IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2014

SINGLE JUDGE REVIEW MOTION

No: J7/7/2014

16TH APRIL 2014

CORAM: JULIUS ANSAH (JSC) PRESIDING

JONES DOTSE (JSC)

PAUL BAFFOE-BONNIE (JSC)

BENJAMIN AMPONSAH MENSAH - PETITIONER/APPELLANT
(SUBSTITUTED BY BERNARD MENSAH AND BARBARA MENSAH) APPELLANT/APPLICANTS

VRS

MARGARET ANN MENSAH - RESPONDENT/RESPONDENT
RESPONDENT/RESPONDENT

RULING

DOTSE JSC:

It is provided in article *134 (b) of the Constitution 1992* as follows:

> *"A single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the decision of a cause or matter before the Supreme Court, except*
>
> *(b) In civil matters, any order, direction or decision made or given under this article may be varied, discharged or reversed by the Supreme Court, constituted by three Justices of the Supreme Court".*

It is also provided under *Rule 73* of the *Supreme Court Rules, 1996, C. I. 16* as follows:-

> "*An application pursuant to article 134 of the Constitution in respect of a cause or matter, civil or criminal,* ***shall be made by motion on notice and shall be served on a party who has interest in the cause or matter****."*

See also section 7 of the Courts Act, 1993 (Act 459) which is a repetition of article 134 of the Constitution 1992.

The Applicants herein are the Executors of the Will of the Estate of Benjamin Amponsah Mensah, (Deceased) the original Petitioner in the matrimonial cause that is the subject of this Ruling whilst the Respondent herein is the Respondent as well.

In this case, a single Justice of this Court on the 26th day of November 2013 granted an ex-parte application for substitution in the following terms:

> "*And in the Matter of Motion Ex-parte For Substitution of Bernard Mensah, and Barbara Mensah being the deceased petitioner's son and daughter herein, respectively for Benjamin Amponsah Mensah Petitioner/Appellant /Appellant.*
>
> *I hereby certify that an order was made as follows:-*

The application to substitute the said Benard Mensah and Barbara Mensah of London is hereby granted. Let them be substituted as executors of the Petitioner/Appellant/Appellant herein. Let the Registrar draw up the order for service on the within-named executors forthwith."

In order to understand the basis and the rationale for the said application and why it was granted, we consider it appropriate to refer to the exact words used in the motion paper and paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the affidavit in support of the said application.

"Motion ex -Parte for and on behalf of the respondent/applicant for an order substituting Bernard Mensah and Barbara Mensah being the deceased petitioner's son and daughter respectively for the petitioner herein and for such further and other orders as to this Honourable Court may deem it fit."

The respondent/applicant therein described in the process referred to is the Respondent herein.

3. *The Petitioner/Appellant/Appellant (hereinafter referred to as the "Petitioner") on 20th April 1994 commenced the petition herein against the respondent in the High Court for the dissolution of his marriage to the Applicant.*

4. *The Applicant cross-petitioned for the dissolution of the marriage and for certain ancillary reliefs.*

5. ***In the course of the proceedings the High Court ordered the Petitioner to pay the Applicant maintenance pending the determination of suit.***

6. ***The Petitioner appealed against the decision of the High Court to the Court of Appeal and applied unsuccessfully to the High Court for stay of execution of the order to pay maintenance pendente lite.***

7. *The Petitioner repeated his application for stay of execution in the Court of Appeal but it was also dismissed* ***whereupon he appealed against that order to this Court. A copy of the***

Petitioner's Notice of Appeal is annexed hereto marked as "KBI".

