IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: DOTSE, JSC (PRESIDING)

BENIN, JSC

PWAMANG, JSC

DORDZIE (MRS), JSC

AMEGATCHER, JSC

CIVIL MOTION
NO. J5/14/2019

19TH JUNE 2019

THE REPUBLIC

VRS

HIGH COURT (COMMERCIAL DIVISION 6), ACCRA ……. RESPONDENT

EXPARTE: NOWFILL S. LABA ……. APPLICANT

1. WISSAM LABA
2. LOUIS KHATER ABI HABIB KHATER
3. LATEX FOAM RUBBER PRODUCTS LTD …….. INTERESTED PARTIES

RULING

DOTSE, JSC:-

PROLOGUE

This is a Ruling, premised on an application at the instance of Nowfill Solomon Laba, the Applicant herein, seeking an order of Certiorari to quash the orders of the High

Court, (Commercial Division 6) dated 27th June 2018 and 2nd November 2018 respectively presided over by Noble-Nkrumah J and also to prohibit the said Judge from hearing suit, No. Misc 0032/2018, pending before the said court.

Even though the application in substance is against all three Interested Parties named herein, it is only 1st and 2nd Interested Parties, Wissam Laba and Louis Khater Abi Habib Khater who have filed and sworn to affidavits in opposition.

The 3rd Interested Party, Latex Foam Rubber Products Limited, the corporate entity founded by the Applicant, and the deceased father of the 1st Interested Party and brother of the Applicant, (and is the reason why the Applicant and Nephew are in court) has for very good reasons in our opinion stayed clear of the ensuing legal quagmire that has engulfed the 3rd Interested Party's business operations for the past couple of years.

CAPACITY OF APPLICANT

In paragraph 4, of the 55 paragraphed affidavit in support of this application, sworn to by the Applicant on 29th November 2018 he deposed to as follows:-

> ***"That I am one of the two founders of Latex Foam Rubber Products Limited, ("3rd Interested Party" or the Company") the Managing Director and a holder of 50% of the issued shares of the company". Emphasis***

FACTS

On the 8th of March 2018, the Applicant herein, therein as the Plaintiff commenced an action in the High Court, Accra by an Originating Motion seeking cancellation of certain resolutions passed and or taken by Respondents therein, herein Interested Parties, in

respect of the Latex Foam Company and claimed specific reliefs against the named Respondents therein in Suit No. MISC. 0032/2018.

In order to lay bare the facts from the genesis of this dispute, it is considered worthwhile to set out in extenso, the title of the suit and the reliefs which the Applicant claimed in this Originating Motion against the Respondents therein:-

In the Matter of the Companies Act 1963 (Act 179)

And

In the Matter of an Application under Section 217 for Injunction and Declaration

Nowfill S. Laba
H/No. 5
1st Rangoon Close
Cantonments Accra

Vrs
1. Wissam Laba
No. 6 Shippi Close
Plot No. 167 East Cantonments

2. Louis Khater Abi Habib Khater
Abi Habib Building Roumieh
El Metn, Lebanon

3. Latex Foam Rubber Products Ltd.
No. 16 Dadeban Road
North Industrial Area, Accra"

RELIEFS

a. "A declaration that the resolution passed on 27th August 2015 **appointing the 1st Respondent and the 2nd Respondent as Directors was irregularly passed and a nullity as same was inconsistent and in**

contravention of the Regulations of the 3rd Respondent Company and the Companies Act, 1963 (Act 179) and therefore void.

b. A declaration that any steps and or action taken based on the said resolution of 27th August 2015 are void to the extent that such step or action is/are founded on that resolution.

c. A declaration that the 1st Respondent and the 2nd Respondent are not directors of the 3rd Respondent Company.

d. A declaration that the 1st Respondent and the 2nd Respondent not being directors of the 3rd Respondent Company have no right to requisition or convene a board meeting of the 3rd Respondent Company.

e. An order of injunction restraining the Respondent from acting on the resolution passed on 27th August 2015.

f. An order cancelling the resolution made on 27th August 2015 and all appointments made therein; and

g. Such other orders as the Court think fit." Emphasis

Pursuant to the said Originating Motion, the Applicant sought and obtained from the High Court on 8th March 2018 an Ex-parte interim injunction restraining the 1st and 2nd Interested Parties herein from holding themselves out as Directors and from requisitioning or holding any board meetings for a period of 10 days. This order has been attached to these proceedings as Exhibit NS2.

It is the case of the Applicant that, whilst the suit referred to supra was pending, but after the expiration of the duration of the interim injunction referred to in Exhibit NS 2, the 1st Interested Party, purporting to act as a Director of the 3rd Interested Party served notice of a board meeting dated 4th June 2018 of the 3rd Interested Party/Company, and had it fixed for the 8th June 2018.

