IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC

CIVIL MOTION
NO. J5/56/2022

14TH DECEMBER, 2022

THE REPUBLIC

VRS

HIGH COURT, (COMMERCIAL COURT 8), ACCRA ……. RESPONDENT

EX PARTE: DR. SAMUEL ANNOR ……. APPLICANT

1. TRASACCO ESTATES DEVELOPMENT LTD.
2. INDEPENDENCE PROPERTIES LTD. **……. INTERESTED/PARTIES**

RULING

DOTSE JSC:-

FACTS

The brief facts of this matter are as follows:-

On the 3rd day of August, 2021, Trasacco Estates Development Company Limited (hereinafter called "the Plaintiff") issued a writ *No. CM/RPC/0840/21* against

Independence Properties Limited (hereinafter called "the Defendant") claiming a liquidated sum totaling about $19.6 million.

It was the Plaintiff's case that by a Contract Agreement, (the contract) dated 9th January 2017, the Defendant engaged it to design, complete works, and remedy defects of a 297 key 4-star Hilton Garden Inn (the project) in a contractual development located at Independence Avenue, Accra.

However, when the money became due, the Defendant refused or neglected to settle the amounts outstanding, thereby causing serious hardship to the Plaintiff.

Now, while this appears to be a rather commonplace dispute between two commercial entities operating in the real estate industry, the nature of the shareholding and directorships of the parties is important to provide much needed context to this seemingly unremarkable dispute.

The membership of the Plaintiff company is provided as follows

- Cinzia Ines Morris, Ian David Morris & Ernesto Taricone hold a cumulative 70% of the issued shares of the company between them
- Agata Luciana Tarricone, a blood relation of Ernesto Taricone, holds the remaining 30% of the issued shares of the company
- Each shareholder also sits on the board of directors
    i. Ernesto Taricone is famously known to be the Executive Chairperson and Chief Executive Officer
    ii. Ian David Morris, once went by the title of Managing Director, according to Court records at the Court of Appeal

The membership of the Defendant company is provided as follows:-

- Cinzia Ines Morris, Ian David Morris & Ernesto Taricone hold a cumulative 60% of the issued shares of the company between them
- Dr. Samuel Annor holds the remaining 40%
- Each shareholder also sits on the board of directors of the company
- Ian David Morris holds the title of Managing Director of the company

So you have a situation in which some of the members of the Plaintiff company are also members of the Defendant Company, save the Applicant.

From the membership and the shareholding structure of the plaintiffs and the Defendants companies, there is a real danger that the named Directors/Shareholders therein can collude and compromise issues raised for determination.

For example, Ernesto Taricone and Ian David Morris own shares and are Directors as well of both companies. It appears, it is only the Applicant herein who is not in such a possible conflicting position.

However, the Applicant has failed to provide concrete and convincing evidence of such a conflict of interest position that has been exhibited or likely to be exhibited.

The contract dated 9th January 2017 was signed as follows:-

- For the Defendant company by Dr. Samuel Annor, the Applicant herein and
- For the Plaintiff company by Ian David Morris a Director and member of both the Plaintiff and Defendant companies as already referred to supra

It is assumed that the applicant knew very well about the shareholding structure of the two companies referred to supra.

APPLICATION TO INTERVENE BY THE APPLICANT

On 19th November 2021, Dr. Samuel Annor (hereinafter "the Applicant") applied for leave to intervene in the action between the Plaintiff and Defendant, arguing that

- it would not be in the best interest of the Defendant company for the conduct of the suit to be left to the directors or members as a whole and
- that the company does not intend to diligently defend the proceedings

In support of his application, the Applicant has argued strenuously that because the other shareholder-directors in the Defendant Company altogether hold a majority shareholding in, not just the Defendant Company itself, but also the Plaintiff Company, there is a conflict of interest which is likely to negatively affect the Defendant company's interests in the conduct of the suit.

The Applicant has also pointed to the fact that the Plaintiff's writ and Statement of Claim was served on the Defendant company on 3rd September, 2021, no appearance was entered on behalf of the Defendant company until 2nd December, 2021, after the Plaintiff

had applied for Judgment in Default of Appearance on 18th November 2021 and the Applicant had applied to intervene on 19th November 2021

As such, and in light of the foregoing, the Applicant prayed that the Court grant him leave to intervene and conduct the suit on behalf of the Company

Even though the Applicant's application to intervene was in respect and interest of the Defendant company**, it is interesting to note that both companies filed affidavits in opposition to the Applicant's application.**

It is interesting to observe that it is not every day that one sees an adverse party show such concern for the proper conduct of its opponent's case. We must commend the Plaintiff company for their compassion if we may describe their conduct in these terms.

