IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
YEBOAH, JSC
GBADEGBE, JSC
MARFUL-SAU, JSC
KOTEY, JSC

CIVIL MOTION

NO. J5/63/2018

17TH JANUARY, 2019

THE REPUBLIC

VRS

HIGH COURT, ACCRA …….. RESPONDENT

EXPARTE: MIREILLI HITTI …… APPLICANT

1. GEORGE JAMIL MOUGANIE
2. CAROLINE AKL
3. ALWAN ROBERT HITTI ……. INTERESTED PARTIES

RULING

GBADEGBE, JSC:-

We have before us in the exercise of our supervisory jurisdiction under article 132 of the Constitution an application for judicial review in the nature of certiorari directed at the

judgment of the High Court, Accra dated 05 June 2018. By the said judgment, a prior order of letters of administration granted in respect of the Estate of Robert Habib Hitti (Deceased) was revoked at the instance of the interested parties herein in a case entitled: George Jamil Mougainie and Another v Alwan Robert Hitti. The grounds on which the applicant relies in support of the application are as follows:

1. The High Court, Accra presided over by Mrs. Justice Jennifer Akua Tagoe on 5th June 2018 breached the rules of natural justice and occasioned a grave miscarriage of justice when it revoked Letters of Administration granted by the High Court differently constituted on 20th June 2001 for the movable and immovable property of the late Robert Habib Hitti (Deceased); when Applicant who is a beneficiary of the Deceased's Estate was neither made a party to the proceedings nor given any hearing in the matter.

2. The Interested Parties breached the rules of natural justice and misled the High Court, Accra into doing same when they purported to sue for the Revocation of the movable and immovable property of the late Robert Habib Hitti (Deceased) without notice to the Applicant, when they knew or ought to have known that the Deceased's estate had been distributed pursuant to the Letters of Administration and wound up over twelve years ago.

The background to this application is stated shortly as follows. Following the death of one Robert Habib Hitti (hereinafter conveniently described as "the testator") who was thought to have died intestate, joint letters of administration to administer his estate was granted by the High Court, Accra to the widow, Theresa Nahum Rouhana (Deceased), and the 3rd interested party herein on June 20, 2001. According to the applicant, in the exercise of the said authority the administrators took several steps in the discharge of their functions as such and had the estate wound up in or about 2002. Subsequently, a document purporting to be the last will of the testator was discovered resulting in an application being filed by the first and second interested parties herein for probate before an Accra High Court in a suit numbered as PA1603/2017. The pendency of the said application for

probate having come to the attention of the applicant herein, she filed a caveat in the matter which was then proceeded with in its normal course and is currently pending before the court for determination.

In the course of the pendency of the determination of the pending probate application, the applicant herein was served with an affidavit by the 1st and 2nd interested parties in which it was deposed among others that in a different suit numbered as PA 543/2018, the High Court Accra had on June 06, 2018 made an order revoking the prior letters of administration granted in respect of the estate of the testator on the ground that the deceased died having left behind a testamentary document. Having had notice of the order of revocation of the letters of administration granted previously in respect of the estate of the testator, the applicant took out the application herein praying that the judgment, the subject matter of these proceedings be brought up before us for the purpose of being quashed on the grounds stated in the opening paragraph of this delivery.

Before we turn our attention to the merits of the instant application, we desire to comment on two matters of procedure of some importance which though not raised by either party to the proceedings herein require to be dealt with for future guidance only. It relates to the formulation of the grounds of the application by the applicant. In our view, in stating the grounds on which an application for judicial review is brought, an applicant should not engage in argumentation but concisely express same without any narrative. A consideration of the grounds urged before us, however reveals that the applicant has engaged in argumentation; an aspect of the matter which properly belongs to the statement of case that parties are required by the appropriate rules of procedure to file in support of an application for judicial review with the narration of the grounds being deposed to in the supporting affidavit.

The second point concerns the nature of jurisdiction that is available to us in an application for judicial review in the nature of certiorari. Such an application confers on

the court a jurisdiction that is exercisable only in relation to matters which transpired in the court whose judgment and or order is the subject matter of the application and does not extend to matters which were not part of the proceedings leading to the judgment or order on which the application is grounded. Relating this to the application herein, we wish to say that the processes filed in respect of the pending probate action before the High Court numbered as Suit Number 1603/2017 are extraneous to the matter herein although it has a bearing on the right to administer the estate of the testator. Accordingly, the applicant should have avoided reference to the processes filed in the said matter. We have taken time to make these observations as our jurisdiction in the matter herein is strictly circumscribed by what was before the court which made the judgment or order which it is sought to have quashed and in the event of us going beyond the allowable limits, we leave ourselves open for complaints in the nature of having exceeded our jurisdiction in the matter. It is for this reason that in applications for certiorari, the applicant is limited to raising matters which may properly be described as belonging to the "record".

