IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA

DOTSE JSC (PRESIDING)
AKOTO-BAMFO (MRS) JSC
BENIN JSC
APPAU JSC
PWAMANG, JSC

CIVIL MOTION
NO. J5/45/2018
31ST OCTOBER, 2018

THE REPUBLIC
VRS
THE HIGH COURT, WINNEBA - RESPONDENT
EX-PARTE; PROFESSOR MAWUTOR AVOKE - APPLICANT
AND
1. SUPI KOFI KWAYERA
2. UNIVERSITY OF EDUCATION, WINNEBA - INTERESTED PARTIES
3. MINISTER FOR EDUCATION

RULING

YAW APPAU

This is the second time within a year that this Court is being called upon to determine the propriety or otherwise of proceedings conducted by the High

Court, Winneba involving issues concerning the University of Education, Winneba. The application before us now can be described as the second episode of an unending story about the University that began in 2017 and it would not be out of place if a brief narration of events is given before we proceed to determine the substance of the application. This would help to present a clearer picture of the matters in issue and lead to a better appreciation of our decision.

The application before us is a judicial review application brought under article 132 of the Constitution, 1992 and rule 61(1) of the rules of this Court, 1996 [C.I.16]. The prayer of the applicant who used to be the Vice-Chancellor of the 2nd interested party until recently, is for an order of certiorari directed at the High Court, Winneba, to bring up into this Court for purposes of being quashed, the ruling of the court dated 2nd May, 2018 in the case intituled SUPI KOFI KWAYERA v UNIVERSITY OF EDUCATION, WINNEBA & Another, Suit No. E12/30/18. The application is in fact, a re-play of a similar one determined by this Court on 20th December 2017 between the University Teachers Association of Ghana (UTAG), Winneba Chapter as applicant (of which the applicant herein was a member) and the very interested parties in this application also as interested parties therein.

The progeny of the first application that preceded this one was that the 1st interested party herein initiated an action at the Winneba High Court against the 2nd and 3rd interested parties herein as respondents by an Originating Notice of Motion seeking as many as ten (10) Declaratory reliefs and three (3) Orders. The 2nd and 3rd interested parties challenged the procedure employed in seeking the reliefs. They accordingly, applied to the High Court to dismiss the action on two grounds:

i. that the action ought to have been commenced by a writ of summons but not a motion and

ii. that the 1st interested party had no capacity to institute the action against them.

The trial High Court refused their application and thereafter granted an injunction application then pending before it against the 2nd and 3rd interested parties

pending the hearing of the Originating Motion. The 2nd and 3rd interested parties herein appealed against the decisions of the trial High Court, Winneba to the Court of Appeal but failed or refused to pursue the appeals. The University Teachers Association of Ghana (UTAG) Winneba Chapter, then applied to join in the action before the Winneba High Court to protect the interest of its members, which included the applicant herein, but the trial High court refused the application for joinder. When the trial court refused the application for joinder, the then President of UTAG, Winneba Chapter, applied to this Court for judicial review seeking to quash the ruling of the Winneba High Court dated 10/07/2017 in which it dismissed the motion by the 2nd and 3rd interested parties herein challenging the propriety of commencing the action by an Originating Notice of Motion. This Court granted the application and quashed the ruling of the Winneba High Court dated 10/07/2017. The Court, speaking through Pwamang, JSC, after analyzing the submissions before it, held as follows: ***"In the circumstances, we grant the application for certiorari, quash the decision of the High Court, Winneba dated 10/07/2017 and set aside the 1st interested party's Originating Motion filed on 23/05/2017 with liberty to him to issue a writ of summons to have his grievances redressed".***

Following the liberty granted him in our ruling as quoted above, the 1st interested party went back to the trial High Court, Winneba and instituted a fresh action against the 2nd and 3rd interested parties herein as 1st and 2nd defendants respectively by Writ of Summons. In this fresh action, the 1st interested party prayed for four declaratory reliefs, namely;

i. **A declaration that the extension of the mandate of the Governing Council of the 1st defendant by the 2nd defendant to stay in office to perform such functions as properly appointed council was in breach of section 8 of Act 672.**
ii. **A declaration that no authority or institution of state has any power to extend the tenure of a member of the Governing Council of the 1st defendant unless such extension is in accordance with Act 672.**
iii. **A declaration that all appointments made by the defunct Governing Council which constituted themselves as the Governing Council of the**

1st defendant by virtue of the directives of the 2nd defendant are null and void and of no legal effect.

iv. **A declaration that all decisions taken by the de facto body of persons who constituted themselves as Governing Council is null and void and of no effect.**

On the 2nd day of May 2018, the High Court, Winneba, upon application by the 1st interested party that the 2nd and 3rd interested parties herein had failed to enter both appearance and defence to his action, entered ex-parte judgment in default of defence against them in respect of all the four declaratory reliefs recalled above. The 2nd and 3rd interested parties did nothing about the ex-parte judgments entered against them. Instead, the applicant who is a stranger to the action in the Winneba court has brought a certiorari application before us urging us to quash the judgment of the High Court, Winneba, for fundamental errors apparent on the face of the record. This is the reason why we term the instant application before us as a re-play of a similar one determined by this Court on 20th December 2017 in which UTAG, Winneba Chapter, which was a stranger to the action, was the applicant.

