

GHANA / JUDGMENT

Arthur Vrs Kwakye [2022]

GHADC 150 (24 November 2022)

[2022] GHADC 150

COURT

District Court

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1 IN THE DISTRICT COURT AGONA SWEDRU - A. D. 2022 BEFORE HIS HONOUR ISAAC APEATU
Civil Suit No A2/18/2022 24th November, 2022 DERRICK ARTHUR Plaintiff VERSUS ENOCK
KWAKYE Defendant AND ROYAL RIDE LIMITED Claimant

Plaintiff/Execution-creditor/Applicant PRESENT Claimant/Respondent ABSENT B. B. Simpson for Plaintiff/ Execution-creditor/Appl. PRESENT Ofori Adusei for Claimant/Respondent PRESENT By Court: Ruling This is a ruling on an application by the plaintiff/execution- creditor/Applicant (hereinafter referred to as Plaintiff) for stay of execution and to set aside the ruling of this court dated the 13th day of June, 2022 made in favour of the Claimant/respondent herein (hereinafter referred to as Claimant). The antecedents to this application are that the Plaintiff filed a suit claiming certain reliefs against one Enoch Kwakye, the Defendant/Judgment debtor therein. Judgment was entered in favour of the plaintiff herein. Plaintiff/judgment-creditor attached in execution of the judgment, a vehicle numbered GS 8646-17 which he claimed belonged to the Defendant/judgment-debtor. Before the vehicle could be auctioned, the claimant/respondent filed a notice of claim to the vehicle dated the 27th day of January, 2022. Upon the plaintiff/judgment creditor's notice of dispute to the claim together with its attached affidavit in opposition filed on the 25th day of May, 2022, the court ordered the claimant/respondent to file its affidavit of interest in the attached vehicle. The claimant/respondent proceeded to file its affidavit of interest in the attached property and attached documents as exhibits in a bid to prove its claim to the vehicle. The court then made a determination of the claim to the vehicle based on a consideration of the affidavit evidence before it and ruled that the Claimant/respondent had succeeded in proving its claim to the vehicle. The court then made an order that the vehicle be released from attachment to the Claimant. It was after the ruling releasing the vehicle from attachment that the Plaintiff/judgment-creditor applied by motion for stay of execution and to set aside the ruling. The plaintiff's case is contained in a six-paragraphed affidavit deposed to by himself. The nub of the plaintiff's case from the affidavit is that the court ordered for the release of the car with registration number GS 8646-17 which is the subject matter of an execution process and a claim. That the order was made without recourse to the rules of court. That being

made aware that the court can set aside its own void orders, he prayed the court as per the motion paper. The Claimant/respondent opposed the application. In a fifteen-paragraphed affidavit deposed to by Ofori Adusei, counsel for the claimant on behalf of the claimant/respondent, he deposed that the application is incompetent and an abuse of the court's processes. I have set out the salient grounds of his assertion as contained in paragraphs 5 to 14 below:

5. That the present application is incompetent and a clear abuse of the court's processes.
6. That the Plaintiff refused to file a notice of Dispute to the Claimant's notice of claim as required by law.
7. That furthermore, there was no affidavit of interest filed by the Plaintiff.
8. That above all, the lawyer for the Plaintiff /Judgment Creditor was conspicuously absent from court without excuse , on the 3rd day of June, 2022, when the court ordered that a car numbered GS 8646-217 be released to the claimant.
9. That the said order was given after the court had thoroughly gone through the affidavit of interest and the exhibits filed by the claimant.
10. That the car in question was wrongfully attached in execution of the judgment debt of the Defendant.
11. That the present application is a clear attempt by the Plaintiff to frustrate the claimant.
12. That from the 28th day of July, 2021, the claimant has been deprived of this car.
13. It is trite learning that a ruling or judgment is not set aside because one is not pleased with the said ruling or judgment.
14. That the Plaintiff had all the chances in this world to participate in the process but once he did not participate, he cannot be heard. Counsel for both parties made submissions before the court. Mr Simpson for the plaintiff submitted to the effect that the court can set aside its own void decisions. He relied on the case of *Mosi v Bagyina*. He submitted that the order made on the 3rd June, 2022, was made in error. According to him, per order 22 rule 11 of C. I. 59, the court was mandated to determine the ownership of the vehicle. That the court could not make an order without affording the parties the opportunity of a hearing. According to him, the claimant must mount the box and be subjected to cross-examination. He submitted that the process adopted by the court was flawed and that the eventual ruling is void and should be set aside. He further referred the court to the "Practice and Procedure in the District Court" by the eminent S. A. Brobbey at page 480 where according to him, the writer stated that the procedure to be adopted by the court was to try the claim summarily. And that summarily means that the claim is tried in the same manner as a civil trial. He concluded that the claimant not having been ordered to prove its claim, the court could not have ordered the release of the car. Counsel for the Claimant/respondent on the other hand, submitted that the application is misplaced. According to him, when a court makes an order

