IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)
APPAU, JSC
MARFUL-SAU, JSC
DORDZIE (MRS.), JSC
KOTEY, JSC

CIVIL APPEAL
SUIT NO. J4/15/2019

26TH FEBRUARY, 2020

THE REPUBLIC

VRS

THE HIGH COURT, COMMERCIAL DIVISION, ACCRA

EX PARTE: JUDICIAL SECRETARY

ASP NANA JUSTICE OPPONG ……. APPLICANTS

DAVID K. AMETEFE ……. INTERESTED PARTY

RULING

BAFFOE-BONNIE, JSC:-

For a fuller appreciation of this ruling I will set out in material detail the facts and series of events that have culminated in this application.

The interested party herein, David Ametefe, brought an action in tort against 'ROSE BIO ATINGA' and 5 other named persons claiming among other reliefs, damages for wrongful arrest and damages for assault and battery. This writ was issued on 27/1/2011. The trial which started in 2012, for some unexplained reasons, travelled through to October 2016. On 26th October,2016 when 2nd defendant, who was then in the box for continuation of cross-examination, failed to appear, the trial judge ruled thus,

"The defendants have continuously been absent to prosecute. I would expunge the evidence of the 2nd defendant from the record and deem the evidence of the defendants to have been closed and further direct the plaintiff to file their written addresses on or before 11th day of November, 2016 with the defendants reacting to same 21 days after being served.

Case adjourned to 15th December, 2016 for judgment. Order as well as hearing notice be served on the defendants for their necessary compliance with costs of GHc1000.00 in favour of plaintiff."

Feeling aggrieved, the Applicants herein, brought an application to vacate the order made on 26/10/2016 but same was dismissed on **07/02/ 2017.**

The applicants herein, filed an interlocutory appeal against this decision, further holding up the trial. This application for stay of proceedings was refused and both parties filed their respective addresses, and a day for judgment was fixed. On the scheduled day for the delivery of judgment, the trial judge intimated to the court that his attention had been drawn to an order signed by the Chief Justice, transferring the entire case to His Lordship Justice Kwaku Ackaah Boafo, so he was precluded from delivering his judgment and the matter was adjourned sine die. When the Interested Party herein, finally procured a copy of the transfer order he felt suspicious and therefore filed an application before the High Court praying for an order of Certiorari to bring the Chief Justices Order of Transfer to be quashed on a number of grounds.

His suspicions were based on the fact that

1. The transfer order quoted a wrong title describing the parties as Daniel Ametepe vrs The IGP and ors, instead of DAVID AMETEFE v ROSE BIO-ATINGA and 5 ors
2. Even though the transfer order was as a result of certain allegations made against the trial judge in the course of the trial, neither the interested party herein nor the trial judge had been asked to make an input.
3. The petition which was dated 27th January, 2017, was received at, and worked on, by the Chief Justices secretariat, and a transfer order signed by Her Ladyship the Chief Justice on 2nd February 2017, yet this response was not put on the court's

docket or brought to the attention of the trial judge until 8 months later, in October, when the case was slated for judgment.

He couched his application for certiorari as follows.

"MOTION ON NOTICE FOR JUDICIAL REVIEW (ORDER 55 OF C.I, 47

TAKE NOTICE THAT EKOW EGYIR DADSON, ESQ, counsel for and on behalf of the Applicant herein will move the honourable Court for an order of certiorari directed at the respondents to bring before this court to be quashed his documents purporting to be transfer order dated 2nd February, 2017 and conveyed to the applicants counsel by a letter dated 4th December, 2017 but delivered in March, 2018"

Both in his affidavit and supplementary affidavit, the applicant questioned the genuineness of the transfer order based on the suspicions outlined above, and harped on the fact that the Chief Justice's power to transfer cases as outlined in the Courts Act 1993, Act 459, is not an unfettered one but subject to the constitution. That the constitution mandates persons granted power to do anything, not to do so arbitrarily or capriciously and must conform to the dictates of the constitution.

In his supplementary affidavit he said this

9, That, in terms of Article 157(3) of the 1992 Constitution of the Republic of Ghana a judge who has heard a matter to its conclusion cannot recuse himself or become ***functus officio*** *unless he gives judgment and a statutory power or function seeking to derogate from same should be devoid of any impropriety*

10. That in this particular case where a matter is ripe for judgment, a date fixed for the judgment and just for a transfer letter to be placed on the docket on the day of judgment is most unfair and same amount to arbitrary and capricious use of such administrative powers.

11. That the power of transfer of a matter must be exercised with due caution and fairness, most especially when the Chief Justice did not act suo motu but upon some purported petition by a party against a judge.

