XIN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

CIVIL MOTION

NO. J5/7/2017

CORAM: ADINYIRA (MRS) JSC (PRESIDING)
ANIN YEBOAH JSC
BAFFOE- BONNIE JSC
AKOTO-BAMFO (MRS) JSC
BENIN JSC
APPAU JSC
PWAMANG JSC

THE REPUBLIC

VRS

HIGH COURT, (COMMERCIAL DIVISION) - RESPONDENTS
ACCRA,

EX-PARTE ELECTORAL COMMISSION - APPLICANT

PAPA KWESI NDUOM - INTERESTED PARTY

RULING

SOPHIA ADINYIRA (MRS.) JSC (PRESIDING):

The application before this Court invokes the supervisory jurisdiction of the Court against the High Court (Commercial Division), Accra praying this Court for an order of certiorari to bring up into this Court for purposes of being quashed the ruling of His Lordship Justice Eric Kyei Baffour dated the 28th day of October, 2016 upon the facts deposed to in the accompanying affidavit.

The grounds for the application are as follows:

i. Error of law on the face of the record.
ii. Wrongful assumption of jurisdiction by the High Court (Commercial Division), Accra.
iii. Excess of jurisdiction.

The brief facts of the case are as follows:

The Applicant is the Electoral Commission constitutionally mandated to organize presidential and parliamentary elections including receiving nominations of candidates. Apart from the Constitution 1992, there are other pieces of legislation such as the Representation of the Peoples Act (PNDCL284) and the Public Elections Regulations, 2016 (C.I 94), which set up the legal regulatory framework for the conduct of general elections in Ghana.

The Interested Party is the Presidential Candidate for the Progressive Peoples Party (PPP) for the 2016 elections.

For the 2016 presidential and parliamentary elections, the Applicant opened nominations on 13th September 2016 and invited candidates to go for nomination forms. At an IPAC meeting held on the 8th day of September 2016, the Applicant announced to the various Political Parties that the **nomination days** shall be the 29th and 30th of September 2016, when all nomination papers would be received by returning officers for both the presidential and parliamentary candidates throughout Ghana. The dates were confirmed in a Press Release issued by the Chairperson of the Applicant. Meanwhile, the Public Elections Regulations, 2016 C.I 94, regulation 9(1)-(3) imposed a duty on the Applicant, to ensure that Returning Officers having received the forms and found any anomalies to give the candidates opportunity to either amend or alter the anomaly within the stipulated nomination period as stated in regulation 9(2) of C I 94.

In the case of the Interested Party, his nomination form was sent by the Chairman of the PPP to the Chairperson of the Applicant and was told that he would hear from the Applicant Commission.

On the 10th day of October 2016, when the Applicant n announced that certain presidential candidates including the Interested Party herein had been disqualified for several reasons.

It is the case of the Interested Party that the Applicant breached their own regulations 9(2)-(4) when they failed to give him and other disqualified candidates the opportunity to amend or alter whatever was found not to be proper with their forms, a conduct the Interested Party considered to be a

breach of the rules of natural justice. And therefore for the two grounds of error of law apparent on the face of the record as well as for the breach of the rules of natural justice, the Interested Party applied to the High Court for judicial review by way of Certiorari and Prohibition.

On the 28th day of October 2016, the High Court presided over by his Lordship Mr. Justice Eric Kyei Baffour granted the said application in part, namely, breach of the rules of natural justice *audi alteram partem* and quashed the decision and made a further order directed against the Applicant and its Chairperson to afford opportunity to the Interested Party to make the necessary alteration or amendments to its nomination paper for it to receive same and then proceed to determine whether the Interested Party had met all the criteria laid down by the laws of the Republic in line with his duty laid down by C.I. 94.

Being dissatisfied with the ruling of the High Court, the Applicant has applied to the court for an order of certiorari to quash the said ruling.

Submissions by parties

Error on the Face of the record

Counsel for Applicant submits that the Trial Judge's holding that the Applicant failed to afford opportunity to the Interested Party within the nomination period because it did not have such a period cannot be correct in the light of Interested Party's averment in paragraph 8 of his affidavit in support (filed before the High Court on 14 October 2016) and exhibited

and attached to her affidavit in support and marked ''CO1" by the Applicant as that "the E C opened nominations between the period of 8th and 30th September 2016." Counsel submits further that in view of the said averment, the nomination period was not in issue because it had fixed a nomination period so the Judge relied on facts which have not been recorded as evidence and this led him to come to the conclusion that the Applicant breached the rules of natural justice because it equally failed to set the nomination period. Counsel concludes that:

> "Our submission is that having regard to the overwhelming evidence and which the parties are ad idem on regarding the fact that Applicant had fixed the nomination period and which was well known by the interested party, the High Court committed an error of law clearly on the face of the record when it held that Applicant did not fix a nomination period"

