IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – GHANA

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

CIVIL MOTION
NO.J8/54/2010
27TH JULY, 2010

GEORGE KOFI GYIMAH - PLAINTIFF/RESPONDENT/APPLICANT

VRS

J. K. ABROKWA - DEFENDANT/APPELLANT/RESPONDENT

R U L I N G

OWUSU (MS), JSC:-

The Applicant herein is under Article 131(2) of the 1992 constitution; section 4 (2) of the courts Act, Act 459 and rule 7 (4) of the Supreme Court Rules C. I. 16 praying for special leave to appeal to the Supreme Court.

The application is supported by 19 paragraphed affidavit on which he relied on all the averments contained therein.

The Applicant as plaintiff instituted an action in the Circuit Court against the Respondent herein for –

> **"a. A declaration that the plaintiff is the only person lawfully entitled to possess and use the land described in his statement of claim as the Land situate, lying and being at Kokompe Accra and bounded on the North West by the Lessor's land - - - on the south west by the Lessor's land and covering a approximate area of 0.13 acres more or less."**
>
> **"b. General damages for trespass."**
>
> **"c. perpetual injunction restraining the defendant and his agents from interfering with the plaintiff's workers on the land."**

This action by the plaintiff was vehemently resisted by the Defendant who counter-claimed for:

> **"a. A declaration that he had been granted a prior lease of the land in dispute from the plaintiff's lessors since 1998 and therefore any subsequent lease of the same property to the plaintiff was void."**
>
> **"b. Perpetual injunction restraining the plaintiff, his agents, principals or any purported lessors from entering upon or carrying on any construction work on the land in dispute."**

At the end of the trial, Judgment was entered for the plaintiff and the Defendant's counter-claim dismissed.

Dissatisfied with the Judgment, the Defendant appealed to the Court of Appeal. By its Judgment dated 5th day of November 2009 the Court of Appeal reversed the decision of the trial court and entered Judgment for the Defendant.

Under Article 131(b) of the constitution, if the plaintiff wanted to appeal against the Court of Appeal's Judgment to the Supreme Court, he needed leave of the Court of Appeal.

Article 131(1) of the constitution reads as follows:

"An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court –

"(a) as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a Judgment of the High Court or a Regional Tribunal in the exercise of its original Jurisdiction; or

"(b) With the leave of the Court of Appeal (e.s.) in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest.

The Applicant has in the instant case commenced the action in the Circuit Court.

The leave to be applied for under Article 131(1) (b), shall be filed with the Registrar of the court below within fourteen days of the date of the decision against which leave to appeal is sought.

The Applicant's case is that being seriously aggrieved by the Judgment of the Court of Appeal, he made up his mind to appeal against it but resolved to appoint new lawyers to take up his further appeal.

The crucial averments in the affidavit and indeed the pillars on which the application stands are:

> **"8. That when I eventually got introduced to my new lawyers, Messrs Dick K. Anyadi & Associates, they insisted on seeing a copy of the Judgment of the Court of Appeal before deciding what step to take in the matter.**

Paragraph 9 which turned out to be false reads as follows:

> **"That by the time I was able to procure the judgment for them to study, the time limited for an application for leave to further appeal to this Honourable court had expired."**
>
> **10. "That although my said lawyers did file an application for extension of time to apply for leave in the Court of Appeal, they had to withdraw same as there is no provision for extension of time under rule 7 of the Supreme Court Rules 1996, C. I. 16."**

Feeling strongly about the need to appeal, he has come to this court to pray for special leave to appeal under Article 131(2) of the constitution.

The said Article states as follows:

> **"Notwithstanding clause (1) of this article, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court, in any cause or matter, civil or criminal, and may grant leave accordingly."**

There is no time frame within which such an application may be brought. It must however be brought timeously. See the case of ALLEN VS SIR ALFRED MACALPHINE & SONS LTD [1968] AER 547

In the case of DOLPHYNE (No. 2) VRS SPEEDLINE CO. LTD [1996-97] SCGLR 373, the court said the discretion given to the court is unfettered and the reason for this is not far fetched. The court being the highest court is given this wide discretionary power to do Justice in appropriate cases.

In holding two indeed the court held that in the exercise of this unfettered discretion, the court is not bound by any rules of practice or procedure or any legislation.

The principles to be applied as guides on which the Supreme Court might determine whether to grant special leave to appeal or not had been set down in the DOLPHYNE (No. 2) case by the court as follows:

> **"(a) where there was a prima facie error on the face of the record; or**
>
> **(b) a general principle of law had arisen for the first time; or**
>
> **(c) a decision by the Supreme Court on the point sought to be appealed against would be advantageous to the public", relying on and approving the ruling of scott J. sitting in the High Court, Cape Coast in the case of NYIMOH VRS DADZIE [1962] 1 GLR 327"**

The holding in that case amply sets out the conditions upon which special leave may be granted thus:

> **"Held: Special leave will not be granted unless (a) there is a prima facie error on the face of the record; or (b) a general principle of law has arisen for the first time; or (c) a decision by the Supreme Court on the point sought to be appealed against will be advantageous to the public."**

In arguing the application, counsel was called upon to satisfy the court as to whether his statutory right of appeal having extinguished, there was any need for the application to be considered. He successfully satisfied the court that the fact that his right of appeal under the rules was extinguished was no bar to the application.

