IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: AKUFFO (MS), CJ (PRESIDING)

ANSAH, JSC

ADINYIRA (MRS), JSC

YEBOAH, JSC

BAFFOE-BONNIE, JSC

CIVIL MOTION
NO. J5/68/2017

24TH OCTOBER, 2018

THE REPUBLIC

VRS

HIGH COURT, FINANCIAL DIVISION

EX PARTE: NICHOLAS ANAMO ……. APPLICANT

THE EXECUTIVE SECRETARY,

ECONOMIC AND ORGANISED CRIME OFFICE ……. RESPONDENT

JUDGMENT

BAFFOE-BONNIE, JSC:-

The Application before us is for judicial review by way of an order of certiorari under article 132 of the 1992 Constitution and rule 61(1) of C.I. 16 as amended by C.I. 24. , praying for an order, to bring up into the court for the purpose of being quashed, the ruling of the High Court, Coram: Her Ladyship Justice Afia Serwaa Botwe, dated 9th of April, 2018, granting an application for stay of execution pending appeal.

The grounds for the application as stated by the applicant are

a. "That the High Court lacked jurisdiction when it continuously froze the applicants account under the guise of "Stay of Execution pending Appeal" when the statutory period of 12 months had lapsed and the same Court had in an earlier ruling dated 19th day of March 2018 ordered for the defreezing (sic) of the Applicant's account after the applicant had been acquitted and discharged by the said Court of all criminal charges brought against him by the interested party.

b. That the ruling of the High Court dated 9th April, 2018, amount to an error patent on the face of the records."

The application was accompanied by an affidavit and a statement of case. The interested party filed an affidavit in opposition to the application, and a statement of case in which he raised a preliminary point of law. In addition to the arguments in support of the preliminary objection, the court also heard extensive oral submissions from counsel.

For a fuller and better appreciation of our ruling hereunder, we deem it necessary to recount in material detail the antecedents of this case. Additionally, since there have been several applications initiated by both parties in this case, we shall refer to the parties in this application by their names, where appropriate, to make for ease of identification. The applicant herein will be referred to as Nicholas Alamo, while the interested person is referred to as EOCO.

Sometime in June 2016, the EOCO caused to be frozen an amount of 200,000 USD, standing to the credit of Nicholas Alamo at the Guaranty Trust Bank, which amount the EOCO suspected to be gains from fraud, money laundering, and related offences. This freezing order was confirmed by the court on an application made to it by the EOCO. While the investigation was going on, Nicolas Alamo, per his counsel, applied for the freezing order to be discharged. The High Court determined that the application was premature and so same was refused. After investigations, Nicholas Alamo, and one Kwabena Asare, were charged with several counts of fraud and abetment of crime. Kwabena Asare was, and still remains at large so Nicholas was tried alone. After the trial, Nicholas was acquitted and discharged of all counts when his counsel's submission of "no case to answer" was upheld by the judge. EOCO, per the state, lodged an interlocutory appeal against the acquittal and discharge of Nicholas Alamo. Meanwhile immediately after his acquittal, Nicholas brought

an application at the High Court for his frozen account to be discharged. This was opposed by EOCO, but after hearing arguments, the application was granted, and the frozen accounts was duly discharged. The EOCO appealed against this decision also to the Court of Appeal.

It is worth mentioning here that neither, the appeal against the acquittal and discharge of Nicholas nor that against the release of the money to Nicholas Alamo, has been pursued to conclusion. Thus they are both still pending.

