IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
APPAU, JSC
PWAMANG, JSC
DORDZIE (MRS.), JSC
PROF. KOTEY, JSC

CIVIL APPEAL
NO. J4/25/2020

25TH NOVEMBER, 2020

THE REPUBLIC

VRS

JUDICIAL COMMITTEE OF SEKONDI
TRADITIONAL COUNCIL …… RESPONDENT/RESPONDENT/APPELLANT

EX-PARTE: EBUSUAPANYIN KOFI SUSU
(SUBST BY EBUSUAPANYIN KOFI ASANTE SUBST BY
OSOFO JOSHUA WILLIAM KWEKU DONKOR) …. APPLICANT/APPELLANT/RESPONDENT

EBUSUAPAYIN KWESI MUSU
(SUBT. BY OPANYIN YAW BADU) …. INTERESTED PARTYRESPONDENT/APPELLANT

JUDGMENT

MAJORITY OPINION

DORDZIE, JSC (MRS.):-

In order to make the conclusions I would come to in this appeal clear, I find it necessary to carefully outline the sequence of how events unfolded in this matter from the Judicial Committee of the Sekondi Traditional Council through the High Court to the Court of

Appeal and finally to this Court, the apex court. Particularly because I find some of the facts as laid out in the submissions of both sides in this appeal a bit distorted.

By a writ of summons dated 15th day of June 2005 The respondent in this court Ebusuapanyin Kwamina Essa (described as the head of family of the Kokodo Ebiradze Royal family of Fijai Kweikuma) per an attorney, Kofi Susu and 3 others instituted an action in the Sekondi Traditional Council against Opanyin Kwesi Musu the interested party herein and another. Their claims, per the record are as follows:-

a. A declaration that the nomination and selection of one Amo as the chief of Fijai by the defendants is contrary to the custom and tradition of Fijai and therefore null and void.
b. A declaration that the 3rd plaintiff was validly nominated, selected confirmed, and outdoored as the chief of Fijai.

In the statement of claim accompanying the writ, the plaintiffs alleged the 3rd plaintiff Nana Agyeman Gyesa alias Alfred Kwofie was lawfully installed by the kingmakers of the royal family with the approval of the 2nd defendant, the Queen mother of the said royal family. Not long after the installation, the 1st defendant with the collaboration of the 2nd defendant have installed another person, one Amo, as chief of Fijai thereby creating confusion in the community.

The defendants responded to the writ by filing a motion to dismiss it. On the 21st of December 2005 the Judicial Committee dismissed the motion and gave the case a full hearing. In an undated judgment marked as exhibit EKS5 at page 22 of the record, the Committee gave its decision as follows: "**Considering the nature of the case brought before the Judicial Committee of Sekondi Traditional Council and how both nominations, confinements and installations took place by the Plaintiffs and Defendants at Fijai, the committee is of the opinion that the claim of the Plaintiffs ought to be dismissed and it is hereby dismissed accordingly and at the same time declare both installations by Plaintiffs and Defendant null and void and have no custom and legal effect. No order as to costs. "**

From the claims placed before the Judicial Committee as quoted above the issues in my view the Committee had to decide were two:

a) Whether the nomination and selection of one Amo as chief of Fijai by the defendants was contrary to custom and tradition of Fijai.
b) Whether the nomination, selection, confirmation and outdooring of 3rd plaintiff as the chief of Fijai was done according to custom and tradition of Fijai and therefore valid.

The decision of the Judicial Committee in my opinion aptly determined these issues, that, custom and tradition were not followed in making the two candidates i. e. Amo and the 3rd plaintiff chiefs of Fajai therefore; the plaintiff's suit was dismissed. In effect, the rights of the parties had been determined by the judgment therefore, the committee became functus officio so far as that suit is concerned. The Court of Appeal, in my view rightly found so.

The Committee made a remark after delivering its judgment which is entitled 'Order' It reads**: "Both Plaintiffs and Defendants, their Agents or Servants, etc. are hereby ordered to unite as one family and elect one overall head of family (Ebusuapanyin) in place of the late Ebusuapanyin Kweku Abuna from the royal family who shall in consultation with the principal elders and the queen mother of Fijai black stool nominate eligible candidate from the Royal family to occupy the Fijai black stool for peace and tranquility to prevail in Fijai. Nana Agyeman Gyesa alias Alfred Kwofie who is the 3rd Plaintiff, herein and spokesman for the Plaintiffs and Amo who was installed by the Ag. Ebusuapanyin Musu are hereby restrained from functioning as chiefs of Fijai until a substantive overall ebusuapayin (head of family) has been elected by the whole family with its branches of sectional heads to empower and support him to nominate and <u>appoint either of the two candidates or any eligible person from the royal family and present same to the Oman for consideration and installation to occupy the black stool."</u>** (Emphasis mine) The emphasized portion of the remark of the Committee confirms that eligibility to ascend the Fijai stool

was not an issue that arose before the Committee. It rather implies that either of the two were eligible but the procedure followed in installing them did not conform to tradition and custom.