REASONS FOR THE APPLICATION

The applicant formulated two reasons why he thought the High Court judgment was amenable to a quashing order.

1. *The first was that notwithstanding the indication in the search report attached to the motion for judgment in default of defence that the 3rd interested party had not been served with the 1st interested party's writ of summons and therefore could not have entered appearance to the writ, the trial High Court went ahead and entered ex-parte judgment in default of defence against both the 3rd interested party who had not been served with the writ and then the 2nd interested party, contrary to the requirements of the rules. This, according to the applicant, was a breach of the natural justice rule of audi alteram partem as the 3rd interested party was denied the opportunity to be heard.*

2. *The second was that since the reliefs sought by the plaintiff were all declaratory, the rules of the High Court [C.I. 47] and settled authorities of this Court do not permit the trial court to enter default judgment in such claims without any legal arguments and/or testimony from the plaintiff in proof of the reliefs. For entering judgment in default of defence in respect of declaratory claims, the trial court had committed a fundamental error of law for which the decision complained of must be quashed on certiorari.*

The 1st interested party opposed the application. His first challenge was against the capacity of the applicant. According to the 1st interested party, the applicant had long been sacked as the Vice-Chancellor of the University and therefore was fighting a personal interest battle for which his remedy was in the High Court but not in the Supreme Court. He contended that aside of the personal interest applicant had in the case, there was no public interest element in the matter and therefore the applicant had no business in this Court. His second was that, the 3rd interested party was served with the writ on the 26th day of March 2018, just three days after filing the motion for default judgment and several weeks before the motion itself was heard. The 3rd interested party could not therefore cry foul for non-service of the writ on it before the motion was heard. The third point raised by the 1st interested party was that the trial High Court did not commit any fundamental error in granting the default judgment because the 2nd and 3rd interested parties were given the opportunity to be heard but they failed to appear before the court so the trial court was justified in doing what it did. He contended further that the reliefs he sought were in connection with breach of statutes, as such, the law was in the bosom of the judge. It was therefore for the judge to interpret the law and come to the right conclusion but not to invite the parties to advance legal arguments as suggested by the applicant. He concluded by contending that the application was brought in bad faith as the applicant should have joined the action in the Winneba High Court to defend his personal interest which he failed to do. Having failed to do so, he could not come to this Court as a busybody to contest a matter that did not concern him.

CAPACITY

The issue of capacity with regard to the role of a stranger to a judgment, ruling or decision in judicial review applications, particularly with regard to prohibition and certiorari, has been over flogged in this Court and given final judicial blessing. The authorities are legion that the remedies of certiorari and prohibition are not restricted by the notion of locus standi and that every citizen of the land has a standing to invite the Court to prevent some abuse of power. There is no need for such an applicant to show a personal interest or grievance in the matter brought for consideration. The only criterion is that the public must be interested in the matter. See **In Re Appenteng {decd); Republic v High Court, Accra; Ex-parte Appenteng [2005-2006] SCGLR 18; Republic v High Court; Ex-parte Charge D'Affairs, Bulgarian Embassy (Unreported judgment in civil motion No. J5/34/2015 dated 24th February 2016); Republic v High Court, Ex-parte Naa Otua Swayne (Unreported civil motion No J5/8/2015 dated 17th February 2016)** and our recent unreported decision in the case of **The Republic v High Court, Winneba; Ex-parte University Teachers Association of Ghana (UTAG)–Winneba Chapter; And Supi Kofi Kwayera and 2 Others (Interested Parties); Suit No J5/65/2017 dated 20th December 2017,** which was referred to earlier on in this judgment.

We wish to re-echo the dictum of this Court on this question of capacity per Pwamang, JSC in the unreported judgment involving the University of Education, Winneba referred to supra, which case, incidentally, was conducted by the same lawyers in the instant application before us: ***"This Court has held repeatedly that applications for prerogative writs have a special public aspect to them and are therefore not restricted by notions of locus standi, i.e. one does not need to show that some legal right is at stake. They may be granted to a total stranger… Our opinion is that since the issues in this application are in respect of the proper administration of justice in conformity with the rules of court, a stranger to the proceedings in the High Court and an incorporated group of persons would have capacity to raise them since it is in the interest of the public that the machinery of the administration of justice works properly".***

The 1st interested party should have taken cue from the above decision to which he is not a stranger and not wasted precious time in re-arguing the question of

capacity since the facts in that application are on all fours with the instant application before us. The issue involved in this application has to do with the proper administration of justice in conformity with the rules of court, which is of public importance. We therefore dismiss the 1st interested party's challenge to the capacity of the applicant as having no merits whatsoever since the applicant, though a stranger in the action before the High Court, Winneba, has every right to pursue the instant application before us.