Nevertheless, before the application for leave to intervene could be heard, the Applicant raised a preliminary objection to the capacity of the Defendant's lawyer to conduct the suit on the grounds that a company acts primarily through its Board of Directors, and yet the Applicant was not privy to any resolution appointing Counsel for the Defendant to act on its behalf. Counsel for the Defendant responded that he had been appointed by the Defendant company's in-house lawyer, who was in turn, acting on the direction of the Managing Director, and adduced evidence of an email correspondence to that.

The learned trial judge ruled that while the objection had merit, he did not consider it fatal to the case of the Defendant, and ordered the Defendant company to ratify the appointment of the lawyer. Subsequently, the Defendant company notified the Court of a letter signed by its Managing Director, officially appointing Counsel for the Defendant as its lawyer.

It is also interesting and puzzling to observe that, the Managing Director, who signed the letter appointing Counsel for the *Defendant*, is the same person that signed the contract, which forms the subject matter of the substantive dispute, on behalf of the *Plaintiff*.

Dissatisfied with the ruling of the learned trial judge, the Applicant filed,

- First, a Notice of Appeal at the Court of Appeal on 17th January, 2022, and
- Second, on 2nd February 2022, a day before the Application to Intervene was scheduled to be heard, **an application to stay proceedings at the trial court, pending the determination of the appeal.**

Naturally, the Plaintiff and the Defendant once again filed affidavits in opposition to the Applicant's application to stay proceedings. Much to the collective chagrin of the Plaintiff and the Defendant, before the application to stay proceedings could be moved in Court, Counsel for the Applicant once again raised two preliminary objections on March 15, 2022 namely:-

- That because the capacity of Counsel had not yet been finally determined, Counsel could not purport to file an affidavit in respect of a matter in which his capacity to act was as yet unresolved.
- That certain portions of the affidavit in opposition filed on behalf of Trasacco ought to be struck out variously as contrary to the relevance and admissibility rules of the Evidence Act and as frivolous, vexatious and scandalous contrary to the rules of Court.

After hearing arguments in respect of the March 15 preliminary objections, the judge adjourned to 4th April and then subsequently to 4th May to deliver his ruling. **To the surprise of the Applicant, when the Court sat on 4th May, the ruling the judge delivered was in respect of the application to stay proceedings, which had not yet been moved in Court, rather than the preliminary objections which had, in fact, been moved.**

The Applicant alleges that the learned Judge made a mistake in delivering the ruling on the application to stay proceedings, rather than the preliminary objection raised. However, as there is no record of this, the veracity of that allegation is up in the air.

Nevertheless, it is this state of affairs that has led the **Applicant to make this application to the Supreme Court for an order of certiorari to quash the ruling of the trial judge delivered in respect of the application to stay proceedings**.

ARGUMENTS OF THE APPLICANT

The Applicant's arguments in support of his application may be summarized as follows:-

1. In failing to hear the Parties on the application for stay of proceedings, the trial judge breached the natural justice principle.

2. That the settled practice and jurisprudence of the Court is for rulings to be delivered after the application had been moved, and that the judge's delivery of the ruling on the application to stay of proceedings *before* that application had been moved in Court, was procedurally improper and constituted a fundamental error patent on the face of the record.
3. That taken together, the trial judge's adjournment which was done ostensibly with the intention of delivering a ruling on the preliminary objections and the mistake in delivering the ruling in respect of the application for stay of proceedings when it had not been formally moved, there is ample evidence that there has been a grave error patent on the face of the record, that the ruling was procedurally improper.

DEFENDANTS ARGUMENTS IN OPPOSITION TO APPLICANTS CASE

The Defendant's arguments in opposition to the present application may be summarized as follows:-

1. Once written arguments have been filed, a court can decide the application on its merits, even though same has not been moved, without breaching the natural justice principle
2. There is no rule of law which precludes the Court from deciding a motion on its merits unless it is moved by the applicant
3. At the time the learned trial judge delivered his ruling on the application for stay of proceedings, there was no pending preliminary legal objection.
4. That if the Applicant's contention is that the decision of the judge to rule on the preliminary legal objection is irregular, then an application to the Supreme Court for an order of certiorari is not the proper remedy.
5. **That the Applicant's real intention has been to frustrate the hearing of the substantive matter by filing frivolous.**

6. That the Applicant, not being a party to the suit, has no capacity to be challenging the representation of a party to the suit.

