

ctu
Proper

IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION
ACCRA - A.D. 2020

16-09-2020

1.05

244

Registers

COMMERCIAL DIVISION

SUIT NO. CM/MISC/1033/2020

IN THE MATTER OF THE MORTGAGES ACT, 1972 (N.R.C.D 96)
SECTIONS 15 (B) AND 18

- AND -

IN THE MATTER OF AN APPLICATION BY A MORTGAGEE FOR AN ORDER
FOR JUDICIAL SALE OF THE MORTGAGE PROPERTIES ONE OF WHICH IS
SITUATED ON THE SPINTEX ROAD AND THE OTHER IN THE FREEZONE
ENCLAVE ALL IN THE GREATER ACCRA REGION OF THE REPUBLIC OF
GHANA

-AND-

IN THE MATTER OF ENFORCEMENT OF MORTGAGES USED AS SECURITY
FOR THE FACILITIES TAKEN BY UNITED STEEL COMPANY AS PRINCIPAL
DEBTOR FROM FIRST ATLANTIC BANK.

469
FIRST ATLANTIC BANK Applicant/Judgment Creditor/Respondent

VS

RABIH MIKATI 1st Respondent/Judgment Debtor/Respondent

ATLANTIC FOODS LTD 2nd Respondent/Judgment Debtor/Respondent

WORLDWIDE HEALTHCARE LTD Claimant/Applicant

**WRITTEN ADDRESS IN SUPPORT OF APPLICATION FOR AN ORDER
FOR ACCESS**

Respectfully your Lordship, Claimant/Applicant herein filed an application before this honourable Court on the 21st day of August, 2020 seeking for an order of the court to grant it access to the subject matter in dispute.

Respectfully your lordship, Claimant/Applicant (hereinafter referred to as Claimant) is a company registered under the laws of the Republic of Ghana with its core business being the manufacture and distribution of Pharmaceutical drugs which includes perishable medicines, lifesaving

6751715 20-09

16-09-20

drugs of essential nature, Covid-19 relief medication as well as cold chain operations.

The business premises/offices and warehouse for the storage of the Pharmaceutical drugs of Claimant is situate at Spintex Road near Coco Cola and described as warehouse situate on all that piece and parcel of land situate at Tema motorway industrial area in the Greater Accra Region and described in Land Title Certificate No. TDA. 2200 (hereinafter referred to as the Property)

Per a tenancy agreement executed on the 16TH day of September, 2016, between United Steel Limited and Claimant, the property was let to the Claimant for a term of six years in the first instance and renewable, at an agreed consideration and subsequently it has been in occupation of the property since the 1st day of December, 2016 and observing all the covenants and rights therein.

On the 5th day of August, 2020, whilst the employees of the Claimant were at work, some officials of the Applicant/ Judgment Creditor/Respondent (hereinafter referred to as Respondent) in the presence of security personnel, went to the property and locked out the employees of the Claimant in execution of an order of the court dated the 7th day of July, 2020 without notice to the Claimant.

My lord respectfully, it is instructive to note that the Respondent as Applicant therein moved this Honourable Court per an originating motion and same was granted.

My lord it is evident from Exhibit 2 that the Respondent herein sought to recover possession of the property relying on the section 34(2) of the Borrowers and Lender's Act, 2008 (Act 773)

Subsequent to the Claimant being evicted/dispossessed of the property and believing to have an interest in the property which ought to be protected, consequently it filed a notice of claim and thereafter an application for an order to stay execution and set aside the order granted on the 7th day of July, 2020, on the 13th day of August, 2020.

The said application for stay of execution was adjourned to enable the Respondent to file its affidavit in opposition, and in the interim, counsel for Claimant herein made a viva voce application praying the honourable court to make interim orders to grant it temporary access to the property to take out some essential drugs.

Claimant thereafter, brought this instant application wherefore it prays for this honourable court to grant it access to use the property pending the determination of claimant's claim.