8. *Meanwhile following the trial the* ***High Court on 4 December 1997 dissolved the marriage and made financial and other awards in favour of the Applicant.***

9. On 15th June 2012 the Applicant's filed a preliminary objection to the Petitioner's appeal to this court.

10. The Applicant, unfortunately passed away on or about 15th March 2013 whilst his appeal to this court is still pending. I annex marked *as "KB2" his Obituary published in the Daily Graphic newspaper edition of 23rd May 2013.* (We believe the Applicant stated therein should have read, Petitioner instead)

11. ***By his will the Petitioner appointed his son Bernard Mensah*** *and his daughter Barbara Mensah as* ***the executors of his last will.***

12. ***I am advised and verily believe same to be true that, the cause of action in the pending appeal did not abate by reason of the death of the Petitioner.***

13. ***I am advised and verily believe same to be true that as personal representatives of the Petitioner, the persons referred to in paragraph 11 supra are proper and fit persons to be substituted in place of the deceased Petitioner."***

From the above, the following facts are undisputed:

i. That the application that was filed in the Supreme Court was an ex-parte application.

ii. It was filed on behalf of the Respondent herein, therein applicant.

iii. It was for the substitution of Bernard Mensah and Barbara Mensah son and daughter respectively in place of their deceased father Bernard Amponsah Mensah.

iv. The matter in respect of which the substitution was granted was a matrimonial petition in which the Applicant's father therein was the Petitioner, and the Respondent was the Respondent/Cross-Petitioner

v. During the course of the trial at the High Court, an order for maintenance pendente lite was made to which the Petitioner therein unsuccessfully applied for stay of its execution. A repeat application for stay at the Court of Appeal was also dismissed.

vi. The Petitioner appealed to this court against the Court of Appeal decision on the 8th December 1997.

vii. In the meantime, the High Court on **4th December 1997 dissolved the marriage and made certain awards in favour of the Respondent herein.**

viii. On 15th June 2012, the Respondent filed a preliminary objection to the appeal filed by the Petitioner to this Court.

ix. The Petitioner passed away on 15/3/2013 and the Applicants herein being son and daughter had been named as the Executors of the last will of the deceased Petitioner.

Following the grant of the application for substitution, the Respondent herein then followed up with another application for leave to serve the order for substitution out of the jurisdiction and this was granted on 18th day of December 2013.

This application is therefore at the instance of the Applicants herein, who are seeking to discharge the order of substitution dated 26/11/2013 pursuant to article 134 of the Constitution 1992, section 7 of the Court's Act, 1993 (Act 459) and Rule 73 of C.I. 16 already referred to supra.

By an order of this Honourable Court dated 26th November 2013 and made by a Single Justice of the Supreme Court, the Applicants herein, Executors of the Estate of Benjamin Amponsah Mensah (deceased), were substituted for the deceased Petitioner/Appellant/Appellant.

By another order dated 18th December 2013, made by the same single Judge, leave was granted the Respondent to serve out of the jurisdiction by courier service the Order of Substitution on the Applicants herein.

In view of the issues raised in the affidavit in support and opposition, we deem it quite expedient to refer in extenso to the following paragraphs in the applicants' affidavit in support- 8, 9, 10 and 12.

> *8. "That the application by Respondent's Lawyer for the Order of Substitution was improper as* ***it should have been brought on Notice under Rule 73 of the Supreme Court Rules 1996, C I 16, and not ex-parte.***
>
> ***9. That I am advised by Counsel and verily believe same to be true that causes of action in divorce matters do not survive parties to the petition to enable the Courts to substitute a deceased party by His Executor (s).***
>
> *10. That an order made or given by a single Justice of the Supreme Court exercising power vested in the Supreme Court not involving the decision of the cause or matter before the Supreme Court may be varied, discharged or reversed by this honourable court constituted by three Justices of the Supreme Court.*
>
> *12. That the subsequent order of this honourable court dated 18th December 2013 also ought to be discharged as it flows from the Order dated 26th November 2013 which Applicants pray should be discharged." Emphasis supplied.*

In similar vein let us also refer to the relevant depositions in paragraphs 4, 5, 6, 9, 13, 14, 16, 17, 18 and 19 of the affidavit of Kizito Beyuo in opposition to motion to discharge the ex-parte order as follows:

4. *"The Petitioner/Appellant/Appellant (hereinafter referred to as the "Petitioner") on 20th April 1994 commenced the petition herein against the respondent herein in the High Court for the dissolution of his marriage to the respondent.*

5. *The respondent cross-petitioned for the dissolution of the marriage and for certain ancillary reliefs.*

6. *The trial commenced on 23rd July 1997 and in the course of the proceeding the High Court ordered the petitioner to pay the* ***respondent maintenance pending the determination of the suit****.*

9. *In the meantime the trial continued and on* ***4th December 1997 the High Court dissolved the marriage and entered final judgment for the respondent. By its final judgment the High Court ordered inter alia that the petitioner settle among others the matrimonial home on the respondent.***

13. *I am advised and verily believe same to be true that since at the time of the petitioner's death,* ***final judgment had been entered against him by the High Court, the final judgment made against the petitioner did not die with him.***

14. The contention by the applicant's herein that upon the death of the petitioner the cause of action did not survive the petitioner is misconceived.