This 'order' at best is an obiter dictum; it can be described as advice to the parties. The Court of Appeal took time to consider the nature of the 'order' and held the same view, which view I do endorse. Counsel for all the parties in this appeal in their respective statements of case filed before us, described this 'order' as judgment of the court; counsel for the appellant further described it as consequential orders. In my view, this 'order' is nothing more than a remark by the panel, counseling the parties to take steps to keep the peace.

It is part of the appellant's argument, justifying the Judicial Committee's acts of reopening the matter that, the 'order' was not executed and could not be left in abeyance. In the face of exhibit EKS7 (page 25 of the record of appeal) I can safely say this argument was not made in good faith. Exhibit EKS7 demonstrates that the parties heeded the advice in the 'order' and made attempts at settlement. Exhibit EKS7 on the face of it is a settlement reached by the parties on 28th December 2006 signed by representatives of 10 out of 12 branches of the Kokodo Royal Ebiradze Stool family and addressed to the Registrar of the Sekondi Traditional Council. Exhibit EKS7 reads:

"NOMINATION OF CANDIDATE

We are pleased to inform you that acting on the order of the Judicial Committee of August 3, 2006, ten (10) of the family's Branches out of the Twelve (12), held a meeting at Fijai in the Family House under the auspices of the overall Head of family (Ebusuapanyin) – KWAMENA ESSAH – on December 26, 2006.

The outcome of this meeting was the nomination of ALFRED JUSTICE KWOFIE as a suitable candidate acceptable to all the Sectional Heads to occupy the Fijai black stool.

We are, therefore, bringing this to your information for entry into your register that ALFRED JUSTICE KWOFIE alias MENSAH TAWIAH is the unanimous choice of the Kokodo

Royal Ebiradze Stool family of Fijai. The appropriate customary processes would be followed properly for his enstoolment."

Irrespective of the contents of exhibit EKS7, counsel for the appellant in his statement of case maintain the 'order' was not implemented therefore, the respondent took a step and brought this to the attention of the Traditional Council per exhibit EKS6. According to counsel, exhibit EKS6 prompted the Traditional Council to invite the parties per exhibits EKS8, EKS9 and EKS10. (See page 3 paragraph 4 of the appellant's statement of case) This submission by counsel for the appellant is very misleading and does not represent the true statement of facts as disclosed by the record of appeal. The date on exhibit EKS6 shows that that document was made before the writ of summons resulting in the judgment of the Judicial Committee of the Council was made. What is more, exhibit EKS6 was not addressed to the Judicial Committee of the Sekondi Traditional Council; it was addressed to the Secretary, Standing Committee of the Traditional Council. Therefore, it could not possibly be the document that prompted the reopening of the case by the Judicial Committee.

The writ of summons which originated the action before the Judicial Committee, exhibit EKS1 is dated 15th day of June 2005, it was filed on the following day 16th day of June 2005. The resultant judgment of the Judicial Committee was delivered on 3rd of August 2006. (The judgment on the face of it is not dated but the Committee's subsequent ruling which is the subject matter of the certiorari application disclosed the date of the judgment as 3rd August 2006).

Exhibit EKS6 is dated 18th of April 2005. The contents of the document gave various dates in April 2005, when attempts were made to mediate on the differences between the parties; these dates are April 9th 2005, April 10th 2005 and April 11th 2005. These dates are confirmation that the date of exhibit EKS6 is accurate. !8th April 2005 obviously precedes 16th day of June 2005 when the respondent filed his writ and 3rd of August 2006 when the Committee delivered its judgment. Exhibit EKS6 therefore is nothing but a red herring meant to throw dust in the eyes of the court.

Seven years after the 3rd of August judgment of the Judicial Committee of the Sekondi Traditional Council, the Council wrote exhibit EKS8 summoning Ebusuapanyin Kwesi Musu and Ebusuapanyin Kofi Susu, the parties in the 3rd August 2006 judgment to appear before the Committee 'to present relevant document which will permit you to ascend to the stool of Fijai.' The parties complied with the invitation. The Judicial Committee gave the following title to the case in its ruling dated 13th November 2013

"**Ebusuapanyin Kofi Susu and Ebusuapanyin Kwesi Musu**

Applicant Eligible to Nominate a Candidate to be Chief of Fijai

The two heads of family having failed to unite and elect head of family (Ebusuapayin) to nominate a chief as ordered in the judgment of chieftancy dispute on 3rd August 2006 has culminated in the presentation of documents as stated below." This title of the ruling is very confusing, underscoring the doubtful nature of the acts of the Judicial Committee.