JURISDICTION

This Court exercises its supervisory jurisdiction whenever: **(i)** there is want or excess of jurisdiction; **(ii)** there is an error of law on the face of the record; **(iii)** there is failure to comply with the rules of natural justice and finally **(iv)** on the Wednesbury Principle. This position has been expressed in various authoritative decisions of this Court including but not limited to the following: **1. REPUBLIC v COMMITTEE OF INQUIRY INTO NUNGUA TRADITIONAL COUNCIL AFFAIRS; EX-PARTE ODAI 1V [1996-97] SCGLR 401; 2. THE REPUBLIC v HIGH COURT, ACCRA; EX-PARTE CHRAJ (Addo Interested Party) [2003-2004] SCGLR 312; 3. REPUBLIC v HIGH COURT, KUMASI; EX-PARTE BANK OF GHANA (NO.1) [2013-2014] 1 SCGLR 477;** and **4. THE REPUBLIC v COURT OF APPEAL; EX-PARTE TSATSU TSIKATA [2005-2006] SCGLR 612.**

In the *Ex-parte Tsatsu Tsikata case* supra, this Court per Wood, JSC (as she then was) held at page 619 as follows: ***"The clear thinking of this Court is that, our supervisory jurisdiction under article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then that the error(s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. The error of law must be one on which the decision depends. A minor, trifling, inconsequential or unimportant error, or for that matter an error which does not go to the core or root of the decision complained of; or stated differently, on***

which the decision does not turn, would not attract the court's supervisory intervention".

It was the case of the applicant that the High Court, Winneba committed non-jurisdictional but patent errors of law on the face of the record which were so substantial or fundamental that they rendered the entire proceedings held before the court a complete nullity. Since there is no doubt to the fact that an error of law on the face of the record is a ground for invoking the supervisory jurisdiction of this Court, what the applicant was expected to establish in this application was to show that the error or errors of law complained of, were fundamental, grievous and so patent on the face of the record that they go to the very root of the decision complained of thus rendering it a complete nullity.

In his submissions, the applicant contended that at the time the 1st interested party filed his motion for judgment in default of defence against the 2nd and 3rd interested parties, the 3rd interested party had not been served with 1st interested party's writ of summons so the application was premature and improper under the circumstances. According to the applicant, the trial court could not have entered judgment in default of defence against a defendant who had not been served with any writ of summons so the whole proceedings leading to the entry of the default judgment was a nullity.

The 1st interested party who appeared to have admitted to this fact tried vainly to explain why he thought the court below was right in determining the motion for default judgment. Under paragraphs 8 and 9 of his affidavit in opposition to this application filed on 13th July 2018, the 1st interested party contended that when the search report on the search he made on the very day he filed the motion for judgment in default of defence (i.e. 23rd March 2018) revealed that the 3rd interested party had then not been served with the writ of summons, he personally accompanied the bailiff to serve the writ on the 2nd interested party in Accra on 26th March 2018. The hearing of the motion, which had been slated for 29th March 2018, was therefore adjourned to 27th April with a further adjournment to 2nd May 2018 to enable the interested parties respond to same but they all failed to do so. The trial court did not therefore err when it

determined the motion on 2nd May 2018 and granted the application for default judgment.

We find this argument quite interesting but unwholesome. We want to emphasize with clarity that before a plaintiff can invoke the jurisdiction of the High Court under Order 13 of the High Court Civil Procedure Rules, 2004 [C.I.47] for judgment in default of defence, the defendant or the party against whom the order is invoked should have been served with the writ of summons, entered appearance to the writ but failed to file a statement of defence afterwards within the time provided for under the rules. Where a defendant or a party has not been served with any writ of summons, no motion for judgment in default of any kind could be filed and heard by the court and any such exercise would be one in futility and thus a nullity. Again, where after service of a writ of summons on a defendant or a party, the defendant or party fails to enter appearance within the time provided under the rules; the plaintiff cannot proceed with a motion for judgment in default of defence. The only motion a plaintiff can pursue against a defendant who has been served with a writ of summons but has failed to enter appearance is motion for judgment in default of appearance under Order 10 of C.I.47 but not motion for judgment in default of defence under Order 13.