12. That when a person applies to the Chief Justice for a transfer, it is just fair and proper that the judge and the person affected by that transfer must be heard on the grounds of audi alteram partem rule so as to test the veracity or otherwise of the allegations so made.

13 That the transfer order is apparently defective as it is not properly set out or make the correct reference to the parties or title of the case and to that extent does not affect the applicant.

The application has been moved and awaiting a ruling. In the interim the applicant herein brought an application pursuant to Article 130(2) praying for an order referring some issues arising from the application, to the Supreme Court for interpretation.

Article 130(2) of the constitution 1992, reads,

Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that Court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination: and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.

In his application before the High Court, the applicant counsel referred specifically to paragraph 9 of the supplementary affidavit of the respondent and submitted that the respondent's interpretation of this constitutional provision is adverse to the interpretation being put on by the applicants. It is his case therefore that this Article 157(3) should be referred to the Supreme Court for interpretation. Paragraph 9 of the respondent's supplementary affidavit in opposition read,

9. That, in terms of Article 157(3) of the 1992 Constitution of the Republic of Ghana a judge who has heard a matter to its conclusion cannot recuse himself or become ***functus officio*** *unless he gives judgment and a statutory power or function seeking to derogate from same should be devoid of any impropriety.*

When this motion was argued before the High Court for the issue to be transferred, the Judge, after hearing both counsel and reviewing the processes filed, and authorities on the subject, concluded as follows,

"……upon a reading of the relevant provisions of the Constitution and decided authorities, it is clear to me that the Constitutional provision(the subject matter for the application for referral), must be one upon which the Court will rely to determine the suit and must be in controversy between the parties.

I have considered the arguments by both parties and it seems to me that there is no controversy concerning Article 157(3) of the 1992 constitution. The argument of the applicant from my understanding, is not that the Honourable Chief Justice cannot transfer a case from one judge to another when the suit has reached the stage of judgment, but that considering the stage of proceedings same must be done in accordance with law and principles of natural justice".

Upon the foregoing, I have come to the conclusion that the Application for referral of Articles 157(3) and 296 of the 1992 Constitution of the Republic of Ghana, to the Supreme Court for interpretation is unmeritorious. In the circumstances, the application is dismissed.

It is this ruling that the applicant is seeking to quash by an order of judicial review.

Before us the applicant's motion reads as follows*;*

"PLEASE TAKE NOTICE that this Honourable Court will be moved by the Lawyer for the applicants herein invoking the supervisory jurisdiction of this honourable court for the orders of certiorari and prohibition directed to the high Court, Accra presided over by Her Ladyship Hafisata Amaleboba (Mrs) to bring to this court the ruling on the application to refer a matter to the Supreme Court for interpretation in case No……. Delivered on 27th June, 2019, for same to be quashed for lack of jurisdiction and to prohibit the said High Court from interpreting the constitution on grounds as per the accompanying affidavit."

Both in his affidavit and statement of case, the applicant has sought to portray that the respondent's application for judicial review raises the issue of interpretation since the interpretation of article 157(3) is at the heart of the problem and therefore has to be resolved first. Counsel relied heavily on paragraph 9 of the supplementary affidavit as quoted above in support of the application.

The applicant concluded that the interpretation being put on Article 157(3) of the constitution was adverse to the interpretation by the Applicant and therefore there is the

need to refer the matter to the Supreme Court which has the exclusive jurisdiction to interpret the constitution. The High Court's refusal to refer the issue to the Supreme Court, was an error of law and has opened the High Court to a situation where a High Court will assume jurisdiction to interpret the constitution, which jurisdiction it does not have. The application before us is therefore praying for an order of certiorari to quash the ruling of the High Court and prohibit her from going ahead to deal with the application for judicial review before it.

For reasons which we will articulate presently we wish to state from the very outset that this application is flawed procedurally and unmeritorious substantively.

We find it very difficult to appreciate why counsel has come before us to ask for certiorari to quash a ruling which was given in an application that was brought by him before the High Court judge. Is he aggrieved because the ruling did not go his way? In simple terms, the applicants' submissions before the High Court was, "Transfer the case to the Supreme Court because it involves interpretation." Then the judge says "No the issue does not call for interpretation".

So why the application for certiorari? The High Court judge had jurisdiction to rule on the application seeking the transfer, and he did rule. At no one point in time did the judge lose, or go beyond, her jurisdiction. If the applicant is aggrieved by the ruling, his remedy lies in an appeal and not certiorari.