The 13th November2013 ruling declared Kwesi Musu the rightful person eligible to ascend the Fijai stool. Ebusuapanyin Kofi Susu aggrieved by the decision applied to the High Court, Sekondi for Judicial review by way of certiorari to quash the decision of the Judicial Committee of the Sekondi Traditional Council. The main grounds of the application were that

1. The Jurisdiction of the Judicial Committee was wrongly evoked, the Committee therefore lacked jurisdiction to make the decision the subject matter of the application.
2. The parties were not given a hearing.

The High Court dismissed the application. Ebusuapanyin Kofi Susu appealed to the Court of Appeal. The Court of Appeal held the view that the Judicial Committee lacked the jurisdiction to suo motu initiate the determination of a matter that was not pending before it and concluded thus: "Under the circumstances and in our view there is a clear error that goes to the wrong assumption of jurisdiction which is such that it makes the decision

of the Judicial Committee a nullity and same ought to be quashed". The decision of the High Court was overturned and the ruling of the Judicial Committee dated 13th November 2013 was quashed.

The Judicial Committee of the Sekondi Traditional Council and the interested party are in this court praying that the decision of the Court of Appeal be reversed.

The appellants filed separate notices of Appeal in which they stated different grounds of appeal. The Judicial Committee of the Sekondi Traditional Council has the following as its grounds of Appeal:

a. The Court Of Appeal held wrongly that the jurisdiction of the Judicial Committee of the Respondent Council was improperly invoked.
b. The Court of Appeal further held wrongly that the matter was suo motu initiated by the Judicial Committee of the Sekondi Traditional Council.
c. There was no error apparent on the face of the record such as occasioned a miscarriage of justice to the Applicant/Appellant/Respondent, and the court below erred in quashing the decision of the Judicial Committee of the Sekondi Traditional Council.
d. The remedy of certiorari was not open to the Applicant/Appellant/Respondent in the circumstances of the suit.
e. The Court of Appeal erred in setting aside the judgment of the High Court, Sekondi
f. The judgment is against the weight of the evidence on record.
g. Additional grounds may be filed.

The Interested party on the other hand has the following grounds of appeal:

(i) The holding by the Court of Appeal, Cape Coast, that the Judicial Committee suo motu initiated the matter when none of the parties had invoked its jurisdiction on the matter was contrary to the Chieftaincy Proceedings and Functions Traditional Councils Regulations (1972) (L.I. 798) Regulation 4(I) (c)

which provided that customary law processes could be used to initiate action at the Judicial Committee and the holding of the Court of Appeal was therefore erroneously made.

(ii) The holding of the Court of Appeal that the Judicial Committee initiated and made a determination on the matter was erroneously made since it is not supported by the evidence adduced at the trial.

(iii) The decision of the Court of Appeal setting aside the decision of the High Court, Sekondi was made in error.

(iv) The decision of the Court of Appeal quashing the decision of the Judicial Committee of the Sekondi Traditional Council dated 13th November 2013 on grounds of nullity was made in error.

(v) The judgment of the Court of Appeal was against the weight of evidence

(vi) Additional grounds would be filed upon receipt of the record of Appeal.

Both parties filed no additional grounds. The grounds in both notices of appeal are similar I therefore consider it appropriate to subsume them under two main grounds the determination of which would take care of the rest.

a) The remedy of certiorari was not open to the Applicant/Appellant/Respondent in the circumstances, the Court of Appeal therefore erred in granting same.
b) The judgment of the Court of Appeal was against the weight of evidence

Arguments supporting these grounds, as I have already stated earlier, are based on exhibit EKS6, a document which was not addressed to the Judicial Committee of the Sekondi Traditional Council; moreover, it was a document written about two months before the writ exhibit EKS1 was issued and two years before the Judicial Committee gave its judgment. It therefore could not be a document that justified the reopening of the case by the Judicial Committee.

The obvious conclusion of these facts is that the Judicial Committee suo motu reopened a matter it had adjudicated on and determined seven years earlier. The Court of Appeal cannot be faulted for saying so.

I must say that the trial court was grievously misled by exhibit EKS6; for, his reasoning in the ruling dismissing the certiorari application was that, the respondent in this appeal initiated the reopening of the matter by writing exhibit EKS6. At page 7 of his judgment page 234 of the record, the reasoning of the learned trial judge goes this way: "I wonder what the applicant was purporting to do with his letter exhibit EKS6, or for whatever purpose he was inviting the committee to do with such a letter after the initial decision of the committee (exb 5) whether or not the Committee did finally and conclusively determine the matter. Indeed the applicant did not explain to the court the motive or any other justification other than to initiate or resurrect an action, and also in essence submit himself to the jurisdiction of the Committee ostensibly to have the matter either determined or conclusively determined. Besides, my view appears to be firmed that by Exhibit 6 in particular, it was the applicant who initiated the whole process after the initial decision of the Committee. He knew or ought to know that this mode is neither an oath nor writ of summons that legitimately in law founds an action before the council." (Emphasis mine)

Counsel for the respondent in his viva voce submission in reply to his opponent's submissions in the trial court made it clear that exhibit EKS6 was not addressed to the Judicial Committee but to the Standing Committee of the Traditional Council. With this and the date of the said exhibit, it was a grievous error on the part of the trial court to hold the view quoted above.

