DENNISLAW [2012]DLHC8148

WESTCHESTER RESOURCE LTD.

vs.

CAML GHANA LTD & 6 ORS.

[HIGH COURT, ACCRA]

SUIT NO. ACI49/2012

DATE: 27 NOVEMBER, 2012

COUNSEL:

OPOKU ADJAYE ESQ. FOR THE PLAINTIFF/APPLICANT

ACE ANNAN ANKOMAH ESQ. WITH HIM PAUL ESSUMAN ESQ. FOR THE DEFENDANT/RESPONDENT.

CORAM:

HIS LORDSHIP JUSTICE DENNIS D. ADJEI, JUSTICE OF APPEAL, SITTING AS AN ADDITIONAL HIGH COURT JUDGE

RULING

DENNIS ADJEI, J.A.:

On 15 December, 2011, the plaintiff instituted this action against the defendants jointly and severally for the eleven (11) reliefs endorsed on the writ of summons. The defendants were served with the writ of summons and the statement of claim by substituted service. The defendants entered conditional appearance and pursuant to that filed a motion to set aside the writ of summons under *Order 9 Rule 3 of the High Court (Civil Procedure) Rules C.I. 47*.

On 26 March, 2012, the 1 defendant filed a motion to stay proceedings pending Arbitration under section 6 of the Alternative Dispute Resolution Act, 2010 Act 798. The plaintiff filed an affidavit in opposition to the application but when the application came on for hearing, on 18 April, 2012, the plaintiff said it was no more opposed to the application and the application was accordingly granted as prayed.

On 16 July, 2012, the plaintiff filed the instant application to set aside the Order for stay of proceedings which was granted on 18 April, 2012. The three main grounds raised by the

plaintiff are as follows:

1. ***At the time the Joint Venture Agreement was executed, the enactment in force at that time was the Arbitration Act of, 1961, Act 38 and it did not avert its mind to it else it would not have withdrawn its opposition to the motion.***

2. ***The United Kingdom is not recognized or declared by the President of the Republic of Ghana as a reciprocating party to the UN Convention and London being the forum for the LCIA, arbitration would render any award emanating therefrom not enforceable and***

3. ***The plaintiff pleaded fraud in its statement of claim and any suit in which fraud is pleaded and particularized cannot be a subject matter of arbitration.***

Counsel for defendant effectively debunked grounds 1 and 2 raised by the plaintiff and it would not serve any useful purpose to discuss them.

The only weightier issue to consider is the issue of fraud raised by the plaintiff. The plaintiff in paragraph 15 of its statement of claim pleaded thus:

> ***"15. Plaintiff says instead of the 1 defendant fulfilling its obligations under the Joint Venture Agreement, defendants fraudulently made publications for the Investor Community claiming 51% beneficial interest and outright ownership free of encumbrances in the Westchester Tenement.***
>
> ***PARTICULARS OF FRAUD***
>
> ***Defendant claimed beneficial interest of 51% and outright ownership when they well knew to be false and thereby raising millions of dollars from the Investor Community."***

The defendants argued that the application is in the nature of review and the plaintiff must demonstrate that it had found or discovered a new and important matter or evidence which after due diligence was not within its knowledge. The defendant submitted that the plaintiff knew of the allegation of fraud and that it pleaded same in its statement of claim and cannot be heard to say that it was a new discovery that it had found.

The submission by the defendants is not the true position of the law because it is one of the numerous considerations for application for review. Review application is not limited to discovering of new and important matter which was not within the knowledge of the party seeking to review the order or judgment. Review application may be considered where the applicant is also able to prove that there was an error or mistake apparent on the face of the record or there are other sufficient reasons to be considered by the court. I am fortified by Order 42 Rule 1 (1) of C.I. 47 which provides as follows:

> ***"A person who is aggrieved;***
>
> ***(a) by a judgment or Order from which an appeal is allowed, but from which no appeal had been preferred or***

(b) by a judgment or Order from which no appeal is allowed.

may upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within that person's knowledge or could not be exercised of due diligence, was not within that person's knowledge or could not be produced by that person at the time when the judgment was given or the Order was made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, apply for a review of the judgment or Order" (emphasis mine).

