applicant being in collusion with a claimant. Who is the applicant in the instance? And who is the claimant? The judgment debtor is neither an applicant nor a claimant in this matter, so obviously this is not the applicable provision.

Rule 4 derives its source from, and its relevance depends on, the preceding rules of Order 48. I therefore quote rules 1, 2 and 3 of Order 48 here:

1. A person may apply to the Court for relief by way of interpleader where

(a) the person seeking relief, in this Order referred to as 'the applicant' is under liability for any debt, money or goods for or in respect of which the person is or expects to be sued by two or more parties in this Order referred to as 'the Claimants' making adverse titles thereto; or

(b) the person seeking relief is a Registrar or other officer of the Court charged with the execution of process by or under the authority of the Court, and a claim is made to any property, movable or immovable taken or intended to be taken in execution under any process or to the proceeds or value of any of the property by any claimant other than the person against whom the process is issued.

2. (1) An application for relief under this Order shall be made by motion with notice to the Claimants.

(2) On the hearing of the application, the Court may order the Claimants to appear and state the nature and particulars of their claims and either maintain or relinquish them.

3. Where the applicant is a defendant, application for relief may be made at any time after the service of the writ of summons and the Court shall stay further proceedings until the application has been dealt with.

Rule 1 envisages two scenarios whereby interpleader summons may be issued. The first falls under rule 1(a) and it enables a person to apply to Court when there is claim for some property and the matter is still before the Court or in respect of an action contemplated by rival Claimants in respect of property that is in his hands. In either case, judgment has not been delivered. In that situation, any person who holds some asset belonging to any of the parties to the dispute and who himself has no interest in the asset, may go to court to protect himself from the rival Claimants, who are called upon to interplead, that is to claim against

each other. This is often described as stakeholders' interpleader. In the case of anticipated litigation, he may apply by way of originating summons, and in respect of pending action, he goes to court by summons in the action. This provision clearly does not apply here.

The other scenario, as captured in rule 1(b) avails only the Court Registrar or other Officer of the Court, often called the Registrar's interpleader, or in other places, the Sheriff's interpleader. In such proceeding it is the Registrar who takes the initiative and brings an application before the court to determine whether the property belongs to the judgment debtor and can therefore be seized or attached in execution or it belongs to the claimant. Here too, these present provisions do not apply, as the Registrar did not initiate any interpleader summons.

This is a matter which falls squarely under the provisions of Order 44 rules 12 and 13 of C. I. 47. The material provisions are:

12(1) A person who makes a claim to or in respect of a property taken or intended to be taken in execution under process of the Court, or to the proceeds or value of any such property, shall give notice of the claim to the Registrar and shall include in the notice a statement of the person's address for service.

12(2) On receipt of claim made under subrule (1), the Registrar shall forthwith give notice of it to the execution creditor who shall within four days after receiving the notice, give notice to the Registrar informing the Registrar whether the execution creditor admits or disputes the claim.

12(3) Where

(a) the Registrar receives a notice from an execution creditor under subrule (2) disputing a claim, or the execution creditor fails to give the required notice within the period mentioned in that subrule, and

(b) the claim made under subrule (1) is not withdrawn, the Registrar may apply to the Court for relief.

12(4) An application for relief by the Registrar under this rule shall be made ex parte to the Court seeking an order that the claimant and the execution creditor shall appear before the Court on a date specified in the order for the issue between them to be determined.

(5) Where the Registrar receives a notice from an execution creditor under sub-rule (2) admitting a claim, the Registrar shall forthwith withdraw from possession of the property claimed and having withdrawn the Registrar may apply to the Court for an order restraining the bringing of an action against the Registrar in respect of the Registrar having taken possession of that property.

13(1) Where the hearing of proceedings pursuant to an order made under rule 12(4) all the persons by whom adverse claims to the property in dispute, in this rule referred to as "the Claimants" appear, the Court may

(a) summarily determine the question in issue between the Claimants and execution creditor and make an order accordingly on such terms as may be just.

It is observed that these provisions apply only after judgment and during the course of executing the judgment, often described as third-party claims. They avail every person who claims interest in the property attached in execution, unlike rule 1(b) of Order 48 which avails only the Registrar or other Officer of Court in execution of court judgment. Suffice it to say that a claim of collusion or fraud may also be raised under Order 44 rule 12 if the judgment creditor has cause to believe the claimant and the judgment debtor are in collusion to deprive him of the fruits of his victory or to deny other persons who may have a claim against the judgment debtor. The rule of evidence that applies here is that the person who asserts the affirmative of the issue assumes the triple burden of producing evidence, of persuasion and of proof. In this case the burden of proving collusion lies squarely on the judgment creditor.