It is therefore clear from my analysis so far that the documentary evidence on record does not support the assertion that the respondent per EKS6 evoked the jurisdiction of the Judicial Committee.

As I have earlier stated, the issue determined by the Judicial Committee in its judgment exhibit EKS5 was on the customary law and procedure the parties followed in installing their respective chiefs which the Committee found to be wrong and therefore declared the nominations and installments null and void. The rights of the parties were determined; the Council became fanctus officio so far as that suit is concerned in my view. Exhibit 7 which by its contents complied with the advice given by the Committee further affirms

the end to that dispute. There is no justification for the argument by the appellants that the orders of the Committee were not complied with; the arguments justifying the acts of the Judicial Committee culminating in their ruling of 13th November 2013 in my view are made in bad faith.

Statue prescribes the mode by which actions could be commenced before the Judicial Committee of Traditional Councils**. Regulation 4 (1) of Chieftaincy Proceedings and Functions Traditional Councils Regulations 1972 (L. I. 798)** prescribes the mode thus:

"(a) by swearing a chief's oath or any oath recognized within a Traditional Council,

(b) by writ in the form set out in the second schedule to these Regulations to which the plaintiff shall append his signature or affix his thumb print;

(c) by any other means recognized by customary law of a particular locality."

Regulation 4 (1) (c) no doubt makes room for a flexible mode of evoking the jurisdiction of the Judicial Committee. However, could the step the Sekondi Traditional Council took, that is, writing to the parties to submit documents to reopen a matter they had already dealt with seven years earlier be described as 'recognized customary law practice' in that locality? Obviously no. The Judicial Committee is a lower adjudicating authority whose jurisdiction is prescribed by law. In all cases, therefore the Committee is expected to operate within the prescribed law. The Committee could not lawfully arrogate jurisdiction to itself in the way it did in this particular case. Article 141 of the 1992 Constitution gives the High Court supervisory jurisdiction over lower Courts and adjudicating authorities. It is the respondent herein's quest for the High Court, Sekondi to exercise its supervisory jurisdiction over the Judicial Committee of the Sekondi Traditional Council, by way of certiorari to quash the Committee's decision of 13th November 2013 that had culminated in the appeal before this court.

Considering the grounds of Appeal the essential issues for our determination are:

a) Whether in the circumstances the appropriate remedy open to the respondent was certiorari and

b) Whether the facts on record sufficiently support the decision of the Court of Appeal to quash the 13 November 2013 ruling of the Judicial Committee of the Sekondi Traditional Council.

The submissions of the appellants before us in support of their grounds of appeal, as I have stated earlier are based on facts that are misleading. These facts are:

1. The Judicial Committee made orders in its 3 August 2006 judgment that needed to be executed (The record per Exhibit 7 demonstrates that the purported orders were executed, there is no other evidence showing the contrary)
2. The suit originated by the writ of summons exhibit EKS1 was still pending before the Judicial Committee, the respondent resurrected same per exhibit EKS6. (I have amply demonstrated above that this is not true, exhibit EKS6 was not even addressed to the Judicial Committee and it was written before the writ was issued.

In my view, the facts on record establish that:

a) The Judicial Committee in its judgment dated 3 August 2006 disposed of the suit instituted by the respondents and became functus officio.

b) The letters written by the Committee 7 years after, summoning the parties to appear before it and submit documents to determine who should ascend the Fijai Stool was an act suo motu instituting an action; an act that contravenes **Regulation 4 (1) of Chieftaincy Proceedings and Functions Traditional Councils Regulations 1972 (L. I. 798)**

c) The decision by the Committee dated 13 November 2013 was given without jurisdiction.

This court in very many decisions had stated the circumstances where the remedy of certiorari becomes available to a party. The issues in this case before us arose out of the High Court Sekondi exercising its supervisory jurisdiction over a lower adjudicating authority. I therefore intend to limit my consideration of the issues within that scope ie the High Court's supervisory jurisdiction over inferior courts and tribunals.