PLAINTIFF'S ARGUMENT IN RESPONSE TO APPLICANTS ARGUMENTS

The Plaintiff's legal arguments in opposition to the present application may also be summarized as follows:-

1. That the Applicant, not being a party to the suit, has no capacity to be challenging the representation of a party to the suit.
2. That the Applicant's real intention has been to frustrate the hearing of the substantive matter by filing frivolous applications on grounds that clearly have no basis in law.
3. That the ruling given in respect of the application to stay proceedings pending the preliminary objection that goes to the root of the decision is fundamental, substantial grave and material error of law patent on the face of the record.
4. **That even if there was an error, it was not substantial enough to require the grant of an order of certiorari.**
5. **That an appeal is the proper procedure to vindicate the Applicant's grievance, and not an application for an order of certiorari.**

ISSUES TO BE DETERMINED

The central question before the Court in this application is broadly, whether an order of certiorari should be granted to the Applicant. Answering this question requires the Court to look at the totality of the circumstances that have led to this point. Some interesting questions have been raised by the facts, key among which include

1. Whether the Applicant was clothed with the requisite capacity to make the applications and objections which it has made, culminating in the present application
2. **If so, whether the applications and objections made by the Applicant, have been motivated by an improper purpose or by an honest attempt to vindicate his rights and**
3. Of course, whether the Applicant ought to be granted the order of certiorari which he seeks

DETERMINATION OF ISSUES RAISED HEREIN

- Capacity of the Applicant To Make Applications & Objections
- The Application To Intervene

Section 201(1) of the Companies Act 2019 (Act 992) provides that "*Subject to subsection (3), the Court may, on the application of a member or director of a company, grant leave to that member or director to*

> *(a) bring proceedings in the name and on behalf of the company or a subsidiary of the company; or*
>
> ***(b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or a subsidiary of the company, as the case may be."***

Regarding the grounds on which the Court may grant such leave, subsection 3 provides that "*Leave to bring proceedings or intervene in proceedings may be granted only where the Court is satisfied that either*

> ***(a) the company or related company does not intend to bring, diligently continue or defend, or discontinue, the proceedings, as the case may be; or***
>
> ***(b) it is in the interests of the company or a subsidiary of the company that the conduct of the proceedings should not be left to the directors or to the determination of the members as a whole."*** *Emphasis supplied*

Having gone through the facts, it is clear that the applicant is indeed a member and a director of the Defendant Company. While this Court is careful not to make any pronouncements as to the potential success or otherwise of the application, we must note that the uncontroverted evidence provided by the affidavits of all three parties suggest to us ***that the Applicant has an interest to be protected, and reason to fear that that interest may be under threat. It appears to us that regardless of whether the application succeeds eventually or not, that the Applicant is indeed clothed with capacity to make the application.***

The Preliminary Objection to the Capacity of the Defendant's Counsel

From our reading of the processes placed before us, our understanding of the Applicant's complaint is that he believes that his interest as a shareholder is threatened by the potential action or inaction of the Defendant to the suit, and is thus praying the Court to allow him to protect that interest by intervening in the action.

Now, before the Court could hear arguments in respect of the application to intervene, the Applicant raises an issue as to the capacity of the Defendant's counsel to even represent the Defendant company.

At this stage of the proceedings, the Applicant is still technically a stranger to the suit. The established practice of the Court suggests that an outsider to a suit does not become a party until the Court makes an order to that effect, and where necessary, appropriate changes are made to the Court records and processes.

Yet, the Applicant is no ordinary stranger. He has applied to protect the interest of a company which he holds membership of, and the objection raised is consequent upon the application to intervene. Cases like ***Sarkodee I v Boateng [1982-83] GLR 715-772*** *and* ***Duah v Yorkwa [1993-94] 1 GLR 217-241*** have solidified the position that where a person's capacity to initiate proceedings is in issue, it is no answer to give that person a hearing on the merits even if he has a cast-iron case.

The issue goes to capacity, arises in limine, and constitutes an abuse of process. The merits thus become immaterial. The court has inherent jurisdiction to strike out as an abuse of process, any proceeding instituted without lawful authority.