Claimant's case

According to the Claimant, title to house no. 267 was established by the production of title deed-exhibit 2-registered with the Land Title Registry. In respect of house no 260, they sought to establish title by way of a sale agreement between them and the judgment debtor herein, tendered as exhibit 3. In respect of the Kpehe Accra New Town house and the Companies' movable assets, they claimed interest therein through a mortgage transaction between them and the Companies represented by the Executive Chairman, who is the judgment debtor herein. The authenticity of each one of these documents was not in issue, so prima facie they support the Claimant's position. Thus, in the absence of rebuttal

evidence, the documents must speak for themselves to establish the claim of interest put forward by the Claimant.

The reasons are not far to seek. Registration of exhibit 2 under the Land Title Registration Law, 1986, PNDCL 152 is evidence of title, subject to the equitable doctrines of fraud and mistake which have been given statutory backing in section 122(1) of this statute, and as decided in several cases including **Amuzu v. Oklikah, (1998-99) SCGLR 141.**

In respect of house number 260, the agreement is acceptable prima facie evidence of the transfer of interest in land. Registration is not the act that gives validity to the transfer as between parties to the sale contract; see this court's decision in the case of **Anthony Wiafe v. Dora Borkai Bortey &. 1 or., CA. J4/43/2015, dated 1st June 2016, unreported.**

The exhibits 5 and 5i provide prima facie evidence of Claimant's interest in those properties, being the subject-matter of the mortgage transaction.

The burden thus shifts to the judgment creditor to show that notwithstanding what these documents portray, the court should discountenance them and decide that they do not convey interest in the subject-matter properties in the Claimant.

Case for judgment creditor

The facts recited by the judgment creditor will be considered seriatim.

In respect of House Number 267, the judgment creditor relied on these facts:

(1) That there is no contract of sale between the Claimant and judgment debtor.

(2) That the property which is the subject-matter of exhibit 2 is not the same as number 267, which was transferred from Empire State Builders (original owners) to the judgment debtor. This is based on two factors namely, (a) the plot number itself, and (b) the dimensions.

(3) The same property was subsequently used by the judgment debtor to guarantee a loan facility for his companies with the same bank, Claimant herein.

(4) The Claimant has never been in possession of this property since the purchase, its rather the judgment debtor and/or his agents who have occupied same.

(5) The fact that the sale transaction is fake is further buttressed by the fact that the judgment debtor still holds on to these properties as owner and the Claimant does not debunk the claim.

The grounds (3) (4) and (5) stated above equally apply to property numbered 260. Besides, consideration paid in respect of no. 260 will also be taken into account, as well as lack of a site plan.

It is necessary at this stage to mention the properties used as collateral by the judgment debtor and recited in the mortgage deed, exhibit 5. It reads:

"The facility shall be secured with

1. Legal Mortgage over property number 372/7, off **CONCAM** Crescent Residential Area, Accra Newtown, Accra with a forced sale value of **USD1,080,000.00** (already held).

2. Legal Mortgage over two residential properties at Adjiriganor Trassaco Valley Residential area estimated at **USD1,296,000.00** and **USD1,512,000** (already held).

3. Legal Mortgage over a quarry land and other quarry asset estimated at GHs5,456,187, subject to it being regularized.

4. Legal Mortgage over the head office building of Anator Holding Company Ltd situate at East Legon extension valued at **USD1,687,500.00"**

From even a cursory reading of this deed, it cannot escape attention that of the three houses used as collateral, it is only the two houses situate at the Trassaco Valley whose identity is not disclosed. The identity of the two houses at Trassaco Valley mentioned in exhibits 5 and 5i is within the peculiar knowledge of the Claimant and the judgment debtor only. That being so, the Claimant was under a duty to make an honest disclosure to the court, especially so as he has approached the court to seek an equitable and legal remedy. He who comes to equity must do equity; he who comes to equity must come with clean hands.

Section 17(1) of the **Evidence Act, 1975 (N.R.C.D 323)** is applicable here. It provides: "Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof."

When material facts are within the peculiar knowledge of a party, he assumes the burden of producing such evidence or suffer a decision against him on the issue.

