IN THE HONOURABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA, SITTING IN ITS OCTOBER TERM, A.D. 2022

BEFORE HER HONOR: SIE-A-NYENE G. YUOH……...ASSOCIATE JUSTICE
BEFORE HER HONOR: JAMESETTA H.WOLOKOLIE……..ASSOCIATE JUSTICE
BEFORE HIS HONOR: JOSEPH N. NAGBE……ASSOCIATE JUSTICE
BEFORE HIS HONOR: YUSSIF D. KABA…..ASSOCIATE JUSTICE

Mutual Benefit Assurance Company (MBAC), represented by and thru its authorized representative and all other officers of the City of Monrovia, Liberia……Appellant

Versus

Bea Mountains Mining Corporation (BMMC), represented by and thru its General Manager, Mr. Halil Ozdemir of the City of Monrovia, Liberia…….. Appellee

APPEAL

GROWING OUT OF THE CASE:

Mutual Benefit Assurance Company (MBAC), represented by and thru its authorized representative and all other officers of the City of Monrovia, Liberia…… Petitioner

Versus

Her Honor Eva Mappy Morgan, Chief Judge, His Honor Chan-Chan A. Paegar, Associate Judge, and His Honor Othello S. Payman, Associate Judge…… 1st Respondent

And

Bea Mountains Mining Corporation (BMMC), represented by and thru its General Manager, Mr. Halil Ozdemir of the City of Monrovia, Liberia..... 2nd Respondent

PETITION FOR A WRIT OF PROHIBITION

GROWING OUT OF THE CASE:

Bea Mountains Mining Corporation (BMMC), represented by and thru its General Manager, Mr. Halil Ozdemir of the City of Monrovia, Liberia…….. Plaintiff

Versus

Mutual Benefit Assurance Company (MBAC), represented by and thru its authorized representative and all other officers of the City of Monrovia, Liberia……Defendant

ACTION OF DEBT

Heard: November 9, 2022 Decided: January 25, 2023

MR. JUSTICE NAGBE DELIVERED THE OPINION OF THE COURT.

This appeal comes before the full bench of the Honorable Supreme Court of Liberia from the ruling of the Chambers Justice, our esteemed colleague, Madam Justice Sie-A-Nyene G. Yuoh, now Chief Justice of the Supreme Court of Liberia, had on July 27, 2022, when she ruled and denied a petition for a writ of prohibition filed on June 28, 2022, by the appellant/petitioner, Mutual Benefit Assurance Company, which grew out of the April 29, 2022, final ruling of the Commercial Court of Liberia, wherein the trial court entered a summary judgment in favor of the appellee, Bea Mountain Mining Corporation.

The facts as culled from the certified records transcribed to this Court reveal that in 2012, Bea Mountain Mining Corporation, entered a contract with the International Construction Engineering (ICE) to perform construction work for the former, and that the appellant, Mutual Benefit Assurance Company, posted a performance and guarantee bond on ICE's behalf; that the contract fell behind and Bea Mountain terminated the contract with ICE in September 2014, for which termination, ICE and Bea Mountain participated in arbitration proceedings in England as required by the contract terms, though to the exclusion of Mutual Benefit Assurance Company; that on January 23, 2017, the arbitral tribunal found ICE liable in breach of the contract and awarded Bea Mountain Six Million, Nine Hundred Ninety Thousand, Six Hundred Twenty-Six United States Dollars (US$6,990,626.28) and Twenty-Eight Cents plus Two Million, Seven Hundred Thousand British (GBP2,700,000.00) Pounds, plus 2% interest, quarterly.

The records further show that as a consequence of the arbitral award, the appellee, Bea Mountain, filed before the Commercial Court an action of debt against the appellant, Mutual Benefit Assurance,

claiming Fourteen Million United States (US$14,000,000.00) Dollars including the arbitral award stating that in as much as the appellant posted several bonds on behalf of ICE in favor of the appellee, the appellant was obligated to the appellee by virtue of the arbitration which held ICE in breach of the engineering contract No. C8128-C-0104.