In our opinion, the Applicant not being a party to the suit is only clothed with capacity in respect of his application to intervene, and did not have capacity to raise the objection. However, the objection having been raised, and being fundamental in nature, could not have been ignored by the judge once brought to his attention. The judge's assumption of jurisdiction in respect of the question of Counsel's capacity did not flow from any duty to rule on an objection made by a stranger to the suit – even if it was the said objection that brought it to his attention – but rather from his inherent power to address any illegality in the conduct of the case, and guard against an abuse of the Court's process. Indeed, it is trite learning that a court has inherent jurisdiction to strike out as an abuse of process, any proceeding instituted without lawful

authority. See ***Reichel v. Magrath (1889) 14 App Case 665, per Halsbury LJ at 668.***

It may be counter-argued on the other hand that the objective of the rules of civil procedure is to facilitate the realisation of the overall objective of the judiciary, which is to assure speedy, effective, inexpensive and accessible justice for all. ***Order 1 r 1(2) of the High Court Civil Procedure Rules, 2004 (C.I. 47)*** provides that "*These rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided*." In the case of ***Republic v. Judicial Committee of the Central Regional House of Chiefs, Ex-parte Aaba [2001 - 2002] SCGLR 545***, Her Ladyship Sophia Akuffo JSC (as she then was) declared that "*civil procedure functions as a vehicle for the actualisation of substantive law and this role has been likened to that of* ***"a handmaiden rather than a mistress"*** *which must not be applied in such a hard and fast manner as to cause injustice in any particular case*."

And in ***Ekwam v Pianim [1996-97] SCGLR 117,*** His Lordship, Kpegah JSC, said that **"*it is the duty of this court to keep the door of the shrine of justice wide open rather than to close it*".**

The position canvassed above however gives the judge the power to decide on the objection without vesting the Applicant with the power to take control of the suit before he is even made a party

Appeal & Application for Order of Stay of Proceedings

Without capacity to make the objection, the Applicant would have no capacity to make an appeal or an application to stay proceedings, consequent upon an appeal.

Second Objection to Capacity of Counsel for the Defendant Consequent upon Application for Order of Stay of Proceedings

Without capacity to make an appeal or a consequent application to stay proceedings, and with the issue of Counsel for the Defendant decided, there would be no basis for a second

objection, until the status of the Application to Intervene was decided. If the status of the Application to Intervene is decided in favour of the Applicant, then the question becomes moot, because the Applicant would then be in charge of the conduct of the case. If the Application to Intervene is decided against the Applicant, then he has no further say in the matter.

Whether the Applications and Objections Made by the Applicant Have Been Motivated by an Improper Purpose or by an Honest Attempt to Vindicate its Rights

As already stated, the court has an inherent power or jurisdiction to prevent the prosecution of frivolous actions and the abuse of legal machinery. See ***Anyimah III v. Kodia IV [1962] 2 GLR 1***. An action is frivolous and an abuse of the legal machinery of the Courts, among others, if it is

- factually weak, worthless and futile and is obviously unsustainable. **Attorney-General of the Duchy of Lancaster v London and North Western Railway Company 1892] 3 Ch 274**
- so clearly frivolous that to put it forward would be an abuse of the process of the Court. **Young v. Holloway [1895] P. 87**
- a sham or not honest or not bona fide **Afodofe v. Central Ins Co. Ltd. [1992) 2 GLR 207**
- brought for the purposes of delaying the trial***. Remmington v. Scoles (1897) 2 Ch 1***

As Lord Esher MR said in ***Roberts v. Plant, [1895] 1 Q. B. 597, CA*** "*it is a strong thing to give such a power to a judge and this Court and all the Court have said, therefore, that they would watch strictly the exercise of power. But they did not mean by that that they would give effect to every pettifogging objection which the ingenuity of the Defendant could raise*".

In ***Re Vernazza, [1959] 2 ALL E.R 200***, affirmed in ***[1960] 1 ALL ER 183 CA*** the court held that in considering whether the proceedings were vexatious one must look at the whole history of the matter, not merely whether the pleading disclosed any form of action. Though the pleading might be in order, the court in its inherent jurisdiction would

be entitled to look at the history of the matter, and if in the light of the history, the action is vexatious, the matter would be struck out and the action dismissed.