or ruling which does not favour a party, the remedy is not to apply to set aside but to appeal. That the court ordered the parties to file their affidavits of interest. The plaintiff/Applicant did not file it. That they did. The court considered their affidavit of interest filed and the exhibits and ruled that the car ought to be released. He saw the application as a waste of time because on the day of consideration of the claim, both the applicant and his counsel were absent. He reiterated his stance that the remedy available to the Applicant is an appeal and not to set aside. To him, the only process which can be set aside was a default judgment. The Plaintiff/Applicant has in this motion, sought to set aside the ruling of the court granting the Claimant's claim to the vehicle numbered GS 8646-17 and the consequential order releasing the said vehicle from attachment. Counsel for the claimant/respondent has argued that the remedy for the Applicant in such a case where a ruling has been given is to appeal but not to apply to have the said ruling set aside. I do not think that that is wholly true. The law is that a party is entitled as of right to apply to set aside a void order or judgment of a court and that nothing can stand in the way of such a party. This is the principle of law enunciated in the oft quoted case of *Mosi v Bagyina* [1963] 1 GLR 337 where the court held in holding 3 thereof as follows: "Where a judgment or an order is void either because it is given or made without jurisdiction or because it is not warranted by any law or rule or procedure, the party affected is entitled *ex debito justitiae* to have it set aside, and the court or a judge is under a legal obligation to set it aside, either *suo motu* or on the application of the party affected. No judicial discretion arises here. The power of the court or a judge to set aside any such judgment or order is derived from the inherent jurisdiction of the court to set aside its own void orders and it is irrespective of any expressed power of review vested in the court or a judge; and the constitution of the court is for this purpose immaterial. Further, there is no time limit in which the party affected by a void order or judgment may apply to have it set aside." Lord Denning expressing his views on a judgment or act which is void had this to say in *Macfoy v UAC Ltd* (1961) 3 All E. R 1169 at 1172: 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.' The import of the above rule is that any void order, ruling, judgment made by a court may be set aside on the application of a party. And there is no time limit within which such an application ought to be made. So it is not the case that a party dissatisfied with a ruling or order of a court must resort to an appeal to seek redress. A party may seek to set aside a void order or judgment of a court. And there is no time limit within which such an application can be made. But when can an order made by a court be declared void? From the cases, an order of a court may be rendered void if it is given or made without jurisdiction or because the order is not warranted by any law or rule or procedure. So does the resort to the wrong procedure make the resultant order of a court void liable to be set aside? It appears from the *Mosi v Bagyina* principle that a ruling given or made by a court by resort to a wrong procedure may be set aside by the affected party. In this case, as I have already set out above, after the court had ordered the claimant to file its affidavit of interest and it had

complied with the order, the court proceeded to consider the affidavit of interest filed by the claimant and the exhibits attached thereto and gave its ruling. The plaintiff/judgment-creditor thinks it was wrong for the court to have determined the claim by affidavit evidence only. Counsel submitted that the court ought to have called the claimant to testify and be subjected to cross examination. And that the court having failed to follow that procedure, the court committed an error and that the eventual ruling from that procedure is void and ought to be set aside. Before I can determine whether the procedure resorted to by the court was warranted or not, it is important to set out the provisions on interpleader actions as set out under the District court (Civil Procedure) rules, 2009 (C. I.59). Rule 11 of Order 22 of C. I. 59 lays out the procedure to be followed where parties make adverse claim to property attached in execution. However, of relevance to the determination of this matter is subrule 1 of rule 11. Subrule 1 of rule 11 reads:

