IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)
DOTSE, JSC
GBADEGBE, JSC
APPAU, JSC
PWAMANG, JSC
MARFUL-SAU, JSC
KOTEY, JSC

CIVIL MOTION
NO. J8/131/2019

28TH APRIL, 2020

OGYEADOM OBRANU KWESI ATTA VI …… PLAINTIFF/RESPONDENT/RESPONDENT

VRS

GHANA TELECOMMUNICATIONS CO. LTD. …. 1ST DEFENDANT/APPELLANT/APPLICANT

LANDS COMMISSION ……. 2ND DEFENDANT

RULING

GBADEGBE, JSC: -

On April 28, we allowed the application for stay of execution in the matter herein, but reserved our reasons, which we now proceed to provide as follows. For reasons of convenience, in these proceedings, the parties will be referred to simply as the applicant and respondent.

We have before us an application for stay of execution of the judgment of the Court of Appeal which dismissed the appeal of the applicant from a decision of the High Court by which it was ordered to pay to the respondent by way of damages USD 16,009,920.00. The circumstances under which the application herein is brought before us may be stated briefly as follows. The respondent initiated a claim before the High Court, Agona Swedru for certain reliefs which were based upon the applicant's alleged unlawful acts of encroachment upon a piece or parcel of land belonging to the respondent's family and the erection of a telecommunication tower or mast thereon. The action went to through a mixed trial at the end of which the learned trial judge delivered a judgment that accepted the respondent's version of the matter and awarded damages against the applicant in the amount mentioned in the preceding paragraph of this ruling. A repeat application for stay of execution from the said judgment was granted by the Court of Appeal on November 07, 2017 requiring the applicant to pay 30% of the judgment debt. The applicant complied with the order of stay of execution and on January 22, 2018 paid the cedi equivalent in the sum of GHS21, 215,040.00 into court, the said sum having been since released to the respondent. The Court of Appeal inquired into the appeal and dismissed it on May 29, 2019. The applicant then filed an appeal to this court from the said judgment on June 11, 2019 and a day thereafter filed an application for stay of execution pending appeal to the Court of Appeal. The application was granted on terms, which applicant deemed a refusal, hence the repeat application before us under Rule 20 of the Supreme Court Rules, C I 6.

The application has been vehemently resisted by the respondent who contended primarily that since the Court of Appeal's decision was a judgment of dismissal of the appeal, it did not make any executable order that can be enforced by a writ of execution, the application was incompetent. In so contending, the applicant relied on previous decisions of this court that where the Court of Appeal merely dismissed an appeal, then no executory order is made that could be stayed by an application for stay of execution. In this regard, the respondent referred to among others, Ghana Football Association v Apaade Lodge Ltd [2009] SCGLR 100 and Anang v Sowah [2009] SCGLR, 111. A careful

examination of these cases reveals that although Eboe v Eboe [1961] GLR 432 is a pre-1992 decision, the declaratory principle continues to be applied to cases which come before the Supreme Court subsequent to the coming into force of the Constitution dealing with applications for stay of execution pending appeals. It needs to be said that in the Apaade case, the situation before the Supreme Court was different from that now before us as in the instant case, the judgment of the court is directly under attack by way of an appeal while in that case ,the appeal was from a collateral attack on the judgment.

As the said decisions were pronounced by this court, they are in principle binding upon us by virtue of article 129(3) of the Constitution of 1992 which provides thus:

> *"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so, and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.'*

True, it is to say that there has been a collection of cases of this court which preclude the court from exercising its jurisdiction to grant stay of execution in cases which come before it in the exercise of its appellate jurisdiction where the decision of the Court of Appeal made no executable orders as in the matter before us. However, in the case of NDK Financial Services Ltd v Yiadom Construction and Electrical Works and Others [2007-2008]1 SCGLR 93, the court granted an order of stay of execution of a non-executable order. Although this was by a majority decision, it mirrors the concern of the learned justices about the earlier cases which declined to grant stay of execution from non-executable orders. The words of Brobbey JSC (as he then was) put the matter bluntly when he observed at page 98 of the report as follows:

> *"In considering an application for stay, the court should endeavor to do substantial justice. The court should consider the essence of the order made than the form in which it is couched. The most important point is what*

would happen if the order of the Court of Appeal were not obeyed by the party. If the consequences would be the same as refusing to obey the High Court order, and the High Court order is executable, then it is my view that the order in the repeat application before the Court of Appeal is equally executable."

The decision of the court in Merchant Bank Ghana Ltd v Similar Ways Ltd [2012] 1 SCGLR 440, while refusing to grant an order for stay of execution, granted an order suspending the entry of judgment in the decision on appeal. In making the order, the court speaking through Atuguba JSC (as he then was), bemoaned the effect of a strict application of the previous decisions on orders made in non-executable decisions of the Court of Appeal, which on principle ought to be vacated. Faced with the troubling consequences of the prior decisions, the Court fell upon article 129 (4), and suspended the entry of judgment. It is observed that the said provision is repeated in section 2 (4) of the Courts Act, 1993, Act 459. The judgment at pages 448- 451 clearly demonstrates the lapses which the court's decisions on stay of execution tended to place in the path of the court in the discharge of its core mandate of doing substantial justice to parties. This new trend must have been heartwarming to parties who must have thought that the Court was breathing a fresh air of relief from its strict application of the rule on the so-called non-executable orders. However this development was met with another obstacle in the path of its nurturing when in the case of Golden Beach Hotels Ltd v Pack Plus International Limited [2012] 1 SCGLR 452 , the Court while acknowledging the power to suspend judgments pending appeal was of the view that to succeed , the application must be made under rule 20 of CI 16 and to succeed, an applicant required to satisfy a stricter and narrower test higher than that relating to stay of execution. The test in such a case is to demonstrate exceptional circumstances, which not having been satisfied by the applicant, resulted in the dismissal of its application. In reaching its decision, the court applied the principle enunciated in the prior decision in Standard Chartered Bank (Ghana) Ltd v Western Hardwood Ltd and Another [2009] SCGLR 196. It is interesting to observe that although the Court's attention was drawn to its prior decision in the Similar Ways

case (supra), it preferred to apply the rule related to non-executable orders not being the subject matter of stay of execution. What would have caused the learned justices so soon after the Similar Ways decision to chart a path that according to them was stricter and narrower than that related to a stay of execution is difficult to discern but emphasises the inconsistency in the approach of the Court to applications for stay of execution pending appeal. Examining the decisions closely, one is compelled to reach the view that the learned justices failed to take advantage of the powers conferred on it under article 129(4) to develop a rule that will avoid the hardships brought upon parties by the strict adherence to the decision in a collection of cases that deny jurisdiction in the Court. Had the learned justices carefully read the provisions of article 129(4), they would have noted that it conferred a wide discretion on them in the following words:

> *"For the purpose 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 purpose of any other authority, expressly or by necessary implication given to the Supreme Court by the Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by the Constitution or any other law." [Emphasis mine]*

The task before us in these proceedings is to determine which of the varied approaches to stay of execution pending appeal is more preferable as representing what may be described as the justice of the matter. In the circumstances, drawing inspiration from the authority conferred on us in appropriate instances to depart from a previous decision of the court, we propose to examine the decisions with a view to discerning which of the approaches best serves our core mandate of doing substantial justice to parties. In doing this, regard would be had to the quality of legal reasoning by which the various decisions were expressed and the source of the court's authority in granting orders of stay of execution. Such an examination, it is proposed, would be done having regard to the nature of the appellate process.

We commence from the premise that stay of execution was developed from the inherent jurisdiction of the court, the reserve of powers by which the court seeks to do justice to parties who appear before it. The learned authors of Halsbury's Laws of England, volume 37, paragraph 14 at page 23 describe this jurisdiction as follows:

> *"In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them*."

Having noted the nature of the inherent jurisdiction as that which seeks to do justice between parties, it follows that the development of the relief which has come to be known as stay of execution must have been informed by the said need. Turning to the peculiar facts relevant to our determination of the application before us, the gravamen of the applicant's case simply is that having pursuant to an order of stay of execution granted by the Court of Appeal pending appeal, paid 30% of the judgment debt, being ordered by the same Court following the dismissal of its appeal to make a further payment under the judgment would have a crippling effect on its business. The respondent denies that the further payment ordered under the order of stay granted by the Court of Appeal would have a crippling effect on the applicant's business and invites us to withhold our jurisdiction to grant stay of execution as it involved no executable order. The respondent, in our view took a position that was firmly anchored on the binding effect of the cases which deny jurisdiction in the Court in applications for stay of execution involving non-executable orders.