The fact that the location of the properties and their value were disclosed in the mortgage deed affirms to me that the Claimant positively knew what these properties were. From the evidence before the court, apart from **260** and **267** the judgment debtor is not known to own any other properties within the Trassaco Valley enclave. It is thus reasonable for any objective third party to conclude that the two properties mentioned in exhibits **5** and **5i** are **260** and **267.** And if indeed the claimant had purchased these assets, they could not have allowed the judgment debtor to use them as collateral for a loan. They allowed it because in truth there was no sale of those properties to them. I have no doubt in my mind that the Claimant was assisting its customer, the judgment debtor herein, to hide the identity of his Trassaco Valley properties under the cloak or veneer of legality by claiming it had purchased them. It is significant to note that the then **CEO** of Claimant bank signed all material exhibits including **5** and **5i** on behalf of the Bank. There is no way the then **CEO** of Claimant bank could tell us he would accept unidentified and unknown properties as collateral for a loan of over nine million Ghana cedis. The **CEO** knew what properties the judgment debtor owned at the Trassaco Valley at the time they advanced the loan to his companies.

I just have to state here that the Claimant appeared to have accepted that the document exhibit **2** does not conclusively resolve title in their favour. Under cross-examination, the Claimant's representative made two critical admissions, namely: (i) that exhibit **2** does not show transfer from the judgment debtor to the Bank and (ii) that exhibit **2** does not even show that it is the same plot no. **267** owned by the judgment debtor. These pieces of evidence add weight to the position taken by the judgment creditor.

I will proceed to consider other facts relied upon by the judgment creditor in proof of the allegation of collusion.

Possession of the Properties

Under normal circumstances, the fact that the Claimant did not take over possession of the properties it claimed to have purchased some five years after

the purchase would have passed unnoticed, but not in a case where collusion is an issue. It is clear from the proceedings that apart from documentation, there was nothing else to show that the Claimant had anything to do with the properties. They did not even know that they were being occupied by the judgment debtor and/or his agents, or by some other person. The Bank's representative admitted under cross-examination that the Bank had never used the two houses for their business or residence. Their claim that they have the keys is false in view of the judgment creditor's credible assertion that people were occupying them. Since the properties were in the hands of the judgment debtor prior to the purported sale, it is safe to accept the evidence that he would continue to be in possession either by himself or his assigns and agents as the Bank had never occupied them. And as will shortly unfold, the judgment debtor has never relinquished his interest in these properties, so a claim that they are being occupied by him and/or his agents cannot be disbelieved. I am satisfied that the continued possession by the judgment debtor and/or his agents in these properties long after the purported sale was not an isolated act, but was part of a scheme carefully crafted between the Claimant and the judgment debtor to use the purported sale documents to shield the assets of the judgment debtor.

Size of number 267

Next, the size of property **267** sold to the judgment debtor by the Empire State Builders differs from that purported to have been registered in exhibit **2.** The land sold to the judgment debtor measures **0.408** of an acre, whereas that purportedly sold by the judgment debtor to the Claimant measures **0.37** of an acre. None of the bearings of the plot as indicated in the Schedule to the deed executed between the judgment debtor and Empire State Builders tallies with the bearings of the property sold to the Claimant and described in the site plan attached to **Exhibit 2**. No explanation was offered for these discrepancies. Standing alone, the court could have glossed over them and give the Claimant and judgment debtor the benefit of the doubt. But in the context and circumstances of this case, wherein collusion is alleged, parties to the deed must explain every discrepancy to the satisfaction of the court. Unless the Court is taking judicial notice of notorious facts, it is not permitted to conjecture as to what brought about these

discrepancies. I am satisfied that no. **267** is not the subject-matter of exhibit **2**; they are different properties.

Consideration paid for number 260

Besides the foregoing, in respect of **260**, there is the question of what consideration was paid. This issue will be better addressed against the backdrop of what the Claimant said in respect of the other property number **267**. When the issue of lack of a sale contract for number **267** was raised by the judgment creditor, the Claimant was quick to point to the registration document annexed to the Land Title Certificate, exhibit **2** as disclosing the consideration paid for the property. This document, headed **TRANSFER OF LEASEHOLD** bearing number **0058873** and dated 5th April 2013, states the consideration for this property as **GHc400,000.00,** receipt whereof the judgment debtor duly acknowledged. This is what counsel for the claimant said in his written statement of case:

"Pages 25 and 26 of the land certificate clearly show that the said property was duly transferred to the Claimant by the 3rd Defendant. **Page 26**....contains the following: **IN CONSIDERATION OF FOUR HUNDRED THOUSAND GHANA CEDIS ONLY, I.....ALFRED AGBESI WOYOME OF PMB 100, GPO, ACCRA.....hereby transfer to....UT BANK LTD.....ALL THAT PIECE OR PARCEL OF LAND NUMBER 267 SITUATE AT TRASSACO VALLEY...."**

The probative value of this piece of evidence, according to counsel, is that the registration document should be accepted by the court as authentically disclosing the consideration paid for number 267. It is accepted on its face value since it is coming from both parties to the sale contract and addressed to a State institution, which also acted on it.

