IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: APPAU, JSC SITTING AS A SINGLE JUDGE

CIVIL MOTION
NO. J8/99/2017

20TH JULY, 2017

ANTONIO OLIMPIO SANTOS FELIX
PLAINTIFF/RESPONDENT/

RESPONDENT

VRS

1. **GIOVANNI ANTONELLI**
2. **BIGLEBB CONST. & CRUSHING LTD**
   DEFENDANTS/APPELLANTS/

APPLICANTS

RULING

APPAU, JSC:-

The application before me is for the suspension of the order of the Court of Appeal dated 20th July 2016 pending the determination of an appeal filed against same on 1st March 2017. The applicants filed the appeal pursuant to special leave a three-member panel of this Court granted them on 23rd February 2017 after a single justice of the Court had refused to do so.

The genesis of this application is that the respondent entered into a Memorandum of Understanding (MoU) with the 1st applicant on 27th February 2015 to become a shareholder in the 2nd applicant company. Based on the MoU, the respondent, in August 2015, made a shipment of machinery, equipment and vehicles from Angola to the 2nd applicant in Ghana. However, before the MoU could be translated into an agreement between the parties with regard to the respondent's actual shareholding in the 2nd applicant/company, a misunderstanding arose between the respondent and the 1st applicant. The respondent contended that the 1st applicant had misrepresented certain facts to him about the real status of the 2nd applicant so he was no more interested in the acquisition of the shares as agreed upon in the MoU. On the 17th day of February 2016, the respondent instituted an action against the applicants claiming about six reliefs. Among the reliefs were:

1. *A declaration that the MoU dated 27th day of February was vitiated by the fraudulent misrepresentation of the 1st applicant;*
2. *A declaration that the respondent is discharged from all obligations and/or liabilities arising from the said MoU; and*
3. *A declaration that the respondent is the owner of the equipment and machinery mentioned in the indorsement of the writ and an order for the recovery of same from the applicants.*

Subsequent to the issuance of the writ of summons, the respondent applied to the trial High Court for interim preservation of the equipment, machinery and vehicles, in question. The trial High court, after hearing from both parties, granted respondent's application for interim preservation to protect the items from wear and tear, pending the final determination of the substantive matter. This was on the 26th day of April 2016.

On the very day that the trial court delivered its ruling, the applicants filed an interlocutory appeal against it to the Court of Appeal. They then filed a motion for stay of execution and/or, suspension of enforcement of the interim preservation order pending the hearing of the appeal. The High court refused to grant the application. The applicants, in compliance with the rules, repeated the application before the Court of Appeal but the Court of Appeal, per a single justice, also refused the application. The Court of Appeal, per the single justice, supported the view of the trial High court judge that the ownership of the machinery and equipment and their value were in serious contention so the end of justice would be better served if same were preserved pending the hearing of the substantive suit before the trial High Court. The applicants subsequently applied to the full bench of the Court of Appeal per article 138(b) of the Constitution, to discharge or reverse the order of the single justice and to order for stay of execution and or suspension of enforcement of same pending the determination of the appeal before it. The full bench of the Court of Appeal refused to discharge the order made by the single justice and affirmed his decision. According to the court,

the applicants did not demonstrate any exceptional circumstances to warrant the discharge or reversal of the single justice's order.

Aggrieved by the ruling of the Court of Appeal, the applicants filed an application before this Court for special leave to appeal and for stay of execution and, or suspension of enforcement of the Court of Appeal ruling pending the determination of the application for special leave to appeal. This Court, per Anin-Yeboah, JSC (sitting as a single justice), refused the two-pronged application for special leave to appeal and suspension of the ruling of the Court of Appeal as prayed. The applicants then filed a reconsideration application before a three-member panel of this court per article 134 (b) of the Constitution, 1992 praying for the discharge or reversal of the single justice's decision. On 23rd February 2017, this Court, coram Adinyira (Mrs.), Dotse and Benin, JJSC, reversed the decision of the single justice dated 4th November 2016 and granted applicants special leave to appeal with the order that the appeal be filed within seven (7) days from the date of the ruling. The applicants filed their notice of appeal on the 1st day of March 2017. They listed as many as nine (9) grounds of appeal. Since my jurisdiction in this application does not extend to the determination of the merits of the appeal before this court, I prefer to seal my mouth to making any comments on the propriety or otherwise of the said grounds of appeal. In that wise, I refuse to reproduce them here.