As earlier indicated, the next matter for consideration is the general nature of appeals. This should not be construed as disrespect to my esteemed brethren whose knowledge of this basic principle is not doubted as I do so out of a desire to explain the nature of the appellate process, to the parties in order that they might understand the reasons for our decision. In their nature, appeals seek correction of decisions made by lower courts and where such an appeal succeeds, the decision of the lower court is reversed. A reversal means that a different decision is substituted in place of the decision by the appellate court. On the other hand, where the appeal is found to be unmeritorious, it suffers a dismissal as was the case regarding the applicant's appeal to the Court of Appeal. While an appeal is pending for determination, it is in accord with fairness and in particular, process integrity that nothing be done to the judgment debtor such that before the decision has finality, he is made to pay up the entirety of the judgment debt or a substantial portion thereof thereby rendering the victory on appeal nugatory. What this portrays is that when a court is confronted with an application for stay of execution , its main focus should be to delicately balance the competing rights of the parties under the judgment on appeal such that a reasonable onlooker apprised of the facts can say that the decision of the court on the application was a just one and not one that keeps people wondering whether in the circumstances there is any purpose in exercising the constitutional right to appeal from a decision of the Court of Appeal to the ultimate court. There can be no doubt that the application of the decisions which deny jurisdiction to the Court may have had dire consequences on appellants who having lost in the two lower courts succeeded before the Supreme Court only to be faced with a pyrrhic victory; the very mischief that the relief of stay of execution pending appeal was developed to avoid.

A matter that requires our interrogation regarding applications for stay of execution from non-executable orders is that whiles in exercising jurisdiction after the dismissal of an appeal, the Court of Appeal but for rule 20 (2) of the Supreme Court Rules, would have been functus officio, it is able to determine applications for stay of execution and make orders in respect of judgments which relate to for example, in this case, monetary awards of the High Court and yet we are unable to exercise a power which they derive

from the lodgment of an appeal to us. The time has come for us to embrace a new approach to our jurisdiction in applications for stay of execution from appeals dismissed by the intermediate appellate court.

After carefully considering the matter before us and applying myself as best as possible, the view is reached that in appropriate cases, the ends of justice is better served even in cases where the judgment of the Court of Appeal is said to be merely executable by inquiring to an application for stay of execution on the merits. This is because in its absence, parties would be left without a remedy, a situation which the learned justice Atuguba JSC (as then was) bemoaned in the Similar Ways case before granting an order suspending the entry of judgment in the matter. Indeed, in the earlier case of NDK Financial Services Ltd v Yiadom Construction and Electrical Works and Others [2007-2008] SCGLR, 93, this court had by a majority decision after adverting its mind to the cases which emphasise the non-executable nature of appeals dismissed by the Court of Appeal, granted the application for the purpose of doing justice in the matter. In the words of Brobbey JSC at page 98 of the report

"In considering an application for stay, the court should endeavor to do substantial justice. The court should consider the essence of the order more than the form in which it was couched. The most important point is what would happen if the order of the Court of Appeal were not obeyed by the party. If the consequence would be the same as refusing to obey the High Court order, and the High Court order is executable, then it is my view that the order of the Court of Appeal is equally executable."

That attitude, better serves our function of doing justice to all in keeping with our oath of office which, we consider to be the guarantee to the public that when they appear before us, our decisions would embody that which is envisioned as the justice of the matter. This, must have informed the lawmaker to craft an extensive power to be utilized by the Court when acting within its jurisdiction to exercise the powers, authority and jurisdiction that are ordinarily not available to it provided that the power so exercised

belongs to any court established under the Constitution or any other law. The words of article 129 (4) express the power conferred on the court as follows:

> *"…… the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law."*

Based upon the said article, it is thought with respect to the learned justices of the Supreme Court who decided to the contrary that they did not fall upon the residual power of the court expressed in article 129(4) of the Constitution, which acknowledges that the powers of the Supreme Court might not be sufficient in all matters, so reserved to it a power that would enable it to do justice in appropriate cases. The statements made by learned justices of this Court in cases such as NDK Financial Services Ltd v Construction and Electrical Works and Others and to some extent the Similar Ways case, seem to us with the greatest respect to the said justices for whom we have great respect to be shying away from the extensive power conferred on them under article 129(4) to examine the peculiar circumstances of an application before them, so as to do justice to the parties.. We do not think that the approach adopted in the cases which emphasized the non-executable nature of the orders is the preferred course of proceeding where parties come before us seeking justice more particularly on account of the said constitutional provision. The power of the Supreme Court as expressed in the said article is quite extensive and goes beyond that available to for example, the Court of Appeal in article 137 (3) by which it is limited to exercising only the powers vested in the court from which the appeal has been lodged. When one considers the said article purposively, it is clear that the power vested in the Court was intended to enable the Court while acting within its jurisdiction to do what the justice of the matter requires. In this regard, the opinion is ventured that had the learned justices of the Court resorted to the said constitutional provision, they would have been provided with an alternative reasoning that would have produced a more just result.

Proceeding further, the position is reiterated that there is of a collection of cases dating from 1960s commencing from Eboe v Eboe [1961] GLR 432 including Mosi v Bagyina

[1963] 1 GLR 337; Standard Chartered Bank of West Africa v Boaitey [1971] 2 GLR 308, Mensah v GFA [1989-90] 1 GLR 1; N. B. Landmark Ltd v Lakiani [2001-2002] SCGLR 318 and lately the unreported case of ADM Cocoa Ghana Ltd v International Land Development, Civil Motion Number J8/47/2015 date May 07, 2015, in which the Court declined to inquire into an application for stay of execution pending appeal in circumstances as confront us in these proceedings.

As the matter before us relates to a direct attack on the judgment as distinguished from a collateral attack on the integrity of the judgment, in approaching the application herein, it is important that this distinguishing feature is borne in mind. This distinguishing feature renders it different from the situation that faced the court in some of the cases to which reference has been made earlier in this delivery, which were based on collateral attacks on the judgment on which the applications were founded. In collateral proceedings, a separate process is taken to challenge the integrity of a judgment such as an application is brought to set aside a judgment or in judicial review applications. Where the decision in the case is that on appeal as is the case before us, the failure of the Court to consider the effect of article 129 (4) on its powers seems to be depriving the applicant of the benefit of the powers contained in the said article. The refusal to allow appeals from judgments as was the case by the Court of Appeal in the matter herein meant that the execution-creditor was free go into execution as it effectually restored the judgment of the trial court. As a matter of practice, the successful party in the appeal before the Court of Appeal in filing an entry of judgment in the matter would have to recite the judgment of the Court of Appeal as the authority for demanding payment of the judgment debt. Without the order of affirmation of the trial court's judgment by the Court of Appeal, the decision of the trial court lacked the essential attribute of a subsisting judgment that can be enforced.

Further, it appears from the decisions which withheld jurisdiction from the Court that a narrow view of the proceedings that transpired on the dismissal of the appeal when they

failed to notice that the usual order made in such circumstances is expressed, for example as follows:

> *"Accordingly, the appeal fails and is dismissed. We proceed to allow the claims of the plaintiff as endorsed on the writ of summons before the High Court."*

The interpretation of "judgment" in section 99 of the Courts Act (Act 459), has a huge bearing on the understanding of a judgment of dismissal on an appeal as it is defined to include an "order" in the words that follow:

> *"Judgment" means a judgment or order given or made by a court in any civil proceedings…… for the payment of a sum of money in respect of compensation or damages to an injured party."*

In the face of these conflicting approaches of the Court to the question of our jurisdiction to grant stay of execution pending appeal, the question that arises is whether it is right in the circumstances of this case to strip the collection of cases to which reference has been made of their efficacy. The conferment of the power of departure in the Court by article 129 (3) of the Constitution is a valuable tool that may be employed to free the Court from the present state of inconsistency related to the grant of stay of execution from judgments of dismissals of appeals by the Court of Appeal. In this regard, the power to depart from previous decisions may be seen as a flexible arsenal to be deployed by the Court to do substantial justice to parties.

