IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF JUSTICE

ACCRA, AD 2011

CORAM: **BROBBEY, JSC (PRESIDING)**
ANSAH, JSC
OWUSU, (MS), JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC

CIVIL APPEAL
SUIT NO: J4/33/2010
12TH APRIL, 2011

CAPTAIN ROBERT MBA TINDANA --- PLAINTIFF/APPELLANT

Vs

1. **THE CHIEF OF DEFENCE STAFF --- DEFENDANTS/RESPONDANTS**
2. **THE MINISTER OF DEFENCE**
3. **THE ATTORNEY GENERAL**

J U D G M E N T

GBADEGBE JSC:

On the 27th day of July 2007, the applicant by means of an originating notice of motion issued the process herein seeking among other reliefs "A declaration that that the respondents have breached the Armed Forces Act, 1962 (Act 105) and the Armed Forces Regulations by wrongfully releasing the applicant from active service" as well as certain consequential orders. It appears from the nature of the case put up by the applicant and in particular the mode by which the action was commenced that it was planked on the provisions of Article 33 of the 1992 Constitution. In fact in the body of the motion paper that originated the action herein it was boldly inscribed in the heading as follows:

> "*IN THE MATTER OF AN APPLICATION UNDER ARTICLE 33 OF THE 1992 CONSTITUTION AND ORDER 67 OF THE HIGH COURT (CIVIL PROCEDURE) RULES (CI 47)".*

Since the applicant based his action on Article 33 of the 1992 Constitution, it is important that the said provision of the 1992 Constitution on which he relied be quoted in extenso. It is provided in Article 33 .1 as follows:

> "Where *a person alleges that a provision of this Constitution on the fundamental human rights has been, or is likely to be contravened in relation to him, then without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress."*

It appears from the originating notice of motion by which the instant action was commenced in the court below that it was brought for the purposes of enforcing an alleged breach of the fundamental human rights guaranteed to us under the 1992 Constitution. It repays in this regard to refer to Order 67 of the High Court (Civil Procedure Rules} which provides the mode by which relief may be sought in cases falling under article 33 of the Constitution as follows:

> "*A person who seeks a redress in respect of the enforcement of any fundamental human right in relation to the person under Article 33(1) of the Constitution shall submit an application to the High Court."*

Clause 2 of Article 33 provides the orders that the High Court may issue in appropriate instances of breach of any of the fundamental human rights by way of securing to the aggrieved person the enforcement and protection of such rights. The events that sparked off the proceedings herein appear to have occurred on 27 June 1988. On that date, a letter under the hand of one Colonel BK Akafia which was exhibited to the affidavit of the applicant as exhibit D and in support of his case reads:

> *" RELEASE FROM SERVICE*
>
> *CAPTAIN RM TINDANA (GH/1841)*
>
> 1. *It has been decided to release Captain Tindana from the service of the Ghana Armed Forces with effect from 27 June 1988 for services no longer required.*
> 2. *You are to issue his release instructions accordingly."*

The said letter according to paragraph 12 of the supporting affidavit was sequential to exhibit C from a member of the erstwhile PNDC to the then General Officer Commanding the Armed Forces that he "had contravened 'military orders' and" had additionally "come to the notice of security agencies on a number of occasions in the past for activities prejudicial to the state and should therefore be dealt with accordingly."

Subsequent to exhibit D, the applicant was advised by a letter in evidence as exhibit E of the date on which his terminal leave was to commence from. Before both the trial High Court and the Court of Appeal, the applicant's right to relief was refused and he has accordingly appealed to this court for an order allowing his claims. In our view, having regard to the cause of action on which the applicant relies namely Article 33.1 of the 1992 Constitution, the court must firstly be satisfied that since the date of his release was prior to the coming into force of the 1992 Constitution, his claim to a relief is authorized under the said article. Consequently when the matter came up before us on 21 January 2011 noting that neither party had raised this point in their statements of case submitted to us we directed their attention to it in compliance with Order 6 rule 8 of the Supreme Court Rules, CI 16. The said rule provides as follows:

> " *Where the Court intends to rest a decision on a ground not set forth by the appellant in the notice of appeal, or on a matter not argued before it*

the Court shall afford the parties reasonable opportunity to be heard on the ground or matter without re-opening the whole appeal"

Subsequently, the parties made full compliance to our direction on the said points and accordingly the appeal herein was adjourned for judgment. In the course of giving thought and consideration to the issues for our determination, however, we observed in regard to the notice of appeal filed in the Court of Appeal that resulted in the decision now on appeal to us that it was filed out of time. While the judgment of the trial High Court in the matter was delivered on 19 June 2007, the notice of appeal to the Court of Appeal was settled by learned counsel for the appellant on 15 November 2007 and actually filed in the registry of the Court of Appeal on 16 November 2007. By a simple computation of time we think that in the absence of an order of either the High Court or the Court of Appeal extending the time within which to appeal from High Court's decision of 19 June 2007, the appeal was improperly constituted having regard to rule 9 of the Court of Appeal rules, CI 19 wherein it is provided as follows:

"(1) Subject to any other enactment governing appeals, an appeal shall not be brought after the expiration of

(a) twenty-one days, in the case of an appeal against an interlocutory decision; or

(b) three months, in the case of an appeal against a final decision unless the court below or the court extends the time.