The meeting scheduled for the 8th June 2018, which the Applicant described as illegal was again restrained by him as he obtained a second order from the High Court dated 6th June 2018 restraining the 1st Interested Party from requisitioning the said Board meeting marked therein as Exhibit NS.3.

An attempt by the 1st Interested Party to vary the order of injunction restraining him from holding the scheduled Board meeting fixed for the 8th of June 2018 by the High Court was unsuccessful. Despite this setback, the Board meeting of the 3rd Interested Party/ Company was held on the said 8th June 2018. In paragraph 14 of the affidavit in support, the Applicant deposed to as follows:-

> *"That at the said illegal meeting, with one J. Opoku Boateng acting as Secretary, Louis Khater Abi Habib Khater the 2nd Interested Party and one Haifa Kyriakos Laba were purportedly appointed as Executive Directors and one Charles Laba was purported to have been appointed Chief Executive officers."*

The Applicant went back to the High Court and for the third time succeeded in obtaining an order of interim injuction to restrain the persons appointed

and listed supra from holding such offices for a limited period of 10 days on the 11th of June 2018 and this exhibit is marked as NS.7.

Following from these successes, the Applicant on the same 11th June, 2018 then filed another application against the said appointed officers and listed supra, and urged the court to restrain them from holding office and prayed that the order ***was to last during the entire pendency of the suit."***

In an affidavit in opposition filed by the 1st and 2nd Interested Parties herein, therein Respondents, they proposed to the High Court, the setting up of an interim management committee, to steer the affairs of the 3rd Interested Party/Company pending the determination of the suit. This request was rejected by the Applicant.

RESPONSE OF THE COURT

The reaction of the High Court, (Commercial Division 6) presided over by Jerome Noble-Nkrumah J, after hearing Counsel for the Parties was to request the parties to the suit pending before him to name two persons each to the court. According to the Applicant, whilst the purpose of the submission of the names were not made known to them, (a fact which was disputed by the Interested Parties) he nevertheless submitted the two names, whilst the 1st and 2nd Interested Parties submitted two names a piece, making four names for them, and six in all.

It is the case of the Applicant that, ***on the 27th June 2018, the High Court proceeded to appoint two persons as forming an Interim Management***

Committee to supervise the work of the General Manager of the 3rd Interested Party.

Since this order is one of the two orders that the Applicant wants this court to quash, we will out of abundance of caution, set out in extenso the said orders of 27th June 2018 accordingly.

THE ORDER OF 27TH JUNE 2018

> *"By Court: The parties have supplied court with names of their Representatives. Respondents have supplied court with 4.*
>
> ***The court will elect Saqib Nazir from the 1st and 2nd Respondents side to partner Alex Shoueiry from the Applicant's side.***
>
> *They shall basically for the pendency of the matter supervise the work of the General Manager of the 3rd Respondent in the running of the business of the 3rd Respondent.*
>
> *The General Manager shall report to them. They shall give directions on the running of the 3rd respondent, it is hoped that this measure aids in the efficient running of the 3rd Respondent. The mentioned representatives will submit quarterly report to this court on their activities regarding 3rd respondent.*
>
> *Further to this there are outstanding guarantees to be renewed.* ***In the interim while the matter is pending, Haifa Kyriakos Laba, wife of the deceased partner of the 3rd Respondent Company shall jointly be responsible for issuing personal guarantees should the need arise with Nowill Laba.***
>
> ***By this order the Applicant's Application for Interim Injunction is struck out. Adjourned to 4th July 2018 at 11.00am." Emphasis supplied***

This is the order made on the 27th July 2018. The Applicant has made a number of allegations against the drawing up of the order of 27th June 2018 and how he felt the order was impugned.

An attempt by the Solicitors of the Applicant to prevail upon the Chief Justice to transfer the case from the Presiding Judge, Noble-Nkrumah J, failed. As a result, the Applicant appealed against the said order. We will revert to this matter later.

STAY OF EXECUTION OF 27TH JUNE 2018 ORDER

Undaunted in his attempt to seek a reversal of the orders of the High Court, dated 27th June 2018, the Applicant applied to the court to stay execution of the orders therein, alleging that the order had placed the management of the company in the hands of people who owed no fiduciary duties to the company but who could still expose the Managing Director to liabilities.

ORDERS OF 2ND November 2018

On the 2nd November 2018, the High Court, as presided refused the application for stay of execution.

In view of the fact that, this is also one of the two orders that the Applicant wants this court to quash, it is imperative for the court to set out in detail the contents of this 2nd November 2018 order as well.

