

GHANA / JUDGMENT

Digitronix Systems Ltd Vrs Jislah Financial Services Ltd [2022]

GHAHC 9 (17 November 2022)

[2022] GHAHC 9

COURT

High Court

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IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT JUSTICE, (COMMERCIAL DIVISION), HELD AT ACCRA, ON THURSDAY, 17th NOVEMBER 2022, BEFORE HIS LORDSHIP JUSTICE CONSTANT K. HOMETOWU SUIT NUMBER: CM/RPC/0875/2020 DIGITRONIX SYSTEMS LTD VRS JISLAH FINANCIAL SERVICES LTD : : PLAINTIFF DEFENDANT

JUDGMENT

FACTS:

On 20th June 2020, the Plaintiff/Judgment Creditor herein instituted an action against the Defendant/Judgment Debtor for the following reliefs:

- i. An order for the recovery of the sum of GHC35,561,465.78 being the principal sum and accrued interest on the fixed deposit investments as at 6th April, 2018. ii. Interest on the sum of GHC35,561,465.78 at the agreed rate of 28% pa from 7th April 2018 to the date of final payment. iii. Cost on full indemnity basis. The Defendant/Judgment Debtor failed to enter appearance and upon an application filed before this Court on 7th July 2020, the Plaintiff/Judgment Page 1 of 15 Creditor was granted judgment in default of appearance on 30th July 2020 for the reliefs endorsed on the Writ of Summons as well as costs of GHC50,000.00. The total judgment debt therefore stood at GHC48,057,978.70 with a post judgment interest rate of 28% per annum from 31st July 2020 to date of final payment. After judgment was obtained by the Plaintiff/Judgment Creditor against the Defendant/Judgment Debtor, execution processes were triggered by garnishing the accounts of the Defendant/Judgment Debtor per Garnishee Nisi order dated 8/09/20 directed at Mr. Eric Nipah and Vish Ashiagbor in their capacities as the Receivers to attend Court on 23/09/2020 to show cause why any affected funds in their custody should not be released to the Plaintiff/Judgment Creditor in satisfaction of the Judgment debt. During the hearing of the application, the representative of the Garnishee (Receiver), Mr. Harvard Otoo, stated on oath that the Receiver had no money in its custody standing to the Credit of the Defendant/Judgment Debtor since a