15. *The import of that contention of the applicant is that with the death of the Petitioner, all his appeals listed above became extinct* ***leaving the judgment of the High Court dated 4th December 1997 in respect of the settlement of the immovable properties and payments of monies to the respondent intact.***

16. *I am advised and verily believe same to be true that the contention by the applicant that a motion herein for the substitution of a deceased petitioner for the applicants herein ought to have been made on notice is untenable.*

17. *I am advised and verily believe same to be true that intendment of the rule in rule 73 of this court's rules* ***is that notice of an application ought to be served on the parties to the suit whose interest may be affected by the application.***

18. *At the time of the application made on behalf of the respondent herein, the other party to the proceedings that is the petitioner was deceased and it was not possible to serve him with notice for substitution.*

19. ***I am advised that in the circumstances of this case, the hearing and grant of the motion ex parte for the substitution by a single judge of this court is proper."***

We have observed from the processes filed in the court that the original petitioner appealed to this court against the decision of the Court of Appeal in December 1997.

The Notice of Appeal itself was filed on 8/12/1997. However, in order to understand the nature of the appeal, we deem it expedient to state in detail the following particulars about this particular Notice of Appeal.

"The Part of the Decision Complained of is as follows:

The decision refusing the application for staying execution pending the appeal to the Court of Appeal against the order of the High Court, Accra, presided over by Mrs. Agnes Dodzie J, made the 18th day of December 1996, whereby, pending the hearing of the Petition by the Petitioner/Appellant/Applicant/Appellant for divorce, he was to pay to the Respondent/Respondent/Respondent/Respondent interim maintenance of $100US per day till the marriage was dissolved.

Reliefs Sought From the Supreme Court are

An order staying execution of the order for payment of interim maintenance pending the hearing of the appeal to the Court of Appeal against the said order.

The Notice of Appeal was dated on the 8th day of December 1997.

The Notice of Appeal was also addressed to

The Registrar
Court of Appeal
And to
Respondent, Accra"

Even though many grounds of appeal were filed, ground I of the notice of appeal, is considered relevant for the purpose of this rendition and is reproduced below as follows:

> *"Both the Court of Appeal and the High Court misdirected themselves in failing to appreciate that as a matter of law and by the public policy behind the Matrimonial Causes Act, 1970 Act 367, upon a petition for divorce upon the ground that the marriage has broken beyond reconciliation because both parties have failed to live as husband and wife for a continuous period of five years immediately preceding the presentation of the petition, if the respondent concedes that the marriage has broken down and desires the dissolution of the marriage on that ground the Court is bound to dissolve the marriage at once unless there are compelling reasons why the dissolution of the marriage be delayed or deferred the day it appears before the court for hearing and that* ***in the absence of such compelling reasons the Court should not entertain any application for maintenance pending trial, since in that event there is no issue for the purpose of deciding whether the marriage should be dissolved or not."***

The above notice of appeal as can be gleaned from the processes referred to was against the decision of the Court of Appeal confirming the interlocutory ruling of Agnes Dordzie J, *(as she then was)* dated 18/12/1996 wherein she made an order of maintenance pendente lite of USD 100 per day pending trial. This notice was addressed to the Registrar, Court of Appeal.

However, we again observe from the processes put before us in this application, that, the Respondents Solicitors filed a Notice of Preliminary objection pursuant to Rule 17 (1) of C. I. 16.

From the processes which will be referred to in extenso, the Respondent sought to question the propriety of the Petitioner therein filing an appeal against the final High Court judgment dated 4th December 1997 in the wrong venue, i.e. the registry of the Court of Appeal.