The High Court derives its supervisory power from ***Article 141 of the 1992 Constitution*** which reads: "***The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority; and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers***"

Section 16 of the Courts Act, 1993 Act 459 which provides for the supervisory jurisdiction of the High Court, repeats the above provision of the constitution and numerates the Orders available to the High Court in the exercise of its supervisory jurisdiction. It reads: ***"The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority; and may, in the exercise of that jurisdiction, issue orders and directions including orders in the nature of habeas corpus, certiorari, mandamus-prohibition and quo warranto for the purpose of enforcing or securing the enforcement of its supervisory powers."***

In the case of Republic v High Court, Accra, Ex-Parte Industrialization Fund for Development Countries & Another [2003-2004] 1 SCGLR 348 at 358-359 this court per Dr. Twum JSC emphasized the purpose of the supervisory jurisdiction of the High Court over inferior courts and tribunals and distinguished same from the purpose of the supervisory jurisdiction of the Supreme Court over superior courts. The Supreme Court expressed its view in the following words: ***"...with inferior courts or tribunals, the superior courts took the view that Parliament had only conferred the decision-making power on the inferior courts on the basis that it was to be exercised on correct legal basis. Misdirection in law, in making the decision, therefore, rendered the decision ultra vires. In order words, if a tribunal whose***

jurisdiction was limited by statute or surbodinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination' not being a determination within the meaning of the empowering legislation, was accordingly a nullity. <u>This policy of keeping all inferior courts, tribunals and other adjudicating authorities within their legal bounds was a concern of the state for the sake of orderly administration of justice."</u> (Emphasis mine)

I very much align myself with this view and must say that the facts leading to the impugned ruling of the Judicial Committee of the Sekondi Traditional Council, as I have outlined above is a clear demonstration of the Committee's disrespect for fair and orderly administration of justice. There is no doubt from the facts on record that the Committee acted without jurisdiction. The appropriate remedy available to the respondent is an order of certiorari to quash the 13 November ruling of the Committee. The Court of Appeal committed no error in quashing the said ruling.

This appeal in my view has no merit and ought to be dismissed.

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

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

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

DISSENTING OPINION

PWAMANG, JSC:-

I read in draft the opinion of the majority to be delivered by our noble and respected sister Dordzie, JSC. While commending her for a well researched decision, I am unable to agree with the views expressed therein so I herewith set out my opinion of the case. My Lords, at the root of this appeal is the issue whether failure to strictly comply with the manner for commencing proceedings under the procedure rules of the Traditional Councils established under the Chieftaincy Act automatically renders the proceedings of a Judicial Committee void even though the Committee otherwise has jurisdiction over the cause or matter. A second and equally important issue that arises from the reasons for the ruling of the High Court is, on what grounds ought an appeal against the exercise of judicial discretion by a lower court to succeed?

There is no controversy whatsoever regarding the background facts in this case. The applicant/appellant/respondent (the applicant) and the interested party/respondent/appellant (the interested party) are heads of family representing two factions both claiming to be the true Mbraye line of the Kokodo Ebiradzie Stool Family of Fijai in the Sekondi Traditional Area. They are disputing over who has the right to nominate an occupant to ascend the Fijai Stool, a Divisional Stool, which has been vacant since 2004. When the Stool fell vacant, the interested party selected one Amo and enstooled him as the chief of Fijai but the applicant and his branch of the family disagreed. They accordingly also selected one Alfred Kwofie who they confined to be enstooled as the rightful chief of Fijai. It appears the interested party made preparations to outdoor their chief so the applicant's family filed a case in the Judicial Committee of the Sekondi Traditional Council and prayed for declaration that the selection of Amo by the interested party as chief of Fijai was contrary to custom and for an injunction against his outdooring. They also prayed for a declaration that Alfred Kwofie was validly nominated, selected and confined as the chief of Fijai. After a trial at which both sides were heard the Committee, on 3rd August, 2006 rendered a decision in the matter in the following terms;

"Considering the nature of the case brought before the judicial committee of Sekondi Traditional Council and how the nominations, confinements and installations took place by the plaintiffs and the defendants at Fijai, the committee is of the opinion that the claim of the plaintiffs ought to be dismissed and it is hereby dismissed accordingly and at the same time declare both installations by plaintiffs and defendant null and void and have no custom and legal effect." The committee accordingly restrained both nominated candidates from acting as chief of Fijai.

The committee then proceeded to make what it described as an order to the effect that both factions were to unite and appoint an overall head of family who together with the queen mother would initiate processes for the selection of one person to occupy the Fijai Stool. What is clear from the above is that the Judicial Committee did not decide the dispute one way or the other and the call for unity in appointing an overall head of family could only be an advice and not an order with any binding effect.