Nevertheless, the approach we will adopt is to determine whether or not the applications and objections filed and raised were at least grounded in some legal basis. If the applications can be justified according to some proper purpose, then the Court should be slow to deny an applicant recourse to his legal rights by imputing mala fides where an alternative explanation exists.

The Application To Intervene

As already discussed, the application to intervene cannot be dismissed outright as spurious.

The Preliminary Objection to the Capacity of the Defendant's Counsel

The question of the Applicant's capacity to raise the objection, and the question of whether it was raised in good faith ought to be treated separately.

From the perspective of the Applicant, if the allegations that the Defendant-company does not intend to diligently defend the action are correct, then the capacity of the lawyer in question is certainly of singular importance to the Applicant whose interest is under threat.

Furthermore, the objection itself is not without legal basis. **According to Order 4 r 1 (2) of the High Court Civil Procedure Rules, 2004 (C.I. 47),** a body corporate shall not begin or carry on proceedings except by a lawyer, unless permitted to do so by an express provision of any enactment. The import of the Applicant's argument in support of his objection that since Section 144 vests the management of the business of the company in the Board of Directors, it is only the Board of Directors who can validly appoint Counsel to institute an action in the name of the Company.

Now, whether this position of the Applicant is misconceived, as has been strenuously argued by the Plaintiff and Defendant companies is not the object of this enquiry.

To answer that question would be to prejudice the appeal pending at the Court of Appeal. At this stage, we are only minded to satisfy ourselves as to the fact that the objection itself was not frivolous or spurious. Indeed, as observed between pages 120-122 in *Civil*

Procedure: A Practical Approach by S. Kwami Tetteh, citing ***Sarkodee I v Boateng*** and ***Duah v Yorkwa*** supra as authorities, this is an issue which goes to capacity.

Appeal & Application for Order of Stay of Proceedings

As stated above, the preliminary objection to the capacity of the Defendant's Counsel is not without basis. Indeed, uncontroverted evidence on the record shows that the trial judge admitted same, when he said that the objection of the Applicant had merit, before he went ahead to overrule same.

In those circumstances, the Applicant cannot be said to have engaged in an abuse of the Court's processes if, believing in the strength of his own case, he decides to exercise his right to appeal a judgment he believes to be wrong in law. An application for an order to stay proceedings pending the determination of an appeal has become an automatic process to file for many an appellant.

We are not unmindful of the decision of the Court in ***Brutuw v Aferiba [1984-86] 1 GLR 25-41*** which affirmed that the jurisdiction of the Court to grant an order to stay proceedings pending the determination of an appeal *would only be exercised if there were special circumstances warranting it.* See also the case of ***Garret v Garret [1991] 2 GLR 366, CA***, where the Court said "*it is our view that while a party who is aggrieved by a ruling of a court has a right to appeal, that appeal should not automatically justify an order staying proceedings before that court pending the determination of the appeal. We think such an order should be made in very exceptional circumstances such as where there is a likelihood that the subject matter of the dispute may be irretrievably lost before the determination of the appeal*."

The combined effect of cases such as ***Brutuw v Aferiba, Garret v Garret***, supra, ***Republic v Committee of Inquiry (R. T. Briscoe (Ghana) Ltd., Ex-parte R T Briscoe (Ghana) Ltd [1976] 1 GLR 166*** on stay of proceedings might be stated as follows:-

> *"In determining an application for stay of proceedings, the court must ensure that there are special circumstances warranting a stay. A mere allegation of misdirection, or a series of them, is not a special circumstances. The power of the court is discretionary to be exercised judicially, not capriciously or whimsically and*

in exceptional circumstances only, not merely on account of the pendency of an appeal."

We believe that given the circumstances of this case, and the Applicant's belief that his substantial investment in the Defendant-company is under grave threat, the appeal and the subsequent application to stay proceedings was not unreasonable or frivolous.

Second Objection to the Capacity of the Lawyer and Parts of the Plaintiff's Affidavit as Scandalous and/or Inadmissible

We must state that we have struggled to see what purpose these objections were intended to serve. Having conceded the merit of the Applicant's initial objection, the learned trial judge directed that the Defendant-company ratify the appointment of their Counsel. The evidence on record proves compliance. We cannot see how Counsel for the Applicant thought that this objection would succeed where the other did not.

Further, examinations of the portions of the Plaintiff's affidavit complained of, does not disclose what constitutes the scandalous or inadmissible material contained therein. We are inclined to hold that these objections were made without basis, and, in bad faith for the purposes of delaying the proceedings.