In that respect therefore, the Respondent raised questions which cast doubts on how an appeal that appears to be non existent can give life to an appeal against the Court of Appeal's refusal to grant a stay of execution of the High Court order for payment of maintenance which grounded an appeal to the Supreme Court.

In order for the full facts to be put in proper perspective, the said Notice of Preliminary objection is reproduced in full as follows:

> ***"Benjamin Amponsah Mensah - Petitioner/Applicant***
> ***H.NO Z 27 Mankata Road***
> ***Airport Residential Area***
> ***Accra***
> ***V***
>
> ***Margaret Ann Mensah - Respondent/Respondent***
> ***Accra Respondent***
>
> ***NOTICE OF PRELIMINARY OBJECTION PURSUANT TO RULE 17 (1), SUPREME COURT RULES 1996, C.I. 16***
>
> ***TAKE NOTICE*** *that the above-named Respondent intends at the hearing of this appeal, to rely on the following preliminary objection of which notice is hereby given you, viz:*
>
> *The Petitioner/Appellant/Appellant having filed his appeal against the judgment of the High Court dated 4th December 1997 at the wrong venue, namely; at the Registry of the Court of Appeal rather than the trial High Court in contravention of Rule 8 (2) of the Court of Appeal Rules 1997 C. I. 19,*

there is no valid appeal against the trial High Court's judgment pending anywhere on the strength of which the Supreme Court's jurisdiction can be said to have been properly invoked to entertain the present appeal against the Court of Appeal's refusal to stay execution pending the said non-existent appeal or any other matter pertaining to the trial High Court's judgment dated 4th December 1997.

AND TAKE NOTICE that the grounds of the objection are as follows:

1. *The Notice of Appeal against the judgment of the trial High Court dated 4th December 1997 having been filed at the Registry of the Court of Appeal rather than at the Registry of the Court below i.e. High Court, infringes Rule 8 (2) of the Court of Appeal Rules 1997 C. I. 19 and thereby renders the said appeal void.*

2. *No useful purpose can be served by the Supreme Court entertaining an appeal against the refusal by the Court of Appeal of the Petitioner/Appellant/Appellant's application for stay of execution of the judgment dated 4th December, 1997 pending a non-existent appeal"*

What we make of the above contents of this Notice of Preliminary objection is that, the Respondent herein, therein respondent urged upon the Court that there was no valid appeal pending against the High Court judgment, and by parity of reasoning, the appeal lodged against the refusal of the Court of Appeal to stay execution of the maintenance orders to the Supreme Court. Simply put, the Respondent contended that there was no appeal pending properly in the Supreme Court.

We observe from the preliminary objection and the Notice of Appeal filed, some serious inconsistencies that completely render ineffectual and of no consequence the relevance of this preliminary objection. Some of these are:

1. There is no indication of any Notice of Appeal against this judgment of 4th December, 1997. This is because the Notice of Appeal referred to is in respect of the order of 18th December 1996 on maintenance.

2. The appeal to this court was based on the order for interim maintenance awards made by the trial High Court which refused a stay of execution of the maintenance awards, and the refusal of the Court of Appeal to grant a repeat application to the Court.

3. It was consequent upon these refusals that an appeal was lodged against the Court of Appeal decision. See the Notice of Appeal referred to above.

4. It must be well noted that, from all the processes referred to supra, whilst all these applications for stay for execution of the maintenance awards were going on from the trial court to Court of Appeal with an appeal lodged to this Court, the substantive trial in the High Court proceeded apace and it was this that led to the delivery of judgment on 4th December 1997. The date on which the interim maintenance award was given is 18th December 1996.

5. The Notice of Preliminary objection is therefore very misleading as it seems to give the impression that the Notice of Appeal was against the final judgment. In the processes filed before us, we have not sighted any Notice of Appeal against the judgment of 4th December 1997.