The factions were not able to put aside their differences and appoint an overall head of family so there was no agreement on the one person who shall occupy the stool. It was in that state of affairs that the applicant wrote a letter dated December 28, 2006 to the Registrar, Sekondi Traditional Council claiming that their choice of Alfred Justice Kwofie had been endorsed by majority branches of the Kokodo Royal Ebiradzie Stool Family so his name should be entered in the register of chiefs for the Traditional Council and that the appropriate customary rites would follow. It is apparent from the record before us that the name of the said Alfred Justice Kwofie was not entered in the Register of Chiefs for the Sekondi Traditional Council and the dispute remained unresolved for a long time. Then by a letter dated 18th February, 2011 the interested party wrote to the Acting President of the Sekondi Traditional Council asking him to allow their newly installed chief to swear the oath of allegiance before the Traditional Council. Following this letter the Registrar of the Sekondi Traditional Council wrote on 7th August, 2013 to the parties herein to say that the Acting President directed him to request them to appear before the Judicial Committee of the Traditional Council on 16th August, 2013 and 2nd October, 2013

at 10.00am in Ahenfie Hall of the Council with all documents which will support their respective claims to the Stool.

Both parties responded accordingly and appeared before the Judicial Committee with documents which were received by the Committee for study and on the adjourned date of sitting the Committee listened to the testimonies of both parties. The interested parties contended that the applicants do not belong to the Fijai Branch of the Kokodo Ebiradzie Family and produced documents that showed that they belong to Kokodo Abantwewa Abradzie Family of Ngyiresia under Essikado Paramouncy so they are not from the right lineage to ascend the family stool under the Sekondi Paramouncy. Furthermore, the interested party led evidence that they were in possession of the black stool of the family and were those entitled to nominate an occupant for the stool. In a written judgment dated 13th November, 2013 the Judicial Committee stated reasons for preferring the evidence of the interested party over that of the applicant and gave judgment in favour of the interested party and granted their prayer for their chief to swear the oath of allegiance.

It is this judgment of the Judicial Committee that the applicant prayed the High Court, Sekondi to quash by certiorari arguing that at the time the parties were summoned to appear before the Judicial Committee for the hearing of the chieftaincy matter concerning the rightful branch of the family to nominate an occupant for the Fijai Stool, there was no case filed before the Committee. He submitted that the jurisdiction of the Judicial Committee was not properly invoked. In his affidavit in opposition the interested party contended that the letters written by the two parties following the failure of efforts to unite and select an overall head of family after the first case were the basis upon which the Judicial Committee summoned them in accordance with custom for a hearing on the merits. He argued that under **Reg 4(1)(c) of the Chieftaincy (Proceedings and Functions)(Traditional Councils) Regulations, 1972 (L.I.798),** any procedure for commencement of proceedings known to customary law could be adopted in the Judicial Committee of the Traditional Council. The High Court judge dismissed the application reasoning that the jurisdiction of the Judicial Committee was properly invoked and that

in any event, certiorari was a discretionary remedy and in the circumstances of this case he would exercise his discretion and refuse the order prayed for. On appeal, the Court of Appeal unanimously set aside the decision of the High Court and granted an order of certiorari quashing the decision of the Judicial Committee holding that the Committee lacked jurisdiction in the case. The Sekondi Traditional Council and the interested party have appealed from the decision of the Court of Appeal to this court.

The Court of Appeal appear to base their holding that the Judicial Committee lacked jurisdiction on the following finding at paragraph 23 of their judgment; "We have scrutinized the record of appeal and do not find that on 7th August 2013 when the Sekondi Traditional Council per Exhibit 'EKS8' informed the parties "to appear and present relevant documents which will permit you to ascend to the stool of Fijai" there was any matter with such **a claim or relief filed by any of the parties pending before it.**" (emphasis supplied). But before the High Court the interested party had argued that the letters written to the Traditional Council by the parties were sufficient to invoke the jurisdiction of the committee under Reg 4(1)(c) of L.I. 798 which the High Court judge agreed with. The Court of Appeal appear to have been fixated with the **filing** of a formal writ of summons so they did not give any consideration to construing the rule and the argument of the interested party on the diverse modes for commencing proceedings in the Traditional Councils.

It is provided under **Regulation 4(1) of L.I.798** as follows;

(1) An action may be commenced in a Traditional Council in one of the following manner;

(a) By swearing a Chief's oath or any other recognized within the area of authority of a Traditional Council;

(b) By writ in the Form set out in the Second Schedule to these Regulations to which the plaintiff shall append his signature or affix his thumbprint.

(c) By any other means recognized by the customary law of a particular locality.

In my view, the real issue on the facts of this case is whether indeed the Regulation was not complied with at all, and even if it was not strictly complied with, then what is the legal consequences of such non-compliance? Is such non-compliance an irregularity or it vitiated the proceedings and rendered them ipso facto void?

L.I.798 unlike the **High Court (Civil Procedure) Rules, 2004 (C.I.47)** does not contain a provision on the effect of non-compliance with its provisions. Order 81 of C.I.47 states as follows;

"EFFECT OF NON COMPLIANCE WITH RULES

Non-compliance with Rules not to render proceedings void

1. **(1) Where, *in beginning or purporting to begin any proceedings* or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it." (emphasis supplied).**

Thus, under the High Court rules, where there is non-compliance with the rules as to the manner to begin proceedings, the non-compliance does not automatically make the proceedings void. The court has discretion to waive the non-compliance and save the proceedings. Secondly, a party who fails to object to breach of a rule of procedure but takes steps in the proceedings after having notice of such breach is deemed to waive the breach and cannot complain about the breach afterwards.