- **Whether an Order of Certiorari Should Be Granted**
- **Grounds for the Grant of an Order of Certiorari**

Orders of prohibition or certiorari are means for ensuring that the machinery of public administration works properly, and that justice is done. In the case *of* ***Republic v Korle Gonno District Magistrate Grade I; Ex Parte Ampomah [1991] GLR****,* it was held that an applicant for orders of certiorari or prohibition need not show that some personal legal right of his was at stake. What is important is that there is some legal or constitutional basis for the action.

Therefore, to succeed in an application for an order of Certiorari, the Applicant must establish at least one of the following grounds.

1. **Breach of Natural Justice**

Natural Justice has two legs:-

a. The requirement of fair hearing and the right to be heard in proceedings before a court. See ***Republic v High Court, Accra, Ex-parte Salloum (Senyo-Coker- Interested Party) [2011] 1 SCGLR 574***

b. The rule against bias, ***Republic v High Court, Denu, Ex Parte Agbesi Awusu II (No 1) (Nyonyo Agboada Sri III Interested Party) [2003-4] 2 SCGLR 864*** and ***Republic v High Court, Accra Ex-parte Concord Media Ltd, & Ogbartey (Ghana Ports &Harbours & Owusu Mensah – Interested Party) [2011] 1 SCGLR 546***

If any of these grounds are breached, the Applicant may be granted an order of certiorari.

2. **Excess or Lack of Jurisdiction**.

   A court or tribunal or administrative body that improperly assumes jurisdiction over a matter can be supervised by an order of certiorari. See ***Republic v High Court, Kumasi, Ex-parte; Bank of Ghana and others (Sefa and Asiedu Interested Parties) No. 1 and Republic v High Court, Kumasi Ex-parte Bank of Ghana & Others (Gyamfi & Others Interested Parties) No. 1 Consolidated [2013-2014] 1 SCGLR 477. See also Republic v High Court, Accra Ex-parte Asakum Engineering and Construction Ltd & others [1993-94] 2 GLR 643***

3. **Patent or Fundamental Error on the Face of the Record**

   The fact that a High Court judge makes an error does not necessarily warrant the invocation of the Supreme Court's supervisory powers. 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 jurisdiction. ***Republic v. High Court (Commercial Division) Accra; Ex parte the Trust Bank Ltd (Ampomah Photo Lab Ltd & Three Others (Interested Parties) {2009} SCGLR 164.***

See also the following cases:-

- ***Republic v High Court, Sekondi, Ex-parte Ampong alias Akrufa Krukoko 1, (Kyerefo III & Others Interested Parties) [2011] 2 SCGLR 716***
- ***Republic v Court of Appeal, Accra; Ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612 and***
- ***Republic (No.2) v. High Court v (Land Division) Accra; Ex-parte Lands Commission (Nungua Stool and others Interested Parties) No.2 [2017-2020] 1 SCGLR 891.***

4. **Wednesbury Principles of Unreasonableness**

The [Court] in making that decision:-

a. must have taken into account factors that ought not to have been taken into account, or
b. failed to take account of factors that ought to have been taken into account, or
c. the decision was so unreasonable that no reasonable authority would ever consider imposing it.

In ***TDC & Musah v Atta Baffour [2005-2006] SCGLR, 121*** where the Supreme Court speaking through Wood JSC (as she then was) stated in part as follows:-

"On the facts of the instant case, the three grounds for judicial review had been satisfied. The Court of Appeal had therefore rightly affirmed the decision of the High Court to interfere with the impugned decision of the TDC. The mandate of the TDC under the Tema Development Corporation Instrument, 1965 (LI 469), Part II, (b) (ii) to

"prepare and execute housing schemes and maintain, manage and control any such housing scheme" did not confer on it very wide discretionary powers. ***The corporation could not do as it pleased, it had to act within the confines of the law.*** Thus the impugned decision by ***the TDC was irrational or unreasonable because first, it sought to deprive the plaintiff of the use of the property which the TDC had, since August 1988, upon application for tenancy, permitted him to use*** *and in respect of which he had a legitimate*

expectation that he would not be thrown out except upon some rational grounds. Second, the decision ***to grant the tenancy to the second defendant defied logic and common sense or accepted moral standards;*** *no sensible or reasonable person called upon to apply his or her mind to the decision to be taken, could have arrived at that decision."* Emphasis