In arguing the application for the applicants, learned Counsel Mrs. Victoria Barth, made copious references to rule 73 of C. I. 16 already referred to. She argued that every application put before a single Justice of the Supreme Court ought to be on notice. She therefore argued that it was breach of procedural rules for the Respondent to have applied to the court and have an ex-parte application put before a single Judge. She referred to the case of ***Republic v High Court, Accra Ex-parte All gate Co. Ltd. Amalgamated Bank Ltd*** – *Interested Party* ***[2007-2008] SCGLR 1041***

Secondly, learned Counsel for the Applicants argued that being a matrimonial cause or matter, the death of the original Petitioner meant that the action did not survive him. As a result, the Applicants herein who are the personal representatives (Executors) cannot be substituted for the original petitioner.

After referring extensively to the affidavits filed in support and in opposition, learned counsel for the applicants submitted that, it is clear the Respondent did not intend to pursue the appeal at the Supreme Court, but rather the case at the High Court. In that respect, learned Counsel contended that the application for substitution should have been pursued in the High Court. According to learned Counsel, the Respondent should pursue the final judgment that was delivered as far back as 4th December 1997 if that is possible in view of the time lapse.

In view of the above submissions learned counsel for the applicants prayed this court to discharge the ex-parte order made by the court substituting the applicants herein in place of their deceased father, for breach of article *134 (b) of the Constitution 1992 section 7 of the Courts Act, 1993, Act 459 and rule 73 of C. I. 16* which Counsel argued is unambiguous and should not be limited in scope in its application.

Responding, learned Counsel for the Respondent, Kizito Beyuo made the following submissions.

That the matrimonial cause was completed and a final judgment had been delivered by the High Court. He submitted that the parties were in the Supreme Court because of the appeal filed by the Applicants father against the refusal of the Court of Appeal to grant a stay of execution of the order of maintenance pendente lite. Learned Counsel also referred to their own application filed raising preliminary legal objection to the appeal pending before the Supreme Court.

Secondly, learned Counsel for the Respondent submitted that, the interpretation being put on rule 73 of C. I. 16 is incorrect because it is inconsistent with the power granted in article 134 of the Constitution 1992.

He argued that, because rule 73 of C. I. 16 derived its source from article 134 of the Constitution 1992 any restriction on the application of the constitutional

provision with rule *73 of C. I. 16* which was made pursuant to article 134 must not be countenanced.

Thirdly, learned counsel for the Respondent argued that, since the Supreme Court rules C. I. 16 does not have any provisions on substitution of parties, the procedure for the time being in force in the High Court must be applied.

Learned Counsel referred to section 2 (4) of the Courts Act, Act 459, rule 5 of C.I. 16 and order 4 rule 6 of C. I. 47. Counsel referred to the ruling in the unreported Suit No. CMJ7/4/2014 dated 18/12/2013 intitutled ***Mass Projects Ltd v Standard Chartered Bank and Anr.***

Learned Counsel therefore argued that based on the above procedural rules and the case of ***Cook v Kutsoatsi and Others [1960] GLR*** pages 97-98 per Adumoah Bossman the procedure adopted in applying to the Court ex-parte for substitution of the deceased Petitioner was proper.

Finally, learned Counsel argued that, since at the time the Petitioner died, the Court had pronounced final judgment, there was an enforceable judgment which did not extinguish with the death of the Petitioner. In other words, the judgment in that petition, is what survived the deceased and also for him to settle the property rights on the Respondent. See case of ***Acheampong v Acheampong 1982-83 GLR 1017 holding 5.***

From the processes filed and the submissions made in this Court, the following are the key issues that fall to be determined in this case:

i. **Whether the sitting of a single Justice in granting the ex-parte application for substitution of the deceased Petitioner is procedurally flawed in view of Rule 73 of C.I. 16 of the Supreme Court Rules, vis-à-vis article 134 of the Constitution 1992.**

ii. **Whether or not the cause of action in the matrimonial cause at whatever level or stage it had reached at the time of the death of the original Petitioner has survived his death.**

Before we proceed with an analysis of the above issues, we are of the view that it is necessary for this court to correct a decision that was given per incuriam by this court in the unreported ruling in the case of ***Mass Projects Ltd v Standard Chartered Bank & Anr***., already referred to supra.