In exhibit **3**, the consideration for Number **260** was stated to be **GHc1.2 million**, but in the registration document, bearing number 0058870, dated 6th May 2013, exhibit **4,** the consideration for the property was stated to be **GHc100,000.00,** receipt whereof the judgment debtor once again duly acknowledged. The Claimant was fully aware of this, since the bank itself put in these particular exhibits. Of much more significance is the fact that exhibit **4** was executed on behalf of the Claimant bank by no less a person than its **CEO,** called Prince Kofi

Amoabeng. The court is not entitled to conjecture as to the clear inconsistency in the sale price quoted on the two exhibits. I find as a fact that no agreement as to consideration for this property was reached between the parties. I am of the firm conviction that the inconsistency exists because in fact and in truth there was no sale between the parties. This further exposes the transaction as a sham.

No site plan

It is undisputed that no site plan of no**.** 260 was issued in the name of the Claimant. Even exhibit 4 which is the registration document still bears the name of the judgment debtor on the site plan. Section 4 of Act 122 requires the name of the person to be registered as owner to be on the site plan. Section 15 of the Land Title Registration Act, 1986, PNDCL 152, takes it further to require not a mere site plan, but one that has been approved by the Director of Surveys or an officer authorized by him. It is common knowledge in this country that any person who acquires land is issued a site plan with his name on it and indicating the dimensions of the land he has acquired. After the land has been sold, it is unreasonable to expect the vendor's name to be on the document that is prepared for registration. To me, this was not a mere omission or mistake, but there was no plan in the Claimant's name because there was no sale to them. I do not think if there was a sale, the Claimant would take steps to register the title and even sign the registration document knowing full well that the site plan bears the name of the judgment debtor. It exposes the transaction as a sham.

When all these pieces of evidence are put together, I am satisfied that the judgment debtor never relinquished his title to, and never sold properties numbered 260 and 267, notwithstanding the documents tendered as evidence of the sale. The Claimant was aware of this and directly and willingly aided the judgment debtor in this enterprise.

I take note of the fact that at all material times, there were legal moves and public agitations that the judgment debtor should refund the 51 million cedis to the State. Any clever person could take steps to place his assets beyond reach in the event of losing a claim in court. At the time these transactions, namely the sale and mortgage, were taking place, there was pending before this court

proceedings commenced in 2012 that eventually culminated in the order made for the judgment debtor to refund the money illegally obtained from the State.

It is my view that even if the evidence had established a sale, it would be clearly unconscionable for a court of equity to lend its aid to the Claimant by releasing property numbers 260 and 267 to it, whilst allowing it to hide the identity of the two properties in exhibits 5 and 5i, from the Court, something which is within its peculiar knowledge. Be that as it may, the evidence has established that it did not in fact and in truth purchase those properties. I find as a fact that there was no sale of these properties. By exhibit 5 and 5i the Court can reasonably exclude these two properties 260 and 267 from the mortgage, as the court cannot re-write the mortgage deed, since the parties failed to disclose their identity in their agreement, contrary to law. They cannot legally form part of the mortgage.

Consequently, these properties are not encumbered in any way, I so find as a fact and are therefore available for execution to be levied on them. I order the execution on these properties numbered 260 and 267, Trassaco Valley, Adjiriganor, Accra, to proceed accordingly.

Other evidence

The foregoing is sufficient to end this claim. But I decided to have regard to a supplementary statement of case filed by the judgment creditor drawing attention to some affidavit depositions made by the Anator companies which has a direct bearing on the mortgage deed under consideration, and their intention to rely on it. After examining the said affidavit, I decided to have regard to it, lest the court should give contradictory decisions in respect of the same subject-matter for two different persons. The result will be messy and absurd. I also decided to have a look at it as both processes are in the same action and the proceedings are continuing until execution is complete. Most importantly, the Claimant Bank is a party to those processes. I will explain this a little further later in this decision.