In endorsing the said decision and emphasising her views in a powerful concurring opinion, Sophia Akuffo JSC (as she then was) also stated as follows:-

"At all material times, the only application for the transfer of the disputed premises is the plaintiffs. ***It was therefore, quite unfair and unreasonable on the part of the TDC that,*** *after the transfer had received all official approval, it turned around to recognise the 2nd defendant, the indolent occupant, as the legal tenant, rather than the Plaintiff, the vigilant occupant****."*** *Emphasis*

See also the locus classicus decision in the case of ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223***, which is the basis of the Wednesbury unreasonableness principle which guides courts to exercise their powers of judicial review in appropriate circumstances.

5. **Intervening to ensure justice**

This was introduced by the Supreme Court to be applied only by the Supreme Court. This ground is used by the Supreme Court to ensure the prevalence of justice, equity and fairness. It was introduced in ***Republic v. High Court, Fast Track Division Accra, Ex Parte Electoral Commission (Mettle Nunoo & Others Interested Parties [2005-2006] 514.***

In the above case, the Supreme Court by a 4-1 majority decision held as follows:-

"The Supreme Court's supervisory jurisdiction under article 132 had been properly invoked. The jurisdiction was not limited to the issuing of the traditional or conventional writs of certiorari, mandamus, prohibition etc. ***These orders and directions might be issued in the Supreme interest of justice to prevent illegalities and a failure of justice and also to ensure fairness and facilitate the expeditious disposal of cases."***

See also ***British Airways v Attorney General [1996-97] SCGLR 547 at 552-553 and 554.***

In ***re Appenteng (Decd) Republic v High Court, Accra, Ex-parte –Appenteng [2005-2006] SCGLR 18 at 23-24***.

See also ***Republic v High Court, Kumasi Ex-parte; Bank of Ghana and Others (Sefa and Asiedu Interested Parties) No. 1 and Republic v High Court Kumasi, Ex-parte Bank of Ghana & Others (Gyamfi and Others, Interested Parties) No. 1 Consolidated, supra,*** where the principles enunciated in the ***Ex-parte Mettle Nunoo*** case supra was used to do substantial justice.

CERTIORARI VRS APPEAL

The simple difference between an application for Certiorari and an Appeal is that whereas an appeal is concerned with the merits of the case, an application for certiorari is more concerned with the manner in which the decision was rendered.

In ***Ex Parte Tsatsu Tsikata [2005-2006] SCGLR 612***, at holding 4, the Supreme Court held that

> *"The Court of Appeal, in dismissing the application for Stay of proceedings, did not make any factual determination founded on the facts stated in the affidavit evidence placed before it by the applicant. But even if it did, any perceived error was to be corrected by way of an appeal since the judicial review process was to be used to correct mistakes of law apparent on the face of the record, not mistakes of fact. The appeal and judicial review jurisdictions were distinct and mutually exclusive of each other."*

See also ***R v Northumberland Compensation Appeals; Ex-parte Shaw [1952] 1 KB 338 and Republic v High Court, Accra, Ex-parte Soku [1996-97] SCGLR 535.***

Whether the Learned Trial Judge Erred in Law When He Delivered a Ruling on the Application To Stay Proceedings Before The Motion Was Moved?

> *"In these courts we dispense justice in accordance with three and only three yardsticks: statute law, case law and the well-known practice of our courts." Taylor J,* ***Harlley v. Ejura Farms (Ghana) Ltd. [1977] 2 GLR 179-222***

According to S. Kwami Tetteh in his book **Civil Procedure: A Practical Approach** at pg. 432, "*unless a motion is moved, the Court cannot determine it; it would therefore be open to the applicant, when it is called to withdraw it*". While the quoted passage suggests that it is a well-known practice of the Court not to determine a motion until it is moved, it does not suggest that the rule exists to protect the parties from some sort of injustice. Rather, the framing of the passage suggests that it is to provide ample opportunity for the party to withdraw the motion, leaving them some room to re-apply at some later date.

It is clear then that the decision of the judge to deliver the ruling on the application to stay proceedings, on the basis of affidavit evidence only, rather than wait for the motion to moved, was irregular, but it does not appear to have been the sort of error that is so fundamental as to go to the root of the decision.