portion of the claim that had earlier been filed by the Defendant/Judgment Debtor with the Receiver in respect of monies owed to them by some of the institutions under receivership had been paid to the Defendant/Judgment Debtor through two accounts created in the Defendant/Judgment Debtor's favour at Consolidated Bank Ghana (CBG) Ltd; as per the practice of the Receiver. The Court then discharged the Garnishee (i.e. the Receiver) as having no funds in its custody for the benefit of the Defendant/Judgment Debtor on the basis that, the funds had been transferred to Consolidated Bank Ghana (CBG) Ltd. Page 2 of 15 The Plaintiff/Judgment Creditor later obtained a Garnishee Order Nisi and subsequently a Garnishee Order Absolute against CBG Ltd on 13th October 2020 which ordered CBG Ltd to release the funds standing to the credit of the Defendant/Judgment Debtor to the Plaintiff/Judgment Creditor in partial satisfaction of the judgment debt. The Receiver tried to set aside this Garnishee Order Absolute through an application dated 21st October 2020 on the grounds that it had claims against the Defendant/Judgment Debtor in respect of which it intends to exercise its right of set-off. It is quite interesting to note that, whilst this application was pending, and in spite of its intention to exercise its right of set-off, the Receiver validated the outstanding claims amounting to GHC2,717,364.66 that had earlier been made to it by the Defendant/Judgment Debtor and paid same into the Defendant/Judgment Debtor's account at CBG Ltd on or about 29th January 2021. One would have expected that the Receiver, who swore to an Affidavit aimed at setting aside the Garnishee Absolute Order and contended that the Defendant/Judgment Debtor owes sums of money to various entities under receivership, would have immediately exercised the said right of set off against the Defendant/Judgment Debtor's claims which were then not under any attachment. Nonetheless, the claims were validated and paid into the Defendant/Judgment Debtor's account at CBG Ltd. The application to set aside was however determined the following year on 18th August, 2021 and dismissed accordingly. Having paid the sum of GHC2,717,364.66 into the CBG Ltd account of the Defendant/Judgment Debtor, the Plaintiff/Judgment Creditor then applied for and obtained another Garnishee Order Nisi dated 22nd October 2021 Page 3 of 15 attaching the funds in the custody of CBG Ltd and ordering CBG Ltd to attend Court and show cause why the funds standing to the credit of the Defendant/Judgment Debtor should not be released to the Plaintiff/Judgment Creditor in satisfaction of the judgment debt. At the hearing which took place on 4th November 2021, the representative of CBG Ltd, Ms. Majorie Mantebea, stated on oath to this Court that an amount of GHC2,717,364.66 stood to the credit of the Defendant/Judgment Debtor which were funds paid by the Receiver on or about 29th January 2021 in favour of the Defendant/Judgment Debtor. This information is available on page 5 of a copy of the record of proceedings for 4th November, 2021 and attached to Plaintiff/Judgment Creditor's Response to the Affidavit of Interest of the 1st Claimant (NDK Capital Ltd), marked as Exhibit 11. However, before an order for Garnishee Absolute was granted by this Court in respect of the hearing of 4th November 2021, both Claimants herein filed notices of claim wherein they claimed to have an interest in the funds so attached by virtue of the Garnishee Order Nisi and followed up with their respective affidavits of interest filed on 21st January 2022 and 23rd March 2022 respectively. The Plaintiff/Judgment Creditor filed its Affidavit in Response

to both notices of claim on 23rd February 2022 and 26th April 2022 respectively. A determination of the issues raised in these notices of claim is the primary focus of this ruling. ARGUMENTS OF THE PARTIES Page 4 of 15 The 1st Claimant (NDK Capital Ltd) contends that, in a pending suit between itself and the Defendant/Judgment Debtor before the High Court, differently constituted, it applied for interim preservation of funds which were in the custody of 2nd Claimant (Receiver) pending the final determination of the said suit. The 1st Claimant (NDK Capital Ltd) contends that the funds which the Plaintiff/Judgment Creditor is seeking to receive in the present Garnishee proceedings falls within the subject matter of the application for interim preservation and thus, this Court should refuse the Garnishee Order Absolute and vacate the Garnishee Order Nisi already granted. It further argued that, at any rate, at the time of filing its Affidavit of Interest before this Court, the said High Court had granted the said Application for Interim Preservation and therefore, the funds of the Defendant/Judgment Debtor in its account at CBG Ltd cannot be the subject of an Order for Garnishee Absolute. The 1st Claimant (NDK Capital) finally contends that the funds which the Plaintiff/Judgment Creditor is currently seeking to fraudulently receive by the present Garnishee proceedings is part of the funds deposited by the Receiver (2nd Claimant) at CBG Ltd and therefore falls within the subject matter of the preservation. The 1st Claimant therefore prays this Court to see the fraud being perpetuated in the suit and lift the corporate veil to hold Emmanuel Obeng, the majority shareholder and Director of both Plaintiff/Judgment Creditor and Defendant/Judgment Debtor, liable for fraud and to order that all moneies received under the suit be returned for preservation. Page 5 of 15 The 2nd Claimant's case is that, in response to claims filed before it by the Defendant/Judgment Debtor in respect of monies owed it by some of the financial institutions under Receivership, it validated the said claims and paid the said monies into an account opened at CBG Limited for the Defendant/Judgment Debtor for the sole purpose of paying the said claims and any set offs that may arise. The 2nd Claimant (Receiver) further contends that it later on received notice of the Defendant/Judgment Debtor's indebtedness to some of the financial institutions under Receivership and that, in accordance with Section 133(4) of The Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), it is under the obligation to set off those debts against the monies already paid out to the Defendant/Judgment Debtor. It argued that it has however not been able to do so as is required by law because the Garnishee Order Nisi granted on 22nd October 2021 has attached the funds so paid out to the Defendant/Judgment Debtor's account at CBG Ltd and caused a Post No Debit (PND) to be placed on the said account. The 2nd Claimant (Receiver) also made reference to the Order for Interim Preservation granted by the High Court, differently constituted, pursuant to the application filed by the 1st Claimant and argued that, being the subject matter of an interim preservation order, the Plaintiff/Judgment Creditor cannot place a Garnishee Order Absolute on the said account at CBG Ltd in satisfaction of the debt owed to it. The 2nd Claimant (Receiver) therefore prayed this Court to vacate the Garnishee Order Nisi to enable it preserve same pursuant to the order of the High Court, differently constituted. Page 6 of 15 Quite notably, both Claimants raise similar arguments, namely that: "To the extent that an Application for an Order for Interim Preservation was pending in