Subsequent to the filing of the appeals, EOCO brought an application for Stay of Execution Pending Appeal aimed at preventing Nicholas Alamo from having access to the money which had been earlier discharged per the court order. The application was granted and the High Court stayed execution of its own order for the release of the account to Nicholas Alamo. Nicholas Alamo did not and has not appealed against the decision to stay execution. Rather, he filed a motion before the Court of Appeal titled,

> "MOTION ON NOTICE TO SET ASIDE AN ORDER FOR STAY OF EXECUTION PENDING APPEAL"
>
> The relief sought was "for the Applicant/respondent/applicant herein(i.e. Nicholas Alamo) humbly praying this honourable Court to set aside an order for stay of execution granted by the High Court on the 9th day of April, 2018"

The Court of Appeal granted the application to set aside the order of stay of execution pending appeal and ordered the release of the money to Nicholas Alamo. Feeling aggrieved, the EOCO brought an application for an order of certiorari before the Supreme Court on the grounds of wrongful assumption of jurisdiction, breach of natural justice and want of jurisdiction. EOCO submitted that, since Nicholas Alamo did not have an appeal pending before the Court of Appeal, the Court of Appeal wrongly assumed jurisdiction to sit on the appeal and rule on same.

In a very well researched and lucid ruling, dated 4th July 2018, this Court, per our brother Anin Yeboah JSC, granted the application and set aside the orders made by the Court of Appeal. The summary of the ruling was that, when the High Court granted the stay of execution pending appeal, the only way Nicholas could have gone to the Court of Appeal

was to have filed an appeal against the High Court order to the Court of Appeal. Even then, pursuant to Rule 28 of C.I. 19 he could only have filed an earlier application before the High Court and if same was refused, or onerous or unconscionable terms were imposed, then, and only only then, could he go before the Court of Appeal. Jumping straight to the Court of Appeal was therefore procedurally wrong. The order of the Court of Appeal setting aside the Stay of Execution pending Appeal was therefore amenable to be quashed. Concluding, Anin Yeboah JSC stated as follows:

> *"The High Court as the court below in these proceedings did not refuse the application as has been pointed out already. The Court of Appeal, in our respectful view, was not seized with jurisdiction under Rule 28 of its Rules to entertain the application under the circumstances. We therefore think that as the applicant has made a case of want of jurisdiction against the Court of Appeal, the application commands merit and same ought to be granted in the terms prayed… As the applicant has made a very strong case on jurisdictional grounds, it would suffice to grant the application without resort to other grounds."*

It is after these events that Nicholas has brought this application seeking judicial review by way of certiorari to quash the Ruling of the High Court dated 9th April 2018 upon the grounds as referred to earlier.

Before us Nicholas, as the applicant, argues forcefully that the High Court was bereft of any jurisdiction to, as it were, continue with the freezing of his account beyond certain periods as specified in the law. This is what he said:

> *"My Lords, the freezing order from the court is not perpetual. It does have a time limit after which it lapses. According to Act 804, the freezing order of the court has a life span of a year after which same lapses. It is worthy to note that the said Act does not make any provision for an extension of the freezing order under the Act after an acquittal."*

In sum, the Applicant's case is that, on the basis of section 38 of the EOCO Act 2010, Act 804, which places inter alia, a limit of 12 months on frozen accounts, the continued freezing of his account for over 2 years is unlawful, especially so when he had been acquitted and discharged of all criminal charges in respect of which he was prosecuted.

EOCO, the interested party, raised a preliminary objection to the current application on the grounds that the issue of whether or not the High Court was right in granting a stay of execution pending appeal had been adjudicated upon by this court in an earlier application. So this application is a repeat or rehash of the same arguments. On the substance of the application, the interested party submits that Section 38 of the EOCO act does not take away his constitutional right to appeal against any decision of the High Court, and for that matter seek any reliefs or orders associated with right of appeal.

Before we go into the substance of this application, we wish to state that the preliminary objection is clearly misconceived. What appeared before this court differently constituted, and which was ruled upon, had very little to do with the application before us. This application brought by the applicant herein, is challenging the jurisdiction of the trial High Court in granting a stay of execution, while that before the earlier court initiated by the interested party herein, challenged the Court of Appeal's jurisdiction in setting aside an order of the High Court when its jurisdiction had not been properly invoked. So in effect, validity or otherwise of the High Court's decision to grant a stay of execution was not in the purview of the earlier application as it is in the application before us. The preliminary objection is therefore overruled.

