IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: AKUFFO (MS), JSC (PRESIDING),
DR. DATE-BAH, JSC
ADINYIRA (MRS), JSC
BAFFOE-BONNIE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL

NO. J4/37/2009

7TH JULY, 2010.

HALLE AND SONNS A.S. ... PLAINTIFF/RESPONDENT/ APPELLANT

VERSUS

1. BANK OF GHANA

2. WARM WEATHER ENTERPRISE LTD ... DEFENDANTS/APPELLANTS/ RESPONDENTS

JUDGMENT

ADINYIRA (MRS), JSC:-

"Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a

handmaid rather than a mistress, and the Court ought not be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what would cause injustice in the particular case". Per Collin's M.R. in, In re Coles & Ravenshear [1907] 1KB 1at page 4.

FACTS

The facts briefly are that, sometime in 1991, Halle and Sons A.S. the Plaintiff/Appellant (hereinafter Appellant) a Norwegian firm allegedly exported fish worth US$ 1,500,000.00 to a Ghanaian company, Warm Weather Enterprise Ltd., the 2nd Defendant /Respondent (herein after 2nd Respondent) on an avalised bill of exchange that was guaranteed by the erstwhile Volta Premier Rural Bank Ltd. In the intervening period the rural bank became financially distressed and the Bank of Ghana took over the operations of the rural bank. According to the Appellant despite the delivery of the fish the Respondents failed to settle the bill. The Appellant therefore issued a writ of summons on 15 December 1998 at the Accra High Court against the Respondents for the following reliefs:

i. Recovery of the sum of US$ 1,500,000.00 being the value of fish supplied to 2nd Respondent on an avalised bill of exchange guaranteed by Volta Premier Bank and accepted by 2nd Respondent.

ii. Interest on the sum of US$ 1,500,000.00 at the prevailing rate of interest from 1/6/91 to date of final payment.

iii. Damages for negligence against 1st Respondent for professional negligence.

iv. General Damages.

The 1st Respondent entered conditional appearance on 25 February 1999 and filed an application to set aside the service of the writ for disclosing no cause of action. The Court refused to grant the application and held that evidence had to be taken to determine the involvement of the 1st Respondent in the matter. The Appellant filed a summons for summary judgment under Order 14 rule 1 of L.I.1129. The 1st Respondent in an affidavit in opposition resisted the application on several grounds namely that its liability for the acts of the distressed rural bank was limited to payments of deposits to customers and to streamline the affairs of the said bank; and that the action was statute barred. In addition, the 1st Respondent filed a defence as well. The 2nd Respondent on its part denied having taken delivery of the fish that was consigned to it. Despite its previous ruling that it would take evidence to determine the involvement of the 1st Respondent in the matter, the trial Court heard the application for summary judgment and gave judgment for the Appellant on 15 May 2001.

The 1ST Respondent applied for a review of the judgment but could not pursue it. On 7/11/2001, the 1st Respondent filed at the High Court a motion for extension of time within which to appeal which was fixed for hearing on 12 November 2001 by the Registrar. On 14/11/2001 it filed a similar motion before the Court of Appeal while the application before the High has not been heard. The 2nd Respondent on its part filed its motion for extension of time at the High Court on 13/11 2001, and then filed another one at the Court of Appeal the next day the 14th. On 8 March 2002 the High Court dismissed the application for extension of time within which to appeal.

On 5 March 2003 the Respondents moved the application filed on 14 November 2001 at the Court of Appeal. The Court granted the Respondents extension of time of 7 days within which to file their notice of appeal. The Respondents accordingly filed their appeal on 10 March 2003. On 30 November 2006 the appeal was allowed on the grounds that the Respondents have raised fairly arguable or triable issues that the trial judge ought to have granted the parties leave to defend the action. The judgment of the High Court was set aside and the Respondents were granted unconditional leave to defend the action.