The appellant filed its answer and denied the allegation and asserted that the contract agreement for which it issued performance bond was different from the one for which the arbitral tribunal gave the award; that on April 29, 2022, during a pretrial conference after pleadings had rested, the Commercial Court entered a summary judgment in favor of the appellee, notwithstanding the issues raised by the appellant. We quote the ruling of the Commercial Court, thus:

> "The underlining contract subject of the arbitration was issued by Mutual Benefit Assurance Company (MBAC) to guarantee performance by International Construction Engineering (ICE). The award having determined nonperformance by ICE which performance was guaranteed by MBA obligates MBA to Bea Mountain…Accordingly, the Clerk is ordered to write a local bank for the opening of the escrow account and that the account number is provided to the MBA to which the full amount of the award and accrued interest will be deposited".

The appellant noted exception to the ruling, announced an appeal to the Supreme Court sitting in its October A.D. 2022 Term, and on May 18, 2022, filed its approved bill of exceptions. Subsequently, on May 24, 2022, the appellant taxed the bill of cost.

The records also reveal that while the appeal announced by the appellant was pending incomplete and undetermined, the appellant, on June 28, 2022, filed before the Chambers Justice a petition for a writ of prohibition against the Commercial Court and alleged *inter alia* that the Commercial Court erred when it ruled and entered a summary

judgment at the pretrial conference; that the lower court proceeded by the wrong rules, including subjecting the appellant to Article IV(2)(3) of the Act establishing the Commercial Court which require the appellant to deposit the full amount of the judgment sum into an escrow account with a commercial bank as a precondition for the completion of an appeal; that the trial court disregarded the fact that the appellant was not a party to the arbitration proceedings out of which the arbitral award, subject of which the debt action grew; that the Commercial Court prepared a bill of cost in the amount of Eleven Million, Two Hundred Twenty-Six Thousand, Five Hundred Seventy-Three United States Dollars (US$11,226,573.85) and Eighty-Five Cents and sought to enforce the arbitral award as if it were its own when it had not satisfied the mandatory standards laid down in Section 7.56 of the Commercial Code of 2010; that the Commercial Court also did not comply with the supplementary mandatory provision under Section 7.56(3)(b) of the Commercial Code which states that: “even if there is a finding that the condition set forth under Section 7.56(1) are met, the Commercial Court shall not enforce a foreign award if the party against whom the award is invoked was not given sufficient notice to enable the party present the party’s case”; and that if the trial court had ruled the case to trial, the appellant would have proved that it was not a party to the arbitration agreement.

On July 5, 2022, the Chambers Justice convened a conference with the parties, and thereafter, on July 6, 2022, ordered the Clerk of the Supreme Court to issue the alternative writ of prohibition, requested the respondents, Bea Mountain Mining Corporation and the Commercial Court, to file returns to the petition, and also ordered the trial court to stay all further proceedings pending the outcome of the conference.

On July 15, 2022, the 2nd respondent, Bea Mountain, filed returns and contended that the trial court's summary judgment was final and consistent with law and cannot be reviewed by prohibition; that the issue before the Commercial Court was an action of debt and not an action to enforce the arbitration award; that the arbitration award was legally enforceable in a debt action against Mutual Benefit Assurance with regard to foreclosing the bonds and that since the bonds covered the full amount of the arbitration award, the Commercial Court committed no reversible error when it entered a summary judgment against Mutual Benefit Assurance; and that the appellant cannot substitute the appeal process by a writ of prohibition.

On July 20, 2022, the Chambers Justice entertained arguments *pro et con* into the petition and the returns thereto, and thereafter, on July 27, 2022, ruled and denied the petition for a writ of prohibition and quashed the alternative writ issued. We quote excerpts from the Chambers Justice's ruling to form the basis for this Opinion.

> "We take judicial notice that after the Commercial Court rendered its final judgment on April 29, 2022, the petitioner noted exceptions thereto, announced an appeal to the Supreme Court and filed a 12 count bill of exceptions. In addition thereto, the petitioner also signed the bill of costs in the amount of Eleven Million, Two Hundred Twenty-Six Thousand, Five Hundred Seventy-Three United States Dollars (US$11,226,573.85) and Eighty-Five Cents…By commencing the appeal process, the petitioner was under a legal obligation to complete the appeal process. And the lawyer should know that once a final judgment is entered and the case concluded on its merits, the review that the appellant [petitioner] is entitled to is an appeal to the Full Bench of the Supreme Court.
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> Applying the above quoted principle of law to the facts of the present petition, this Court says that given the fact [that] this case emanated from the Commercial Court and is subject to Article IV of the Commercial Court Act, we state here that