The circumstances under which this court would exercise its supervisory jurisdiction has been stated in numerous decisions. The common grounds are

a. Where the High Court makes a jurisdictional error of law or

b. Where the High Court makes a non-jurisdictional error of law which is fundamental or substantial to the decision impugned.

See the case of **The Republic V High Court, (Commercial Division); ex parte Electoral Commission (Papa Kwesi Nduom- Interested Party) Unreported Civil MotionNoJ5/7/2017** dated 7th Nov 2016, where our esteemed sister **Adinyira JSC,** said,

> *"This court recalls our firm holding in the plethora of cases referred to by counsel for the applicant that in order for the Supreme Court to exercise its supervisory jurisdiction of the High Court, the High Court must have made an error patent on the*

face of the record which either goes to jurisdiction or are so plain as to make the impugned decision a nullity"

See also the quote of **Prof Ocran JSC,** in the case of **Republic v Fast Track High Court Accra, Ex parte Electoral Commission [2005-2006] SCGLR 514.** He said,

"*Certiorari lies not only to review and quash a decision taken in absence of initial jurisdiction, but also in the exercise of excess of jurisdiction as when a court initially clothed with jurisdiction embarks upon a path unwarranted or uncalled for in the disposition of the specific matter before it."*

Section 33 of the Economic and Organised Crime Act, 2010, Act 804 (hereafter referred to as "the Act") provides as follows;

33(1) Where the Executive Director considers that freezing of property is necessary to facilitate an investigation or trial, the Executive Director may in writing direct the freezing of

(a) The property of a person or entity being investigated

33(2) The Executive Director shall within fourteen days after the freezing of the property apply to the Court for a confirmation of the freezing.

Section 35 provides as follows:

35(1) Where an application is made for a freezing order, the Court shall issue the order if it is satisfied that

(a) The respondent is being investigated for a serious offence,

(b)The respondent is charged with a serious offence

(c)There are reasonable grounds to believe that the property is tainted property related to a serious offence.

Section 38 of the Act provides as follows

Duration of Freezing Order

38 (1) A freezing Order remains in force until

(a) The order is (i) discharged, (ii) revoked, or (iii) varied,

(b) Twelve months after the date the order is made or a later date determined by the court, or

(c) A confiscation order or a pecuniary penalty order is made in respect of the property which is the subject of the order

(2) Where an investigation has commenced against a person for a serious offence and the property related to that offence is frozen or restrained, the court shall order the release of the frozen or restrained property if

(a) the person is not charged with a serious offence within twelve months after the date of commencement of the investigations or

(b) the person is acquitted and discharged

It is the case of Nicholas Alamo, that his accounts were frozen pursuant to an investigation commenced against him for a serious offence (money laundering and fraud), so having been acquitted and discharged the court had no discretion to exercise in the release of the money frozen. According to him Section 38(2) (b) is expressed in mandatory terms, i.e., "…….the court shall order the release of the frozen or restrained property if the person is acquitted of the serious offence".

Accordingly, to counsel for Nicholas Alamo, the High Court judge, who all this while, had jurisdiction to freeze and discharge the accounts, lost his jurisdiction when he purported to grant a stay of execution, thereby extending the period of the freezing of the account beyond that permitted by the law.

Issues

1. What is the nature of the application for stay of execution pending appeal – is it Civil or Criminal?

2. What law governs the application for stay of execution of a defreezing order under the Act, pending appeal?

An action may be criminal or civil in nature. The 9th Edition of Black's Law Dictionary defines "criminal action" as "An action instituted by the government to punish offenses against the public". By the combined effect of Article 19 clauses 7, 11 and 12 of the 1992 Constitution, a criminal action (or a quasi-criminal action, such as contempt proceedings) is

one that results in either conviction or acquittal. Accordingly, any action that does not result in either conviction or acquittal is civil in nature. It must however be said that a purely civil action or procedure can arise or emanate from a criminal process. In the recent case of **Martin Kpebu v Attorney-General (No. 1) [2015 – 2016] 1 SCGLR 143**, where section 104 (4) of Act 30 (imprisonment of a surety for non-production of an accused person) was struck down as unconstitutional and against human rights and freedoms, the Supreme Court held that an action for forfeiture of recognizance (even though it emanates from a criminal action) is a civil action, not a criminal cause or matter.