> *"On the 11/7/2018 the Applicant/Appellant/Applicant filed the present Motion on Notice of stay of Execution Pending Appeal. The Applicant seeks an order of*

court staying execution of ruling/orders of this court dated 27/6/2018. For this application parties were ordered to file their written submissions by the 23/10/2018 for a ruling on the 2/11/2018. Respondents filed their written submission on the 23/10/2018. As at 31/10/2018 when I am writing this ruling there is no written submission from the Applicant.

According to the Applicant at paragraph 22 of his affidavit in support.

The pith of the appeal is that this court erred when it purported to strike out an interim injunction (application) when all interim injunction that had been had lapsed.

The brief genesis to events of the preceding paragraph was an 11th June 2018 application for interlocutory injunction filed by the Applicant seeking to restrain certain persons. As was to be expected the Respondents opposed this application.

In view of the heated exchanges that had characterized virtually every hearing in this matter, this court on the 26 of June 2018 decided to invite the parties to nominate one representative each to be appointed by the court to supervise the General Manager of the 3rd Respondent instead of going on with the hearing of the motion, as it then appeared to the court that the parties had taken entrenched positions*. This court took an adjournment to the next day to enable the parties make their nominations. On the 27th June 2018, the parties presented the court with the names and two persons were constituted to supervise the General Manager of the 3rd Respondent in a bid to free the parties especially the Applicant for a quick resolution in court of issues between the parties in court and also to prevent the 3rd Respondent from total collapse.* ***Having so acted this court was of the view that the application for injunction had been rendered unnecessary and therefore considered it struck out.***

It is this decision of court, this application seeks to stay while it is appealed against.

In opposing this application the Respondents in their affidavit in opposition raise basically four arguments:-

a. *This Courts orders of the 27th of June 2018 are not executable*
b. *The Applicant consented to the appointment of the two persons to supervise the General Manager of the 3rd Respondent.*
c. *Balance of convenience tilts unfavorably against the 3rd Respondent should the court grant the present application.*
d. *The Applicant has no interest or right that needs protection by the grant of the instant application.*

In the first place as stated earlier on in this ruling, the court's decision of the 27th of June was in no way foistered on the parties. It was largely driven by the parties own reaction to each other in court. The parties were given a day to nominate their representatives*. Further to this the courts appointment of the two coincided with a proposal by the Respondents in their affidavit in opposition to that application. It is rather strange now that the Applicant by this application seeks (sic) pull out from this arrangement.*

Basically the Applicant seeks a stay of execution which simply means suspend the enforcement of a judgment or order see ***Amankwa v Kyere [1963] 1 GLR 409.***

In ***NB Land mark Ltd v Lakiani [2001-2002] SCGLR 318****, the Supreme Court has held that where a decision is incapable of being enforced by any of the known processes of execution, an application for stay of execution of such a decision cannot arise.*

If it is the appointment the Applicant seeks to stay I do not see how that is possible in the light of a clear line of authorities in that regard. Should it be directed at my

striking out of the application, I fail again to see how my refusal to grant an interlocutory injunction is an executable order.

The appointment of the two to supervise the General Manager pending the litigation was to shield the 3rd Respondent from orders and acts of court which affected the parties and in turn had the effect of disrupting the activities of the 3rd Respondent. This being the case should this order of court be stayed, the odds will greatly affect the fortunes of the 3rd Respondent and its work force.

In any case in the event that this application fails and the Applicants appeal succeeds, he retains his position as director, the appointed two will account for their stewardship and hand over. This matter has suffered some amount of delay. Such applications add on more time. ***The life of a business is at stake here and we must be seen to be conscious of that.***

I will decline to grant the Applicants prayer and same is dismissed." Emphasis

RATIONALE FOR THE CERTIORARI APPLICATION

The Applicant contends that the reasons stated by Noble-Nkrumah J, in his orders of 2nd November 2018 referred to supra are untenable because

(1) *The learned Judge erred when he inserted* ***"interim Injunction order struck out"*** *and that this was not part of the original order read out and that this error is* ***akin to judicial impropriety.***

(2) *That the Judge had no power to appoint an interim management committee without regard to the Regulations of the 3rd Interested party/Company, contending however that the Judge could have appointed a Receiver/Manager under the Companies Act 1963 (Act 179).*

(3) That the learned Judge by reason of the above, exceeded his jurisdiction in the orders he made on the 27 June 2018.

GROUNDS FOR THE CERTIORARI AND PROHIBITION

The following are the grounds the Applicant has stated in his motion for the instant Certiorari and Prohibition applications seeking to quash the orders of Jerome Noble-Nkrumah J dated 27th July 2018 and 2nd November 2018 respectively and prohibit him from hearing the suit accordingly.