> there is nothing substantive about this case before the Commercial Court except for the Commercial Court to allow the appellant complete the appeal process by the designation and opening of an escrow account to enable the appellant deposit the full judgment sum; file an approved appeal bond if the Commercial Court so required, which in the instant case was not required and then allow the appellant to serve and file his/her notice of completion of appeal.
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> In view of the above, we hold that the petitioner is obligated and required to complete the appeal process which is the only remedy available to it plus the fact that the Commercial Court's jurisdiction is restricted only to allow the petitioner pay the judgment sum into an escrow account and complete the appeal process…In the case *In Re Ibrahim et al v. Paye, Supreme Court Opinion March Term A. D. 2006,* the Supreme Court held that "the Writ of Prohibition is not the cure for all judicial misfortunes or ails and that writ will not be used as a substitute for an appeal"…that the writ of prohibition is not applicable to the petitioner.
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> Wherefore, and in view of the foregoing, the alternative writ of prohibition issued is quashed and the peremptory writ of prohibition is denied. The Clerk of this Court is ordered to send a mandate to the Commercial Court to resume jurisdiction and allow the petitioner to perfect its appeal in keeping with the law. Costs are ruled against the petitioner. AND IT IS HEREBY SO ORDERED".

The appellant, Mutual Benefit Assurance Company, not satisfied, noted exception to the ruling of the Chambers Justice and announced an appeal to the Supreme Court *en banc* sitting in its October Term A.D. 2022.

This Court having been called upon to review the ruling of the Chambers Justice, coupled with the facts gleaned from the records before us, we have determined that the singular issue on which this appeal must be decided is: whether or not prohibition will lie where an appeal has been announced and steps taken to perfect said appeal?

While we do not wish to belabor the facts in this case, we are compelled to reemphasize the aspects thereof that are germane to this Opinion.

The historicity of this controversy is traced to a debt action instituted by the appellee against the appellant in the Commercial Court seeking to enforce arbitration award granted in favor of the appellee during arbitral proceedings in London between the appellee and the International Construction Engineering (ICE), a construction company the appellant guaranteed to indemnify in the event of a default on the part of ICE during the execution of the construction contract ICE entered with the appellee, Bea Mountain Mining Corporation. The appellee asserted that in so far the appellant indemnified ICE in four (4) separate performance bonds, and that the award was an outcome of arbitration proceedings for breach committed by ICE, the appellant was liable, consistent with the performance bond contract.

The appellant answered and contended that the contract for which it issued performance bond was substantially different from the original contract for which the arbitration tribunal made the award in favor of the appellee; hence, the appellant rejected liability imposed by the Board of Arbitration. At the call of the case on April 29, 2022, for a pretrial conference, the trial court granted a summary judgment and ruled, adjudging the appellant liable to the appellee. The appellant noted exception to the ruling and announced an appeal to the Supreme Court, and began the appeal process by filing its approved bill of exceptions within the ten days statutory period.

We note that although the appellant announced an appeal to the full bench of the Supreme Court, it took flight to the Justice in Chambers, Her Honor Sie-A-Nyene G. Yuoh, (now Chief Justice) with a petition for

a writ of prohibition to inhibit the trial court from enforcing its ruling, especially, Article IV(2)(3) which speak specifically to the money judgment sum to be deposited in an escrow account in the face of an appeal been announced. On review, the Chambers Justice ruled and denied the petition for reason that in as much as the appellant had commenced the appeal process, prohibition was not applicable to the circumstance because the petitioner is obligated and required to complete the appeal process, which is the only remedy available to it. The Chambers Justice relied on the case: *In Re Ibrahim et al v. Paye, Supreme Court Opinion March Term A. D. 2006,* in which the Supreme Court held that "the Writ of Prohibition is not the cure for all judicial misfortunes or ails and that writ will not be used as a substitute for an appeal".

We are in perfect agreement with the Chambers Justice to the effect that prohibition cannot serve as a substitute for an appeal. In the case *Liberia Fisheries Incorporated v. Bardio et al,* 36 LLR 277 (1989), the Supreme Court held that "prohibition is a preventive rather than a corrective remedy and is designed to forestall the commission of a further act rather than to undo an act already completed". The facts as to the Liberia Fisheries case set forth the following that, as petitioner, Liberia Fisheries filed before the Chambers Justice a petition for a writ of prohibition on ground that no writ of summons was served on it and as such, the judgment entered against it was *void ab initio;* that it wanted the trial judge and court officers to desist from enforcing the alleged void judgment. The respondent judge refuted the allegations and argued that the writ of summons was served and returned served by the sheriff, and that the judgment had already been enforced and the sale completed. The Chambers Justice, upon hearing had on the petition, granted same, and ordered the issuance of the peremptory

writ of prohibition. On appeal to the Supreme Court, the Chambers Justice was reversed on ground that prohibition was the wrong remedial writ chosen by the petitioner since the acts complained of had already be done and completed.