11. Powers of Court hearing application for relief
 - (1) Where in proceedings that arise out of an order made under sub- rule (4), all the persons who make adverse claims to the property in dispute, in this rule referred to as the claimants, appear at the hearing, the Court may
 - (a) summarily determine the question in issue between the claimants and the execution creditor and make an order accordingly on terms that are just; or
 - (b) order that any issue between the claimants and the execution creditor be stated and tried, and direct which of them is to be plaintiff and which defendant. The procedure laid down by subrule 1 of rule 11 appears two-pronged. The rule, to my understanding, requires that where the parties appear before the court, the court may resort to one of two options. The first option is for the court to “summarily determine” the question in issue and make an order on terms that are just. The second options appears the more elaborate one. It is for the court to order that any issue between the claimants and the execution creditor be stated and tried. The court does this by directing which of the parties i.e. claimants and the execution creditor is to be plaintiff and which is to be the defendant. It is important to note that what is “summarily” is not defined in the rules. However, from legal texts, it appears to mean a kind of trial that settles a controversy or disposes of a case in a relatively prompt and simple manner. See Black’s Law Dictionary, 8th ed. 2004. I understand the term to mean that where a court is to determine a matter summarily, it assumes a summary jurisdiction where the court can give a ruling or judgment or decision without the necessity of a trial. Which option the court decides to adopt depends on the court’s own discretion based on the facts in issue. I think that where the court resorts to the first option, it needs only to consider the affidavit of interest filed by the claimant and that in dispute of the claim, if any, filed by the execution-creditor. It needs not order for a full trial as in the second option. So that the question in issue is determined by the court on the affidavit evidence before it. In this matter, it was the first option i.e. rule 11 subrule (1)(a) of order 22 of C. I. 59 that this court resorted to in determining the controversy between the Claimant and the execution creditor. I think that what counsel is proposing the court to have resorted to is the second option contained in

rule 11 subrule (1)(b) of order 22 of C. I. 59 which is the more elaborate procedure. It is important to note that save as mandated by law, it is the preserve of a trial court to determine which of two or more modes of trial to resort to depending on the circumstances of each case. It cannot be held bound by one mode over the others. In this case, the court judged the question in issue and the circumstances of the case and directed that the case be determined under rule 11 subrule (1)(a) of order 22 of C. I. 59. I do not think that the court erred in law or in procedure when it took that course of action. It is clear from the record that of the two Procedural options provided for under rule 11 of order 22 of C. I. 59, counsel for the Applicant argues that the court ought to have determined the claim by resort to subrule 1 (b) as opposed to subrule 1 (a). As such by its failure to adopt that Procedure, he thinks that the court committed an error. I must admit that the procedure advocated by counsel for the Applicant appears to be the more elaborate of the two procedures. That option when chosen, directs that the court designates one of the parties as a plaintiff and the other as a defendant so that a full-blown civil trial is held. However, it is not always the case that in every claim to property attached in execution, there should be a full-blown civil trial. It is this mode of trial i.e. subrule 1 (b), which I think the learned S. A. Brobbey in his book Practice and Procedure referred to by counsel for the Applicant, stated in page 480 of his book. Be that as it may, as I stated before, whether or not to opt for one procedure over the other is always subject to the discretion of the court, of course having taken into consideration the peculiar circumstances of the case. It is a question for the court as to which of the modes of trial to adopt. Subrule 1 of rule 11 of Order 22 of C. I. 59 made provision for two modes of trial when a claim is made to property attached in execution. This court exercised a discretion and decided that considering the circumstances of the case, a fair determination of the claim could be made by resort to affidavit evidence. That exercise of discretion is warranted under the rules of procedure. I do not think that the court erred in that respect. Is a trial by affidavit evidence a mode of trial which could be resorted to by the court to decide a matter? The courts try cases by affidavit evidence. Order 26 of CI 59 states: Evidence by affidavit

- (1) On an application in a cause or matter, the Court, unless these Rules prescribe otherwise or it determines otherwise, may order that evidence be given by affidavit and may, on the application of a party, order the attendance for cross-examination of the person making the affidavit. Thus evidence may be given by affidavit unless in the case of any such application, any provision of these Rules otherwise provides or the Court otherwise directs. And after a court has accepted affidavit evidence, a party who is desirous of examining a deponent to an affidavit may subject to leave, apply to cross examine such a deponent. But the Court may, on the application of any party, order the attendance for cross- examination of the person making the affidavit, and where, after an order has been made, the person in question does not attend, that 'person's affidavit shall not be used as evidence without the leave of the Court. Counsel for the Plaintiff/judgment-creditor/Applicant submitted that the court erred by not affording his client the opportunity of a cross- examination. I do not think that the court erred in that circumstance. The court rightly adopted a procedure permitted by the

rules of procedure. What the Plaintiff/Judgment-creditor/Applicant ought to have done if he intended to cross-examine the deponent to the affidavit was to have applied or requested to cross-examine him. However, he failed to make that request. That failure cannot be the court's doing. Plaintiff could have applied to the court for leave to cross examine the deponent to the affidavit if counsel was of the view that the depositions contained therein warranted being examined. However, he did not indicate any such intention to cross examine the deponent. For the foregoing reasons, I am not minded to grant the Application to stay execution and to set aside the ruling of this court dated the 3rd day of June,

2022. The motion is dismissed. Cost of GH¢1,000 is awarded against Plaintiff/Applicant. (SGD)
HIS HONOUR ISAAC APEATU DISTRICT MAGISTRATE

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