IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2013

CORAM: BENIN, J.S.C. SITTING AS A SINGLE JUSTICE OF THE SUPREME COURT

CIVIL MOTION

No. J8/84/2013

1ST AUGUST,2013

MURIEL ABREFI ODURO -PLAINTIFF/APPELLANT /RESPONDENT

VRS.

ISAAC KWAME ACHEAMPONG -DEFENDANT/RESPODENT /APPLICANT

RULING

BENIN, JSC:-

Article 131 of the 1992 Constitution under which this application has been brought has these material provisions:

(1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court-……..(b) with the leave of the Court of Appeal, 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.

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

The scope of these provisions has received interpretation from this court in some cases two of which Counsel for the respondent cited in his submissions in this application. These cases are **DOLPHYNE (NO. 2) v. SPEEDLINE STEVEDORING CO LTD. (1996-97) SCGLR 373;** and **NSIAH v. AMANKWAAH and Others (1996-97) SCGLR 453**. I will refer to these decisions very shortly.

Now the facts of this application. The respondent herein brought an action at the Circuit Court against the applicant herein, seeking a declaration of title to a piece of land and recovery of possession, among other reliefs. The Circuit Court gave judgment for the applicant. The respondent appealed to the Court of Appeal which by a majority of 2 to 1 reversed the decision of the Circuit Court and entered judgment for the respondent. The applicant says he desired to appeal against the Court of Appeal decision to the Supreme Court so he took steps to secure a copy of the Court of Appeal judgment to enable him ask for leave to appeal against same. However, by the time he secured a copy of that judgment the 14 day limitation period had expired. He applied to the Court of Appeal for leave to appeal to the Supreme Court but was compelled to withdraw it because time had ran out hence the present application to this court under Rule 7 of the Supreme Court Rules, 1996 (C.I.16).

Counsel for the applicant stated in his argument that the main points they rely upon are contained in paragraph 15 of the affidavit in support of the application. For its full force and effect I set it out here:

'That the case involves substantial questions of law namely:

i. The findings by the trial judge and determination of the Appellate Court on these findings.

ii. Part-performance and its effects on purchase of land.
iii. Adverse possession and its effects and
iv. The treatment of unpleaded facts.

The applicant also exhibited a copy of what he intends to file as grounds of appeal if granted leave to appeal. He also recounted some facts in the case to support his application. For her part the respondent deposed in an affidavit that the application is without merits. She deposed that on the day that the judgment was given by the Court of Appeal all the parties and lawyers were present so the applicant could have acted within time if he was so mindful. That no exceptional circumstance exists which warrants the grant of this application. She also went into the facts of the case to support her claim to have made out a better case to deserve the court's judgment. In a supplementary affidavit in opposition deposed to by one of her lawyers, the respondent replied directly to paragraph 15 of the applicant's affidavit. Paragraph 4 of the said affidavit provides:

'That regrettably, the grounds canvassed by the Applicant in paragraph 15 of the affidavit in support as forming the basis of the application are not known to be the legitimate grounds for invoking the special leave of the Court to appeal namely:

(a) That 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 of the Supreme Court on the point sought to be appealed against will be advantageous to the public.'

At the hearing Counsel for the respondent cited the two cases referred to above wherein the principles governing this type of application were outlined. Indeed paragraph 4 of the supplementary affidavit quoted above is a reproduction of those principles first applied in **NYIMOH v. DADZIE (1962) 1 GLR 327** and endorsed by this court in the two cases cited above, first in the DOLPHYNE case and then in the NSIAH v. AMANKWAA case. Thus a party who comes for special leave of this court must satisfy at least one of the grounds as set out above; but each case will be determined on its own peculiar facts and circumstances. Thus except the principles of law set out in the cases cited which I entirely agree with,

the facts and circumstances therein will not be accepted as precedent or even as a guide. Thus the court's discretion will have to be exercised or not in the light of the facts and circumstances of this case.