The Respondent herein, has filed an affidavit in opposition to the instant application and wherefore this Honourable court has ordered parties to address and or respond to the issues therein raised.

The Respondent maintained and deposed as follows (Respondent's position hereinafter Italised):

Respondent deposed that this Suit no CM/MISC/1033 with a fresh title being a fresh suit cannot be sustained to invoke the jurisdiction of this honorable court as same is not one of the known three (3) means of initiating an action in our jurisprudence; the initiating process not being a Writ, neither a Petition nor an Originating Motion.

That prior to filing of the initial process, there had not been any judgment or execution process on file as to have the new suit commenced in the manner as deposed and therefore the jurisdiction of this court has not been properly invoked by the initiating process.

We maintain that the jurisdiction of this Honourable court has been properly invoked.

Claimant maintain that it filed a notice of claim to the originating motion filed by the respondent herein intituled:

IN THE MATTER OF THE MORTGAGES ACT, 1972 (N.R.C.D 96)
SECTIONS 15 (B) AND 18

- AND -

IN THE MATTER OF AN APPLICATION BY A MORTGAGEE FOR AN ORDER FOR JUDICIAL SALE OF THE MORTGAGE PROPERTIES ONE OF WHICH IS SITUATED ON THE SPINTEX ROAD AND THE OTHER IN THE FREEZONE ENCLAVE ALL IN THE GREATER ACCRA REGION OF THE REPUBLIC OF GHANA

-AND-

IN THE MATTER OF ENFORCEMENT OF MORTGAGES USED AS SECURITY FOR THE FACILITIES TAKEN BY UNITED STEEL COMPANY AS PRINCIPAL DEBTOR FROM FIRST ATLANTIC BANK.

FIRST ATLANTIC BANK Applicant/Judgment Creditor/Respondent

VS

RABIH MIKATI

1st Respondent/Judgment Debtor/Respondent

ATLANTIC FOODS LTD

2nd Respondent/Judgment Debtor/Respondent

The suit number assigned upon filing of that originating motion is CM/MISC/1008/2020.

Claimant herein, in exercise of its rights filed a notice of claim using the same suit number. However, upon presentation for same to be filed at the registry of this court, the registrar issued a different suit number with the reason that when a notice of claim is filed, it becomes a fresh suit to be determined by the court and as such a new docket had to be created.

A cursory look at the notice of claim filed by the Claimant will show that the initial suit number endorsed thereon by counsel for claimant and deeming that to be the appropriate suit number was erased by the registry of this honourable court by applying correction fluid.

Respectfully my lord, the registry runs the administration of the court and we as lawyers, have no say in its administration.

In the case of **Frimpong and another .v. Nyarko (1998-1999) SCGLR 734 at 751**, the court held: "I concede that this false NHC filing stamp was the handiwork of the officials of the house and generally the law does not permit the court to penalize a party in a situation arising from the misconduct over which the party has no control..."

My lord, from the above decision of the apex court of this land, we hold that this Honourable court cannot penalize us in this instant matter as the suit number given herein was at the direction of the registrar of this honourable court and not arising from the direction of the Claimant or counsel for Claimant.

Respondent deposed that prior to filing of the initial process, there had not been any judgment or execution process on file as to have the new suit commenced in the manner as deposed and therefore the jurisdiction of this court has not been properly invoked by the initiating process.

My lord respectfully, it is on record that the Respondent herein filed an originating motion for an order to recover possession with police assistance (exhibit 2).

That the said order was granted on the 7th day of July, 2020.

Claimant maintains that Respondent concealed from the court the existence and presence of any third party on the property.

Respondent upon executing the order of this court procured erroneously, evicted the Claimants from the property and thereafter filed an application for judicial sale of the same property by instituting same through an originating motion.