I am of the considered opinion that the instant application is not for review. It is trite that injunctive orders of interlocutory nature may be dissolved at anytime before judgment. It is also settled law that injunctive orders include interlocutory injunction, stay of execution and stay of proceedings. See the *Court of Appeal case of Michael Essien Vrs. Veralight Deladem Ackumey (unreported) Civil Appeal No. H1/261/2010* where the Court held that:

"Both application for injunction and stay of proceedings are injunctive applications and the ratio in the injunction application applies pari pasu to the stay of proceedings."

The contention by the defendants that the plaintiff should have raised new and important matters in this application is misconceived because it is applicable to review applications and not an application to dissolve an injunctive order as in the instant case. Kerr on Injunctions, Sixth Edition by J.M. Paterson, published by Universal Law Publishing Company Pvt Ltd. at page 659 discusses how injunction could be dissolved. He states as follows:

"An interlocutory injunction may be dissolved at any time before judgment in the action. A defendant who wished to have an injunction dissolved must serve the plaintiff with notice of motion for that purpose...

An injunction cannot on the motion to dissolve, be sustained on grounds not raised by the statement of claim. See ***Burdett Vrs. Hay 4 De G.J. & S. 41; 32 L. J. Ch 41. Nor is it competent for the plaintiff, on the motion to dissolve, to make a new case.*** See ***Barker Vrs. North Staffordshire Railway Co., 5 Ra Ca 401."*** (Emphasis mine)

The plaintiff is not making a new case and it is grounding its application on the issue of fraud pleaded by it in its statement of claim. I am satisfied that the application is well founded.

I have read the numerous authorities cited by the defendants including ***Essilfe Vrs. GPHA (1980) GLR 468, Fattal Vrs. Minister of Affairs (1981) GLR 104, Wilson Vrs. Osei (1982-83) GLR 588, Dwira Vrs. SIC (1991) GLR 398*** and ***Republic*** vs. **High Court Tema**; ex parte **MT shipping PVT Ltd**. [2011] 1 SCGLR 237 and I am satisfied that they are not relevant to the determination of this application. For example, Gwira vs. S.I.C (Supra) is about submitting to judgment and it is my decision that submitting to judgment is different from not opposing an application for an injunctive remedy and cannot operate as an estoppels. It is trite law that any injunctive order whether it was opposed or not could be dissolved at anytime before judgment. Wilson vs. Osei and another (supra) was an application for review under Order 39 rule 1 of High Court (Civil Procedure Rules) 1954 (LN 140A).Under the Old Rules the only ground upon which review could be considered was where the applicant has discovered new and important facts after the decision with all

diligence and was not within the knowledge of the applicant. It is important to note that Order 42 of C.I. 47 has introduced other grounds upon which review application could be made. Such grounds include an error or mistake on the face of record and any point which the court may consider as sufficient reason. However, as already stated, the instant application is not a review and the Wilson's case is inapplicable.

The defendants further submitted that under section 27(2) of the repealed Arbitration Act, 1961, Act 338 a provision was made that where an issue of fraud is made against one of the parties to the arbitration, the issue of fraud must be determined by the court but there is no such provision in the Alternative Dispute Resolution Act, 798 and therefore issue of fraud is now arbitrable.

The law on fraud is that it is a scarlet sin and therefore vitiates everything including a judgment validly obtained from the court. In the case of Okofo Estates Ltd. vs. Modern Signs Ltd.[1996-97] SCGLR 233 at 253 the Court held thus:

> ***"An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document or a document obtained by fraud pass no right".***

Fraud is a second degree felony and it is the courts which can hear any matter involving fraud being civil or criminal. The standard burden of proof of fraud is proof beyond reasonable doubt. Section 13 of the Evidence Act NRCD 323 provides as follows:

> ***"In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt".***

Section 73 of the Courts Act, Act 459 talks about reconciliation in criminal matters but it expressly excludes settlement of offence amounting to felony. It provides as follows:

> ***"A court with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of an offence not amounting to felony and not aggravated in degree, on payment of compensation or on any other terms approved by the court before which the case is tried, and may, during the pending of the negotiations for a settlement, stay proceedings for a reasonable time and in the event of a settlement being affected shall dismiss the case and discharge the accused person".***

I am satisfied that felonious crimes such as fraud and forgery cannot be settled and it is the court which must resolve them.

I am at the candid opinion that the plaintiff is alleging fraud and the issue of fraud is not arbitrable. I will therefore grant the application and set aside the order of this court which was granted on18th April, 2012. There will be no order as to cost.