Having filed their appeal against the ruling of the Court of Appeal, the applicants, on the 8th day of March 2017, filed an application in the Court of

Appeal praying it to stay execution and/or suspend the enforcement of its decision of 20th July 2016, pending the determination of their appeal before this Court. The respondent raised a preliminary objection to the application on the ground that the ruling of the Court of Appeal was not executable so the application was incompetent. The applicants, however, contended that their application was not for stay of execution as such, but was one for the suspension of the ruling of the court pending the determination of their appeal before the Supreme Court. They referred the Court of Appeal to the decision of this Court in **Merchant Bank (Gh) Ltd v Similar Ways Ltd [2012] 1 SCGLR 440**. The Court of Appeal, per Sowah (Mrs.), JA (sitting as a single justice), parried the preliminary objection based on the clarification made by the applicants that they were praying for suspension of the ruling but not for stay of execution. She delved into the substance of the application before her and refused it on the ground that the applicants did not demonstrate any exceptional circumstances to warrant the grant of the application. The applicants applied to the full bench of the Court of appeal to reverse or discharge the ruling of the single justice but the full bench also refused to do so. In dismissing the application, the Court of Appeal (duly constituted), held as follows:

"We have read the processes filed in this application and have listened to counsel for the parties. In this application, the applicant is asking this court to review the decision of a single judge of this court made on 21st March, 2017. That decision involves an exercise

of discretion and we are not satisfied that counsel for the applicant, has in this application, demonstrated that the single justice exercised her discretion wrongly. Indeed, this matter involves the exercise of discretion in four different forums. The applicant seems to be asking this court to substitute its discretion for the previously exercised discretions, and he is doing so without satisfactorily demonstrating that in any of the earlier forums, there was abuse in the exercise of discretion. We do not find any proper basis for the grant of the application and the same is accordingly refused…"

The application before me is a repeat application as per rule 20(2) of C.I. 16, for the suspension of enforcement of the ruling of the Court of Appeal dated 20th July 2016 pending the determination of the appeal before this Court. The rationale behind the filing of this application was clearly spelt out under paragraph 4 of the affidavit in support filed on 26th May 2017, which I reproduce below:

"4. I have been advised that the suspension of the ruling of the Court of Appeal dated 20th July 2016 and consequentially the ruling dated ordering the preservation of the machines, equipment and vehicles would ensure that the determination of the appeal in favour of the applicants would prevent it from being rendered nugatory"

So in brief, the contention of the applicants was that if the ruling of the Court of Appeal, which they themselves agreed is not an executable one and therefore not amenable to a stay of execution, is not suspended, they would be handed a pyrrhic victory in the event of their appeal succeeding. Arguing in support of the application, applicants said the respondent would lose nothing in case their appeal fails since damages would be an adequate remedy as the value of the equipment, machinery and vehicles could be assessed. They contended further that there are serious matters of law and fact for the consideration of the Supreme Court that was why the three-member panel of the Court granted them special leave to appeal. Applicants cited the decisions of this Court in **Standard Chartered Bank Ltd v Western Hardwoods [2009] SCGLR 196** and **Merchant Bank (Gh) Ltd v Similar Ways Ltd [2012] 1 SCGLR 440** in support of their prayer.

The respondent vehemently opposed the application and relied on his affidavit in opposition filed on 22nd June 2017. He submitted that this Court has no jurisdiction to grant the application as laid. Arguing in support of this submission, respondent contended that the substantive appeal pending before the Court of Appeal was to set aside the preservation order made by the High court. However, instead of concentrating on the prosecution of that appeal, the applicants have circumvented the procedure and want this Court to determine what the Court of Appeal is yet to determine. The respondent argued that the refusal of the application would not, in any way render nugatory any success the applicants might chalk in their appeal before this

Court. According to him, the appeal before this Court is not against the preservation order made in the High Court but against the ruling of the Court of Appeal refusing to discharge or reverse the ruling of its single justice. The respondent recalled this Court's attention to its previous decision in the case of **Merskworld Co. Ltd (No.2) v Zoomlion (Gh) Ltd (No.2) [2013-2014] 1 SCGLR 327**. In that case, a three-member panel of this Court, per Anin-Yeboah, JSC stated that in determining applications of this nature, ***"care must be taken not to prejudice the substantive appeal at the Court of Appeal by embarking on any pronouncements of the law that may pre-empt the appeal before it is even heard".***