The affidavit in support of the motion filed by the 1st interested party for judgment in default of defence on 23rd March 2018 stated expressly under paragraph 4 that the defendants who were the 2nd and 3rd interested parties had not entered appearance to the writ of summons. The said paragraph reads:

"4. That on the 23rd March 2018, I caused a search to be conducted at the registry of this Honourable Court to ascertain whether or not the defendants had entered appearance or filed their defence. <u>The search results show that the defendants have neither entered appearance nor filed any defence.</u> Annexed and marked as Exhibit 'SKK' is the search result". {Emphasis ours}

The above deposition by the 1st interested party in the affidavit in support of the motion for judgment in default of defence should have put the trial judge on his guard that he was dealing with an improper application; an application that was not warranted under the rules of court. But it appeared the trial judge did not

read the application and its attachments before granting same. Whilst 1st interested party's affidavit in support said none of the 2nd and 3rd interested parties had entered appearance to the writ, the search report attached to the application said 2nd interested party had entered appearance but the 3rd had not because he had not been served with the writ. The trial court nevertheless went ahead to grant same in contravention of the rules of court by indicating, albeit erroneously that the 2nd and 3rd interested parties had been served with the writ but had failed to file defence.

Again, the 1st interested party's admission that the 3rd interested party was served with the writ of summons on 26th March 2018 was indicative that at the time he filed the motion for judgment in default of defence on 23rd March 2018, the 3rd interested party had not been served with the writ. It was therefore a patent error; **(i)** on the part of the 1st interested party to apply for default judgment against a defendant at a time the said defendant had not been served with any writ of summons and **(ii)** on the part of the trial court to welcome such a process that was not recognized under the rules, notwithstanding the fact that the 3rd interested party was later served with the writ before the determination of the motion. The fact is that, the motion was dead from birth so in reality, there was no motion pending.

The second and final point or argument the applicant canvassed was that the rules of the High court do not lend support to the grant of a default judgment in respect of a declaratory relief as the trial High court judge did in this case. According to the applicant, since the reliefs claimed by the 1st interested party in his writ of summons were declaratory ones, the trial judge could not have entered default judgment simpliciter against the 2nd and 3rd interested parties either in default of appearance or defence without calling on the plaintiff to establish his claim, even granted they were all served with the writ of summons but failed to enter appearance or file defence. In our view, this argument of the applicant is inviolable and the 1st interested party could not provide any answer to it.

Aside of the fact that Order 11 rule 6 and Order 13 rule 6 of C.I. 47 on judgments in default of appearance and defence respectively make this point clear, this Court has settled this very issue with regard to the entry of default judgments in declaratory reliefs in the cases of **IN RE; NUNGUA CHIEFTAINCY AFFAIRS; ODAI AYIKU IV v THE ATTORNEY-GENERAL (BORKETEY LARWEH XIV-APPLICANT) [2010] SCGLR 413 @ 416; REPUBLIC v HIGH COURT, ACCRA; EX-PARTE OSAFO [2011] 2 SCGLR 966** and **REV. DE-GRAFT SEFA & Others v BANK OF GHANA (Unreported Judgment of this Court in Civil Appeal No. J4/51/2014 dated 19th November 2015).**

In the *Rev. De-Graft Sefa case* supra, Gbadegbe, JSC expressed the sentiments of the Court in the following words: ***"the settled practice of the courts is that a declaratory relief cannot be obtained by a motion in the cause but after hearing the parties either by way of legal argument or a full scale trial".*** This was an affirmation of the Court's earlier decisions in the *Odai Ayiku* and *Ex-parte Osafo cases* supra, which is a re-statement of the procedure stated in the Volume 37 edition of Halsbury's Laws of England that; ***"a declaratory judgment or order should be final, in the sense of finally determining the rights of the parties, but should not be granted in the course of interlocutory proceedings or by way of an interim declaration".***

Having failed to take evidence and/or legal arguments from the 1st interested party in proof of his declaratory reliefs before entering judgment against the 2nd and 3rd interested parties in his favour on same in default of both appearance and defence, the trial court seriously erred for which its decision must not be made to stand. This is a clear case where certiorari must lie. In the circumstances, we grant the application for certiorari and order that the judgment of the High Court dated 2nd May 2018 be brought before this Court for the purpose of it being quashed and same is hereby quashed.

Y. APPAU
JUSTICE OF THE SUPREME COURT

V. J.M DOTSE
JUSTICE OF THE SUPREME COURT

V. AKOTO-BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

A.A. BENIN
JUSTICE OF THE SUPREME COURT

G. PWAMANG
JUSTICE OF THE SUPREME COURT

COUNSEL

PROF. RAYMOND ATUGUBA WITH HIM HAROLD ATUGUBA FOR THE APPLICANT.
ALEXANDER AFENYO MARKIN FOR THE 1ST INTERESTED PARTY.
PAA KWESI ABAIDOO FOR THE 2ND INTERESTED PARTY.