The Appellant being dissatisfied appealed to this Court on the sole ground that:

"The Court of Appeal in terms of jurisdiction was not seized with the 1st and 2nd Defendants' appeal, both having been filed based on wrongful orders to extend time, and the Notice of Appeal having been filed out of time. The upshot is that the judgment of the Court of Appeal is void for want of jurisdiction"

Submissions by Parties

The Appellant submits that the High Court decision was delivered on 15 May 2001 and the application for extension of time to appeal was granted against the rules of Court on 5 March 2003 which is irredeemably out of time. He submits that the Court of Appeal ignored the rules to aid the Respondents to resurrect the dead case. He referred to the case of **Nye v. Nye [1967] CC 75** where the Full Bench of the Court of Appeal held in limine that it had no jurisdiction to enlarge time for an appeal because the applicant was out of time. He also referred to the case of **Republic v. Circuit Court Judge, Tamale ex parte Volta Senior Game Warden [1984-1986 1GLR 372 SC** where it was held that where one did not take advantage of the time prescribed by the rules of Court to apply for extension of time to appeal, the applicant's right is extinguished. The appellant submits further that even if the application for extension of time was filed within time the real issue is when it fell to the lot of the Court to determine the application filed. He cited the case of **Doku v. Presbyterian Church of Ghana [2004-2005] SCGLR 700** as authority for his proposition that, even if the application was filed within time but the determination was outside the time prescribed by the rules of court to enlarge time, then the right of appeal was extinguished.

The 1st Respondent, the only party that filed a statement of case in response argues that there was a notice of motion for extension of time to appeal against the judgment of 15 May 2001 duly filed on 14 November 2001 which was within the 6 months limit. He further submits that it is irrelevant when the application for extension of time was moved and determined, and all that was required for the court to exercise its discretion was that the application be filed within time. He concluded that the Court of Appeal had jurisdiction to enlarge time within which to appeal which paved the way for the notice of Appeal to be filed on 10 March 2003.

CONSIDERATION

The issues raised in this appeal are quite technical and must be pragmatically considered against two of the underlying factors underpinning the administration of justice. These are that it is in the public interest that there must be an end to litigation as against the overriding duty of the Court to meet the demand that the justice of the cause or matter requires.

Before considering the above submissions of the parties it is pertinent to set out the relevant rules of procedure on the time limits for appealing. It is provided under the Court of Appeal Rules, 1997, C.I 19, Rule 9 that:

Rule 9 Time limits for appealing

"(1) Subject to any other enactment for the time being in force, no appeal shall 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 has been filed in the Registry of the court below

4) No application for extension of time in which to appeal shall be made after the expiration of three months from the expiration of the time prescribed by this rule within which an appeal may be brought.

(5) An application for extension of time must be supported by an affidavit setting out good and substantial reasons for the application and grounds of appeal which prima facie, show good cause for the extension of time to be granted.

(6) Where the extension of time is granted a copy of the order granting the extension shall be attached to the notice of appeal.

(7) Notwithstanding rule 28 of these Rules, no application shall be made to the Court for extension of time within which to appeal after six months from the date of the decision appealed against.

(8) For the purposes of sub rule (4) of this rule and rule 28, where a person has applied to the court below for extension of time within which to appeal and after a period of not less than one month the court below fails or refuses to grant the application, the applicant may subject to sub-rule (5) of this rule move the Court to determine the application."

Rule28. Court to which application should be made

"Subject to these Rules and to any other enactment, where under any enactment an application may be made either to the court below or to the Court, it shall be made in the first instance to the court below, but if the court below refuses to grant the application, the applicant shall be entitled to have the application determined by the Court. "

The appellant seems to suggest in his submissions that:

> "it is not the time when a process is filed which is of essence in so far as extension of time within which to appeal is concerned but rather the determination of the process filed if it is outside the six months period, the court cannot enlarge time"

He contends that even if the application was filed within the prescribed time by the rules of court to enlarge time, the right of appeal would have been extinguished, as a result, the court cannot extend the time within which to appeal. To buttress his case, he referred to the case of Doku v. **Presbyterian Church of Ghana [2005-2006] SCGLR 700** and relied in particular to the dictum of her ladyship Sophia Akuffo (delivering the judgment) held at page 704 that:

> "The decision appealed against herein was delivered on 16 December 1999. The alleged leave of the court is supposed to have been granted on 31 August 2000, nearly nine months after the decision against which the appellant appealed. Therefore, if indeed, the Court of Appeal, as claimed in the notice of appeal purported to grant the applicant an extension of time (evidence of which is wholly absent from the record), such an extension is a nullity and the appellant's appeal is incompetent."