In that ruling, the Court, speaking through me stated at page 4 paragraph 3 thereof thus:

> ***"We have looked at the Supreme Court Rules, 1996 C. I. 16 and perused the entire rules, but observed that no specific procedure rules have been made to regulate how this special jurisdiction by a single justice of the Court is to be exercised."***

Indeed, having been referred to *rule 73 of C. I. 16* which we have extensively referred to herein, it is quite apparent that the above observation was made in error, and we hereby accordingly correct it.

What it does mean in effect is that, our rules of procedure on the exercise of the jurisdiction of the single justice of the Supreme Court in rule 73 of C. I. 16 are similar in content to the rules of procedure in rule 67 of The Gambia Supreme Court Rules referred to in that ruling i.e. the *Mass Projects Limited v Standard Chartered Bank & Anr.* That not withstanding the effect of the ruling in the ***Mass Projects Limited v Standard Chartered Bank and Anr.*** remains the same.

The only matter we wish to add is that, perhaps it will be most desirable and appropriate for the Rules of Court Committee to come out with detailed rules on the exercise of this single Justice jurisdiction pursuant to article 134 of the Constitution.

This is because, resort to the exercise of this single Justice jurisdiction has become popular. This has become very important and crucial because in some of the cases, the choice of the single Justice jurisdiction is not made by the parties, but a decision that is taken administratively by the Judiciary.

These are the reasons why the request for detailed rules of procedure for the exercise of the single Justice jurisdiction of this court needs to be seriously considered by the Rules of Court Committee.

We concede the fact that the constitutional provisions in article 134 of the Constitution 1992 on the conferment of the single justice jurisdiction of the Supreme Court vests that jurisdiction in a single Justice of the Court.

Indeed, that constitutional provision is absolute and is superior to any other statutory and or subsidiary legislation such as C. I. 16.

However, the point ought to be made that all the provisions in the Constitution 1992 which have conferred specific jurisdiction on the Supreme Court, and indeed other Courts have had corresponding procedure rules enacted for the Courts, i.e. C. I. 16 for the Supreme Court, C. I. 19 for the Court of Appeal and C. I. 47 for the High Court, just to mention a few. These issues were addressed by this Court in the ***Mass Projects Ltd. v Standard Chartered Bank and Anr.*** referred to supra.

In this instance Rule 73 of the Supreme Court Rules, makes specific procedure rules as to how this single Justice jurisdiction is to be exercised. The bare constitutional provision on the jurisdiction of a single Justice in article 134 of the Constitution 1992 without the necessary procedural rules on how this jurisdiction is to be exercised will remain a white elephant. It is like the birth of a child, they are born toothless, later they develop teeth with which they can chew and bite. The rules of procedure are therefore the teeth of the Constitution.

It is in this respect that the provisions in rule 73 of C. I. 16 are to be understood. Without such a provision it would be very difficult to implement the substantive jurisdiction that has been conferred by article 134 of the Constitution.

For example, the conferment of supervisory jurisdiction on the Supreme Court is contained in article 132 of the Constitution 1992 as follows:-

> *"The Supreme Court shall have supervisory jurisdiction over all courts, and over any adjudicating authority and may, in the exercise of that*

supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers."

The above are just bare jurisdictional provisions on the supervisory jurisdiction of the Supreme Court. By what process and methods these jurisdiction is to be invoked and exercised is not stated.

However, Part Six, of the Supreme Court Rules, 1996, C. I. 16 Rules 61 to 66 deals with how this aspect of the jurisdiction of the court is to be exercised. For example, the method by which this jurisdiction is to be exercised is stated in rule 61 (1) to be made by motion on notice accompanied by an affidavit with other requirements. Therefore the use of a writ for example in invoking supervisory jurisdiction will not be countenanced.

In the same vein, Rule 73 of C. I. 16 specifically states that an application made pursuant to article 134 of the Constitution 1992 be by motion on notice with a further directive that this motion shall be served on any party who has an interest in the cause or matter.

It has been submitted that, the reference, *"Shall be served on a party who has an interest in the cause or matter"* actually refers to a party in the case who has an interest in the matter.

We beg to differ from this interpretation. In our opinion, what this means is that any person who has an interest in the cause or matter, the subject matter of the application that has necessitated the invocation of the jurisdiction of the single Judge must be served. Such a party need not be a party to the action.