A resort by the Supreme Court in some of the decisions under scrutiny in this delivery, shows an attempt to differentiate stay of execution and stay of proceedings by virtue of rule 20 of CI 16 in an attempt to overcome the overbearing weight of cases which preclude relief from applicants. In reality, however, the said provision is just an acknowledgment of the inherent power of the Court in appropriate instances to grant stay of execution or proceedings. In substance when any of these orders is granted in

the course of a pending appeal, its effect is to suspend the enforcement of the rights granted the judgment-creditor under a judgment of the Court, which is on appeal. Where the application seeks to suspend the rights of the judgment creditor from enforcing the judgment generally, a stay of execution is more appropriate. When, on the other hand, the application is directed as a specific order under the judgment such an order for accounts or distribution of a specified fund, the court may grant an order staying the taking of steps under the particular process, a stay of proceeding related , for example to the distribution of a fund or the taking of accounts as ordered under a judgment , which is on appeal. Orders for stay of execution may be made in relation to processes of execution such as *fieri facias*, *writ of possession*, and the like. It is noteworthy that Ollennu 's judgment in Eboe v Eboe very clearly emphasised the differences between these different concepts but although the case continues to be cited daily on the principle related to non-executable orders and stay of execution, sight is unfortunately lost of other aspects of the judgment, which on the facts available is unexceptionable. It is its extension over the years without any examination of the peculiar circumstances provoking the making of the decision that has tended to undermine its precedential value.

Before considering article 129(3), reference is made to the origins of the principle of departure from previous decisions. In a speech made by Lord Gardiner, the Lord Chancellor, preceding the delivery of a judgment in a pending case that is reported at page 77 of [1966] 3 All ER., he observed in a manner that is seminal to the modern approach to the doctrine of judicial precedent as follows:

> *"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs upon which to decide what the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.*

"*Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice int to do so. a particular case and also unduly restrict the proper development of the law. They propose, therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so….*" [Emphasis mine] was granted by the Court"

Careful consideration of the words quoted above reveal that article 129(3) of the 1992 Constitution is expressed substantially in the same words. It repays to quote the formulation contained in the said article:

"*The Supreme Court may while treating its previous decisions as normally binding, depart from a previous decision when it appears to it right to do so……" [Emphasis mine]*

This provision was similarly contained in both the 1969 and 1979 Constitutions of Ghana. Therefore, cases decided previously provide us with guidance as we seek to depart from the previous decisions. In the case of Loga v Davordzi [1966] GLR 530, the Supreme Court had before the incorporation of the principle of departure into our Rules, specified some of the circumstances justifying the exercise of the power to depart from a previous decision to include a decision that was *per incuriam* or for any exceptional reason not be followed. Also, in the course of his judgment in Essilfie v Anafo [1992] 2 GLR 654. Archer CJ (as he then was), observed at page 666 of the report as follows: 2005]

. "*There is no doubt that this conflict in the two decisions has caused anxiety and confusion to parties and their counsel and must now be resolved if the principle of the binding effect of judicial precedent is to have any relevance at all in Ghana. The doctrine at times can bring about unforeseen consequences and that is why the Constitution, 1969 for the first time empowered the Supreme Court to depart from its previous decisions 'when*

it appears right so to do'. This Constitutional power was repeated in the Constitution, 1979. In Ghana, the practice appears to have the backing of statutory law, whereas in England where this practice was first introduced and copied by Ghana, the practice is based on the practice statement by the House of Lords and not by an Act of Parliament."

That pronouncements by the Court of the right of a party to an order of stay of execution pending appeal has been concerning to some of its members is evidenced by Dotse JSC in a paper presented to the Ghana Bar Association at its annual conference in Ho on September 13, 2013 entitled " Executable-Non-Executable Orders-The Predicament of the Judgment Debtor in Staying Execution Pending Appeal" and Pwamang JSC's dissenting opinion in Sethi Brothers Ghana Ltd v Regency International Insurance Ltd, an unreported judgment of the Supreme Court in Civil Appeal No J8/68/2019 dated May 20, 2019. It is noteworthy to observe that Dotse JSC's presentation came to the notice of the learned justices of the Court in the course of their deliberation in the unreported decision in ADM Cocoa Ghana Limited v International Loan Development Ltd. Both respected Justices of the Court deprecated the uncertainty in the decisions regarding applications for stay of execution pending appeals. These voices, which may be likened to cries in the wilderness point in the same direction urging us to bring about an end to the apparent lack of certainty in our decisions in applications for stay from the so-called non-executable judgments of the Court of Appeal. It is a cry to us to assume the powers, authority and jurisdiction conferred on us by article 129(3) of the Constitution to depart from previous decisions when we are satisfied that it is right to do so. Although the power to depart is vested in us, this should be done rarely and sparingly when a decision is shown to be manifestly wrong or we are faced with different approaches of the Court to the resolution of a particular problem. It must be exercised with self- restraint and resorted to only when the Court is convinced that the earlier decision was incorrect or such a departure is necessary to bring certainty to its decision in order to give teeth to the doctrine of judicial precedent. Departure from a precedent should be seen as an avenue to shaping the course of the law to avoid perpetuating what is considered an

error. Such is the nature of restraint that it took the House of Lords, forty years from the Practice Statement in 1966 to sometime in 2006, when, in Horton v Sadler [2006] UKHL 27, it departed from Walkley v Precision Forgings Ltd [1979] 1 WLR 606. The Canadian case of R v Neves [2005] M.J No 381 in which it was observed as follows, though of persuasive authority, commends itself to me.

> *"The principle of stare decisis is a bedrock of our judicial system. There is great value in certainty in the law, but there is also, of course, an expectation that the law as expounded by judges will be correct, and certainly not knowingly incorrect, which would result when a decision felt to be wrong is thus not overruled. The tension when these basic principles are in conflict can be profound."*

The confusion and anxiety which confronted the Supreme Court in Essilfie v Anafo (supra) and indeed, in the Canadian court in R v Neves (supra) is no different from that which now confronts us. From the authorities, such an occasion presents an opportunity to depart from previous decisions that are considered to be wrong. The benefit to be gained by the entire legal system by the correction of the error outweighs that to be gained by a strict adherence to precedent. Therefore, having demonstrated that the collection of cases to which clear reference has been made previously in this delivery were wrong in their application of the clear provisions of article 129 (4) of the Constitution, it is right to say that the time has come for us to chart a new journey by taking advantage of the enormous powers conferred on us by article 129(3) of the Constitution .As the said decisions did not correctly apply the power conferred on the Court under article 129 (4) of the Constitution, they were delivered *per incuriam* and need not fetter us in our pursuit of seeking to bring certainty to the law in order to enhance the application of the principle of judicial precedent. That failure provides us with a compelling reason to depart from the said decisions in order to give meaning to the supremacy of the Constitution as provided in article 1 of the 1992 Constitution. Accordingly, in the exercise of the powers conferred on us under article 129 (3), the

conclusion is reached that in appropriate cases, the Supreme Court can utilize the power conferred on any other court in the realm to grant an order of stay of execution from non-executable judgments of the Court of Appeal.

Then, there is the decision in Similar Ways case in which the court granted an order of suspension of the entry of judgment from a dismissed appeal. The decision of the Court in NDK Financial Services Ltd v Yiadom Electrical and Construction Works and Others having been expressly departed from by the court in Standard Chartered Bank (Ghana) Ltd v Western Hardwood Ltd [2009] SCGLR ,196, the observation is made that even though in the Similar Ways case some relief in the nature of suspension of the entry of judgment was granted by the Court, it fell short of the express power conferred on the Court 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."