There is abundant case law on the subject as to when and how the supervisory jurisdiction of this court in the form of *certiorari* can be invoked. In the case of ***Republic v High Court, Accra; Ex parte Commission on Human Rights and Administrative Justice (Addo Interested Party)*** **[2003-2004] 1 SCGLR 312,** our brother Dr. Date-Bah JSC said,(as stated holding (4) of the headnote at page 316) that:

"Where the High Court… has made a non-jurisdictional error of law, which was not patent on the face of the record…the avenue for redress open to an aggrieved party was an appeal, not judicial review. Therefore, certiorari would not lie to quash errors of law which were not patent… An error of law made by the High Court…would not be taken as taking the judge outside the court's jurisdiction, unless the court had acted ultra vires the Constitution or an express statutory restriction validly imposed on it."

On the same-subject-matter, the Supreme Court **in *Republic* v *High Court, Accra; Ex parte Industrialization Fund for Developing Countries [2003-2004] 1 SCGLR 348*** held (as stated in holding (1) of the headnote) that:

"Certiorari is a discretionary remedy which wold issue to correct a clear error of law on the face of the ruling of the court; or an error which amounts to lack of jurisdiction in the court as to make a decision a nullity. In the case of errors of law or fact not apparent on the face of the ruling, the avenue for redress is by way of an appeal."

In this case, the applicant is praying for an order of *certiorari* not because the trial judge did not have jurisdiction to give a ruling on the matter but that he is dissatisfied with the ruling. This may be a ground of appeal but definitely not a ground for *certiorari.* The judge might have erred in his appreciation of the facts and the conclusions drawn from them. If that is the case, it would be a matter of appeal. It would not be an egregious error on the face of the record to be cured by *certiorari.* 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: see ***Republic* v High Court, Kumasi, Ex Parte Fosuhene [1989-90] 2GLR 315**

Before I conclude I wish to note that this special jurisdiction inserted in the 1992 Constitution by the framers is being abused by legal practitioners as they inundate the court with applications which clearly they should pursue on appeal. I would therefore reiterate the words our sister Wood JSC(as she then was) said in the case of **Republic v *Court of Appeal; Ex parte Tsatsu Tsikata [2005-2006]* SCGLR 612 at 619** that:

"The clear thinking of this court is that, our supervisory jurisdiction under Article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which error either go to the jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then, that the error(s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter."

If practitioners were to appreciate the obvious sense in this statement, I am sure many of the applications inundating this court and invoking our supervisory jurisdiction will not be brought. As Justice Date-Bah admonished in the case of *Republic* v *High Court, Accra; Ex parte CHRAJ Addo Interested Party)* (supra) at 316:

If such conduct is not checked

"*…judicial review would* supplant *the system of appeals, which has carefully been laid down in the 1992 Constitution and the Courts Act, 1993 (Act 459), as amended by the Courts (Amendment) Act, 2002 (Act 620).*"

It is our view that the application for *certiorari* before the court is misconceived.

Having dismissed the application on procedural grounds, that ordinarily should be the end but because, we allowed counsel to make submissions beyond the preliminary point of law, we felt it necessary to deal with it substantively.

In his submissions on the substance , the applicant referred to two paragraphs in the affidavit of the respondent where he said;

9, That in terms of Article 157(3) of the 1992 Constitution of the Republic of Ghana a judge who has heard a matter to its conclusion cannot recuse himself or become ***functus officio*** *unless he gives judgment and a statutory power or function seeking to derogate from same should be devoid of any impropriety*

10. That in this particular case where a matter is ripe for judgment, a date fixed for the judgment and just for a transfer letter to be placed on the docket on the day of judgment is most unfair and same amount to arbitrary and capricious use of such administrative powers.

From these 2 paragraphs the applicant concludes that, an issue of interpretation arises. It is his submission that what the respondent means is that per article 157(3) of the constitution the chief justice cannot transfer a case that is ripe for judgment. This interpretation is adverse to his because in his view the article 157(3) is referable only to a judge being precluded from recusing himself when a matter has reached the stage of

judgment. These 2 interpretations are adverse to each other therefore there is the need to refer the issue to the Supreme Court for interpretation.

The respondent naturally opposed this application and submitted that nothing in his application calls for interpretation by the Supreme Court. He has not sought to interpret the constitution and that merely referring to some articles of the constitution, without more, does not entitle the High Court to refer same to the Supreme Court for interpretation.

We must say that from the processes before us it is clear that the arguments canvassed before us, are the same as those canvassed before the High Court when applicant sought to have the matter transferred for interpretation.

It is provided by Article 130(1) and (2) of the 1992 Constitution as follows;

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in-

(a) All matters relating to the enforcement or interpretation of this Constitution; and

(b) All matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question, of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.