Again, it has been held severally that where after a criminal trial a convicted person is ordered to make some form of restitution or compensation to a complainant, such an order has to be pursued through the civil process of execution rather than a further criminal punishment for failure to comply. Therefore, as the application for the stay of execution pending appeal did not, and could not, result in either conviction or acquittal, the process was civil in nature, even though it might have emanated from a criminal action.

Generally, it is the judgment-debtor who would apply for stay of execution to hold in abeyance the execution of the judgment to be enforced when his appeal is pending. In the case of **REPUBLIC v COURT OF APPEAL, EX PARTE SIDI [1987-88] 2 GLR 170,** Justice Taylor said of the nature of stay of execution at page 176 as follows:

> *"a stay of execution…means simply the suspension of any process or procedure that would post date the judgment. If an applicant asks for such stay pending the hearing and determination of his appeal, what he is in effect asking is that all processes that can be taken after judgment for the purpose, no doubt of satisfying the judgment, should be stayed until the appeal is finally heard and a decision on it given"*

See also the case of **Republic v General Legal Council Disciplinary Committee: Ex Parte, Aboagye Da Costa.** [1989-90] 2 GLR, 104. In that case, Counsel who had been found to have breached disciplinary rules was suspended from practising law for a year. He appealed the decision and brought an application for stay of execution pending appeal. In granting the stay of execution the Court said, taking into consideration the shortness of the sentence and the likelihood of the appeal delaying, if the stay was not granted, he would

have served the full sentence before the appeal was heard. Indeed 2 years later when the appeal was heard the Court of Appeal affirmed the decision of the Disciplinary Committee, but reduced the period of suspension from 12 months to 6 months and the lawyer duly served it. See the case of **Aboagye da Costa v Disciplinary Committee of General Legal Council 1991 2 GLR, 313**

A stay of execution may, by virtue of the rules of court, be in force even when there would be no appeal. For example Order 51 rule 9(2) of CI 47 of 2004, permits a statutory stay before the High Court. Interpleader proceedings pending for determination before a court which delivers a judgment and executing it normally stays execution till the interpleader proceedings is determined. Another statutory stay under our rules is under Rule 27(3) (a) and (b) of the Court of Appeal Rules, C.I. 19 of 1997. All other applications for stay of execution must be made to the court for the order to be made after hearing the parties to the case.

Being a civil action, application for stay of execution pending appeal (before the Court of Appeal) is governed entirely by the Court of Appeal Rules, 1997 (C.I.19) and the Courts Act, 1993 (Act 459) and therefore had absolutely nothing to do with the EOCO Act. Accordingly, section 38 of the EOCO Act, on which Nicholas Alamo seeks to rely, does not apply to this application.

As counsel for EOCO rightly pointed out, their right to appeal against the acquittal and discharge of the Nicholas Alamo, is guaranteed under the constitution. It goes without saying that all other appeal processes, such as stay of execution, stay of proceedings, etc, are guaranteed under the constitution and cannot be taken away by any act of parliament.

It is our view therefore that the High Court Judge was acting within her jurisdiction when she granted the stay of execution even though it had the effect of extending the freezing order. If Nicholas Alamo is dissatisfied with the decision to stay execution pending the determination of the appeal before the Court of Appeal, his remedy lies in appealing against same rather than to come by way of certiorari.

Consequently, the application for certiorari fails and same is dismissed hereby.

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

AKUFFO (MS), CJ:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

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

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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