In this wise he referred the court to the case of ANSAH and others VRS ATSEM and Others [2001-2002] SCGLR 906 at 910 where the most respected sister of mine Bamford-Addo J.S.C. (as she then was) quoting from her own ruling in the case of KOTEY VRS KOLETEY [2000] SCGLR 417 said:

"Since no conditions were imposed under the ruled and the matter was left at large under article 131 (2) and rule 7 (4) of C. I. 16, the grant of special leave is at the discretion of the court and not fettered by any rules of procedure or any law nor should the court lay down a set of iron rules on which the discretion of the court was always obliged to run."

Touching on the merits of the application, counsel submitted that there are errors of law in particular, wrong invocation or misapplication of various legal doctrines and or principles by the Court of Appeal in the judgment, which, if he is able to substantiate, would clearly constitute a prima facie error on the face of the record.

He argued further that the Court of Appeal fell into error in decreeing specific performance of the alleged contract between the Defendant and the Vendor family when there was no sufficient act of part performance.

Are these the type of errors envisaged under the guiding principle as set out in NYIMOH VRS DADZIE already referred to and approved and applied in DOLPHYNE (No. 2) case?

The errors complained of are such that the Applicant could have addressed them in an application for ordinary leave to appeal.

The errors are not prima facie errors on the face of the record for which reason the court must exercise its discretion to grant special leave.

In the affidavit in support, the applicant averred that it was only when he succeeds in substantiating the errors complained of that they would constitute prima facie errors. This supposes that one would have to read the record before discerning these errors if indeed they are errors of law. The Applicant's complaint against the Court of APPEAL Judgment is a matter to be decided by an appeal if he had obtained ordinary leave to appeal.

In an attempt to get this court to grant the leave sought for, the Applicant swore to an affidavit in which he deposed to deliberate falsehood that at the time he obtained copy of the Court of Appeal Judgment, time for filing an application for leave to appeal has run out.

This deposition has already been referred to.

The Judgment of the Court of Appeal was delivered on 5th November 2009 and the instant application was filed on 28th May 2010. In the affidavit in opposition, the Respondent in paragraph 6 averred as follows:

"That I vehemently deny paragraph 9 of the affidavit in support and further say that on the face of Ex "A", the Applicant, obtained his

copy of the Judgment on 11/11/2009, just six day (sic) after the Judgment was delivered on 5th November 2009. - - -

Having been served with this affidavit, there was no reaction from the Applicant. In court when counsel's attention was drawn to this paragraph and an explanation was called for, he told the court this was a mistake and that what the Applicant actually meant was proceedings instead of Judgment. What proceedings did he need to file the application for leave? He had the statement of case he filed in the Court of Appeal, that of the Appellant and the record of proceedings from the trial court. All that he needed was the Judgment copy of which he had obtained on 11/11/2009.

That averment is a deliberate falsehood to put the reason for the delay at the doorstep of the court in order to sway the court in the exercise of its discretion in favour of the Applicant.

We must express the court's utter disgust at such conduct of both counsel and litigants that tend to disable the court from exercising its discretion in such matters judicially.

As officers of the court our avowed duty is to see to it that Justice is done at all cost.

How does the Applicant expect the court to exercise its discretion in his favour when he is not candid with the court? For this reason alone, the application for special leave ought to be dismissed.

Another reason for which this court would refuse an application for special leave is the need for prevention of delay in the administration of justice. Delay in pursuing an appeal could adversely affect the acquired rights of others with consequent injustice to them.

I must admit that in the instant application, the delay is not inordinate but each application must be considered on its own facts.

In paragraph 10 of the affidavit in opposition, the Respondent avers as follows:

"that great hardship, injustice and inconvenience will be caused to me if the court re-opens the right of appeal for the Applicant, because I have acted on the Judgment and have commenced developing the land forming the subject matter of the suit."

On the whole, no good reasons have been given for which the Applicant must be given this special leave to appeal. In the case of KOTEY VRS KOLETEY already referred to, Atuguba J.S.C. had this to say –

"although an application for normal leave must show some merits in the intended appeal, an application for special leave must do more

than that; it must also give good and convincing reasons why the application is special. - - -

The application for the reasons assigned herein fails and same is hereby dismissed.

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

J. ANSAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

COUNSEL:

DICK K. ANYADI FOR THE PLAINTIFF RESPONDENT/APPLICANT.
DANIEL NTIM BOATENG FOR THE DEFENDANT/APPELLANT/RESPONDENT.