Counsel for the respondent in response submits that the above dictum was quoted out of context. He said:

> "However a careful reading of the decision in the Doku case as a whole and in context would reveal that the dictum upon which the Appellant set so much store is itself premised on an earlier holding by the court at page703 that there was no evidence whatsoever on record that the Appellant had at any time applied to the Court within the 6 months limitation period prescribed by

> the Rules or that it had been granted any such extension. The Court concluded that any application for extension of time could only have been filed outside the six month limitation period and that the leave granted almost nine months after the time limited for lodging appeals was incompetent."

I agree with the submission by Counsel for the Respondent that her ladyship was quoted out of context. The facts of the Doku case relevant to the issue before us are that, the respondent raised a preliminary objection to the appeal to the effect that the appeal is incompetent since the notice of appeal was filed almost nine months after the time for lodging appeals has expired. The notice of appeal read in part as follows: 'Take notice that the appellant …having obtained leave on 31 August 2000 of the Court of Appeal..." The respondent contended that there is nothing on the record to show that the appellant at any time applied for or was granted an extension within which to lodge his appeal. Even if any such extension was ever granted it was without notice to him and as such a nullity. The Appellant in reply asserted that he petitioned to the Chief Justice who granted him extension of the period within which he could appeal.

In her judgment, her ladyship at page 703 said:

> "There is nothing on the record before us demonstrating that the appellant at any time applied to any court for, or was granted, an extension of time for filing the appeal. It is therefore clear that, despite the leave claimed in the notice of appeal; to have been granted by the Court of Appeal no such leave or extension of time has ever been granted. Rather the assertion is apparently based on some sort of approval purportedly granted by his Lordship the Chief Justice".

The Court held that from the language of rule 8 (1) (b) it is clear that only the Court of Appeal and the Supreme Court have power to grant the appellant an extension of time. She continued:

> "Thus if indeed his Lordship the Chief Justice purported to grant the appellant an extension of time, as asserted in the appellant's reply to the preliminary objection, such extension would be a nullity. Moreover by virtue of the provisions of rule 8(4), if an appellant fails to take advantage of the opportunity to apply to either the court below or this Court for an extension of time within the stipulated time, neither court would have the power to grant him any extension of time."

It was after the above dictum that the passage relied on by the Appellant herein was made at page 704.

It is pertinent to note that her ladyship during her discourse made the observation at page 703 that:

> "By virtue of article 131(1)(a) of the 1999 Constitution, an appeal to this court from the Judgment of the Court of Appeal in a civil case which has been

> commenced in the High Court, is as of right. As such an appellant does not need the approval of the Chief Justice, or that of any other person for that matter to commence an appeal. However, although such an appellant has a constitutionally protected right of appeal, the procedure in appeals to this court are also governed by the Supreme Court Rules, 1996 (C.I. 16), r 8(1)(b), which stipulates that an appeal against a final decision shall be lodged within three months from the date of the decision, unless the court below or this court extends the period. *Rule 8 furthermore, provides in sub rule (4) [as quoted in full in the head note above at page 701] that no further extension of time shall be made after the expiration of the three months from the end of the periods prescribed by the rule within which an appeal may be lodged."(*The emphasis mine)

The above view expressed by her ladyship in the Doku case seems to suggest that an extension of time granted 9 months after a judgment was delivered was a nullity in view of rule 8 (4) of C.I.16 (which is analogous to rule 9(4) of C.I.19), I respectfully think otherwise. On the facts of the Doku case the real issue was whether a Chief Justice had jurisdiction to extend time for filing of an appeal. In that case no application at all was made to the Court of Appeal for extension. Doku's case is therefore clearly distinguishable, as in the case before us; the Respondents did file an application for extension of time at the Court of Appeal on the 14 November, the last day of the expiration of the 6 months deadline. It was the hearing of the application which took place about 14 months later after the expiration of time for filing appeal.

So the real issue here for determination is whether or not the Court of Appeal on 5 March 2003 had jurisdiction to determine and grant an application nearly 14 months after the time prescribed for filing an appeal has elapsed. The determination turns largely on the construction of rules 9(4) and 9(7) of C.I. 19 which is repeated here.