"GROUNDS OF APPLICATION

1. Error of Law on the face of the record

1.1 That His Lordship Justice Noble Nkrumah sitting in the High Court (Commercial Division 6), Accra on 27th June 2018 committed a jurisdictional error of law when he appointed an interim committee of two to supervise the duties of the General Manager of the Company without regard to the Companies Act, Act 179 and Regulations of the Company.

1.2 That His Lordship Justice Noble Nkrumah sitting in the High Court (Commercial Court 6), Accra on 2nd November 2018 committed a jurisdictional error of law when he read into his previous Order of 27th June 2018 that he erroneously described as Consent Order, the "accounting of the two of their stewardship and hand over" to the Applicant when nothing like that was stated on the face of the said order.

2. JUDICIAL IMPROPRIETY

2.1 That His Lordship Justice Nobel Nkrumah sitting in the High Court (Commercial Division 6), Accra on 27th June 2018 committed judicial

impropriety when he inserted "interim injunction struck out" in the drawn up order, which was not part of the ruling delivered in open court.

2.2 That His Lordship Justice Noble Nkrumah sitting in the High Court (Commercial Division 6), Accra on 2nd November 2018 sacrificed judicial propriety by his ruling on the said date in implying the suspension of the Applicant's position as a director by his Order of 27th June, 2018 in favour of the interim committee of two when nothing like that was stated on the face of the said order.

2.3 That the cumulative judicial impropriety inherent in the Orders on 27th June 2018 and 2nd November 2018 respectively erode any confidence and perception that justice will be done in the final determination of the case."

1st AND 2ND INTERESTED PARTIES RESPONSE

In a 71 paragraphed affidavit in opposition, sworn to by the 1st Interested Party on behalf of the 2nd Interested Party as well, these Interested Parties vehemently opposed the twin applications of Certiorari and prohibition on substantially the following grounds:-

1. That the application is without merit, incompetent and should be dismissed.

   This argument was premised on the fact that, according to 1st and 2nd Interested Parties, the date of the 27th June 2018 order, which the Applicant wants this court to quash, has been filed beyond the 90 day limit as regulated and sanctioned by Rule 62 of the Supreme Court Rules 1996 (C. I. 16).

   According to the 1st and 2nd Interested Parties, the order of 27th June 2018 is distinct and separate from that of 2nd November 2018 and therefore the latter

order cannot and did not revive the rights of the Applicant which have long lapsed, and must be considered as dead and buried.

2. Secondly, the Interested Parties contend in their affidavit that, a review of the application of the Applicant's application indicates quite clearly that the proper remedy which the Applicant should have filed was for an appeal against those orders and not to have invoked the supervisory jurisdiction of the court as had been done, because the error if any is not jurisdictional, whether excess or lack thereof.

We observe that, the Interested Parties then sought to justify on legal grounds why the 1st Interested Party who was restrained by the order of 8th June 2018 did not violate the said order as he did not attend the meeting of the 8th June 2018.

Since it is not within our remit in this application to go into the merits of the grant or otherwise of the Interim Injunction orders, violations if any of the said orders, are immaterial, and we decline the invitation made to us to go on that tangent.

3. Thirdly, the Interested Parties contend that, the ideal of an Interim Management Committee was mooted and or suggested by both parties. For example, in paragraph 29 of their affidavit in opposition, the Interested Parties deposed to in part as follows:-

> "*The Applicant supported the constitution of an Interim Management Committee* ***but suggested a different unreasonable composition of***

himself and the General Manager of the 3rd Interested Party as the members of the Interim Management Committee." Emphasis

Whilst the Interested Parties concede that they proposed the idea of an alternative solution to the court for the appointment of an Interim Management Committee *"comprising the Applicant, Charles Laba and a Senior Partner of any of the Big Four (4) Accounting Firms"*. Emphasis

Besides the above, issues relating to the appointment of an interim management committee had been extensively argued before the court by learned counsel for the parties. In this respect, we take note of paragraphs 32, 33, 34, 35, 36 and 38 of the 1st Interested Party's affidavit in opposition and agree that the issues of the appointment of an Interim Management Committee had been extensively discussed which led the learned trial Judge to request the parties to make nominations of candidates to be considered by the court for consideration for appointment to that effect. This phenomenon infact found expression in the orders of 2nd November 2018.

4. The 1st and 2nd Interested Parties therefore prayed this court to dismiss the application with punitive costs.

ISSUES

1. Is the application in respect of 27th June 2018 distinct and separate from that of 2nd November 2018 and time barred in lieu of Rule 62 of C. I. 16?

2. Are the orders of 27th June 2018 and 2nd November 2018 amenable to the orders of Certiorari as claimed by the Applicant.

3. Has the Applicant made a genuine case for the grant of Prohibition against the learned trial Judge?

DECISIONS

In deliberating on our opinion in this case, we have taken into serious consideration all the processes filed by the parties, to wit, affidavits in support and in opposition, as well as supplementary affidavits, all the many relevant and irrelevant exhibits and the statements of case of the parties filed on their behalf by learned counsel.