It is a result of Exhibit 2 that the Respondent filed the instant originating motion for Judicial sale. Therefore, Respondent cannot in one breadth expect this honourable court to grant it its prayer for judicial sale as a result of executing whilst relying on Exhibit 2 and later come to tell this honourable court that there has not been any judgment or execution process to have the Claimant commence the suit in this manner when the claimant is directly affected by its execution of the said order.

Respondent deposed that following the wrong initiation of this Suit, the Applicant on 14th August 2020 filed a "NOTICE OF MOTION APPLICATION FOR STAY OF EXECUTION AND AN ORDER TO SET ASIDE WRIT OF POSSESSION" which was also incompetent for the simple reason that no judgment or execution has been initiated in this suit prior to the filing of the unknown originating process to entitle the Applicant to file a Motion for Stay especially so when he is not a party to the suit he alleges to have been filed by the Respondent.

That on the face of the "NOTICE OF MOTION APPLICATION FOR STAY OF EXECUTION AND AN ORDER TO SET ASIDE WRIT OF POSSESSION" the Applicant shows that it became a tenant of the Spintex Road Property near the Coca Cola and described as 'all that piece of land in extent 0.559 hectares (1.380 acre) more or less situate in the Tema Motorway Industrial Area in the Greater Accra Region of the Republic of Ghana as described in Land Title Certificate No: TDA. 2200' not from Rabih Mikati the mortgagor but United Steel Company Ltd, which is neither the occupant nor owner of the property in respect of which the Applicant is seeking a Stay of Execution after the rights of the Respondent Lender as mortgagee has been exercised in accordance with law.

That not only is this honorable court's jurisdiction being improperly invoked but the Applications resting on the wrong originating procedure also lack merit.

As we have maintained above, the instant suit has been rightly initiated.

My lord, to determine the above objections/ issues raised by the Respondent, we must first take a critical look at the facts and the applicable laws.

Respondent maintains that per a facility letter dated the 4th of June, 2018, the Applicant/Judgment creditor had restructured all loan facilities granted in favour of its Landlord; United Steel Company (Principal Debtor) and as such, legal mortgages were created over the 1st and 2nd Respondents properties as securities for the loan.

Upon default of the loan facility, Respondent in exercising its right of possession secured an order to recover possession of the property with police assistance relying on section 34(2) of the Borrowers and Lenders Act, 2008 (Act 773)

My lord, we must first look at the provisions of Act 773 in relation to recovery of possession of property used as security for a loan upon default of a borrower.

Section 33 provides for the remedies of lender on default. It provides that: "Where a borrower fails to pay an amount secured by a charge under this Act, the lender may

- (a) Sue the borrower on any covenant to perform under the credit agreement, or
- (b) Realize the security in the property charged on notice to the person in possession of the property."

Respectfully my lord, the drafters of the law envisioned the possibility where a property charged may be occupied or be in the possession by other persons other than the mortgagor. Therefore, it made the provision where such persons ought to be placed on notice before the lender secures the property charged.

My lord, it is on record that there exists a tenancy agreement between the principal debtor and the claimant herein over the property, the subject matter.

Respectfully my lord, the said Rabih Mikati is son of the Chief Executive Officer of United Steel; Hani Mikati

That with the consent and authority of Rabih Mikati, United Steel rented out the property to the Claimant herein for a period of Six years in the first instance from the year 2016 and before the application of the loan and the charge thereto.

Thus per section **33(B) of Act 773**, the lender was mandated to notify the claimant who was in possession and occupation of the said property of its exercise to recovery of possession of the property, the subject matter of this claim.

Further, Section **34(2) of Act 773 provides:** "(2) where a lender is unable to enforce a right of possession in a peaceable manner, the lender may use the services of the police to evict the borrower or other person in possession pursuant to a warrant issued by a court."

The question that begs to be answered is whether or not the Respondent put the Claimant on Notice and if so, thereafter, was there an attempt by Respondent to enforce the right of possession in a peaceable manner which it was unable to and therefore warranted an order for possession with police assistance?