"4) **No application for extension of time in which to appeal shall be made** after the expiration of three months from the expiration of the time prescribed by this rule within which an appeal may be brought.

(7) Notwithstanding rule 28 of these Rules, **no application shall be made to the Court for extension of time** within which to appeal after six months from the date of the decision appealed against. "

Counsel for the Respondent in his statement of case submitted that:

> "Without doubt, what both rules 9(4) and (7) prohibit is the making of an application for extension of time within which to appeal after the expiration of the 6 month limitation period, that is six months from the date of the judgment appealed against. Both rules explicitly state that an application 'shall not be made'. The use of the word 'made' in rules 9(4) and (7) as opposed to 'move' in rule 9(8); or 'grant 'or 'refuse' in rule 9(8) and rule 28;

or 'determine' in rule 9(8) and rule 28) clearly shows, an invocation of the presumption of consistent expression, that the frames of the enactments only sought to prohibit the lodging or filing of an application in the Court of Appeal and not the hearing of or the determination of an application properly lodged in the Court of Appeal before the expiration of the six months limitation period.

Any other construction of rules 9(4) and (7) will clearly result in absurdity. The word 'made' is in consequence to be given its ordinary meaning, particularly where there is nothing in the context to suggest otherwise. In **Prestcold (Central) Ltd. v. Minister of Labour [1969] 1WLR 89** Lord Diplock LJ explained:

"The habit of a legal draftsman is to eschew synonyms. He uses the same word throughout the document to express the same thing or concept and consequently if he uses different words, the presumption is that he means a different thing or concept . . . a legal draftsman aims at uniformity in the structure of his draft."

I share the views expressed by Counsel for the Respondent. The expression "no **application shall be made to the Court for extension of time** "is not synonymous with the expression that no application shall be moved or heard after the 6 months period. It is my considered view that an extension of time made by a court after the prescribed 6 months limit for filing an appeal is permissible and within the discretion of the court <u>only where the application upon which the extension was granted was filed within the 6 months period</u>. Otherwise there would a great deal of injustice to parties where applications are brought rather tardily though within the prescribed time. Not forgetting the slow pace at which cases move in our courts due to various inhibitions.

There is no provision in the rules prohibiting an applicant from moving an application filed within time after the expiration of the 6 months period. The determining factor in the circumstances is when the application was made. An application obviously must first be made before it can be moved for determination by a court. Rule 9(5) prescribes the mode in which the application must be <u>made:</u>

Rule 9(5) "An application for extension of time must be supported by an affidavit setting out good and substantial reasons for the application and grounds of appeal which prima facie, show good cause for the extension of time to be granted."

It is my thinking then that since it is the application that must be made within the 6 months period and not the determination of it, any application that is filed any time within the 6 months period ought to be moved and determined on its merits at any

time, though expeditiously. In the instant application the Court of Appeal took note of:

> "The inadequacies by counsel and state that their results must not be visited on the party. There are substantial points raised in this application and we think the interests of justice will be better served if the application is granted."

Indeed when the appeal was lodged and heard by another panel of justices of appeal on its merit, the court set aside the summary judgment on the grounds that the respondents had raised triable issues which the trial judge ought to have granted unconditional leave for them to defend the action.

For the above reasons, we hold that the Court of Appeal did not err in granting extension of time for the Respondents to file their notice of appeal. And since the Appellant took fresh steps in all the proceedings including the hearing of the Appeal, they cannot at this stage complain.

Another point I desire to make here concerns some technical hurdle or obstruction that confronted the Respondents due to their own tardiness. This concerns the effect of rules 28 and 9(8) of C.I. 19 which Counsel for the Respondents has raised for our consideration.