In the instant case, it does not take much to observe that the Applicants herein who are the Executors of the Will of the original Petitioner in the case are definitely interested persons in the cause or matter that is the subject of this ruling.

Therefore, by ordinary rules of interpretation, it should be noted that any invocation of the single justice jurisdiction under article 134 of the Constitution 1992 must be by motion on notice served on persons who have an interest in the cause or matter.

In the instant case, once the application has been stated to be ex-parte, it connotes that it is not on notice and therefore is not in compliance with the procedural rules in *rule 73 of C. I. 16* which supplement article 134 of the Constitution.

In that respect, we are of the view that the exercise of that jurisdiction by a single Judge in an ex-parte motion and also when persons who have interest in the cause or matters have not been notified and served is contrary to the procedural rules made pursuant to article 134 of the Constitution and to that extent ought to be discharged.

The second issue which is whether the cause of action in the matrimonial action has survived the death of the original petitioner deserves some serious discussion and analysis.

Before we proceed with this second issue as to whether the cause of action survived the estate of the deceased petitioner, it is pertinent to make the following observation.

We have perused all the cases that have been referred to us by learned Counsel for the parties. We are however of the view that because of the special peculiarities of this case which essentially hinge around the application of rule 73 of C. I. 16 vis-à-vis article 134 of the Constitution 1992, those cases with respect cannot hold and be applicable.

There is absolutely no doubt that the death of the original Petitioner in the matrimonial action would have brought the case to an end. This is because such a cause of action is a personal action and is generally referred to as one in personam and as a result does not survive the death of a party.

However, the matter is not so simple. From the depositions we have referred to in extenso in the processes filed, it is clear that the position is somewhat different. This is because of the following:

1. In the first place, an order for maintenance had been made by the trial court as a result of which the Petitioner had appealed to this Court.
2. Secondly, there are also depositions to the effect that final judgment had been delivered in the substantive matrimonial cause or matter since 4th December 1997.

3. We have however not sighted any document to wit the final judgment or Notice of Appeal against this final judgment save for these bare assertions.

4. There is a Notice of Preliminary objection to the propriety of Interlocutory appeal in this Court against the interim maintenance orders.

Taking the above factors into serious consideration, we come to the following conclusions:

The appeal against the interlocutory maintenance order being an order made in personam against the original Petitioner cannot survive after his death.

Secondly, being interlocutory in nature, it would even have ended with the delivery of final judgment unless it was incorporated into the final judgment. That being the case we hold and rule that the appeal that was pending in this court in respect of the interlocutory order for maintenance has lapsed due to the death of the Petitioner and delivery of the final judgment. Any arrears of maintenance in existence prior to his death also cannot survive against the estate of the Petitioner for the same reasons because it was an action in personam.

But then, there is this deposition that some immovable properties have been resolved in favour of the Responent in the final judgment. If that is so, then it would appear that these would be relating to real property, and therefore **in rem.** Can this therefore survive against the estate of the original petitioner?

Learned Counsel for the Respondent, Mr. Kizito Beyuo thinks so and has forcefully invited us to make findings to that effect. On the contrary, learned counsel for the Applicants, Mrs. Victoria Barth thinks otherwise and contends even that the judgment if indeed it was delivered on 4th December 1997 cannot even be executed as of now because of stipulated timelines that regulate the execution of judgments. We in this court will not concern ourselves with whether the judgment can be executed or not since that issue really does not arise for determination.

What we should be concerned with is whether the action has survived the estate of the Petitioner and whether any action is pending in the Supreme Court to warrant the application being made to the Court in the first place. We concede that under rule 5 of the Supreme Court Rules, 1996, C. I. 16 where no express provision regarding the practice or procedure on any cause or matter has been made, this court shall prescribe such practice and procedure as in the opinion of the court the justice of the court may require.

We are also aware that in many instances like the above, resort has been made to the *High Court (Civil Procedure) Rules, 2004 (C.I. 47)*. See also article 129 (4) of the Constitution 1992 which reinforces the above view.