A mortgage deed is by law a registrable instrument, by virtue of section 3(2) and (4) of the Mortgages Act, 1972, NRCD 72. Section 3 of this Act sets out what the requirements should be for the mortgage instrument to be registrable under the Lands Registry Act, 1962, (Act 122). Among others, the requirements are:

(a) the name and address of each mortgagor and of each mortgagee;

(b) the nature of the mortgagor's interest in the property which is mortgaged and the extent to which that interest is subject to the mortgage;

(c) identity of the mortgaged property by reference to its location and boundaries .....

As a condition for the release of the loan, the mortgage deed required the borrower to produce to the lender a copy of the company resolution authorizing the borrowing, among other documents. The parties agreed in the mortgage deed, exhibit 5 and 5i as follows: “The facility shall become available for draw down upon receipt of the following documents in all respects satisfactory to UT Bank:

1. Receipt of formal letter of request for the consolidation of all the facilities.....

3. Execution of legal Mortgage over two residential properties at Adjiriganor Trassaco Valley Residential area.....

7. Receipt of board resolution authorizing the consolidation.....”

I must mention at this stage that, relying on this same mortgage deed, Anator Holding Company Ltd. and its subsidiary Anator Quarry Ltd., also put in a claim of interest in these same proceedings claiming that all the properties listed on the mortgage deed were used as collateral to secure the loan facility provided by the Claimant bank, so they could not be sold by the judgment creditor. They filed an affidavit of interest, per one Siade Puplampu, Administrative Officer, copied to the Claimant bank and they were served on 23 November 2018, according to court Registry records. To my mind it constituted notice to be heard on this matter, which was in their own interest to react to it, as they are the other contracting party to the mortgage. The mortgage deed is at the center of these two processes wherein the Claimant bank is the lever on which they hinge. Consequently, it behoved the Claimant bank to tell the court their position in respect of the affidavit depositions by Anator companies. The judgment creditor urged the court to conclude that their silence is an admission of the truth of the affidavit depositions made by Siade Puplampu in these same proceedings. As the apex court wherein ultimate justice is required to be done, the court cannot shun the invitation to consider such important piece of evidence which has a direct

bearing on the case on hand. Parties have a duty to assist the court to bring finality to the matter.

The Bank was joined as the 1st Claimant whilst the Anator companies were the second claimants. And they were a necessary party since they and the Anator companies were the contracting parties to the mortgage deed. I think they ought to have been joined as an interested party and not as claimant, since a person cannot be compelled to commence an action. But this does not amount to a miscarriage of justice, as the title could be amended to reflect their correct position in the process. What is important is that they were served to appear which invitation they spurned. I fail to appreciate why they did not contest the adverse claim by the judgment debtor.

The law is quite settled that proceedings include all post-judgment steps taken in the action, so every person who is notified must appear to answer unless he has nothing to tell the court. Black's Law Dictionary, 9th edition, at page 1324, quoting from the author Edwin E. Bryant's 'The Law of Pleading under the Codes of Civil Procedure', states the law as follows: "Proceeding is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action', but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of the action, including the pleadings and judgment. As applied to actions the term 'proceeding' may include: 1. the institution of the action;……. 8. the judgment; 9. the execution; 10. proceedings supplementary to execution, in code practice."

The code practice is the equivalent of our rules of court.

It is stated for emphasis that even during execution proceedings, every person, whether a party in the original action or not, who stands to be adversely affected by the execution, must be heard by the court if he so wishes. That justifies the Anator Companies' joinder of the UT Bank as a party to their notice of claim since they had mortgaged their property with the Bank, and the latter is relying on the same mortgage deed in its claim against the judgment creditor.

The court is also able to come to this conclusion because the mortgage deed required the Anator companies, as the borrower, to present a board resolution authorizing the consolidation of the loans. Besides, it is a legal requirement under

the Mortgages Act that the deed must state the mortgagor's interest in the property as well as its clear identity and precise location. Further, since the landed properties did not belong to Anator companies as the borrowers, the consent of the real owner was required to support the application. All these relevant pieces of information which would facilitate the bank's approval of the loan facility are contained in the affidavit which the judgment creditor sought to rely on. The fact that the approval was given by the Bank is indicative of the fact that all the prerequisites were met by the companies. Hence the evidence is material and relevant.

The material depositions made in the affidavit of Siade Puplampu on behalf of the Anator companies are these:

"15. That on 29th October, 2013, UT Bank granted yet another facility to Anator Holding Company Limited as additional working capital to purchase equipment for Quarry operation.....