This article has received judicial interpretation in a number of cases and from eminent jurists. In the case of Ex parte Akosah which was decided on the 1979 constitution which had similar provisions, this court enunciated a well thought out scheme for determining an issue of enforcement or interpretation as follows;

"An issue of enforcement or interpretation…. arises in any of the following eventualities;

(a)where the words of the provision are imprecise or unclear or ambiguous.
(b) where rival meanings have been placed by the litigants on the words of any provision of the Constitution
© where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision shall prevail

(d)Where on the face of the provision, there is a conflict between the operations of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation"

See the case of **Ex Parte Electoral Commission [2005-2006] SCGLR 514 pg 559,** where Prof Ocran admonished trial judges as follows;

> *"In dealing with constitutional provisions which have received little or no prior judicial interpretation, it will be a safer course of action for the trial court to refer the matter to the Supreme Court rather than to assume that there is no real issue of interpretation, or that his or her view of the constitutional provision is more likely to be more correct than that of five or seven Supreme Court Justices put together"*

See also the case of **Republic v Fast Track High Court 1, Ex parte CHRAJ,** DR Anane, Interested Party in which the trial High court judge was chastised by the Supreme Court for purporting to interpret the word "Complaint" as found in article 290 of the constitution.

It must however be said that there is also a long list of cases that caution trial judges in the hasty referral of issues to the Supreme Court. It is not every issue dressed up beautifully as an issue of constitutional interpretation that has to be referred. In other words, an action must raise a genuine issue of interpretation or enforcement of the constitution before the original jurisdiction of the Supreme Court can be invoked under Article 130(1). As a corollary, where an action or issue involves no more than the application of a clear and unambiguous provision of the constitution, and raises no issue of enforcement or interpretation, that action will remain with the lower courts rather than come before the Supreme Court.

See the cases of **Bimpong-Buta v General Legal Council [2003-2004] 2 SCGLR 1200;**

Aduamoa II v Adu Twum [2000] SCGLR 165;

Gbedemah v Awoonor Williams SC 30 October 1969 digested in (1970) CC 12 SC.

Further if the provision of the constitution has received judicial interpretation earlier, then no issue of referral for interpretation arises. A trial judge will only be called upon to apply the interpretation as given earlier.

Having established the legal framework within which a trial judge has to operate to decide whether or not to refer an issue for interpretation to the Supreme Court, we will now deal with the case at hand.

The applicant believes that by referring to article 157(3) of the constitution in paragraph 9 of his supplementary affidavit, the respondent had sought to interpret the said article, and since the meaning the respondent put on that article is adverse to what the applicant puts on that self-same provision, an issue of interpretation arises. This argument did not find favour with the trial High Court Judge, and it does not find favour with us.

It is obvious that the applicant selected just two paragraphs from an otherwise lengthy affidavit and commented on them. If he had read the whole document and the other processes like the motion paper, he would have had a better appreciation of the words in paragraphs 9 and 10 of supplementary affidavit.

The application for certiorari was couched as follows

"MOTION ON NOTICE FOR JUDICIAL REVIEW (ORDER 55 OF C.I, 47

TAKE NOTICE THAT EKOW EGYIR DADSON, ESQ, counsel for and on behalf of the Applicant herein will move the honourable Court for an order of certiorari directed at the respondents to bring before this court to be quashed his documents purporting to be

transfer order dated 2nd February, 2017 and conveyed to the applicants counsel by a letter dated 4th December, 2017 but delivered in March, 2018"

Then this is what he said in his supplementary affidavit

9, That in terms of Article 157(3) of the 1992 Constitution of the Republic of Ghana a judge who has heard a matter to its conclusion cannot recuse himself or become ***functus officio*** *unless he gives judgment and a statutory power or function seeking to derogate from same should be devoid of any impropriety*

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11. That the power of transfer of a matter must be exercised with due caution and fairness, most especially when the Chief Justice did not act suo motu but upon some purported petition by a party against a judge.

12. That when a person applies to the Chief Justice for a transfer, it is just fair and proper that the judge and the person affected by that transfer must be heard on the grounds of audi alteram partem rule so as to test the veracity or otherwise of the allegations so made.

13 That the transfer order is apparently defective as it is not properly set out or make the correct reference to the parties or title of the case and to that extent does not affect the applicant.

It can be seen that both in his motion paper and supplementary affidavit, the applicant questioned the genuineness of the transfer order and harped on the fact that the Chief Justice's power to transfer cases as outlined in the Courts Act 1993, Act 459, is not an unfettered one but subject to the constitution. That the constitution mandates persons granted power to do anything, not to do so arbitrarily or capriciously and must conform to the dictates of the constitution. This is the gravamen of the respondents' application before the High Court and before us. The trial judge found that the respondent has never questioned the Chief Justices power to transfer cases from one judge to another but that such power should not be exercised arbitrarily or capriciously. She found no conflicting

interpretation of article 157(3) to warrant the transfer to the Supreme Court, and we agree with her.

The application for certiorari fails and same is dismissed.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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

A. M. A. DORDZIE (MRS.)
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