respect of the subject matter of the current execution proceedings, the said funds cannot be the subject of a Garnishee Order Absolute.” The Plaintiff/Judgment Creditor in its response argued that, the Application for Interim Preservation was rather directed at the Receiver (2nd Claimant herein) for monies it held on behalf of the Defendant/Judgment Debtor and not at CBG Ltd and therefore, any attempt by the Receiver (2nd Claimant herein) to purport to exercise control over the funds now in the custody of CBG Ltd would be contrary to law. It further argued that, at any rate, at the time the Garnishee Order Nisi was granted, the Application for Interim Preservation was still pending and had not yet been determined by the Court and accordingly, the Plaintiff/Judgment Creditor had attained priority over the account of the Defendant/Judgment Debtor at CBG Ltd when same was earlier attached by virtue of the Garnishee Order Nisi. The Plaintiff/Judgment Creditor therefore prayed the Court to dismiss the claims of both Claimants and proceed to grant a Garnishee Order Absolute over the said account of the Defendant/Judgment Debtor at CBG Ltd. ISSUES FOR DETERMINATION Page 7 of 15 The contentions put forward by the parties raise the following issues for

determination:

Issue 1: Whether or not the Plaintiff/Judgment Creditor has priority of interest over the accounts of the Defendant/Judgment Debtor at CBG Ltd as against the Claimants. Issue 2: Whether or not the 2nd Claimant can purport to exercise any control over the accounts of the Defendant/Judgment Debtor at CBG Ltd. after having paid the Defendant/Judgment Debtor’s claim into said account which has been attached in execution per the Garnishee Order dated 22nd October 2021. Issue 3: Whether or not the Judgment Creditor is fraudulently seeking to receive part of the Defendant/Judgment Debtor’s funds deposited at CBG Ltd. Issue 1: Whether or not the Plaintiff/Judgment Creditor has priority of interest over the accounts of the Defendant/Judgment Debtor at CBG Ltd as against the Claimants. The 1st Claimant argued in its written address filed before this Court on the 22nd of July 2022 that, an interim preservation motion, being an Order 25 relief, operated in the same manner as an Injunction so that once it is served on a party, it injuncts that party from doing anything contrary to that injunction. Page 8 of 15 However, as can be gleaned from the 1st Claimant’s own Affidavit of Interest, the said Application for Interim Preservation, attached as Exhibit H, shows in paragraph 19 that the Application was aimed at preserving all monies due and/or accrued to the Defendant/Judgment Debtor standing with the Receiver, Mr. Eric Nana Nipah. It is also clear from paragraph 3 of page 4 of the Ruling which granted the Application for Preservation, attached to the 1st Claimant’s Affidavit of Interest as Exhibit J, that the funds in the custody of the Receiver should be preserved pending the final determination of the said suit. Never was the Application for Preservation directed at the subject matter of the current execution proceedings i.e. the funds which stand to the credit of the Defendant/Judgment Debtor in its account at CBG Ltd. It is also worthy of note that the Ruling which granted the Application for Preservation was delivered after the funds in the Defendant/Judgment Debtor’s account with CBG Ltd were attached by virtue of the Garnishee Order Nisi. As has already been noted, the said Ruling was directed at monies which were due and/or accrued to the Defendant/