As a general principle of law, where a statute provides that processes are to be complied with in the exercise of a power without stating the legal consequence of

non-compliance with the processes, a court confronted with the question of the consequences of non-compliance is required to construe the statute as a whole and decide whether the law maker intended such non-compliance to invalidate the exercise of the power. See **R v Sonje and another [2005] 4 All ER 321. HL.**

To properly construe L.I.798 and determine the intention of the rule maker, we have to read Reg 4(1) within the context of the whole instrument, taking into account the words used by the rule maker. At this point it is instructive to compare Reg 4(1) of L.I.798 with Oder 2 Rule 2 of C.I.47 on commencement of proceedings in the High Court. It states as follows;

"Commencement of proceedings

2. Subject to any existing enactment to the contrary all civil proceedings *shall* be commenced by the filing of a writ of summons." (emphasis supplied).

When the language of Reg 4(1) of L.I.798 is compared with that of Or 2 Rule 2 of C.I.47 it is seen that whereas that of C.I.47 is rendered in mandatory words, that of L.I.798 is in permissive terms. In my opinion, the language of Reg 4(1)(c) is so loose that the apparent intention of the rule maker was to make the manner of commencement of proceedings in the Judicial Committee very flexible. The swearing of an oath to commence proceedings and the open ended mode in Reg 4(1)(c) do not involve any filing of a process yet the Court of Appeal was looking for a filed process. In any case, the letters of the parties petitioning the Traditional Council are in the record and they both sought reliefs from the Council. To give Reg 4(1) a rigid legalistic interpretation will in my opinion defeat the clear intention of the rule maker. In the case of **Pomaa v Fosuhene [1987-88] 1 GLR 244** the Supreme Court per Francois, JSC observed as follows at page 262 of the Report;

"Members of judicial committees of traditional councils have been urged on several occasions by this court to curb their enthusiasm to don a legalistic garb that is ill-fitting and turn their genius to deciding on customary and constitutional matters: see

Kyereh v. Kangah [1978] 1 G.L.R. 83, C.A., and Nyamekye v. Tawiah [1979] G.L.R. 265 at 269, C.A. I add my voice. I think it cannot be over-emphasised that if our revered chiefs would resist the temptation of traipsing the maze of legal rules and procedures and restrict themselves to the sphere where they tower above everyone else, they would be providing greater service to Ghana and advancing the customary law."

Then in **Darko V Amoah [1989-90] 2 GLR 214** Francois, JSC again in a case concerning the mode of commencement of proceedings in chieftaincy tribunals, said as follows at page 220;

"Where succession to a stool is at stake, I think the fullest consideration must be given to the merits. A tribunal must resist attempts to shunt off issues of substance, in gambits aimed purely at avoiding the real matters in controversy. A court can only be party to such manoeuvres if the law demands strict compliance."

Consequently, since even non-compliance with rules of the High Court on the commencement of proceedings stated in mandatory language would not automatically make the proceedings void, I wonder how a court can construe Reg 4(1) of L.I. 798 to mean that failure to initiate proceeding by filing a formal writ of summons, swearing an oath or adopting a specific pre-approved customary mode as rendering the proceedings void. It must be remembered that the Judicial Committees of the Traditional Councils are the lowest tier of chieftaincy tribunals and operate in less rigid settings. Secondly, the applicant having participated actively in the hearing is deemed to have waived any perceived breach of Reg 4(1) of L.I.798 and cannot be heard to now complain.

On the facts of this case, the substance and import of the letters that were written by the parties, which letters contained clear reliefs prayed for from the Traditional Council, were sufficient, in my view, to initiate the proceedings that sought to resolve the issue of who is the rightful person to nominate an occupant of the vacant Fijai Stool, which issue was pending before the Traditional Council undecided. The

summons from the Registrar to the parties stated clearly the nature of the dispute so the applicant was not prejudiced in the hearing of the case in any way. If the first decision of the Judicial Committee dated 3rd August, 2006 had decided the issue in controversy between the parties, then it might have been possible to talk of estoppel per res judicata but the first judgment did not decide anything. In the administration of justice, substance has to prevail over form unless such an approach would result in an unjust outcome.