Whether the Learned Trial Judge Erred in Law When He Delivered the Ruling on the Application to Stay Proceedings Pending the Determination of the Appeal When He Had Not Delivered The Ruling on the Preliminary Objections

Again, it is trite learning that the well-known practice of the Courts is a major source of civil procedure. While the **High Court (Civil Procedure) Rules 2004, C.I 47** does not specifically provide for preliminary objections, its essential features may be gleaned from principles of general application and the well-known practice of the Courts.

According to S. Kwami Tetteh in his book ***Civil Procedure: A Practical Approach*** at pg. 439, "*A preliminary objection, once raised, ought to be ruled upon. It is not open to the court merely to ignore the objection*." He draws his authority from the Nigerian case of ***Onyekwuluje v Animashaun (1996) 3 NWLR 439 at 637*** where it was held that "*it is a cardinal principle of the administration of justice to let a party know the fate of his application whether properly or improperly brought before the court. It will amount to unfair hearing to ignore an objection raised by a party or his Counsel against any slip in the proceedings. The court is duty bound to express in writing whether it agreed with the objection or not."*

In this instance, the learned author, justifies the rule by reference to the audi alteram partem principle. However, there is no suggestion that the learned trial judge had ignored

the preliminary objection altogether. The evidence on record shows that the learned trial judge had adjourned the ruling, rather than refused to acknowledge the existence of the objection. As such, we cannot hold that there has been a breach of natural justice.

We are more inclined to consider an argument under the Wednesbury principles of unreasonableness; that the decision to deliver the ruling on the application to stay proceedings pending the determination of the appeal *"was so unreasonable that no reasonable [judge] would ever consider"* it. Even if that was the case, we do not see how an order of certiorari could be granted, when the objections were, as we have held above, made in bad faith and calculated to delay the proceedings.

CONCLUSION

We would answer the question of whether there has been a non-jurisdictional error which is either patent on the face of the record or which goes to the root of the decision complained about in the negative.

We do think there is a case to be made for the irrationality of the decision to rule on an application that had not been moved. Our opinion is that it contravened the settled practice of the Court, which, as we know, is a source of civil procedure. Do we think it fundamental enough to justify the grant of an order of certiorari? No, we do not think so.

We also do not believe that there was a breach of the rules of natural justice. The fact is that the arguments in respect of the preliminary objections which *have not yet* been ruled on were heard.

There was no suggestion that the judge refused to deliver the ruling.

It is also a fact that affidavit evidence was taken in respect of the application to stay proceedings, even though the motion, ultimately, was not moved. Honestly, notwithstanding the irregularity of the procedure, we cannot see how anyone can argue that they were not heard when their evidence was taken.

Ultimately, our position would be that the application should be dismissed and it is accordingly dismissed.

EPILOGUE

Taking all the above circumstances into consideration, we are of the opinion that, the penchant of litigants seeking to use this courts supervisory jurisdiction to quash decisions

of the lower superior courts is a very unhealthy development. This is because, despite the statements of clarity in several decisions of this court outlining where this court may or may not grant the supervisory jurisdiction in appropriate cases, the parties nonetheless resort to this with recklessness.

In the past couple of months, we have observed a phenomenon of incessant delay tactics adopted by learned counsel presumably acting on the instructions of their clients.

These specie of conduct lies in the indiscriminate filing of processes against decisions of the trial courts, without any basis whatsoever and proceed to either file processes in the intermediate appellate court to stultify the conduct of the case or proceed to this court for the exercise of our supervisory jurisdiction. These normally take the form of applications for Stay of Proceedings, Stay of Execution, Appeals against any orders of the trial courts and in other cases application invoking the supervisory jurisdiction of this court which may be Certiorari or Prohibition.

At the rate at which this dangerous phenomenon is gaining grounds, it is our concern that, if urgent steps are not taken by the Rules of Court Committee or by this court itself to deal with it, parties and their counsel will deliberately and intentionally hold the administration of justice hostage.

We therefore urge the Rules of Court Committee to make proposals for law reforms to facilitate the expeditious hearing of cases without sacrificing the justice of the case of the parties.

We therefore dismiss the applications and direct the parties to go back to the High Court for expeditious trial.

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

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

PROF. H.J.A.N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

COUNSEL

DANSO AMOAH FOR THE APPLICANT

ERNEST KUSI WITH HIM OSEI TUTU BONSU FOR THE 1ST INTERESTED PARTY

ALFRED PAAPA DARKWA WITH HIM KATHLYN BOTCHWAY FOR THE 2ND INTERESTED PARTY