Similarly, we uphold that principle today. This Court says that the argument propounded by the appellant that the trial court proceeded by the wrong rules in an attempt to enforce a foreign judgment; a hearing in which the appellant alleged it did not participate, coupled with the alleged gross disregard to the statute governing summary judgment by the trial court; that the granting of a summary judgment by the trial court, however irregular the proceedings have been conducted, brings to finality the merits of the case; hence, prohibition, the path chosen by the appellant to reach the Supreme Court was wrong, because "prohibition cannot be used to correct errors already committed, or to review and reverse such errors", Catholic Relief Services v. Natt et al, 39 LLR 415 (1999); *Chariff Pharmacy v. Pharmacy Board of Liberia et al*, 37 LLR 135 (1993).

We must also note that upon the entry of the summary judgment by the Commercial Court, the appellant noted exception, announced an appeal to the Honorable Supreme Court, filed its approved bill of exceptions within the time allowed by the appeal statute, and subsequently taxed the bill of costs emanating therefrom. By that, the appellant was under duty to continue with and complete the appeal process consistent with the dictates of the statute controlling same. But to abort the appeal process and substitute same with a request for a writ of prohibition to undo what has already been done was an unfortunate pattern. This Court, speaking through Mr. Justice Ja'Neh, said "the writ of prohibition cannot be used in place of an appeal; for

the writ of prohibition has a clearly defined role. It is used to stop a trial judge from proceeding when and where it has no jurisdiction or if it has jurisdiction, it can still be stopped when it proceeds by wrong rule". *Western Steel Inc. v. RL et al*, Supreme Court Opinion, March Term, A. D. 2015; Broh v. Hon. House of Representatives et al, Supreme Court Opinion, October Term A. D. 2013, decided on January 24, 2014.

At this juncture, we should also note that the appellant strenuously argued that its appeal was not subject to the appeal provision of the Commercial Court of Liberia; that the trial judge imposed on it Article IV(2)(3) of the Act which created the Commercial Court relative to the provisions for the completion of the appeal process. The appellant maintained that enforcement of a foreign award, as in the instant case, is not the enforcement of the Commercial Court's own judgment. We disagree. Chapter 7, Subchapter 6, Subsection 7.54(1) under the caption: Enforcement of Award provides that: "An award made by an arbitrator pursuant to an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the Court to the same effect". By the language of the provision stated supra, we find it difficult to accept the appellant's claim that the arbitration award (foreign award) has different mode of enforcement by the Commercial Court to that of the Court's own judgment.

Additionally, the appellant should take cognizance that all appeals growing out of judgments (awards) emanating from the Commercial Court, whether by arbitration or through regular trial [emphasis supplied], are governed by Article IV of the Act that created the Commercial Court of Liberia. Article IV, Sections (2) and (3) state that:

> (2) "An appeal from a judgment of the Commercial Court shall not serve as a stay on enforcement of the judgment, provided that the amount of the judgment paid shall be placed in an

interest-bearing escrow account with a commercial bank to be designated by the Commercial Court pending disposition of the appeal"; and

(3) "Payment of the full amount of judgment shall be a condition precedent for the completion of an appeal from a judgment of the Commercial Court, but the appeal bond, which may be required of the appellant, shall be exclusive of the amount of the judgment paid".

We must conclude this Opinion by emphasizing that the law quoted hereinabove is the law in vogue, and has distinguished no one from complying with any of its provisions. That said, it is our holding that the ruling of the Chambers Justice be upheld; and that appellant should proceed to perfect its appeal *nun pro tunc.*

Wherefore, and in view of the foregoing, the ruling of the Chambers Justice denying the issuance of the peremptory writ of prohibition is affirmed. The Clerk of this Court is ordered to send a Mandate to the Commercial Court to resume jurisdiction over this case and give effect to this Opinion. AND IT IS HEREBY SO ORDERED.

When this case was called for hearing Counsellor Aloysius Jappah appeared for the appellant. Counsellors Eugene L. Massaquoi and Kunkunyon Wleh Teh appeared for the appellee.