We decided to be very elaborate in our narration of the facts of this case for the reason that, we want all and sundry to understand the basis of our short but incisive decision on the points of law, but not the many issues of emotion, passion and repetitions which were canvassed before the trial court and before us in this court.

ISSUE ONE (1)

The Interested Parties relied on Rule 62 of the Supreme Court Rules, 1996 (C.I.16) which provides as follows:-

"An application to invoke the supervisory jurisdiction of the court shall be filed within ninety days of the date when the grounds for the application first arose unless the time is extended by the court."

Learned counsel for the Interested Parties, Samuel Adu Boahen relied on the Supreme Court case of ***Republic v High Court, Accra, Ex-parte State Housing Co. Ltd. [2009] SCGLR 187*** where this court speaking with one voice through Wood C. J, held as follows:-

"*The statutory period of ninety days was determinable by reference to the " date when the grounds for the application first arose", and not the "date of the decision against which the jurisdiction is invoked" as existed under the old rule 62.* ***A plain reading of the amended rule presupposes that the legislature envisages a situation where the grounds could even arise a second or some other subsequent time, but clearly, the time limit begins to run from the "date when the grounds for the application first arose."*** *Emphasis*

Whether or not the order of 27th June 2018 could be said to be the actual date for the computation of time or the 2nd of November 2018 is the date when the grounds for the application first arose as was explained in the Supreme Court decision referred to supra, is the crux for resolution of this issue.

A fundamental reason why this preliminary point cannot be sustained is that, it was the Applicant who sought by his application to stay the execution of

the orders of 27th June, 2018 that made the operation of the earlier orders ambulatory till 2nd November 2018.

In effect, the consequent Ruling of the Court on 2nd November 2018 was upon the effect or otherwise of the Ruling of 27th June 2018. It was from that date that the Ruling of 27th June 2018 became absolute unless set aside on appeal or otherwise. We are indeed fortified by this line of reasoning when the 1st Interested Party himself in paragraph 31 of his affidavit in opposition to the instant application deposed to as follows:-

> *"Lastly, we submit that the learned High Court Judge, acted within his jurisdiction when an application for stay of execution* ***on 2nd November 2018 he considered and commented on his decision of 27th June 2018 whose execution, the Applicant sought to stay." Emphasis***

In this instance, the Interested Parties cannot therefore be seen to blow hot and cold in respect of the same matter. Once they argue that it was perfectly legitimate for the learned trial Judge to refer to the previous Ruling of 27th June 2018 in the Ruling of 2nd November 2018, the argument of the application being time barred fails and is accordingly dismissed.

ISSUE TWO (2)

In further articulating the submissions of the Applicant in respect of the resolution of issue 2, learned counsel for the Applicant in the Statement of Case in support of the instant application argued thus:-

1. The main thrust of the Applicants argument in support of the application for Certiorari is that, although a court under the Companies Act, 1963 (Act 179) can appoint a Receiver/Manager under the appropriate circumstances, it cannot appoint an interim management committee contrary to the Regulations of the company. In this respect, learned counsel for the Applicant referred copiously to sections 88 and 236 – 238 of Act 179 respectively.

   After referring to the relevant statutory interventions referred to supra, learned counsel referred to the case of Samuel ***Bervell Ackah v Express Maritime Services Limited & Others, CM 299/2002*** dated 23rd January 2003 and concluded that there is nothing in Act 179 or in the Regulations of the 3rd Interested Party's, for the appointment of the said two member Interim Committee

2. That the order of 27th June 2018 is illegal and this goes to jurisdiction because of the untenable nature of the application in the manner the Interim Management Committee was appointed coupled with the risk the Applicant and the company will suffer and that, these constitute exceptional circumstances that warrant the grant of the certiorari.

3. The Applicant further urges in the statement of case that the patent error of law in the appointment of the interim committee to run the company goes to jurisdiction causing serious miscarriage of justice. Based on the above arguments learned counsel for the Applicant contended that the rulings of 27th June 2018

and 2nd November, 2018 are susceptible to the supervisory jurisdiction of this court in the nature of certiorari. Apart from relying on article 132 of the Constitution as the basis for the instant applications, learned counsel also referred to the following cases in support of the grant of the Certiorari application:-

i. ***Republic v High Court, (General Jurisdiction "5" Ex-parte, The Minister for the Interior and Another, C.M. No. J5/10/18 dated 8th March 2018. S.C***

ii. ***In Re-Speedline Stevedoring Co. Ltd, Republic v High Court Ex-parte Brenya [2001-2002] SCGLR 775.***

iii. ***Republic v Court of Appeal, Accra Ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612, at holding 1***