Under Rule 9 (1) b extension of time may be granted by either the court below or the Court of Appeal. Rule 28 however directs that the application shall be made in the first instance at the court below. Meanwhile Rule 9 (7) prohibits an application to the Court of Appeal after 6 months from the date of the decision. Rule 9(8) therefore offers an applicant the opportunity to make an application before the Court of Appeal to consider an application for extension of time if the court below is unable or refuses to grant the extension, all within the 6 months period. Such an application ought to be by a motion supported by an affidavit in terms of rule 9(5). It appears that such a step can only be taken under rule 9 (8) where the application has been pending before the High Court for *not less than a month.*

The Supreme Court in considering similar provisions in the then Supreme Court Rules C.I. 13 Rule 8 (6) and the Court of Appeal rules, 1962 L.I. 218 rule10 (6) as amended by L.I.618, in the case of **The Republic v. Circuit Court Judge, Tamale ex parte Volta Senior Game Warden [1984-1986 1GLR 372 SC** at 371 to 372 held per Adade JSC that:

> "As would be observed, both the above rules envisage a situation where after a certain period of time the court below has failed to take a decision, one way or the other, in an application pending before it. In that event, in order that the fortunes of the applicant shall not be prejudiced by the indolence of that court, the applicant is given the liberty to ignore the court and to file his application direct to the appellate court."

We however have an entirely different situation here, where the indolence is rather on the part of an applicant who had barely 7 days before the expiration of the period within which to seek an extension of time for filing appeal. We are thus faced with an awkward position of having to decide, on the invitation of the Respondent, whether the Respondents, having filed an application at the High Court without first moving it for determination by the High Court could file the same application at the Court of Appeal in order to beat the time limit.

There is definitely an irregularity in the filing of the second application before the Court of Appeal. So how do we confront this conundrum?

To start with we must allow flexibility in the rules of procedure to enable courts to make such orders as it considers just or necessary for doing justice to the case. I agree with Justice Modibo Ocran that we must totally reject *technicism* as a judicial approach to case resolution. See his comments in the case of **GIHOC Refrigeration & Household Products v. Hanna Assi [2005-2006] SCGLR 458** at page **492.**

I am of the thinking that Rule 63 of C.I. 19 gives the Court of Appeal the flexibility in resolving such technicalities in the event of a breach or non-compliance with any rules of procedure. Rule 63 provides that:

"63. Waiver of non-compliance Rules

> When a party to any proceedings before the Court fails to comply with these rules or with the terms of any order or directions given or with any *rule* of practice or procedure directed or determined by the Court, the failure to comply shall be a bar to the further prosecution of proceedings *unless the Court considers that the non-compliance should be waived."(*Emphasis mine.)

It is evident that it was rather at a late hour that the Respondents decided to exercise their right, under rule 9 (4), to apply for extension of time in which to file their appeal. As a result there was no way that they could have complied with either rule 9(8) or rule 28. Our Courts have now come so far that any wrong step taken in legal proceedings should not have the effect of nullifying the judgment or proceedings, except in those cases where the court has no jurisdiction. A Court has discretion in such matters to waive or set aside the proceedings depending on the circumstances of each case. See **Order79 of CI 16, Order 63 of C.1 19 and Order 81 of C.1. 47.** I believe that this is a situation where the Court can waive non-compliance with the rules by the Respondents

However, it is my thinking that having filed the application before the Court of Appeal; the Respondents should have abandoned the one before the High Court. It

seemed to me that the Respondents found themselves tied and bogged down by rule 28, rather than to take a cue from the principle underlining rule 9(8) when it was evident that the High Court would not be able to hear the application before the expiration of the 6 months period. This time, I think Counsel in the case allowed the rules of procedure to become a "mistress" rather than a "handmaid."

I however unreservedly frown on the way counsel for each of the Respondents managed the case from the various stages at the High Court to the time that the extension of time was granted by the Court of Appeal.

I end my opinion with the words of Lord Denning MR in **Harkness v. Bell's Asbestos & Engineering Ltd. (1967) 2 QB 729 at735 -736 C.A**

> "It can be asserted that it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, and any mistaken step in his litigation".

The same can also be said of our Courts in Ghana in view of our rule 79 of C.1. 16, rule 63 of C.I 19, and Order 81 of C.I.47.

Accordingly the notice of appeal filed pursuant to leave granted was properly before the Court of Appeal. The Court of Appeal therefore had jurisdiction to entertain the appeal.

The appeal therefore fails and is accordingly dismissed. The judgment of the Court of Appeal is affirmed.

S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

DR. S.K. DATE-BAH

JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE

JUSTICE OF THE SUPREME COURT

V. AKOTO-BAMFO (MRS)

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