The different approaches adopted by the Court in applications for stay of execution related to a non-executable order were in their nature a dichotomy designed to provide a relief by way of a suspension order when in truth the matter before it is one for stay of execution. This, can be observed from the decision of the Court in the Similar Ways and the Golden Beach Hotel cases. In their attempt to do so, the law was unfortunately put on a course that is not only wrong in principle but wrong in practice as well. Wrong in principle, because article 129 (4) provides the Court with ample jurisdiction in very clear language to assume the authority and or jurisdiction of any other court in order to do substantial justice to the parties. And it was wrong in practice because, stay of execution is quite different from orders of suspension which in their nature are more cognizable in applications for stay of proceedings, so the more we attempt to engage in the dichotomy, the more unjust it tends to be to the parties who come before us for relief from the enforcement of judgments pending appeal. The decisions of the Court in the Similar Ways and the Golden Beach Hotel cases, demonstrate quite clearly the attempt of our judges to engage in a differentiation of the right to stay of execution, suspension and stay of proceedings related to judgments pending appeal and the uncertainty associated

therewith. It is therefore no wonder that with the passage of time, some members of the Court started showing signs of change of minds, something that is healthy for the development of the law. My Lords, the time has come for us to embrace the wind of change that enables us to correct errors that are innate to human beings.

For example, although the court considered article 129 (4) together with rule 20 of CI 16, in the Similar Ways case, it came to the conclusion that as the appeal did not relate to any executable order, some other remedy was appropriate. The words of Atuguba JSC in the course of the judgment at page 448 of the law report reveals the fundamental misconception of the power vested in the Court by virtue of article 129(4) of the constitution when the learned justice proceeded thus;

> *"…. It has appealed from the High Court's dismissal of that application and pending its determination applied unsuccessfully to the High Court and the Court of Appeal for an interim injunction to restrain the execution of the judgment. It has sought relief from this court pending bits appeal from the adverse ruling of the Court of Appeal. All along, it is obvious that its applications and appeals do not relate to any executable order. That, however, does not mean that that it has no interest in holding off the enforcement of the substantive judgment to which its processes relate. If a stay of execution cannot lie, other remedies may lie. One of such remedies can be the suspension of the entry of judgment"*

Explaining the nature of the order made, the learned justice continued at page 448-449 as follows:

> *"In that event, the effect of the judgment itself is temporarily frozen and incidental processes such as execution cannot fly, not because execution itself is stayed but because the life of the judgment itself is in a coma. This measure would prevent the eventual success of the applicant's appeal being rendered nugatory."*

The words which fell from the lips of the learned justice who delivered the ruling of the Court actually leaves no doubt in the minds of any discerning reader that the Court did not take advantage of the enormous power available to it under the Constitution. The Court in that case could have exercised the jurisdiction of the High Court to stay execution of the order which was the subject matter of the appeal. Had the learned justices fully appreciated the scope and extent of the extensive discretion available to them under the Constitution, they would in all probability have made an order for stay of execution. As it seems, from a careful reading of the speech of Atuguba JSC (as he then was), the learned justices inadvertently thought that they were lacking in authority to grant a stay of execution. The learned justices must have been overwhelmed by the force of the decisions which deny jurisdiction in the Court. That, however, is where, with respect to them, they fell into a manifest error; an error which happily by virtue of article 129(3), we are enabled to correct in order to avoid its repetition. The Court in the Similar Ways case, had all the "powers, authority and jurisdiction" to have acceded to the application for stay of execution. The order of suspension granted related to a step in the proceedings which had been taken by the judgment creditor before execution processes commenced, so it is difficult to appreciate its real intendment. The order made in the said cases stopped short of suspending processes founded on the entry of judgment since the court was engaged in a meaningless differential approach to two related but different concepts of stay of execution and stay of proceedings. Procedurally, orders that are suspended are those which take effect immediately without any further order such as injunctions and orders of imprisonment and committal for contempt. For a precedent, see Atkins Court Forms, Volume 19, 2nd edition Form No 216 at page 322. Every other order which requires taking steps to be executed with the aid of writs of execution are those in respect of which stay of execution are concerned.

In the light of the above, parting company with my brethren is a more just ways of proceeding in the matter herein. Therefore, it is declared that the Supreme Court by virtue of article 129(4) has the jurisdiction to determine applications for stay of execution

from judgments of dismissal by the Court of Appeal. This, it is hoped will remove all the uncertainty about stay of execution and suspension of judgments related to such applications and enhance public confidence in our ability to do substantial justice to parties. In arriving at this conclusion, regard has been had to the prayer of the applicant by which it seeks an order of suspension of the judgment entered against it in the Court of Appeal. The uncertainty in the decisions of the Court as appears from some of the decisions referred to in the course of this delivery may have contributed to the difficulty that practitioners face in setting out the relief that they seek before us. After all, if the Supreme Court's decisions are declaratory of the law and binding on all other courts, how can a practitioner who seeks the exercise of a discretion in his favor frame his case in a manner contrary to the effect of the binding decisions of the Court. As the substantive relief sought from the application is an order of stay of execution, and the parties contested the application on that basis, no injustice is done in considering the application as one for stay of execution.

Having disposed of the question touching and concerning our jurisdiction, the next matter to be considered is the merits of the application. Having given careful thought to the application, it is noted from paragraph 15 of the affidavit in support that the applicant raises the likelihood of the payment which was ordered by the Court of Appeal having a crippling effect on its finances should the said order be complied with. As previously observed, the applicant has made a payment amounting to 30% of the judgment debt on the orders of the Court of Appeal before its determination of the appeal and yet a further payment was ordered to be made after the determination of the Appeal pending the determination of an appeal to this Court. It is observed without any hesitation that the order to make payments beyond the 30% allowed, was in substance, a denial of stay of execution pending appeal. Accordingly, the application is properly before us.

In Linotype-Hell Finances Ltd v Baker [1992] 4 All ER 887, which is of persuasive authority, Stoughton LJ observed as follows:

"In the Supreme Court Practice 1991 vol1, para 59/13/1 there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending appeal. At a brief glance they do not seem to me to reflect the current practice in this court and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one, the Court should concentrate on the current practice. It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution. The passage quoted in the Supreme Court Practice from Atkins v Great Western Rly Co (1886) 2 TLR 400, 'As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds' seems to be far too stringent a test today…."

The likelihood of the applicant's business crippling if it were to pay further sums as ordered by the Court of Appeal also brings the matter within exceptional circumstances, which by the decision of this Court in Joseph v Jebeille [1963]1 GLR 387, is a good ground for the grant of stay of execution not to mention the dire circumstances in which we now are and its effect on businesses.

Then there are also the matters, which have according to the applicant come to its knowledge since the entry of judgment against it related to the ownership of the land being vested in the State contrary to the admission made by the 2nd defendant; this is a matter covered by Order 43 rule 11 of the High Court (Civil Procedure), Rules CI 47, which provides:

"Without prejudice to the generality of Order 45 rule 15, a party against whom a judgment has been given may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters

which have occurred since the date of the judgment or order, and the Court may by order grant relief, on such terms as it thinks just."

If the facts deposed to in the affidavit of the Executive Secretary of the Lands Commission, in support of the application for stay of execution are proved to be true then their existence at the trial would have prevented the judgment being given in favor of the plaintiff. In London Permanent Benefit Building Society v de Baer, [1968] 1 All ER 372, Plowman J observed of Order 45 rule 11 of the English Rules on which our order 43 rule 11 is based as follows:

"The power conferred by that rule to grant relief is a power to do so, and I quote "on the ground of matters which have occurred since the date of the judgment". It is in my judgment implicit in the rule that the matters referred to are matters which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order."

For these reasons, the application for stay of execution succeeds. In particular, an order of stay of execution is granted in respect of the judgment of the High Court, Agona Swedru dated May 10, 2017.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, CJ:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

ANIN YEBOAH
(CHIEF JUSTICE)

DOTSE, JSC:-

This is to indicate that, having read the two opinions in this case, it is Gbadegbe's lead ruling that l concur in respect.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

PROF. KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

PWAMANG, JSC:-

My Lords, the application before us has reignited a legal controversy that has troubled this court and the profession in general for some time now. The issue is, by what authority

can the court entertain an application for stay of execution of a judgment that is not directly on appeal before the court. A related question is whether the court can stay execution of a non-executable judgment of the Court of Appeal. The background facts of this case evoked in all of us a sense of uneasiness and on 28th April, 2019 we rightly concluded that the applicant is entitled to interim relief pending the determination of its appeal lodged in this court. Nonetheless, as we give the reasons for our ruling it is important to clarify the grounds for our decision as the arguments of the respondent questioning the jurisdiction to entertain the application are based on some decisions of this court that are anchored on basic and fundamental principles of our system of law. Because of the persistent recurrence of the question I have decided to make some remarks of my own while I concur with my worthy brother, Gbadegbe, JSC on the conclusion in the brilliant opinion he just read.