16. That as security for the payment of the facilities granted to Anator Holding Company Limited, 3rd Defendant Judgment/Debtor in a Statutory Declaration agreed and released the property known as 372/17 off Comcam Crescent.....Accra to Anator Holding Company Limited to be used as collateral security for the loan facility from UT Bank .....A copy of the Statutory Declaration dated 30th day of October 2013 is annexed as exhibit AHCL 11.

17. That Claimant, UT Bank Limited (in receivership).....filed a witness statement through one Eric Nana Nipa.....that the properties belonging to the.....judgment debtor attached in execution of the judgment of this Honourable Court, to wit: (a) two residential properties at Trassaco Valley Phase 2, plots numbered 260 and 267; (b) Hse no. 327/7;Kpehe, Accra Newtown, Accra; (c) moveable assets of Anator Quarry Company Limited.

18. That on 15th January, 2014, Anator Holding Company Limited in a letter captioned consolation (sic) of loan facilities for Anator Quarry Company Limited addressed to the Managing Director of UT Bank Ltd., Anator Holding Company resolved to deal with the loan facility granted to it and 3rd Defendant by consolidating all the loan facilities and transfer to Anator Quarry Company Limited. A copy of the letter together with extract from the minutes of meetings

of the Board of Directors of Anator Holding Company held on 3rd January 2014 held at its head office in East Legon, Accra is hereby attached as exhibit AHCL 12.

19. That thereafter the.....judgment debtor in a Statutory Declaration dated 16th day of January, 2014 agreed to release and released properties known as No. 260 and 267 at Trassaco Valley, Adjiriganor to Anator Quarry Company to be used as security for the consolidated loan facility from Ut Bank Ltd.

20. That for all intents and purposes the 3rd Defendant ceased to hold any interest in the above-mentioned properties so long as the properties remain in the hands of Anator Quarry Company Limited. A copy of the Statutory Declaration dated 16th January 2014 is herby attached and marked as exhibit AHCL 13."

This affidavit is very revealing in terms of the dealings between the Claimant bank and the Anator companies. It states very succinctly that the judgment debtor owns properties numbered 260 and 267 situate at the Trassaco Valley, inter alia. It disclosed the course of doing business between the parties notably that the borrower provides a statutory declaration confirming ownership of the properties to be secured for the loan, before the Claimant releases the facility. Thus, the Claimant had possession of the Statutory Declaration, exhibit ACHL 13 before agreeing to consolidate the loans.

For its full force and effect, I will reproduce the judgment debtor's statutory declaration dated 16th January 2014. It reads:

"**IN THE SUPERIOR COURT OF JUDICATURE**

HIGH COURT OF JUSTICE, ACCRA. GHANA. A.D. 2014

STATUTORY DECLARATIONS ACT 389 OF 1971

IN THE MATTER OF STATUTORY DECLARATION BY ALFRED AGBESI WOYOME GIVING HIS CONSENT FOR THE USE OF HIS PROPERTIES, NO. 260 AND 267 AT TRASSACO VALLEY ADJIRIGANO ACCRA, AS COLLATERAL SECURITY FOR A CONSOLIDATED LOAN FACILITY FROM UT BANK.

I, ALFRED AGBESI WOYOME of PMB 100 GPO ACCRA in the Greater Accra Region of the Republic of Ghana, do hereby solemnly and sincerely declare as follows:-

1. That I am the declarant herein and a Ghanaian by birth and Nationality.

2. That I am the owner of properties known as Plot no. 260 and 267 at Trassaco Valley Estates Adjirigano, Accra.

3. That I have agreed and released my said property to Anator Quarry Company Limited to be used as collateral security for the consolidated loan facility from UT Bank Limited, Airport City Branch, Accra.

4. That the said property has not been mortgaged or involved in any financial transaction whatsoever and can therefore be used for its intended purpose.

5. That I shall hold trust for my said property until such time Anator Quarry Company Limited is able to fully liquidate its repayment obligation to UT Bank Limited, Airport City Branch, Accra.

6. That UT Bank Limited is at liberty to confiscate my property (ies) should Anator Quarry Company Limited renege on its repayment obligations.

7. Wherefore, I make this solemn declaration conscientiously believing same to be true and correct in accordance with Statutory Declaration Act 389 of 1971.