Although the applicant does not rely on "Error of law on the face of the record', and for that matter is not constrained in the making of the application by notions of what constitutes the "record', we are of the opinion that the admission of affidavit evidence to prove breach of the right to be heard does not extend to the introduction of matters relating to a case other than that in which the judgment the subject matter of these proceedings was rendered. Since matters relating to the suit numbered as 1603/2017 were not introduced for the purpose of showing that in case number PA 543/2018 the applicant was denied the right to be heard such as to establish jurisdictional error arising from the failure of the trial court to meet the minimum requirements of fairness inherent in the right to be heard, the processes filed in respect of Suit Number 1603/2017 are not matters to be taken into account for the purpose of showing that indeed, the applicant suffered a denial of justice when she was neither made a party nor heard before the decision of the court on the application for judgment on admissions was made. We are of the view that to succeed in her application, the applicant must rely only on processes

that were filed in Suit number PA 543/2018 for the purpose of satisfying us that breach of the rules of natural justice on which the application is grounded has the attribute of invalidating the decision rendered in the matter. Proof of the denial of the right to be heard in such cases renders the judgment based thereon one subject to jurisdictional error for which reason in seeking to confine the trial court to its jurisdictional limits, the exercise of the supervisory jurisdiction must to be good relate to matters which arose in the said matter only. The jurisdiction conferred on us in the exercise of judicial review is thus narrow and limited in terms of the processes that can form the legitimate basis for the invocation of our jurisdiction. We add that it is important to bear in mind that should we veer outside the narrow limits of our jurisdiction, we would be embarking on a journey beyond the parameters of the supervisory jurisdiction conferred on us under article 132 of the Constitution.

We now turn our attention to the substantive application. The two grounds urged by the applicant raise for our consideration a case of an alleged breach of the right to be heard before a determination is made against a person. While the first ground is raised against the trial court, the second ground is essentially urged against the interested parties who are neither exercising a judicial nor a quasi-judicial function such as to be amenable to the supervisory jurisdiction. In our opinion, the second ground on which the application is planked does not strictly speaking come within the scope of the jurisdiction conferred on us under article 132 of the Constitution. We have taken note of the related matter contained in ground 2 which speaks of the estate having been wound up long before the application was filed to revoke the grant and add that as the letters of administration was obtained contrary to the statutory provisions that authorise the grant of letters of administration, the order was from its inception a nullity and the feeble point concerning the statute of limitation does not arise for our consideration; for such a point cannot override the fact that where a deceased died leaving a will, the estate falls to be distributed by rules of testacy but not intestacy.

With particular reference to the issue raised before us in ground(2) of the application concerning the estate having been wound up before the action was taken to revoke the grant of administration, we emphasise our previous observation regarding the limits of the supervisory jurisdiction and say further that since the point was not raised before the learned trial judge in the course of the proceedings preceding her judgment, or raised to supplement the 'record of proceedings' for the purpose of showing absence of jurisdiction or identifying jurisdictional error we are disabled from having regard to it in the application before us; to do so would mean that we are exercising a jurisdiction other than the supervisory jurisdiction.

We are of the opinion that there is ample jurisdiction in the court to intervene to get rid of the grant on which this case turns and make reference to previously decided cases in which the court revoked letters of administration after the discovery of a will by the deceased. Reference is made to the following cases of persuasive authority; (1) Carolus v Lynch 161 ER 6; (2) Baker v Russel 161 ER 62; (3) In the Estate of Musgrove, Davis v Mayhew [1927] P 264. Indeed, in the Estate of Musgrove, the revocation was made twenty years after the death of the testator. In any event assuming for the purposes of argument that the failure of the trial court to uphold the plea of limitation of statute was wrongly dismissed, it is an error made within jurisdiction and cannot be a basis for the invocation of certiorari; the proper means of seeking redress is to appeal and not engage in a collateral attack as the applicant has employed in these proceedings.