My lord, the answer to the above is in the **negative** which is further admitted by the respondent in Paragraph 18 in its affidavit in opposition.

Respectfully we refer the court to the case of **The Republic vrs High Court (land Division) Accra, Ex Parte Lands Commission, Nii Tetteh Opremreh (Interested party) Civil Motion No.J5/19/2014 at page 2.**

The court held: "the application for recovery of possession was ex parte but as there were people in actual possession after the applicant, Order 43 r3 of CI 47 requires that the leave shall not be granted unless it is shown that every person in actual possession of the whole or part of the immovable property has received such notice of the proceedings as appears to the court for any relief to which the person may be entitled. The rule is in consonance with the principle of natural justice, i.e. the audi ulteram partem rule. A breach of this rule of natural justice is a proper ground for this court to exercise its jurisdiction in favour of the applicant."

My lord, it is the Claimant's case that the order upon which the Respondent relied on to evict the Claimant from the property is void ab initio as the Respondent failed to comply with the provisions contained in the statutes.

Also, the Supreme Court in the case of **Mosi V. Begyina (1963) 1 GLR 337-348** held at holding 4: "where a judgment or order is void either because it is given or made without jurisdiction or because it is not warranted by any law or rule of procedure, the party affected is entitled to ex debitio justitiae to have it set aside, and the court or a judge is under a legal obligation to set it aside, either suo moto or on the application of the party affected. No Judicial discretion arises here..."

My lord in this instant application, the Claimant brought an application for access to the property pending the determination of the application for an order for stay of execution and an order to set aside the order of the court as contained therein.

The above substantive application being adjourned, and with the Claimant desiring to have access to the property, it brought the instant application to this honourable court seeking the reliefs therein.

Respectfully, *Respondents claim that this honourable court's jurisdiction is being improperly invoked and further to that the Applications, resting on the wrong originating procedure also lack merit.*

In the case of **Network Computer System Ltd vs. Intelsat Global Sales and Marketing Limited (2012) 1 SCGLR 218** at holding 3, the court held: "A superior court could set aside a void order made by a court no matter how the void order was brought to its notice."

Also, in the case of **Republic v. District Magistrate, Accra; Ex parte Adio (1972) 2 GLR 125-134**, the court held that: "(1)... However, the assumption of jurisdiction to make one of the statutory orders depends on satisfactory evidence before the district court that the statutory conditions have been complied with. Wherever there is proof of full compliance with the statutory provisions, there is a [p.126] mandatory duty on the part of the court to make one of the orders specified in the Schedule. On the other hand, if the statutory requirements have not been complied with, the district court has no discretion in the matter whether or not to make one of the orders. On the evidence, it was clear the statutory requirement of notice was not complied with.

(2) When the term "excess of jurisdiction" is used, it may mean that from the inception of the case, the court has no jurisdiction whatsoever because the nature of the case or value involved is beyond its jurisdiction. But it may also mean that although the court has jurisdiction to hear the case, the orders which the court can pronounce are restricted by statute. If an order is therefore beyond the powers of the court, it is perfectly correct to say that it has exceeded its jurisdiction. Since the statutory notice was not affixed to the appellant's premises as required under the Act, the district magistrate exceeded his jurisdiction in granting the order of sale to the city council.

(3) Where an inferior tribunal decides a collateral issue the High Court is entitled to look at the correctness of the decision even with the aid of extrinsic evidence, and if it appears that the decision is erroneous, then certiorari would lie to quash the decision."

From the above sited cases, this honourable court acted in excess of its jurisdiction by granting the order for recovery of possession with police assistance which culminated in the filing of the application for stay of execution and order to set aside the order of the court and subsequently the instant application herein.

It is the claimant's submission that this Honourable Court's jurisdiction has been properly invoked as it filed its notice of claim pursuant to the Respondent's originating motion on an application for judicial sale of the mortgaged property.