This statutory declaration which was given to the Claimant as collateral sounded the death knell on the dealings between the Claimant and the judgment debtor in respect of properties numbered 260 and 267. Even when common sense is brought to bear on these dealings, it will dictate that the Claimant would not accept their own properties to be used as collateral by a borrower to secure a loan from them. The judgment debtor could not overtly, confidently and boldly have given this statutory declaration to the Bank if indeed he had sold these properties to them. Why then did the Bank not challenge these affidavit depositions by the companies? Their stoic silence, in the face of all the opportunities they had to react, raises a very strong presumption that they had no answer to offer. The evidence supports the judgment creditor's position that the two houses were not sold.

The court cannot be used as an instrument of fraud. In one breath, the Bank says the properties have been sold to them by the judgment debtor. In another

breadth, the judgment debtor says he has never encumbered the two houses except releasing them as collateral for the loan. So the parties have taken these contradictory positions so that whichever story the court chooses to believe, the properties are saved from execution. But what the court believes and is convinced about is that the properties were neither sold nor used as collateral for the loan. The entire scheme is a sham

Properties covered by mortgage deed

I turn next to the properties identified in exhibits 5 and 5i. The legal position as stated in sections 1(2) and 4(1) of the Mortgages Act is that a mortgage creates an encumbrance and a charge on the properties secured under the mortgage. The law therefore prohibits the mortgagor from dealing with the properties whilst the mortgage lasts. The law grants the mortgagee security and an assurance that he will recover his money from a sale of the mortgaged property in the event of a default by the mortgagor. Consequently, property secured under a mortgage deed cannot be used to pay for another obligation owed by the mortgagor to a third party. These are the prevailing general principles stated in this statute.

However, the equitable doctrine of fraud will be applicable in an appropriate case for a court to cancel a mortgage deed whose aim and purpose was to defraud creditors of the mortgagor. And as submitted by the judgment creditor, certain interest in land will not take effect unless registered under law. He cited the Court of Appeal decision in the case of **First Atlantic Merchant Bank Ltd v. Osei (2013-2015) 2 GLR 457** as well as certain statutes which I will refer to shortly. The decision of this court in the **Anthony Wiafe v. Dora Borkai Bortey** case cited above does not do away with the requirement for registration, it only stated clearly that the contract gives a right to the transferee, lessee or purchaser, as the case may be. The court went on to decide that such a person may lose title to a bonafide purchaser who has gone ahead to register his title even though it was acquired later in time. Therefore, lack of registration may defeat a contract creating an interest in immovable property in appropriate situation.

Registration of documents

Counsel for the judgment creditor made reference to these statutes: Borrowers and Lenders Act, 2008 (Act 773), section 25 thereof; Land Registry Act, 1962, (Act 122), section 4 thereof; and section 72 of PNDCL 152. Counsel's argument, in a nutshell, was that these statutes made it obligatory for the mortgage deed to be registered in order to render same effectual. Besides, I have already stated herein that a mortgage document is a registrable instrument under the Mortgages Act.

The relevant statutory provisions cited by counsel for the judgment creditor are these:

Section 25 of Act 773 provides:

Registration of charges

(1) A borrower or a person interested in a charge shall register a certified copy of a charge or collateral created by the borrower in favour of a lender with the Collateral Registry within twenty-eight days after the date of the creation of the collateral or charge.

(2) Where a charge is created by a company, the requirement to register charges with the Collateral Registry under this section shall be in addition to the requirement under section 107 of the Companies Act, 1963 (Act 179) to register charges with the Registrar of Companies.

(3) A charge which is not registered in accordance with subsection (1) is of no effect as security for a borrower's obligations for repayment of the money secured and the money secured shall immediately become payable despite any provision to the contrary in any contract.

Section 72 of PNDCL 152 provides:

(1) A mortgage created after the commencement of this Law shall be in the prescribed form and shall have no effect unless it is registered in accordance with this Law.

Counsel for the judgment creditor was of the view that since exhibits 5 and 5i, among other documents, have not been registered, the court should give no effect to them.

On his part, counsel for the Claimant sought to downplay the effect of non-registration of these documents. This is what he said in his statement of case:

".....exhibit 5i clearly indicates that the property at Accra New Town and the Plant and Machinery of Anator Quarry Limited are encumbered properties and that fact was acknowledged and admitted by the 1st defendant. The mere fact that the mortgage deed in respect of the said properties had not been registered, as provided for by statute, does not take away the fact that they are encumbered." Counsel proceeded to cite two decided cases in support of his submission, which he said are very instructive. These are: **Republic v. Lands Commission; ex parte Vanderpuye Orgle Estates Ltd (1998-99) SCGLR 677 and Nartey v. Attorney-General (1996-97) SCGLR 63.** He concluded the submission on this question by stating that "it would be absurd that the legislature would intend that, in circumstances where it has been established as a matter of fact that a property has been used as collateral, and this fact has been admitted by both contending parties, the non-registration of a deed of mortgage duly executed by the parties.....will invalidate the interest of a lender, after the lender had given out its depositors funds as a loan to the borrower....."