In our view as a will was discovered subsequent to the grant of letters of administration to the wife of the testator and the 3rd interested party herein, the said grant was made on the basis of a fact which did not exist and made the grant contrary to the provisions of the Administration of Estates Act, Act 63. In our opinion where a grant is made to a person other than the one lawfully entitled, there is authority in a court to revoke the grant. In the course of his judgment in the case of Asamoah v Ofori alias Renner, [1961] 1 GLR 269, Ollennu J observed of the position at page 273 as follows:

> *"Again, the contention that administration cannot be revoked is erroneous. Administration may be revoked for good cause, e.g., when, as in this case, it is granted to a person other than the person lawfully entitled to it."*

In the case before us, we have no doubt that "good cause" includes the mandatory provision of section 67 of the Administration of Estates Act, 1961, Act 63 which provides as follows:

> "Where *administration is granted in respect of an estate of a deceased person, a person shall not bring an action or otherwise act as an executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant is recalled or revoked."*

Having regard to the above statutory provision, we are of the opinion that as the 1st interested party derived his authority from the will, indeed from the moment that the testator died, he was obliged to take the required step in the matter to enable him exercise the office of an executor by seeking an order revoking the grant of letters of administration. In seeking an order revoking the prior letters of administration granted on the basis of intestacy, the necessary and proper party to sue in law is the person or persons to whom letters of administration were granted. We think that an action by which a revocation of the letters of administration is sought is intended to remove any obstacle in the path of the executor who by law succeeds to the estate of the testator and perfects same by taking out probate to enable him distribute the estate of the testator. For this reason, we do not see any substance in the objection touching and concerning the applicant herein not having been made a party to the proceedings. The executor took the proper steps in the matter by pursuing only the surviving administrator of the estate of the testator. In coming to this opinion, we do not disregard that in taking out the action to revoke the letters of administration, the executor joined one of the beneficiaries of the last will of the testator as 2nd plaintiff but in our view, this was an instance of misjoinder and it would equally have been so if the applicant herein were also joined to the said action. However, the misjoinder of the 2nd interested party herein to the action to revoke

the grant of administration has no consequence on the determination of the matter before the trial court in view of Order 4 rule 5(1) of the High Court (Civil Procedure) Rules, 2004, CI 47, which is expressed in the following words:

> "*No proceedings shall be defeated by reason of misjoinder or non-joinder of any party, and the Court may in any proceeding determine the issues in question in dispute so far as they affect the rights and interests of the persons to the proceedings.*"

Further in our opinion, the provisions of rule 35 of Order 66 of CI 47 are inapplicable to actions for the revocation of a grant of probate or letters of administration. In coming to this view of the matter we have read the entirety of the Order as one in order that all the various rules thereunder can be heard singing in a harmonious tone. Proceeding thus, we note that the applicant who is neither a person who is entitled to nor claims to be entitled to administer the estate of the testator under or by virtue of an unrevoked grant of probate of his will or under his intestacy cannot be a competent party to an action to revoke probate or letters of administration. Going further, as the applicant is a beneficiary under the will of his deceased father, she does not come within the contemplation of the words *"a person not already a party to the action who has an interest adverse to the applicant*" within the intendment of rule 35 (1) of CI 47 such as to be notified of the pendency of the action to revoke the grant of administration. Having come to this conclusion we observe that the argument pressed on us at the hearing by learned counsel for the applicant under the said rule, which seemed to have engaged our attention pales into insignificance and is rejected accordingly.

A very close and careful consideration of the application herein reveals that the invitation to us based on breach of the right to be heard seeks to impute to the learned trial judge whose order is the subject matter of these proceedings knowledge of the issues raised in the pending probate action numbered as Suit Number PA 1603/2017 which is pending before another judge. Since there is not the slightest indication from the processes filed

in the application herein that she was aware of those issues, it would be unreasonable to fix her with knowledge of them. In our opinion, having regard to the circumstances of this case, ground (1) of the application also fails.

For these reasons, we are unable to accede to the application before us for certiorari and proceed to dismiss same.

N. S GBADEGBE
(JUSTICE OF THE SUPREME COURT)

ADINYIRA, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

PROF. N A. KOTEY
(JUSTICE OF THE SUPREME COURT)

COUNSEL

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CLARENCE TAGOE FOR THE 1ST AND 2ND INTERESTED PARTIES.

ACE ANKOMAH FOR THE 3RD INTERESTED PARTY.