Respondent also claims that on the basis of this wrong process, the Applicant got this honourable court to make interim orders on the 19th of August 2020 to give the Applicant access to remove all their Pharmaceutical Drugs and moveable properties from the property in question, which order has not been appealed upon nor set aside even though the jurisdiction of this honourable had not been invoked by the known processes in law thus constituting it into abuse of process.

That it is in perpetuation of this abuse of process that the Applicant filed this new "NOTICE OF MOTION APPLICATION FOR AN ORDER FOR ACCESS" with such misrepresentations as to the fact that there exists a motion for Judicial Sale in this suit.

That it verily believes that not only is this instant application frivolous, vexatious and an abuse of the Court process; but also it is the Respondent's case that same is founded on an originating process which in itself cannot invoke the jurisdiction of this Honourable Court and therefore procedurally flawed.

That it verily believes same to be true that the depositions made by the Claimant in paragraphs 19 to 22 of the Claimant's affidavit in support of the application were the same arguments made by the Claimant in court on the 19th August 2020 which led the court to grant the Claimants the said Access into the mortgaged property.

That it verily believes that if the Claimant was dissatisfied with the said Order for Access to remove its properties, the Claimant should have acted properly by either Appealing against the said Order or applying for a variation of the said order. But the Claimant instead chose to bring this application after having been given access to the Mortgage Property by the Respondent as ordered by the Court.

That it verily believes same to be true by filing this instant application for Access during the lifetime of the said Exhibit FAB 7, and with the Claimant

having enjoyed the outcome of the Order for Access is an abuse of the Court Process which should not be taken lightly by this Honourable Court.

Respectfully my lord, it is the Claimant's submission that the notice of claim filed makes it a party to the suit or gives it interest in the originating motion for an order for judicial sale filed by the Respondent.

Therefore, subsequent to its entry into suit via the same originating motion, Claimant filed an application for stay of execution which was not heard but adjourned. In light of the undue hardship to be faced by the Claimant pending the determination of the application to stay execution and set aside the order for recovery of possession with police assistance, it made a humble plea for an interim order for it to remove its pharmaceutical drugs and other movable property.

It is evident on record that the Honourable court in the interest of justice granted the Claimant its prayers and made interim orders to that effect. However, my lord, it must be stated emphatically that there is no substantive application for access on record prior to the instant one herein.

That with the interim access not being enough for the Claimant to remove its movable property, it thought it prudent to bring the instant application to grant it access to the property.

Therefore, this is the proper application to be brought for the Claimant to have access to the property per its depositions in the affidavit.

This application is in no way an abuse of the court process neither is it an attempt by the Claimant to intercept the outcome of the Application for stay of execution and an order to set aside the writ of possession nor has it been brought to set aside the Respondent's alleged legitimate claim of possession.

Claimant maintain that Respondent is not going to suffer any hardship with the property being locked up, rather it is the Claimant that is unduly faced with immense hardship in this instance.

It is the claimant's submission that from the above authorities and analysis, it has been able to establish its interest and right being claimed and derived from the tenancy agreement executed between its principal debtor and the Claimant as well as establishing the fact that the Respondent failed to comply with the provisions of Act 773 when it was enjoined and mandated to have notified the claimant of its intention to secure the mortgage.

We humbly submit that this Honourable Court's jurisdiction has been properly invoked and the instant application should be granted pending the determination of the application for stay of execution and an order to set aside the writ of possession as well as the determination of the claim.

DATED AT CONSTANCE CHAMBERS, ACCRA, THIS 14TH DAY OF SEPTEMBER, 2020.

FAIBILLE & FAIBILLE

Constance Chambers

No. F142/8 Northside Link

Opposite Cenita Services Ltd.

North Labone-Accra

Maame Ama Hany (Mrs)

Faibille & Faibille

Solicitors for the Claimant/Applicant

License No. eGAR02875/20

The Registrar
High Court
Commercial Division (Ct. 4)
Accra