In the application before us the applicant prays us "for an order of stay of execution of the judgment of the Court of Appeal, Cape Coast, constituted by Lawrence Lazagla Mensah, JA, Angelina Mornah Domakyaareh (Mrs), JA and Patience Mills-Tetteh, J dated 29th May, 2019, pending the determination of the Appellant's appeal against the judgment upon the grounds contained in the accompanying affidavit and for such further order(s) as the honourable court may deem fit ".

In the affidavit of the respondent in answer he deposed that he had a preliminary objection to the application which he contends is legally incompetent. Consequently, at the first hearing of the application we called on counsel to state his objection. Kwasi Afrifa Esq, lead counsel for the respondent said that the judgment of the Court of Appeal that has been appealed against by the applicant did not make any executable order so by the decisions of this court an application for stay of execution of the judgment of the Court of Appeal does not arise.

The concluding part of the judgment appealed against states as follows;

"As the analysis of the entirety of this judgment shows, all the grounds of appeal have failed. Accordingly, the appeal is dismissed in its entirety save for the enhancement of

the costs awarded by the trial court from Ghc20,000.00 to Ghc40,000.00 in favour of the respondent as against the appellant. Subject to the variation of the costs as indicated, the judgment of the High Court, Agona Swedru dated 10th May 2017 is hereby affirmed."

In view of the fundamental nature of the issue raised we requested the parties to file further arguments which they have done and the Chief Justice enhanced the bench for the hearing. In its written submissions the applicant invites the court to consider making an order staying execution of the judgment of the trial court if it is not minded to stay execution of the judgment of the Court of Appeal which it admits is non-executable. Ace Anan Ankomah Esq, lead counsel for the applicant submits that the court has authority under **Article 129(4) of the Constitution, 1992** to exercise the powers of either the High Court or the Court of Appeal to stay execution of the judgment of the High Court. In fact, a reading of the affidavit in support of the application leaves no doubt that the applicant is asking us to stay execution of the judgment of the trial court dated 10th May, 2017 which is not directly on appeal here. That judgment ordered the applicant to pay to the respondent USD16,009,920.00 as damages for trespass to land about 8.242 acres in extent lying and being at Gomoa Afransi in the Central Region adjudged to belong to the respondent.

This application and similar ones made on previous occasions in the court praying for stay of execution is stated to be pursuant to **Rule 20 (2) of the Supreme Court Rules, 1996 (C.I.16).** This provision just as the enactments *in pari materia* that preceded it has been understood to be the source of the jurisdiction of the Supreme Court to entertain applications for stay of execution pending appeal. It is as follows;

"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.

(2) Subject to these 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 that court refuses to grant the application, the applicant may repeat the application before the Court for determination."

The rule has been interpreted as limiting the court's jurisdiction to entertain applications for stay of execution pending appeal to only applications in respect of the judgment that is on appeal before the court. Accordingly, where that judgment is not executable, the decisions maintain, the jurisdiction does not arise. The cases that have so held include **N.B. Landmark Ltd v Lakiani [2001-2002] SCGLR 318; GFA v Apaade Lodge Ltd [2009] SCGLR 100; Takyi v Ghassoub (Ghana) Ltd [1987-88] 2 GLR 452, and Anang Sowah v Adams [2009] 111**. The applicant on the other hand argues that the court can grant its application and for authority referred to us the cases of **NDK Finance Ltd v Yiadom [2007-2008] SCGLR 93; Standard Chartered Bank Ghana Ltd v Western Hardwood Ltd & Anor [2009] SCGLR 196; Merchant Bank (Ghana) Ltd v Similar Ways Ltd [2012] 1 SCGLR 440 and Golden Beach Hotels (Gh) Ltd v Packplus International Ltd Ltd [2012] 1 SCGLR 452.**

My Lords, there appears to be some confusion as to whether Rule 20 of C.I. 16 is capable of a wide interpretation that would clothe the Supreme Court with jurisdiction to either stay execution of a judgment of dismissal by the Court of Appeal or of the judgment of the trial court that is not on appeal before the court. In its written arguments the applicant submitted that the court should be able to give the rule a wider interpretation and entertain its application. However, the applicant appears to be under the impression that this court has on a previous occasion suspended the enforcement of a non-executable judgment. It states as follows at pages 11-12 of its written submissions;

"My Lords it was only a matter of time that this Honourable Court began to make inroads into the opaque and impassable rule on 'non-executable judgments'. The first was that when the trial court has made a fundamental mistake, the Supreme Court would not allow the judgment to be executed even though the actual judgment appealed against before the Supreme Court is non-executable. However in appropriate cases this Honourable Court has suspended the enforcement of such orders pending the determination of an

appeal. My Lords in Merchant Bank (Ghana) Ltd v Similar Ways Ltd... this Honourable Court suspended the enforcement of a non-executable order because the trial court had breached the rules of natural justice and that 'in such compelling situation procedure must take a back seat.'"

It is not correct that in **the Similar Ways case** this court suspended the enforcement of a non-executable judgment. This is the final order of the court at page 451 of the report;

"in the special circumstances of this case, the entry of judgment in the High Court filed on 28th July, 2009 in respect of the judgment delivered on 8th January,2009, is hereby suspended pending the determination of the applicants appeal to this court from the ruling of the Court of Appeal." The judgment of 8th January 2009 was delivered by the High Court wherein the applicant was ordered to pay $30,800.30 with interests and costs. In that case the Court of appeal decision on appeal to the Supreme Court did not contain an executable order and no purpose would have been served by its suspension as there was nothing to enforce.

My Lords, the practice whereby the court now entertains applications such as the one before us has evolved over time and it is important to clarify the jurisprudence so that our decision in this case will be understood in the proper context. I have given serious consideration to the invitation by the applicant to give Rule 20 of C.I.16 a wide interpretation but I have unhesitantly come to the conclusion that the rule is not capable of a wide interpretation and that the cases that interpreted it to have limited application were not wrongly decided. I shall review the cases to justify my position. In the case of **N.B. Landmark v Lakiani**, default judgment was given by the Circuit Court, Accra against the defendant for reliefs including recovery of possession on 2nd November, 1998. The defendant filed a motion to set aside the default judgment but the Circuit Court dismissed the motion. The defendant then appealed against the refusal to set aside and applied to the Circuit Court for stay of execution which was dismissed and he repeated it before the Court of Appeal which granted it. On appeal to the Supreme Court the court was at pains to point out that since the judgment in respect of which the application for

stay was made was a judgment of refusal and thus not capable of being executed the Court of Appeal could not in law stay execution of it.

Acquah JSC, (as he then was) with whom the rest of the court agreed, said at page 196 that;

"Now, it is trite learning that an application for stay of execution, presupposes that the order or decision in respect of which the stay is sought is capable of being executed by any of the known processes of execution. If the order or decision is incapable of being executed, an application for stay of execution cannot be applied in respect of it. Thus in Eboe v Eboe [1961] GLR 432 Ollennu J (as he then was) held that a declaration that the defendant was a trustee did not require any person to do anything or abstain from doing anything and there was no method of executing it. Consequently, there could be no application to stay the said order."

He then disposed of the case as follows;

"In the instant case the judgment in respect of which the application for stay was sought, was one refusing to set aside a default judgment. How does one go into execution in respect of such a refusal order? 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."(emphasis supplied).***

Acquah, JSC did not doubt that it is possible to obtain an order for stay of execution of the substantive judgment but his view was that the case at bar did not target that judgment but rather the judgment of refusal. The statement that if the order or decision is incapable of being executed, an application for stay of execution cannot be applied for in respect of it is an immutable statement of settled law. In fact, it is an oxymoron in legal terminology to talk of staying execution of a non-executable decision. There is nothing opaque about the principle on non-executable judgments that applies in all common law jurisdictions and was described by Date-Bah, JSC in **the Golden Beach**

Resorts case as part of our received learning. A declaratory judgment or a judgment of refusal to set aside a judgment as was the case in Lakiani is not capable of being stayed by an order for stay of execution. As a result I am of the opinion that, on the facts the Lakiani case was rightly decided just as Eboe v Eboe was also rightly decided by Ollennu J (as he then was). Such were the facts in the case of **Morkor v Kumah [1998-99] SCGLR 620** and this court came to the same conclusion.