In the *Merchant Bank v Similar Ways* and *Standard Chartered Bank v Western Hardwood cases* (cited supra) this Court held that it could, in appropriate cases, grant applications for the suspension of orders or decisions of lower courts where the conventional means of applying for stay of execution is not possible. However, in the case of Golden **Beach Hotels (Gh) Ltd v Pack Plus International Ltd [2012] 1 SCGLR 452**, the Court gave a caution as to how this power must be exercised. The Court held that this power of suspending orders must be exercised sparingly in order not to vary or render irrelevant the otherwise settled rule of practice on executable and non-executable orders or decisions. The Court, per Date-Bah JSC, stated that the preconditions for triggering suspension orders must be stricter and narrower than that of ordinary applications for stay of execution. This,

according to the Court, was to prevent the Court from descending into a 'morass of sophistry'.

The Court held: - ***"The criterion for suspending an order of a lower court should not be identical with the criterion summarized by Akufo-Addo JSC in the Jebeile case in relation to applications for stay of execution, but should embody an additional element or requirement…we would propose that a possible test could be the nugatory effect referred to in the Jebeile case…, combined with the need for exceptional circumstances. If this test of a 'nugatory effect plus more' is not insisted upon, there would be no point in maintaining the distinction between the two kinds of orders, namely; stay of execution and suspension of orders of lower courts".***

In the present application before me, the only point raised by the applicants is that, if their application for suspension of the order of the Court of Appeal dated 20th July 2016 is not granted, any success they would chalk in their appeal before this Court would be rendered nugatory. Aside of that, they did not demonstrate any exceptional circumstance to warrant the grant of the application. I must say that as the respondent rightly contended, the appeal before this Court is not in respect of the preservation order. The appeal before this Court is against the refusal of the Court of Appeal to discharge the order of the single justice of the Court of Appeal refusing to stay the execution of the preservation order made by the trial High Court. The appeal

against the preservation order itself is still pending before the Court of Appeal. As this Court held in the *Merskworld v Zoomlion case* supra, it is not appropriate for me to take any step that would pre-empt the determination of that subject matter pending before the Court of Appeal. Quite apart from that, I do not see how the refusal of this Court to suspend the decision of the Court of Appeal dated 20th July 2017 could render nugatory any judgment that the applicants must obtain in their appeal against it.

In my view, to stay execution of a judgment is tantamount to suspending its enforcement within the period of the stay. The two have something in common. In some sense, they may have the same result. This Court has settled on the principles governing the grant of stay of execution and this has crystallized in the oft-quoted maxim that; *'non-executable orders cannot be stayed'*. The fact alone that this Court granted leave to the applicants to appeal against the ruling of the Court of Appeal is not a *sine qua non* for the suspension of the ruling sought to be impeached. The applicant must go further to demonstrate exceptional circumstances to merit the suspension of the order or ruling in question.

The increase in the number of such applications before this Court of late seeks to suggest that where one fails to succeed in an application for stay of execution of a decision, the next step available to the unsuccessful applicant is to apply for suspension of enforcement of that decision. I wish to emphasize that an application for suspension of the decision or orders of a lower court is not the inevitable successor to an unsuccessful application for

stay of execution. If that were the case then the settled practice that the courts cannot stay non-executable orders would be a mirage. The courts require more than the nugatory effect from a party who wants non-executable orders to be suspended pending appeal otherwise we would be wading into a semantic quagmire, which Date-Bah, JSC in the *Golden Beaches Hotel case* described as a 'morass of sophistry'.

The criterion for the grant of applications of the nature before me, as clearly spelt out in the *Golden Beach Hotels case* (supra) is; ***will the appeal be rendered nugatory upon succeeding and if yes, are there any exceptional circumstances to necessitate the suspension of the decision complained of***? The nugatory effect alone is not enough to ground an application for suspension of enforcement where an application for stay of execution is not the appropriate remedy. In the instant application before me, the applicants have not demonstrated in any way that their appeal before this Court would be rendered nugatory upon succeeding. That apart, they did not demonstrate any exceptional circumstance to warrant the grant of their prayer. Having failed to satisfy the criterion for the grant of such applications, their application must necessarily fail and I so decree.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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