Counsel then proceeded to cite authorities such as **Ababio II v. Akro & Co [1963] 1GLR 195; Barko v Mustapha [1964] GLR 78, Rep. v High Court, Kumasi: Ex-parte Bank of Ghana (Sefa & Asiedu – Interested Parties) (No. 1.) , Rep. v High Court, Kumasi: Ex-parte Bank of Ghana & Ors (Gyamfi & Others – Interested Parties) [2013-14] 1SCGLR 477; Rep. v. Court of Appeal Ex parte Tsatsu Tsikata [2005-2006] SCGLR 612, Rep. v. High Court Ex-parte Industrialization Fund for Developing Countries & Anor [2003 - 2004] SCGLR 348, Rep v. Michael Konduah Ex-parte George Supi Asmah (Unreported Judgment) of the Supreme Court in Civil Appeal No.J4/28/2012 dated 15th August 2013, Rep. v High Court**

(Commercial Division), Accra Ex-parte – The Trust Bank Ltd (Ampoma Photolab Ltd & 3 Ors – Interested Parties) [2009] SCGLR 164 in support of his position.

Counsel for the Interested Parties responds that in view of the duty cast on the EC to afford candidates the opportunity to effect amendments or alterations within the stipulated nomination period that duty cannot be performed if the EC fails to set a clear nomination period, within which period there can be nomination day or days.

Consideration of the issue whether there was error on the face of the record

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 against the decision 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. In the case of **Republic v Court of Appeal, ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612** this Court held thus:

> "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 errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity."

In the **ex-parte Tsatsu Tsikata** case Wood JSC (as she then was) explained further that:

> "...It stands to reason then that the error(s) of law as alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. A minor, trifling, inconsequential or unimportant error which does not go to the core or root of the decision complained of; or, stated differently, *on which the decision does not turn would not attract the courts supervisory jurisdiction*"

We agree with Counsel for the Applicant that by the averments made by the Interested Party in his affidavit in opposition, (which he now claims before us that it was made out of a mistake); the nomination period was fixed from 8th September to 30 September 2016. Even if the judge erred by his findings that the Applicant did not set a nomination period, in view of the averments, we do not think the error goes to the core or root of the decision complained of; as the decision did not turn on the nomination period; it rather turned on the failure by the Applicant to afford the Interested Party the right to be heard before being disqualified.

Counsel for the Applicant submitted that the nomination period played a crucial role in so far as the ruling of the court was concerned, as any anomaly that the [Applicant] detected on the Interested Party's nomination paper was to be corrected within the nomination period. We do not see any error of law in that finding as it is reasonable to expect or contemplate that the nomination period would extend beyond the nomination day(s) in order for the Applicant to assess the nomination forms and to offer opportunity to the candidate to make any amendment or alteration

necessary to his nomination forms within the nomination period, as prescribed in rule 9 (2) of C.I. 94

Indeed we find no error on the face of the record in so far as the decision quashing the disqualification of the interested party was made as a result of the finding by the learned judge of a breach of the rules of natural justice.

The application based on this ground fails.

Wrongful assumption of jurisdiction by the High Court

The second ground for the application as couched by the Applicant is that the High Court (Commercial Division) Accra wrongfully assumed jurisdiction.

We will not spend much time on this ground as the Interested Party invoked the supervisory jurisdiction of the court by way of judicial review of a procedural impropriety and was not challenging the grounds of his disqualification which by virtue of rule 9.5 of C.I. 94 ought to be by an election petition and to be commenced after the election.

This ground for the application is dismissed.

Excess of Jurisdiction

The last ground for this application is Excess of Jurisdiction.

The High Court after quashing the decision of the Applicant disqualifying the interested party as a candidate made the following consequential orders:

> "[And] order that the [Applicant] afford opportunity to the [Interested Party] to make the necessary alteration or amendment to its nomination paper for it to receive same and then proceed to determine whether the [Interested Party] had met all the criteria laid down by the laws of the Republic, in line with its duties laid down by C.I. 94. EC has no basis to complain that nomination period has closed when they did not set one. They only set nomination date under regulation 7 but not nomination period under regulation 9(2) as I have already found. The time frame to afford the [Interested Party] is entirely within the discretion of the [Applicant] being mindful of the limited available time for the election of December 7, 2016."

Submission by Parties

The Applicant complains that the consequential orders made by the High Court effectively extended the nomination period for the Interested Party which has very serious consequences for the electoral calendar.

For purposes of clarity; we will set out the relevant portions of paragraphs 21, 22, and 23 of the Applicant's affidavit in support of her application.

> 21. That accordingly I have been advised by Applicant's lawyers and verily believe same to be true that the High Court wrongly assumed jurisdiction over Applicant's case and indeed exceeded its jurisdiction when it ordered that Applicant allow the interested party to make amendments to his nomination paper regardless of the nature of the non-compliance, the High Court unlike this Court having no powers under article 2 of the 1992 constitution.