3. Finally, learned counsel for the Applicant labored under the erroneous and wrong presumption that because the learned trial Judge was wrong in his labeling of the order of 27th June 2018 as consent judgment, the orders are erroneous and ought to be quashed. In this respect, learned counsel referred to the cases of

    i. ***Republic v High Court, Accra, Ex-parte Joseph Danso (New Patriotic Party and 4 Others, Interested Parties) C M No. JS/5/2015 S.C and***

ii. ***Republic v High Court, Accra, Ex-parte Deborah Atakorah (Billy Cudjoe- Interested Party) [2015-2016] 1 SCGLR 298***

ARGUMENTS BY COUNSEL FOR THE 1ST AND 2ND INTERESTED PARTIES IN THEIR STATEMENT OF CASE IN OPPOSITION TO THE GRANT OF CERTIORARI APPLICATION

Learned counsel for the 1st and 2nd Interested Parties argued in their statement of case in opposition to the grant of the order of Certiorari that, ***the learned High Court Judge acted within his jurisdiction*** when he appointed the interim management committee pursuant to the consent of the parties.

Learned Counsel also argued that the contention that the learned trial Judge committed a jurisdictional error of law when he appointed the interim management committee is flawed and misconceived.

Learned counsel for the Interested Parties also contended that the entire applications for Certiorari and Prohibition are misplaced and should be dismissed.

In support of their submissions, learned counsel referred to the following cases:-

i. ***Republic v High Court, (Commercial Division) Ex-parte, The Trust Bank Ltd, [2009] SCGLR 164 at pages 169-171.***
ii. ***Republic v High Court, ex-parte CHRAJ, [2003-2004] 1 SCGLR 312 at 326-327***
iii. ***Essilfie and Others v Anafo and Others [1992] 2 GLR 654***

iv. Learned Counsel for the Interested Parties in relying on the following case also referred to the decision of the Supreme Court as follows:-

The Republic v High Court Kumasi, Ex-parte Bank of Ghana and Others, (Sefa and Asiedu- Interested Parties) No. 1, Republic v High Court, Kumasi; Ex-parte Bank of Ghana and Others, (Gyamfi and Others – Interested Parties) (No. I) (Consolidated) 2013-2014 1 SCGLR 477 at 509 -511, the Supreme Court examined and re-stated the parameters upon which it will grant an application for Certiorari and stated the broad principles as follows:-

"*It was settled that the Supreme Court would exercise it's supervisory jurisdiction* ***on grounds of want or excess of jurisdiction, failure to comply with the rules of natural justice, breach of the Wednesbury principle,*** *namely an administrative action or decision would be subject to judicial review on the grounds that it was illegal, irregular or procedurally improper, and the superior court must have made an* ***error patent on the face*** *of the record.* ***In case of an error not patent on the face of the record the avenue for redress was by way of appeal. Furthermore, an erroneous decision of a High Court, acting within its jurisdiction, would normally be corrected by appeal whether the error was one of fact or law, and that, the supervisory powers of the Supreme Court under article 132 of the Constitution was wide. Instead of specific orders, the court might issue directions as a means of enforcing its supervisory powers." Emphasis***

ANALYSIS OF THE ARGUMENTS

We have reviewed the facts and the law of the application for Certiorari in respect of the above principles.

In the instant case, on the issue of want or excess of jurisdiction, we are of the considered opinion that, the Applicant has not satisfied us that the learned trial Judge was either bereft of jurisdiction or acted in excess of it's jurisdiction.

What must be noted is that, it was the Applicant who invoked the jurisdiction of the court, for an application to injunct the Interested Parties. In their response to this application, they in turn proposed the appointment of an interim management committee. In a supplementary affidavit, the Applicant herein made counter proposals, so in essence it can safely be accepted that the Applicant did not oppose the establishment of the Interim Management Committee.

The only points of divergence was in the nature of the appointments, hence the request the learned trial Judge made to the parties to nominate persons from whom the Judge picked the nominations. From the records, this request was made after heated and lengthy submissions on same by the respective counsel. In order to allow them to consider the request in contest, the court adjourned the case to the following day to enable them make the nominations.In the case of ***Republic v High Court, Kumasi, ex-parte Fosuhene [1989-90] 2 GLR 315***, it was stated that, ***"where a judge has jurisdiction, he has jurisdiction to be wrong as well as to be right and the***

corrective machinery to a wrong decision in the opinion of a party is an appeal."

Indeed, there are a number of respected judicial opinions that where a lower court such as the instant trial High Court had jurisdiction and there was no error of law patent on the face of the record as to make the decision a nullity, the superior court such as this court would not grant an order of certiorari on the grounds that the court had misconceived a point of law. To correct the misconception or otherwise of the wrong decision, the remedy opened to the party aggrieved was an appeal and not certiorari.