The **Nartey v. Attorney-General,** supra, case which counsel cited is completely inapplicable, in terms of both fact and law. That was a constitutional case and the decisions rendered therein cannot in any way be applied in this case. Equally, there is nothing in the other case namely, **ex parte Vanderpuye Orgle Estates Ltd** that is relevant to the issue on hand. It behoves Counsel in citing a decided case to look for its relevance and point out to the court the ratio, usually found in the principle of law espoused in that decision, which can be applied in the present case. I spent precious time reading all the five opinions delivered in the Nartey case to see whether anything useful and relevant to the instant case would be found. Not even an obiter dictum that is worth the effort could be found therein. Counsel should endeavour to spare us such ordeal. The simple truth is that Counsel has no answer to the arguments put forward by counsel for the judgment creditor, which are unassailable.

The statutes cited above are very explicit in their terms and admit of no ambiguity. A mortgage deed whereby money has been lent and borrowed imposes an obligation on the parties to register same under the law, namely Act

773; and Mortgage over land requires registration under NRCD 96 and PNDCL 152, as already explained. lest it should be rendered ineffectual. Counsel for the Claimant admitted the existence of these statutes. Why they failed to comply with the requirement of registration, albeit belatedly, before coming to this court beats my understanding. The court cannot allow anybody to circumvent the clear statutory provisions, especially as registration of such mortgage documents attracts some revenue to the State and more importantly it serves as notice to third parties that the properties are encumbered. On ground of public policy that the law must be enforced, the court will enforce the law regardless of whether or not the Claimant will suffer a loss of the loan it granted to the Anator companies. The Claimant bank should bear the consequences, if any, of their own default. I hope this will be a lesson to all lending institutions in the country, to ensure strict adherence to the law requiring registration of mortgage deeds. However, counsel's fear is taken care of by section 25(3) of Act 773, as failure of a mortgage deed does not relieve the borrower of his liability to pay back the loan under contract.

In the result, I hold that exhibit 5 and 5i, being a mortgage deed which has not been registered by virtue of section 3 of the NRCD 96 (which made it registrable under Act 122), section 25 of Act 773 and section 72 of PNDCL 152, is ineffectual as far as third party claims or interests in those properties are concerned. It is even arguable whether the court will discountenance lack of registration when the issue is raised 'inter partes' on ground that it is unconscionable. It is a point that may arise in future.

Stamp duty

Counsel for the judgment creditor argued further that the mortgage deeds should be rejected by the court for failing to comply with the Stamp Act, 2005 (Act 589). In the case of **Lizori Ltd v. Mrs. Elizabeth Boye and 1 or. (2013-2014) 2 SCGLR 889,** this court held that any document executed in Ghana or elsewhere that affects land situate in Ghana cannot be admitted in evidence if it has not been duly stamped. There is no dispute that exhibits 5 and 5i have not been stamped and for that reason they were not receivable in evidence in the first place. The position of the law is that where legally inadmissible evidence has found its way into the record, it is the duty of the court to reject it when pronouncing judgment.

It is not one of those situations which can be saved under section 6 of the Evidence Act. This is because the stamp duty is a statutory imposition and a source of revenue to the State so parties cannot be allowed to flout the law and deny the State of its revenue. That was why in the **Lizori Ltd** case, supra, the court rejected the unstamped documents. This point is also unanswerable.

I find it surprising that a banking institution will pay no regard to the laws of the land in its operations and yet will appeal to the court to give it solace in time of need. The court is not the right place for persons who violate the law to seek comfort. For failing to stamp the mortgage deeds which create interest over land situate in Ghana under section 32 of Act 689, I reject exhibits 5 and 5i in their entirety.

In effect I hold that any of the properties listed in exhibits 5 and 5i that is found to be owned by the judgment debtor is free from any encumbrance or charge and is liable in execution of the judgment against him.

I hereby reject the Claimant's application and dismiss same accordingly.

(SGD) A.A. BENIN

(JUSTICE OF THE SUPREME COURT)

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BENEDICTA ANTWI.

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