Judgment Debtor standing with the Receiver, if any, and not at the monies which are now in the custody of CBG Ltd. To the extent that the Interim Preservation Application and the resulting Order was directed at the Receiver, it is only funds in the custody of the Receiver standing to the credit of the Defendant/Judgment Debtor which were the subject of preservation and that funds legitimately paid into the CBG accounts of the Defendant/Judgment Debtor for its benefit cannot be affected by the said Interim Application and/or orders therefrom. Page 9 of 15 The contention of the 1st Claimant therefore fails and must not be given any attention by this Court. Issue 2: Whether or not the 2nd Claimant can purport to exercise any control over the accounts of the Defendant/Judgment Debtor at CBG Ltd. after having paid the Defendant/Judgment Debtor's claim into said account which has been attached in execution per the Garnishee Order dated 22nd October 2021. The 2nd Claimant argues that it has the legal obligation to exercise its right of set off against the Defendant/Judgment Debtor in respect of the funds in the Defendant/Judgment Debtor's account at CBG Ltd in accordance with Section 133(4) of The Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) which provides that: "(4) A claim against a bank or specialized deposit-taking institution arising from a deposit shall be set-off against any sum due from a depositor to the bank or specialized deposit-taking institution as of the date on which the licence is revoked and the receiver is appointed in the following manner:

- a. Automatically, if the sum is matured or past due; or
- b. At the option of the depositor, if the sum is not matured or past due." The particular set-off envisaged under The Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) is an insolvency set-off; an important characteristic of which is the principle of mutuality. The Page 10 of 15 concept of mutuality simply means that one person must be a creditor of another person and vice-versa for accounts that are known and certain. In *Jones v. Mossip* (1884) 67 ER, it was noted that with the exception of contractual set-off, one of the key features of set-off is that there must be mutuality of debts. This case sets out the guiding principle behind mutuality – i.e. that, a debtor should not be entitled to use another person's debt to pay its own liability. (See *Chitty on Contracts, General Principle Volume 2*, 28th Edition Sweet & Maxwell, 1087 paragraph 21- 043). From the above, it becomes clear that Section 133(4) of Act 930 is only intended to come into operation where the Receiver has a claim against the other party (in this case, the Defendant/Judgment Debtor herein) and the other party has a claim against the Receiver. It would be remembered, as stated early on in this Ruling, that in spite of an earlier application dated 21st October 2020 by the Receiver to set aside an earlier Garnishee Order Absolute granted in favour of the Plaintiff/Judgment Creditor against the Defendant/Judgment Debtor on the grounds that it intended to exercise its right of set-off, this same Receiver voluntarily validated the outstanding claims amounting to GHC2,717,364.66 that had earlier been made to it by the Defendant/Judgment Debtor and paid same into the Defendant/Judgment Debtor's account at CBG Ltd on or about 29th January 2021, at a time when its own application to set aside was still pending. This conduct of the 2nd Claimant (Receiver) is only indicative of the fact that it has no interest whatsoever in the subject matter but has Page 11 of 15 merely embarked on this venture to frustrate the Plaintiff/Judgment Debtor; a course of conduct which this Court finds rather