In the instant case, the entire record of the court is not before us to examine it as to what happened during the reception of arguments during the appointment of the Interim Management Committee.

That is why it is settled law that in circumstances like this, the best remedy opened to the parties was an appeal.

In this respect we rely on cases of this court such as the following:

Republic v High Court, Ex-parte CHRAJ, already referred to supra

Republic v High Court (Commercial Division) ex-parte The Trust Bank Limited referred to supra where this court held as follows:-

> *"This court should endeavor not to backslide into excessive supervisory intervention over the High Court in relation to its errors of law.* ***Appeals are better suited for resolving errors of law" emphasis***

We have also reviewed the effect of the decision of the Supreme Court in the cases of Ex-parte Brenya already referred to supra as well as those in ***Ex-parte Minister for Interior and Comptroller-General of Immigration Service*** and ***Samuel Bervell Ackah v Express Maritime Services Ltd & Others*** all referred to supra and conclude that those cases do not apply to the circumstances of the instant case.

Whilst the thrust of the decision of the Supreme court in the ex-parte Brenya case was to intervene because the High Court had purported to appoint Directors of the company, instead of receivers and managers and this the Supreme Court held was in excess of the powers of the court, the thrust of the issue in the instant case was the confirmation of some nominees of the parties as indicated to the court as a result of which the order was made to ensure the continuous operation of the 3rd Interested Party as a going concern. Since the Applicant had already exercised his right of appeal, we do not find our way clear in granting the application for Certiorari in a matter which appears to have been generated by consensus.

In any case, a reference to the reliefs which the Applicant filed in the originating motion in the High Court clearly indicated that the Applicant would have been better off if he had been advised to pursue the said reliefs in the substantive case rather than spend all his energies on interlocutory issues.

For the reasons enumerated above, the application for certiorari to quash the orders of the High Court, Commercial Court Division 6, presided over by

Jerome Noble-Nkrumah dated 27/6/2019 and 2/11/2019 fails and is accordingly refused.

ISSUE THREE (3)

In what appears to be incoherent arguments by the Applicant in support of the claim that the learned trial Judge, presiding over the suit in the High Court, Commercial Court '6' Jerome Noble-Nkrumah J, should be prohibited from further presiding over the suit, learned counsel for the Applicant concluded without any basis whatsoever that ***"the cumulative judicial impropriety inherent in the Order on the 27th June 2018 and 2nd November 2018 respectively eroded any confidence and perception that justice will be done in the final determination of the case."*** *Emphasis supplied*

Furthermore, in what appears to be a lecture on the common law principle of bias or real likelihood of bias, learned counsel for the Applicant stated that, "a Judge, Magistrate or an independent arbitrator would be disqualified from adjudicating whenever circumstances pointed to a real likelihood of bias, by which was meant ***"an operative prejudice", whether conscious or unconscious in relation to a party or an issue before him***. In support of the above proposition, learned Counsel referred to the following cases:-

Adzaku v Galenku [1974] 1 GLR 198 at 202 and In ***Re-Appenteng (Deceased) Republic v High Court, Accra Ex-parte Appenteng & Another [2005-2006] SCGLR 18.***

Based on the above decided cases and others, the Applicant concluded that, the judicial improprieties, borne out of the proceedings in the trial High Court and which have been highlighted in the facts of the case, lead to only one irresistible conclusion that the learned Judge has formed an opinion on the matter as to pre-judging, which disables him from further conduct of the case.

The brief but incisive submissions of learned counsel for the 1st and 2nd Interested Parties are very much on point on this Prohibition argument.

Learned counsel for the Interested Parties, rightly in our view concluded that, in the end whilst the Applicant merely cast aspersions on the integrity of the learned trial Judge, he failed to meet the judicial standard required for the accusation of bias which is required to be met before he can be prohibited.

The Supreme Court, in the case of ***Republic v High Court, Denu, Ex-parte Agbesi Awusu II (No.1) (Nyonyo Agboada Sri III) Interested Party [2003-2004] 864***, laid down the following as a standard test of conditions for grant of prohibition against Judges in the following words:-

> ***"A charge of bias or real likelihood of bias must be satisfactorily proved on balance of probabilities by the person alleging same.*** *Whether there existed a real likelihood of bias or apparent bias was an issue of fact determinable on a case to case basis." Emphasis*

See also the celebrated case of ***Attorney-General v Sallah, Court of Appeal, 17/4/1970, digested in (1970) C.C 54 and (1970) 2 G&G 487*** where the court stated with clarity and in detail the law on judicial bias as follows:-