However, it ought to be pointed out that the fact that there can be no stay of execution of a declaratory judgment does not mean that there can be no interim relief in respect of it on a justifiable ground such as pending the determination of an appeal. There is jurisdiction to suspend the effect of a declaratory judgment as was done in **Republic v General Legal Council Disciplinary Committee; Ex parte Aboagye da Costa [1989-90] 2 GLR 164.** See also the Canadian Supreme Court case of **Labatt Breweries v A-G [1980] 1 SCR 494**. Statute may also provide for the suspension of the effect of declaratory judgments. See, infra, **Or 43 R11 of the High Court (Civil Procedure) Rules, 2004 (C.I.47)** which has a wider breadth than is noticed by a casual reading of the provision. See also **Rule 24.2(a)(3) of the Texas Rules of Appellate Procedure.** But the point I make about suspending a declaratory judgment does not apply in respect of judgments of dismissal or refusal as we have in this case and as was dealt with in Lakiani and Morkor v Kumah. Whereas a declaratory judgment determines legal rights and status of the parties to a case without more, a judgment of dismissal or refusal does not decide anything by way of rights or status.

It was in **Takyi v Ghassoub (Ghana)** that the Supreme Court made a definitive pronouncement on the ambit of the rule on stay of execution by appellate courts. The court interpreted Rule 27 of the **Court of Appeal Rules, 1962 (L.I 218)** which is *in pari materia* with Rule 20 of C.I. 16. The court held as follows;

"The Court of Appeal's assumption of jurisdiction could not be ***justified under rule 27*** *of the Court of Appeal Rules, 1962 (L.I 218) As amended by rule 2 of the Court of Appeal (Amendment) Rules 1975 (L.I 1002) because even if it (sic) was changed to or,* ***the proceedings contemplated were proceedings under the judgment or decision***

***appealed from**, not prior to, or leading to, the judgment. And since the question of damages and costs had not been dealt with by the High Court, they would not be proceedings under a judgment but rather proceedings pending before judgment."(emphasis supplied).*

This was the interpretation of Rule 20 the court adopted in Anang Sowah v Adams and GFA v Apaade Lodge. The facts of GFA v Apaade Lodge were similar to the Lakiani case but here the application targeted the executable judgment but which was not on appeal before the Supreme. Default judgment was entered by the High Court, against GFA on 4th April, 2006 to pay certain sums to the plaintiff. GFA applied to set aside the default judgment but the application was refused by the High Court. It appealed against the refusal to the Court of Appeal but lost there and further appealed to the Supreme Court. It then brought an application for stay of execution of the judgment of 4th April, 2006. The Supreme Court held that since there was no appeal against the judgment of 4th April, 2006 there could be no stay of it pending appeal. Sophia Adinyira, JSC, who authored the unanimous opinion of the court said at page 109 as follows;

"The only appeal properly before this court is the one against the judgment of the court of appeal dated 22nd May, 2008. Consequently, it is only in respect of that judgment that has been appealed against that this this court can be invited to exercise its discretion to grant stay if there is an executable order and the application is with merits. The applicant did not appeal against the default judgment; the Court of Appeal did not therefore make any executable orders in respect of the said judgment; ***wherein lies our jurisdiction to entertain an application for stay of execution of a judgment which is not on appeal?"(emphasis supplied).***

Counsel for the applicant in **GFA v Apaade lodge** obviously did not argue the application outside Rule 20 so the court's hands were tied. In cases that came after effort was made to locate jurisdiction to entertain applications for stay of execution of the executable judgment of the trial court outside of rule 20 and I shall refer to them later in the delivery.

In the interpretation of statutes, it is often said that where the courts have on a previous occasion given a particular interpretation to words used in an enactment, then when the law maker uses those same words in subsequent legislation, the law maker is deemed to use the words in the sense interpreted by the court. See **Republic v Tekperbiawe Divisional Council; Ex parte Korle II [1972] 1 GLR 199.** A related presumption in interpretation of statutes is that the law maker is deemed to know the state of the existing law at the time a law is made. When these presumptions are applied to Rule 20 the implication is that since as at 1996 when C.I.16 was made, the rule maker knew the limited breadth of the rule from the decision of the Supreme Court in Takyi v Ghassoub decided in 1988 then the rule maker ought to be understood to have repeated the provision with that limited scope in mind. Concomitantly, when the rule directs that applications for stay of execution should first be made to the Court of Appeal and upon a refusal to the court, it was not contemplated that where the Court of Appeal gave a judgment of dismissal an application could be made to stay its execution since the rule maker is deemed to know that there can be no stay of execution of such judgment as was held in **Eboe v Eboe** and affirmed by the Supreme Court in **Mensah v GFA [1989-90] 1 GLR 1**. Therefore, in my opinion the procedure under Rule 20 arises only where the Court of Appeal gives an executable judgment and there is an appeal against it to the Supreme Court. If the judgment of the Court of appeal is not executable, Rule 20 cannot found jurisdiction to entertain an application for stay of execution.

The majority decision in the case of **Mensah v GFA**, is often referred to as deviating from the principle on non-executable judgments but such would be a misreading of the decision. In that case the Supreme Court considered an application for stay of execution pending appeal against a judgment that granted a perpetual injunction. The respondent relying on Eboe v Eboe argued that an injunction was not capable of execution by the known methods of execution set out in the **High Court (Civil Procedure) Rules, 1954 (LN 140A).** The majority explained that execution is the putting in motion the machinery of the law to enforce a judgment of a court and that since the applicant could be

proceeded against for contempt of court, that would amount to execution. Amua-Sakyi, JSC who authored the majority judgment said as follows at page 5 of the report;

"We have found it necessary to deal with the question whether the judgment was one which was executable because we agree that if it was not then no order staying execution could properly have been made and the appeal must succeed. Having come to the conclusion that it was executable we now have to consider the merits of the appeal against the decision of the Court of Appeal granting a stay.'

It is reported in the Headnote as follows;

"1) where a person had been granted an order of perpetual injunction in protection of his rights, it would be executable in the sense that any breach of the order would render the person liable to attachment for contempt."

Taylor JSC in his dissent limited execution to the writs of execution stated in LN 140A. In my view, the majority was right since contempt proceedings are a form of execution and in our current **High Court (Civil Procedure) Rules, 2004 (C.I.47),** it is so expressly stated at **Or 43 R5(1)(cc).**

The effect of the decisions on Rule 20 is that in order for the procedure under Rule 20 of C.I.16 to become applicable there are two key requirements to be satisfied; 1) the judgment that the applicant seeks to have stayed ought to have been appealed against to the Supreme Court, and 2) The judgment must also be executable. The challenge that applicants in the category of the one before us face is that, their applications satisfies only one of the requirements; it has appealed against the judgment it has prayed to have stayed, i.e. the Court of Appeal judgment, but then the judgment is not executable (Lakiani and Mokor cases). Looked at in another way, if the applicant prays for the Supreme Court to stay the judgment of the High Court, (as in GFA v Apaade Lodge) then it would satisfy the requirement of executability but then that judgment is not on appeal before the Supreme Court. That brings us to the question posed in GFA v Apaade Lodge; where does the court get the jurisdiction from to entertain an application to grant relief in such a case?

My Lords, it is critical to pause and consider what is meant by the term 'jurisdiction' in the question. It is obvious that the court was questioning its authority to determine an application for stay of execution of the judgment of the trial court that was not immediately on appeal before it. Amua- Sakyi, JSC in **Ex parte Laryea [1989-90] 2 GLR 99 at page 101**; defined jurisdiction as "By jurisdiction is meant, of course, the power or authority of the court or judge to give a decision on the issue before it". Similarly, Lord Reid in **Anisminic v Foreign Compensation Commission [1969] 1 All ER 208** explained that in its original sense jurisdiction of a tribunal as "(the) tribunal being entitled to enter into the enquiry in question". In that regard, when we refer to Rule 20 as giving jurisdiction of the court to make orders for stay of execution we are referring to "procedural jurisdiction" only and not the substantive authority by which the court can make the order. In my understanding, it is not Rule 20 that confers subject matter jurisdiction on the Supreme Court to hear and determine applications for stay of execution. However, that does not mean that the court does not have jurisdiction over such applications. In Takyi v Ghassoub and the cases that followed it the court only said the jurisdiction cannot be justified under the rule.