unfortunate. Be that as it may, in the case of *Admiralty Comrs v. National Provincial and Union Bank of England Ltd* (1922) 127 LT 452, Sargant J. noted that there is no right of set-off in respect of monies which are recoverable by a third party as monies paid to the bank's customer under a mistake of fact, and to which a claim is made before he set-off. Again, once the Receiver's instructions to credit the Defendant/Judgment Debtor's account at CBG Ltd was completed, the Receiver lost custody over the funds and cannot legally control the accounts by subsequent instructions to CBG Ltd. I am therefore satisfied that the Receiver's right to set-off the debt, if any, extinguished immediately it settled the Defendant/Judgment Debtor's claim by the payment into the Defendant/Judgment Debtor's account at CBG Ltd and accordingly, the 2nd Claimant cannot exercise any control over the Defendant/Judgment Debtor's account at CBG Ltd. Issue 3: Whether or not the Judgment Creditor is fraudulently seeking to receive part of the Defendant/Judgment Debtor's funds deposited at CBG Ltd. Upon a careful consideration of the 1st Claimant's Affidavit of Interest, it becomes clear that the 1st Claimant's allegation of fraud is solely premised on the fact that both Plaintiff/Judgment Creditor and Defendant/Judgment Debtor have a common Director and Shareholder in the person of Page 12 of 15 Emmanuel Twum Obeng who could have paid the Plaintiff/Judgment Creditor's debts without having to commence the suit which has resulted in these execution proceedings. Consequently, the 1st Claimant argues that, for the Plaintiff/Judgment Creditor to have commenced the said suit against the Defendant/Judgment Debtor is suggestive of fraud, as the Plaintiff/Judgment Creditor wants to use the process of Court to defraud the Claimants. In the case of *Brown v. Quarshiegah* [2003-2004] SCGLR 930 at 946, the Supreme Court, speaking through Dr. Seth Twum JSC stated that: "In short, fraud is dishonesty. In *Kerr on Frauds and Mistakes* 7th Edition, the learned author stated that fraud in all cases implies a willful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to." It must be noted that, fraud is a very serious allegation and as such, must not only be pleaded but must be clearly and distinctly proved by the party alleging same. Fraud in civil proceedings requires a higher standard of proof than any ordinary civil matter. Indeed, there must be proof of criminal deception as was stated in the case of *In Re Agyepong (Decd); Poku v. Abotsi* [1982-83] GLR 254-276. The standard of proof required for establishing fraud was also stated by Denning LJ in *Bater v. Bater* [1951] P 35 at 37 as follows: "A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it Page 13 of 15 would require when asking if negligence is established." [Emphasis Mine] The 1st Claimant, after having alleged fraud against the Plaintiff/Judgment Creditor, failed to lead any credible evidence of the said fraud. Its arguments bordering on fraud before this Court, at best, remain as mere speculations. No evidence of dishonesty or a material misrepresentation of fact, knowledge of the fact and an intent to induce reliance was led to prove the issue of fraud. The resultant effect is that, the 1st Claimant's allegation of fraud has no basis and cannot be given any due attention by this Court.

CONCLUSION

In conclusion, the claims of both Claimants in the present application are without any merit whatsoever and are accordingly dismissed forthwith. The Garnishee Order Absolute is granted. The Garnishee Bank, Consolidated Bank Ghana Limited (CBG Ltd), is hereby directed to release the funds held its custody in favour of the Defendant/Judgment Debtor, amounting to GHC2,717,364.66, and pay same to the Plaintiff/Judgment Creditor forthwith, in partial satisfaction of the judgment debt. I award costs of GHC 10,000.00 in total in favour of the Plaintiff/Judgment Creditor, equally against 1st and 2nd Claimants. (SGD) Justice Constant K. Hometowu, Justice of the High Court Page 14 of 15 Parties

1. Nana Ama Amponsah, Esq., with Selina Asantewaa Odame – Counsel for the Plaintiff/Judgment Creditor;
2. Ana-Maria Amissah, Esq., with Jasmin Asiedu, Esq., - Counsel for the Receiver/Claimant;
3. Akosua Gyamfi Duamroh, Esq.,
- Counsel for NDK Capital/Claimant Page 15 of 15

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