> *"Bias in a Judge disqualifies him from adjudication upon a case.* ***And in this regard the law recognizes not only actual bias as a disqualifying factor but a likelihood of bias as well." Emphasis***

In the recent and unreported Ruling of this court, delivered in the case of ***The Republic v The High Court, (Financial Division 3) – Respondent, Accra Ex-parte Ms Arch Adwoa Company Ltd – Applicant, 1. The Auditor-General and Attorney General*** – **Interested Parties Suit No. CMJ5/32/19 dated 10th April 2019 this court coram:** *Dotse (JSC) Presiding, Yeboah, Appau, Pwamang, Marful-Sau (JJSC)* in considering the standard test required for proof of prohibiting a Judge, held as follows:-

> *"We however do not find any reason to grant the order of Prohibition against the learned trial Judge. There are clear legal grounds upon which a court or Judge might be prohibited from determining a suit.* ***To disqualify a Judge, the ground of the objection had to be supported by cogent and convincing evidence. A mere or reasonable suspicion of bias was not enough, the law recognized not only actual bias, but also that interest other than direct pecuniary or proprietary nature which gave rise to real likelihood of bias.*** *The fact of the trial Judge serially giving Rulings against the Applicant*

by itself does not qualify to disqualify the Judge on the basis of real likelihood of bias which is the standard test in this jurisdiction." See case of ***Sasu v Amua Sekyi, [1987-88] 2 GLR, 221 at 225.***

In the instant case however, it was rather the Applicant in whose favour series of Rulings were given by the learned trial Judge. It thus lies ill in his mouth, and in very bad faith for the self same Applicant to cast these aspersions against the trial judge.

Based on the above rendition, we accordingly dismiss the prohibition as well. **We however direct that the learned trial Judge be granted the option to recuse himself from the case if he deems that option prudent.**

CLOSING REMARKS

In the premises, the application by the Applicant for the orders of Certiorari to quash the Rulings of the High Court, Accra Commercial Court 6, presided over by Jerome Noble Nkrumah J, dated 27th June and 2nd November 2018 respectively and also to prohibit the said Judge from continuing to hear and adjudicate Suit No. MISC. 0032/2018 hereby fails in it's entirety and same is accordingly dismissed as being without any merit and substance.

EPILOGUE

1. During the pendency of the hearing of the application we advised the parties to settle the case out of court. Even though that attempt failed, we again appeal to the parties in the interest of the business entity, that is the 3rd Interested Party

and their family relations to go back to the negotiating table and attempt to settle the case amicably.

2. We also advised both counsel to take their personal emotions out of the case and handle it more professionally. This is because we have not been impressed by the unnecessary and irrelevant documents that have been filed in this simple application invoking our supervisory jurisdiction.

3. Thirdly, the conduct of learned counsel for the Applicant in deposing to the fact that they had ex-parte discussions with the learned trial Judge is reprehensible, and this must be frowned upon.

   This is because this is contrary to the Code of Ethics of the Judges and magistrates, as well as of the Bar.

In the unreported unanimous judgment of the Supreme Court, in C.A. J4/4/2019 dated 3rd April 2019 in a suit intitutled, ***Atuguba & Associates – Plaintiff/Respondent/Appellant v Scipion Capital (U.K) Ltd & Anr. – Defendant/Appellants/Respondents,*** where a similar request by the instructing Solicitors based in England suggested to their Ghanaian counterparts acting for them to engage the learned trial Judge in an Ex-parte communication was condemned by the Supreme Court. This is what the Supreme Court, speaking through Amegatcher JSC stated on such unethical phenomenon

"The instruction from the respondent to the Appellant is to request the appellant to engage in an ex-parte communication with the Judge. We find this request

unfortunate especially coming from a firm of Solicitors in the United Kingdom. We condemn the directive in no uncertain terms and reiterate that Ghana is not one of the countries where ex-parte communication with Judges is sanctioned or encouraged. The rules of judicial conduct in Ghana prohibit Judges from engaging in ex-parte communications."

We wholly adopt the said words supra, and hereby sound a note of caution to all lawyers that such conduct will in future be reported to the Disciplinary Committee of the General Legal Council, the appropriate regulatory body of Lawyers for sanctions against erring Counsel. This is because, in the past couple of years, some of our own colleagues have had to suffer the ultimate sanctions, (dismissals) in some cases.

Save for the above, the application stands dismissed as stated supra.

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

BENIN, JSC:-

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

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DORDZIE (MRS.), JSC:-

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

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

AMEGATCHER, JSC:-

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

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

COUNSEL

SAMUEL ADU BOAHEN WITH HIM EUNAS ESHUN FOR THE APPLICANT.

AUGUSTINE KUDICIL WITH HIM PAA KWAME LARBI FOR THE 1ST AND 2ND INTERESTED PARTIES.