IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: **GBADEBGE, JSC (PRESIDING)**

AKOTO - BAMFO, JSC

BENIN, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL MOTION

NO: J5/17/2016

28TH JULY 2016

THE REPUBLIC	**---**	**PLAINTIFF**
VS		
HIGH COURT, (GENERAL JURISDICTION) ACCRA EX-PARTE: RICHARD KWABENA FRIMPONG – DARBO & ANOR	**---**	**DEFENDANT**

RULING

GBADEGBE JSC:

The simple question for our decision turning on the application before us for judicial review in the nature of certiorari is whether the learned trial judge of the

High Court acted within jurisdiction when he made an order on February 08, 2016 that the applicant (a defendant to the action before the trial High Court) to give bail for his appearance in a civil action by virtue of Order 73 of the High Court (Civil Procedure Rules), CI 16. From the impugned order , which appears at page 1 of what is loosely described as Exhibit "A" series, the learned trial judge did not as required by the rules afford the applicant, the opportunity of showing cause why he should not provide good and sufficient cause for his appearance in the action. The obligation imposed on the learned trial judge is expressed in the following words of Order 73 rule1 sub-rule (2) and rule (2) thus:

1. *(2)." Where the court is satisfied that the provisions in paragraph (a) or (b) of sub-rule (1) have been substantiated and that the execution of any judgment in the action against the defendant is likely to be obstructed or delayed, it may issue a warrant to bring the defendant before the Court to show cause why the defendant should not give good and sufficient bail for the defendant's appearance.*

2. *Where the defendant fails to show cause, the Court shall order the defendant to give bail for the defendant's appearance at any time while the action is pending and the execution or satisfaction of any judgment that may be given against the defendant in the action, and the surety shall undertake to pay any money that may be adjudged to be paid by the defendant in the action, in default of the appearance of the defendant."*

We venture to say without any hesitation that the order for bail arises only when following his appearance before the court under a warrant issued under order 73 rule (1) sub-rule (2), he is unable to show cause as provided for in rule 2 of the

Order. The order for bail so made upon his failure to satisfy the court in regard to his appearance while the action is pending may be likened to bail in criminal cases. The purpose of the bail granted to the defendant is to ensure that he appears not only at the trial but as some form of security that any judgment obtained against him in the action may be satisfied. It seems therefore that the failure of the defendant to satisfy the court that he would appear at the trial and also satisfy any judgment that might be rendered against him in the action is an essential pre-requisite to the making of the order by a court for bail to a defendant in a civil matter.

The order for bail which is authorised under rule (2) of Order 73 is not to be made lightly but upon proof that indeed, the defendant against whom an absconding warrant was made ex parte is not able to show satisfactorily to the court that he will appear for the trial and also satisfy any judgment that may be entered against him. The defendant's obligation to show cause may be satisfied by proof either that he has valuable property situate within the jurisdiction to enable him pay off any judgment that may be entered against him in the action or by means of the deposit of money. A defendant who satisfies the court in relation to either of these instances cannot properly speaking be ordered by the court to give bail for his appearance. The order requiring an absconding defendant to provide bail for his appearance from the very plain language of rule (3) of Order 73 is contingent upon the failure of the defendant to satisfy the court that he has funds or property within the jurisdiction that are sufficient to secure his appearance in the execution and to satisfy the execution of any judgment that may be obtained against him in the action.

Examining the proceedings before the court on February 08, 2016, we make the unhappy observation that the learned trial judge did not ensure that that the condition precedent to the order that the defendant provide bail existed before he directed him to give bail for his appearance. We think that the effect of the order made by the learned trial judge fundamentally sinned against the strict requirements of the rules by which a defendant who absconds may be ordered to give bail for his appearance as the learned trial judge's conduct may be likened to making an order in the absence of a condition precedent; an attribute which deprives the order so made of jurisdictional competence.

In our view, the learned trial judge without first requiring the absconding defendant to explain why he should not be made to give bail in the action to guarantee his appearance in the action and also in respect of any judgment that might be recovered against him, acted in excess of jurisdiction. The failure firstly of the learned trial judge to afford the applicant the opportunity to show cause before the order that he gives bail for his appearance apart from being procedurally flawed also shows from the impugned proceedings a clear denial of the applicant's right to be heard before he was condemned to give bail. This position is in accord with the decision of this court in the case of The Republic v The High Court, Koforidua, Ex parte Osae-Akonnor [2009] SCGLR 753. In the course of the judgment in the said case, Owusu JSC (as she then was) observed at page 584 as follows:

> *"In violation of the rules, the applicant was denied the opportunity to be heard. It was only where the defendant had failed to show cause that the court should order him to give bail for his appearance….. In view of the court's failure to call upon the defendant to show because*

why he should not be made to give bail, the grant of bail was unwarranted and same ought to be quashed."

In our opinion, the circumstances with which we are concerned in these proceedings are no different from that which fell to be considered in the case referred to in the preceding paragraph, a decision that is binding on us and renders the order of 08 February 2016, as appears from page 1 of exhibit "A" amenable to judicial review in the nature of certiorari having been made without jurisdiction. Accordingly, the impugned proceedings are brought up before us for the purpose of being quashed by the writ of certiorari and the same are hereby quashed.

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO-BAMFO (MRS.)
JUSTICE OF THE SUPREME COURT

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

(SGD) Y. APPAU
JUSTICE OF THE SUPREME COURT

(SGD) G. PWAMANG
JUSTICE OF THE SUPREME COURT

COUNSEL:

KWEKU PAINTSTIL FOR THE APPLICANT.

NO APPEARANCE FOR THE INTERESTED PARTY.