But before I discuss the jurisdiction of the court outside Rule 20, let me say this at the risk of being repetitive. I am of the firm view that it would be contrary to established basic and fundamental principles of law for the Supreme Court to purport to stay execution of the judgment of the Court of Appeal that does not contain an executable order. It will be a vacuous order and pointless for the court to make such order. Take for instance the situation that the court were to make such an order and the judgment creditor goes ahead to execute the judgment of the High Court which has not been stayed, can she be proceeded against for contempt of court? That is why in the **Similar Ways case** the order of suspension was made in respect of the judgment of the High Court which was executable and also when I decided in dissent to grant an application for stay of execution in the case of **Sethi Brothers v Reliance Insurance Co; Civil Motion J8/68/2019 dated 30 May, 2019 (Unreported)** I made the order staying execution of the judgment of the High Court and not the decision of the Court of Appeal

as same was not executable. Therefore, I am of the view that the appropriate and only legally beneficial analysis in this case is to ascertain the authority of the Supreme Court to hear the application as seeking for a stay of the judgment of the High Court.

As I indicated supra, Rule 20 covers only a limited range of interlocutory matters that may arise after the Court of Appeal has determined an appeal. Once the court has determined the appeal it becomes *functus officio* and its jurisdiction in respect of the *res* of the case lapses. See **Agyiliha v. Tayee [1975] 1 G.L.R. 433, C.A..** Of course, after judgment the Court of Appeal, like any superior court, retains residual jurisdiction in matters of execution and contempt in respect of its judgment. See Francois, JSC's judgment in **Republiv v. High Court, Ho; Ex parte Evangelical Presbyterian Church of Ghana & Anor [1991] 1 GLR 323 at 335**. But where the interlocutory matter arises not on the strength of the Court of Appeal judgment but on account of the judgment of the trial court, then the Court of Appeal may be constrained after becoming *functus*. It seems to me that it is this residual jurisdiction that is the source of the Court of Appeal's authority to hear applications for stay of execution of its judgment referred to in Rule 20. As was observed by the venerable Atuguba, JSC in **the Similar Ways case,** apart from the remedy of stay of execution, there is no provision that authorizes the Court of Appeal to make any other interlocutory orders after its judgment on the substantive appeal. Meanwhile, by reason of Rule 16 of C.I.16 the procedural jurisdiction of the Supreme Court to entertain interlocutory applications in respect of the subject matter of the case on appeal other than for stay of execution does not arise until the appeal is entered. Rule 16 is as follows;

"16. (1) After the transmission of the record of appeal from the court below to the Court, the Court shall be seized of the appeal and ***any application relating to the appeal*** *shall subsequently be made to the Court. (2) Any application filed in the court below after the transmission of the record of appeal shall be transmitted to the Court."*

It appears to me that when the appeal has been entered and the Supreme Court is seized of the appeal there can hardly be any doubt of its jurisdiction to make any interlocutory order it considers just that will ensure that its final judgment in the appeal does not

become nugatory. Authority for this is the case of **Wilson v Church No.2 (1879) 12 Ch D 454** which was referred to by the court in **Joseph v Jebeile [1963] GLR 387.** This power of the court must necessarily extend to preventing execution of the judgment of the High Court if the execution will destroy the *res* of the case and produce the result of rendering a successful appeal nugatory. Additionally, if at this stage the court decides to fall on its powers under Article 129(4) to exercise the authority of the trial court to stay its judgment, I doubt that a question of jurisdiction will be posed.

The lacuna, if it can be so described, is before the appeal has been entered. If in the interregnum any interlocutory matter that falls outside Rule 20, including an application for stay of execution not covered under the rule as we have in this case should arise, the issue has all along been can the Supreme Court, a court of last appeal, say it has no jurisdiction to hear the interlocutory application? For me the issue is not staying execution of a judgment of dismissal of the Court of Appeal that is on appeal to the Supreme Court as the authorities are clear on non-executable judgments.

In the **Similar Ways case** the appeal had not yet been entered and Rule 20 of C.I. 16 could not be called upon because the decision of the Court of Appeal that had been appealed against was not executable. The court resorted to its undoubted powers at common law incorporated by Article 126(2) of the Constitution, the reserved power of the court under Rule 5 of C.I.16 and Article 129(4) of the Constitution to found jurisdiction to entertain and grant relief in respect of the executable judgment of the trial court. However, the court restrained itself from making an order for stay of execution of the judgment of the High Court and instead suspended the entry of judgment filed in respect of it. In the case of **Olympio v Giovanni Anthoneli & Ano [2017-2018] 1 SCLRG,** Appau, JSC said that suspension of judgment has the same effect as staying execution of it. If the court considered that it could appropriate the powers of the High Court and the Court of Appeal by virtue of Article 129(4), then one would have expected it to make a straight order for stay of execution since both courts have that power and the judgment of the High Court that was suspended was executable?

At the further hearing of this application we invited the comment counsel for the respondent as to whether we do not have power under Article 129(4) of the Constitution to entertain the application for stay of execution but he did not proffer an opinion, meaning he left it to the court. Counsel for the applicant however in his written submissions drew the court's attention to the fact that Article 129(4) has a threshold for its application and if we are to resort to it we still have to scale over that hurdle. It provides;

"(4) ***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." (emphasis supplied).*

The threshold for the invocation of Article 129(4) is therefore that before the court can draw on the powers of any other court on account of the article, it must first have jurisdiction or statutory authority over the matter it is dealing with. Counsel referred to us Republic v Duffour; Ex parte Asare [2007-2008] SCGLR 394 where at 403 Atuguba JSC said as follows;

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

In the case of GFA V Apaade Lodge Ltd [2009] SCGLR 100, Sophia Adinyira, JSC, in an erudite judgment reviewed this court's jurisprudence on article 129(4) and concluded as follows at page 110;

"We wish to emphasise that article 129(4) of the 1992 Constitution cannot be used as a springboard to clothe us with jurisdiction where there is no appeal against the judgment sought to be stayed."

See also Kpegah, JSC in **Edusei (No 2) v Attorney-General [1998-99] SCGLR 753.**

It is often said that appeal is a creature of statute and appellate jurisdiction is to be exercised strictly in accordance with the statute regulating appeals. If authority for this were required I will refer to **Nye v Nye [[1967] GLR 76, CA (Full Bench), and Sandem-Nab v Asangalisa [1996-97] SCGLR 302**. However, it is also settled law that jurisdiction is conferred by the Constitution or substantive enactments and that rules of court contained in subsidiary legislation only regulate the exercise of existing jurisdiction but do not confer jurisdiction and so cannot take it away or diminish or enlarge it. In the case of **Republic v High Court, Koforidua; Ex parte Ansah Otu [2009] SCGLR 141,** the celebrated Anin Yeboah, JSC (as he then was) made the following profound statement of the law at page 152 of the report;

"The jurisdiction to grant the interlocutory injunction is exercisable by both the Superior Court of Judicature and the Lower Courts in Ghana. Both the 1992 Constitution and the Courts Act, 1993 (Act 459), have conferred jurisdiction on the courts to grant this equitable relief. It is relief which the common law courts have always granted, in the exercise of their discretion, when the circumstances appear to be just and convenient. It is, however, granted to protect rights and in some cases prevent any injury or damage in accordance with laid down legal principles which have developed as a result of case law over the years.

In my opinion, the rules of court merely regulate the procedure for applying for judicial reliefs. It does not confer the jurisdiction on the courts to grant injunctions. In my view, Order 25, r 9(1) and (2) of the High Court (Civil Procedure) Rules, 2004 (CI 47), which learned counsel for the applicants has forcefully pressed on this court, is not meant to impose any serious fetters on the discretion of the court in granting an interlocutory injunction, it being a discretionary relief. I think the circumstances of the case must be looked at in considering the grant or refusal of the application for interlocutory injunction.

Even though rule 9(1) and (2) of Order 25 requires of an applicant to give an undertaking, it is procedural and should not be interpreted to limit the jurisdiction imposed on the courts by the 1992 Constitution and the Courts Act, 1993 (Act 459)."