We believe that it was the above practice that made the Supreme Court to rely on provisions in the *High Court Rules in C.I. 47* on Joinder and for further and better particulars in the recently concluded Presidential Election Dispute intitutled ***Nana Addo Dankwa Akufo-Addo and two others v John Dramani Mahama and two others*** when such applications were brought.

We note that under *Order 6, rule 1 of C. I. 47*, where a party dies and the cause of action survives, the action shall not abate by reason of the death of that party.

Sub-rule 2 gives the court the power whenever it is desirable at any stage of the proceedings to assign the interest or liability of a party to another person for the effective and complete determination of the matters in dispute, and order that person to be substituted for the first named party. Sub-rule 3 states as follows:

"An application for an order under this rule may be made ex-parte".

We therefore conclude that it was perfectly legitimate for the Respondent to have filed an ex-parte application to the Supreme Court for substitution of the original petitioner by the Applicants.

If such an application had been put before the regular panel of five Justices of the Court for determination there would have been no problem as that would be deemed to be the proper procedure.
This is because that procedure is permitted by the High Court Rules. However, once the jurisdiction had been exercised by a single Justice then, rule 73 of C. I. 16 comes into focus.

This Rule makes specific provisions on how a single justice jurisdiction is to be exercised, then a fortiori, it means that resort to any other procedure contrary to the courts own procedure rules will render null and void any contrary procedure.
It does not matter that it was an administrative decision that put the case before a single justice. Jurisdictional issues cannot be treated lightly, and once the procedure adopted, is wrong any step taken on such wrong procedure is untenable, is null, void and should be vacated and set aside once attention is drawn to it.

Secondly, what we observe also is that, in view of our earlier discussions, it is apparent that there was indeed no cause of action pending in the Supreme Court for the Respondent to even invoke the Court's jurisdiction for substitution of the original petitioner. This is because it was only the appeal against the interlocutory maintenance order that was pending in the Supreme Court. Besides, there is even no indication that the appeal record had been transmitted from the Court below to this Court to warrant the Respondent to file the application to this court as required under rule 16 (1) of C. I. 16.

Thirdly, once we are of the firm conviction that the appeal in the interlocutory appeal did not survive the death of the original petitioner, the action in this court must fail.

It is for the above reasons that we are of the considered view that the Application by the Applicants herein to this court succeeds. Accordingly, the orders made by the single Judge on 26th November 2013, are hereby discharged,

By parity of reasoning, the further orders made on 18th December 2013 for service on the Applicants outside the jurisdiction is also set aside and or discharged. This is because once the foundation has collapsed anything founded on it cannot stand.

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

CONCURRING OPINION

BAFFOE-BONNIE JSC.

I had the benefit of reading beforehand the lucid ruling just read by my esteemed brother Dotse JSC.

I must say that I agree with the conclusion arrived at by my brother and the court that the cause of action is not pending in the Supreme Court for the deponent to even invoke the court's jurisdiction for the substitution of the original petitioner.

However, with all due respect to my learned brother and the court, I am unable to agree that the application should have been brought on notice since it was brought before the single Justice of the Supreme Court.

The applicant filed his application at the registry of the Supreme Court. It has been argued that had the full bench of the Supreme Court sat on the ex parte application, it would have been proper. But since it was taken by a Single Justice, that application should have conformed to rule 73 of ci 16 and therefore on notice.

The applicant filed his application at the registry of the Supreme Court with no indication that it was filed pursuant to article 34 of the constitution. That it was placed before the single Justice was purely administrative and was not pursuant to Article 34 of the Constitution

I do not see how an applicant can be made to suffer because of the administrative convenience of the self-same Supreme Court. I am therefore of the view that ,that the application was made ex parte before a single justice of the supreme court is not fatal.

Subject to this observation I agree that the application succeeds and so same is dismissed.

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

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

COUNSEL

MRS. VICTORIA BARTH WITH HER DIANA ASONABA DAPAAH AND PRISCILLA ANIMA AKYEAMPONG FOR THE PETITIONER/APPELLANT/APPELLANT/APPLICANTS.

MR. KIZITO BEYUO FOR THE RESPONDENT/RESPONDENT/ RESPONDENT /RESPONDENT.