(2) The prescribed period within which an appeal may be brought shall be calculated from the date of the decision appealed against.

(3) An appeal is brought when the notice of appeal is filed in the registry of the Court.

(6) Where the extension of time is granted, the notice of appeal shall include the date of the grant and the Justice or the Court by whom the grant is made."

Having made the said discovery, which initially looked startling to us in view of the fact that the matter was fully argued before the Court of Appeal on the same record of proceedings on which this re-hearing is based save the inclusion of what transpired before this court pursuant to the transmission of the record to this court under rule 14 of the Supreme Court Rules, CI 16 , we came to the view after a careful perusal of the record of appeal that the instant appeal was filed clearly

outside the time frame provided in rule 9 of CI 19 and consequently unable on the grounds of the absence of jurisdiction to consider the appeal on the merits. But before we pronounce on the appeal herein, we wish to consider a point of procedure that turns on rule 6.8 of the Supreme Court rules, CI 14 in the words that follow:

> "Where the court intends to rest its decision on a ground not set forth by the appellant in the notice of appeal, or on a matter not argued before it, the court shall afford the parties reasonable opportunity to be heard on that ground or matter without re-opening the whole appeal."

In our view, this provision seeks to afford the parties to an appeal that is likely in the opinion of the Court to be allowed on a point that was not taken by the appellant but by the court itself to provide it with assistance on the point before it is pronounced upon. It does appear from the rule that where the effect of the point that we have taken regarding the competency of the appeal is one that does not result in the appeal being allowed then there is no obligation on us to give the parties the opportunity to be heard on it before deciding the appeal.

There is yet another reason in our opinion that enables us based on the said rule of having regard to the circumstances of this case not to exercise ourselves by affording the parties to the appeal herein the opportunity to answer the point that has been raised by us. We think that the comments made in the case of *AkufFo-Addo v Cathleen* [1992] 1 GLR 377 at 392 may be applied to the situation that arises before us under rule 6.8 of the Supreme Court Rules. Although the pronouncements made by Kpegah JA (as he then was) in delivering the lead judgment of the Court at page 392 were in reference to rule 8.6 of the previous Court of Appeal Rules, LI 218, the purpose of both rules is the same and for that matter are of value to us in construing it. We make particular reference to that part of the speech of the learned judge that is relevant to the issue before us as follows:

> "*Therefore in applying the proviso to rule 8(6) of LI 218 care must be taken that we do not in the process give an interpretation which will inhibit or stultify the rule that an appeal before the Court of Appeal (shall be by way of rehearing". The proviso cannot, in my view, be said to imply an absolute prohibition. In certain special or exceptional circumstances, the proviso will not apply. So it can be said that the Court of Appeal should not decide in favour of an appellant on a ground not put forward by him unless the court is satisfied beyond doubt, first, that it has before it all the facts or materials bearing upon the contention being taken by it suo motu; and secondly, that the point is such that no satisfactory or*

meaningful explanation or legal contention can be advanced by the party against whom the point is being taken even if an opportunity is given him to present an explanation or legal argument; for example void matters as in this case."

The point touching rule 6.8 is in our view wholly unanswerable and as such no useful purpose can be served by giving the parties the opportunity to answer it. The appeal which was filed long after the three months period provided under rule 9 of the Court of Appeal Rules was plainly incompetent resulting in the absence of jurisdiction in the Court of Appeal to determine it. Consequently, the entire proceedings acquire the attribute of nullity and same are hereby set aside.

The result is that we do not have before us any appeal to be considered on the merits. It is to be observed that in such cases the court's decision is based essentially on the requirements of due process that all parties who desire to appeal in cases that have been tried must comply with the conditions under which the right of appeal has been conferred on them. See: *Darke* v *Darke* [1984-86] GLR 481.

For these reasons the instant appeal is struck out as incompetent.

[SGD] N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

[SGD] S. A. BROBBEY

JUSTICE OF THE SUPREME COURT

[SGD] J. ANSAH

JUSTICE OF THE SUPREME COURT

[SGD] R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

[SGD] P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

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