Also, in the case of **Beverly Levy v Ken Sales & Marketing Ltd [2008] UKPC 6**, Lord Scott of Foscote, delivering the opinion of the Board of the Privy Council stated at para 19 as follows;

"The Civil Procedure Rules 2002, which came into effect on 1 January 2003, contain Rules relating to the making of charging orders but while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction."

Therefore, in my view, it is the appellate jurisdiction of the Supreme Court conferred by Article 131 of the Constitution and Section 4(1) of the Courts Act, 1993, (Act 459) that is the source of authority for the court to hear and determine the substantive appeal as well as any interlocutory matter related to it. This jurisdiction is activated on the filing of the notice of appeal and it gives the court authority over the *res* or subject matter of the case which in this case is the damages claimed by the respondent. We may say that it is the judgment of the Court of Appeal that is on appeal before the Supreme Court but the substantive jurisdiction of the court is actually over the *res* of the case. C.I. 16 only directs, regulates and organizes the appellate jurisdiction of the court but does not confer it. Where directions for the exercise of the jurisdiction conferred by the Constitution and the Courts Act have been given in C.I.16, the court has to comply with them but directions in subsidiary legislation for the exercise of jurisdiction conferred by substantive enactment cannot take away that jurisdiction or limit it.

Accordingly, to answer the question posed in GFA v Apaade Lodge, my view is that the jurisdiction of the Supreme Court to make interim orders touching and concerning the subject matter of an appeal including upon an application for stay of execution that falls outside Rule 20 derives from the general appellate jurisdiction of the Supreme Court conferred by the Constitution and the Courts Act. Rule 20 of C.I.16 is not the source of the court's jurisdiction, it only regulates its exercise in terms of procedure. It must be noted that the rule does not even purport to confer jurisdiction on the court to make orders for stay of execution. When the language of Rule 20 is compared and contrasted with that of Or43 Rule 11 or Or 45 rule 15 of C.I. 47 it becomes plain that Rule 20 only

allocates the exercise of the jurisdiction to stay execution but does not confer it. Rule 11 of Or 43 of C.I. 47 is as follows;

"Without prejudice to Order 45 rule 15, a party against whom a judgment or order has been given or made may apply to the Court for a ***stay of execution of the judgment or order or other relief*** *on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant the relief, on such terms as it thinks just." (emphasis supplied).*

But Rule 20(1) & (2) say;

"(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****.(emphasis supplied)*

(2) Subject to these 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 that court refuses to grant the application, the applicant may repeat the application before the Court for determination."

From its language, Rule 20 takes the authority of the court to make orders for stay of execution before the appeal is entered as already existing, and rightly so because Article 131 and section 4 of the Courts Act have conferred it on the court. So, in respect of applications for stay of execution that come under the purview of Rule 20, before the appeal is entered, the rule defers the exercise of the undoubted jurisdiction by the court until the Court of Appeal has heard the application and refused it. When the appeal is entered, the court's jurisdiction in respect of all interlocutory applications including even applications for stay of execution that ordinarily would have come under Rule 20 (executable decisions of the Court of Appeal) is immediate and the deferral does not apply. Consequently, as C.I.16 has not deferred the exercise by the court of its jurisdiction in respect of other interlocutory matters outside Rule 20, the only conclusion is that before the appeal is entered an application for such interlocutory remedy falls immediately to the court to be heard and determined directly as it would do where the appeal has been

entered. The fact that C.I.16 does not prescribe any special procedure for applications that fall outside Rule 20 does not limit the jurisdiction of the court to entertain such applications and determine them.

It was thought that the Supreme Court can draw on Rule 5 of C.I.16 to prescribe a procedure by which interlocutory applications including for stay of execution that fall outside Rule 20 may be made after the filing of the appeal but before it is entered. The Rule states;

"5. Where no provision is expressly made by these Rules regarding the practice and procedure which shall apply to any cause or matter before the Court, the Court shall ***prescribe such practice and procedure*** *as in the opinion of the Court the justice of the cause or matter may require." (emphasis supplied).*

It is noteworthy that the power given by the rule to the court is only to prescribe procedure for the exercise of an existing jurisdiction which to my mind does not include power to confer authority that does not already exist. It is like inherent jurisdiction which complements existing jurisdiction and does not confer substantive jurisdiction. In that wise I very much doubt if there is any need for a special procedure or even if it is feasible. We have no power to confer jurisdiction on the Court of Appeal to hear such applications as a court of first instance unless such jurisdiction already exists in the Court of Appeal. I say I do not see the need for a special procedure because when the court assumes the powers of either the Court of Appeal or the trial court to entertain an application outside Rule 20, then the procedure in the court whose powers are being exercised would be applicable. For example, **Or 25 R 1(2) of C.I.47** provides;

"2) A party to a cause or matter may apply for the grant of an injunction ***before, or after the trial of the cause or matter****, whether or not a claim for the injunction was included in the party's writ, counterclaim or third party notice."*

So, if before the appeal is entered in the Supreme Court there is a need for the preservation of the subject matter of the case, a party may apply to the Supreme Court to exercise the powers of the High Court under this rule. What I am saying is that in such

a case the procedure in Or 25 would become applicable and there is no need for the court to prescribe a new practice. It appears to me to be in order for applications such as we have in this case to be stated to be pursuant to Articles 131 or Section 4 of Act 459 and 129(4) of the Constitution then followed by the rule in the court below whose powers are to be exercised, e.g Or 43 R 11.

I will therefore state the position as follows; where the Court of Appeal has only dismissed an appeal against an executable judgment on appeal to it without more, except an order for costs, if the judgment of the Court of Appeal is appealed against to the Supreme Court, the court can, in appropriate cases, entertain an application for stay of execution of the first judgment. This simplifies the procedure instead of the manner in which the applications are currently drafted by applicants as being for suspension of the judgment or injunction against its execution.

Because this is a special remedy, and in order to prevent its abuse by litigants whose only motive would be to frustrate judgment creditors, I will echo the caution of Date-Bah, JSC in **the Golden Beach Resorts case** to keep the window very small. In that regard I will urge Your Lordships to accept it as the law that this special procedural jurisdiction shall only be exercised in favour of an applicant upon satisfying the court that there is a basic and fundamental error committed by either the trial court or the Court of Appeal or for some other compelling reason. In the case of **Wilson v Church No.2 (supra)** the court actually stated at page 459 that:

"Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such orders for staying proceedings under a judgment appealed from, as would prevent the appeal, if successful, from being nugatory. ***But the court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances.(emphasis supplied)"***

We very often mute this last sentence but it is critical especially in the situation where two courts have decided against a party on the substantive matter. The court referred to this case in **Joseph v Jebeile** but I find the grounds for staying execution stated in

Joseph v Jebeile to be tilted more in favour of the appellant than the judgment creditor and that standard ought not to be applied in the circumstances we have discussed here..

Staughton LJ also said in **Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887** that:

"Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that ***he has an appeal which has some prospect of success"(emphasis supplied)***

See also **Dzobo v. Agbeblewu & Ors [1991] 1 GLR 294. C.A.**

For the purpose of disposing of the application before us, I shall treat it as one seeking the stay of execution of the judgment of the High Court which I understand to be the alternative prayer of the applicant. As my analysis above shows, the court has jurisdiction to entertain that application and make an order in order to prevent its final judgment in the substantive appeal being rendered nugatory and by virtue of Articles 131 and 129(4) of the Constitution and Or 43 R11 of C.I.47. On the basis of the matters deposed to in the affidavit in support, I find merit in the application and make an order staying execution of the judgment of the High Court in this case dated 10th May, 2017 pending the determination of the appeal of the applicant lodged in this court.

This case has rekindled the need for legislation in respect of interlocutory remedies in general that parties to an appeal may stand in need of after the filing of a notice of appeal but before the appeal is entered in the Supreme Court. As things stand now, the Supreme Court may be inundated by such applications that would take the valuable time of the court whereas such matters can be assigned by legislation to the Court of Appeal. In jurisdictions where appeals to the second appellate court are with the permission of the intermediate appellate court, the legislation confer authority on the intermediate appellate court to make interim orders where it grants permission to appeal. Most of the appeals to our Supreme Court from decisions of the Court of Appeal are as of right. We do not have this problem between the trial courts and the Court of Appeal because the

original jurisdiction of trial courts enable them to consider any application for interim relief until the appeal is entered and then the Court of Appeal takes over.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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