In his statement of case in this court, the applicant placed reliance on the following statement quoted by the Court of Appeal from the case of **Republic v Nii Adama Thompson & 10 Ors [2014] 73 GMJ 1 at 45;**

"…let us state that parties and/or their lawyers cannot consent or by acquiescence confer jurisdiction upon a court where the court otherwise does not have such jurisdiction. See; Quist vrs Kwarteng and Others [1961] GLR 605. And any agreement to confer jurisdiction on a court must equally be authorized by legislation." Another passage quoted by the Court of Appeal is from **Republic vrs Court of Appeal; Ex parte Bediako IV [1994-95] GBR 566** as follows; *"Lack of jurisdiction might arise from lack of authority to enter into the inquiry or some part of it from or from conditions precedent to the exercise of jurisdiction."*

These statements are not applicable in this case. The reference to jurisdiction in those passages is to substantive subject matter jurisdiction over the dispute which the Judicial Committee has in this case. By the provisions of the **Section 29 of the Chieftaincy Act, 2008 (Act 759)** jurisdiction to determine a cause or matter affecting a Divisional Stool is conferred on the Judicial Committee of the Traditional Council. The issue in this case is about the procedure for invoking this jurisdiction which has to be resolved by construing the procedure rules in L.I.798. The type of want of jurisdiction that is a ground for certiorari is not present in this case so the reference by the Court of Appeal to **Ex parte Tsatsu Tsikata [[2005-2006] SCGLR 612** is misplaced.

Further to the above, it is a trite statement of law that certiorari is a discretionary remedy and even if the legal grounds for its grant are satisfied, it may nevertheless be refused by a court where there has been no miscarriage of justice or no useful purpose will be served by its grant or for reason of some inequitable conduct by the applicant. See **Republic v High Court, Accra; Ex Parte Tetteh Apain [2007-2008] SCGLR 72.** The High Court judge held that even if the Judicial Committee was bereft of jurisdiction he would refuse the prayer of the applicant because he was not acting in good faith having actively participated in the hearing without complaining. Would the applicant have complained if the decision went in his favour? He should therefore be deemed to have waive any objection and a court of equity ought not to exercise a discretion in his favour. In exercising his discretion to refuse the application, the trial judge relied on the principle of certiorari being discretionary applied in the Supreme Court in a plethora of cases.

Considering the discretionary nature of the jurisdiction that was exercised by the High Court, the approach of the Court of Appeal to the case ought to have been to determine whether the discretion of the trial judge was exercised on the right legal principles or not. But in their judgment the Court of Appeal approached the case as if they were called upon to exercise a fresh discretion in the matter and that is not lawful. In the case of **Ballmoos v Mensah [1984-86] 1 GLR 724** Holding (1) of the Headnote it the law is stated as follows;

"1) the Court of Appeal would not interfere with the exercise of the trial court's discretion save in exceptional circumstances. An appeal against the exercise of the court's discretion might succeed on the ground that the discretion was exercised on wrong or inadequate materials if it could be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account; but the appeal was not from the discretion of the court to the discretion of the appellate tribunal. Crentsil v Crentsil [1962] 2 GLR 171 at 175, SC and Blunt v Blunt [1943] AC 517 at 518, HL cited."

Unfortunately, the Court of Appeal in this case failed to consider the discretionary nature of the relief of certiorari and consequently did not discuss that ground for the decision of the high Court judge. The High Court judge exercised his discretion on correct principles of law and based on relevant legal grounds so there was no justification to reverse him.

The manner in which the jurisdiction of the Judicial Committee was invoked in this case did not occasion a miscarriage of justice against the applicant therefore the decision ought not to have been quashed. The applicant had earlier sought substantive reliefs from the committee for a declaration that his nominee was the rightful person to mount the stool and lost. In the second proceedings which led to the certiorari application he lost again on the merits because the Committee accepted the case of the interested party that the applicant does not hail from the Fijai branch of the family. **Article 277 of the Constitution of Ghana, 1992** defines a chief as;

" a person, who, hailing from the *appropriate* family *and lineage*, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage." (emphasis supplied).

So if one does not hail from the appropriate lineage even if he hails from the right family one does not qualify to become a chief. The case on the merits against the applicant's branch is that they do not hail from the appropriate lineage to mount the Fijai Stool under Sekondi as their roots are at Essikado. If the applicant felt aggrieved by this formidable finding of fact against him he was not without remedy since he could appeal against the decision on the merits to the Regional House of Chiefs. This recourse to technicism without alleging and proving any miscarriage of justice suffered by him from the proceedings ought not to be endorsed by the court.

For the above reasons I allow the appeal against the decision of the Court of Appeal dated 29th May, 2019 and set aside same. The ruling of the High Court dated 19th May, 2014 is hereby restored.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I have had the privilege of reading the two opposing views of my respected brother and sister Pwamang, JSC and Dordzie, JSC respectively, which are all brilliant by all standards.

Unfortunately, however, l do not agree with the position of my sister Dordzie, JSC. I therefore concur with my brother Pwamang, JSC that the appeal be allowed on the strength of the reasons advanced in his judgment. I have nothing more to add.

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

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