22. That Applicant's lawyers have advised me and I verily believe same to be true that the High Court exceeded its jurisdiction when it ordered Applicant to permit the interested party to make the alterations and amendments necessary to correct the duplicate subscription to his nomination paper when the nomination period had expired.

23. That Applicant's lawyers further advise me and I verily believe same to be true that the High Court also exceeded its jurisdiction when it ordered Applicant to permit the interested party make the alterations and amendments necessary to correct the double subscription to his nomination paper the reason being that the said ordered interfered with Applicant's constitutional mandate in electoral matters.

Counsel stated further in his statement of case at 4.2 that: "The High Court's decision effectively extending the period of nomination has very serious consequences for the electoral calendar. It has been held that public policy and national interest is a good reason to refuse an application for judicial review."

Consideration of the issue of whether there was excess of jurisdiction

In as much as we agree with Counsel's submission that the High Court's decision effectively extending the period of nomination has very serious consequences for the electoral calendar, we do not think it is sufficient reason to hold that the High Court has exceeded its jurisdiction.

However, since the complaint of the Interested Party was that the Applicant failed to give him a hearing before being disqualified the most appropriate consequential order in the circumstances is to order the Applicant to give the Interested Party a hearing. In that respect we can say the High Court exceeded its jurisdiction by ordering the Applicant to permit the Interested Party make the alterations and amendments necessary to correct the double subscription to his nomination paper.

We will therefore proceed to quash the consequential order and order the Applicant to give the Interested Party a hearing that he deserves.

Other Reliefs

Counsel for the Applicant in his concluding statement of case stated:

> "We accordingly pray the Court to grant whatever relief is appropriate in the present circumstances especially where there can be no doubt that the High Court committed an error apparent on the face of the record."

Counsel for the Interested Party opposed this by stating:

> "… Counsel for the Applicant appeared to be appealing to this Court to make any orders and give such directions as would ensure fairness or ensure that justice, equity and fairness prevail. I invite the Court to decline the invitation, since the conduct of the Applicant is rather not calculated to ensure fairness and equity and it is likely to rather endanger the electoral calendar. This Court must dismiss the

application and order the Applicant go ahead and comply with the orders of the High Court simpliciter."

This view held by Counsel for the Interested Party is with due respect misplaced. It is trite law that the supervisory jurisdiction of the Supreme Court under Article 132 is not limited to the issuance of conventional prerogative writs but also to issue orders and such directions as will ensure prevalence of justice, equity and fairness. **See British Airways v Attorney-General [1996-97] SCGLR 547, Republic v. High Court Accra(Fast Track Division), Ex-parte Electoral Commission (Mettle Nunoo & Others - Interested Parties) [2005-2006] SCGLR 514; Republic v. High Court Kumasi (Fast Track Division), Ex parte Bank of Ghana & Ors (Sefa &Asiedu Interested Parties) (No1); Republic v. High Court Kumasi (Fast Track Division), Ex parte Bank of Ghana & Ors (Gyamfi &Others Interested Parties) (No1) (Consolidated) [2013-2014] 1SCGLR 477 at 509 to 510.**

The Supreme Court, mindful of the importance that nominations should be concluded according to time schedule fixed by regulation 4(2)(b) of C.I. 94 and the limited time available for the Applicant to complete processes, prior to the printing of presidential ballot papers and collation sheets etc before December 7, 2016; and while taking judicial notice of the plethora of cases pending in various High Courts with similar claims, and primarily to ensure prevalence of justice, equity and fairness in the election process; we find it prudent to exercise our supervisory jurisdiction under Article 132 of the

Constitution 1992 to give directives to the Applicant on how to proceed to obey the order of the Court.

This Court hereby orders the Electoral Commission

1. The Applicant extends the nomination period from today Monday 7th November 2016 to the close of working day of Tuesday 8th November 2016.

2. The Applicant should invite the Interested Party and all the presidential candidates who were able to submit their nomination papers by the close of the nomination day on 30th September 2016 and were disqualified without a hearing and give them hearing within the extended period.

3. In appropriate cases, to afford candidates, the opportunity to comply with regulation 9 (2) of the Public Elections Regulations, 2016 (C.I.94).

4. CONSEQUENT to the above directives, we find it necessary and expedient to make a further order to stay all court proceedings pending in the various High Courts against the Applicant by some of the disqualified presidential candidates on the same issue of having been denied a hearing to enable the EC to carry out its mandate in line with these orders.

WHEREFORE we accordingly stay all such proceedings in the High Courts.

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

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
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

THADDEUS SORY WITH HIM SEAN OPOKU, SANJA ANITA MORRISON, AND REINDOLF TWUMASI ANKRAH FOR THE APPLICANT

AYIKOO OTOO WITH HIM GARY NIMAKO MARFO, FELIX OGRAH, DENNIS OFOSU APPIAH, NAA DJAMA AYIKOO OTOO AND BARBARA BROWN FOR THE INTERESTED PARTY