The fact that the applicant did not act in a timely manner to meet the deadline before the Court of Appeal is not a crucial or critical factor, it may only be taken into account when considering all the circumstances of the case, especially when it is said that the applicant deliberately delayed the processes to his advantage. But in the present case I have no cause to chastise the applicant for tardy conduct. Even though Counsel for the applicant could have applied for leave in the court below before receipt of the judgment which he said they had applied for, yet I take note of the fact that they applied to that court so soon from the date they received the judgment, judging from the fact that the application was struck out on 24th June 2013. And soon thereafter they put in the present application before this court. In my view the applicant has conducted the processes quite responsibly, except that his counsel could and should have acted fast whilst waiting for the judgment to enable him file grounds for the application in view of the fact that they had only 14 days to apply. I do not consider it just or fair to let the applicant suffer for this lapse on the part of his counsel.

I will thus consider the application in the light of the three principles set out above. I must say that in such an application, where the court does not have the benefit of the record, the parties must endeavour to place the facts as nearly as the record bears out to enable the court to appreciate the basis for the application as well as the opposition thereto. This is because oftentimes error of law arises from wrongful application of the law to the facts.

In the instant case the judgment does not disclose any error of law apparent on the face of the record. Also no new principle of law appears to have been raised in the judgment. Thus the first two principles do not apply here. Hence counsel for the applicant argued that the appeal will be to the advantage of the public applying the third principle. I must say that it is by no means easy to outline those cases which will be of advantage to the public. The operative words 'advantage'

and ‘public’ cannot be defined with any degree of precision or certainty in this context.

‘Advantage’ as used here appears to me to mean benefit or interest to the development of the law in a particular field of law. When the law is established or developed the entire society, not just the legal fraternity, is better for it and that is where the ‘public’ element comes into play. In other words development of law is the concern of the public at large, hence nothing should be done to frustrate the pronouncement on a legal issue by the highest court of the land, unless of course it is a point which has been firmly established and the present case offers no exceptions to it.

Thus we have to examine the points of law that the applicant intends to raise for the Supreme Court’s consideration. These are contained in paragraph 15 of the affidavit in support, supra. First of all he complains that the appellate court made its own findings disregarding those as found by the trial court. I take note of this fact. But without stating an opinion on it, I am of the view that where the appellate court arrives at a conclusion on matters of fact different from what the trial court found, it may be a good reason for a second appellate court to have another look at the facts and resolve same finally. For the principle of law is that the trial court’s findings should not be disturbed unless they cannot be supported on the record; thus the appellate court is not entitled to form its own opinion on the facts and accept that in place of what the trial court has found. This is what the applicant is complaining about as having happened in this case. Without the entire record it is difficult to confirm this, but a reading through the Court of Appeal judgment, annexed to the affidavit in support as exhibit IKA2 shows the majority of their Lordships at the Court of Appeal disagreed with the trial court on the findings of fact. This is a case which I believe should engage the attention of this court, if only to ensure that the principles relating to appeals on findings of fact which have clearly crystallized in our jurisprudence have been followed and correctly applied.

The issues on part-performance and adverse possession are equally important since they go a long way in land matters to determine ownership. I will not

advance this any further. The final complaint is that the court accepted and relied on facts that were not pleaded. Once again the record is unavailable to enable me assess it the way I would have liked to. But for now I could say that there is divergent opinion on how to treat facts that have not been pleaded but which have found their way into the record. Different judges have treated same differently but often based upon the record at hand. This also calls for another look by a second appellate court especially at the level of this court. Upon receipt of the complete record this court will be able to find out whether in truth facts which were not pleaded were admitted, whether with or without objection, and if so their impact on the case.

To conclude, I am satisfied that there are weighty and material factual and legal issues raised herein that this court should have the opportunity to look at, there is no frivolity here. Such developments will no doubt benefit the public for which reason I will allow the application. The applicant is ordered to file his notice of appeal within one week from today. I want to place it on record that I am impressed by the industry put in this application by counsel for the respondent which was of great assistance to the court.

The application is allowed accordingly in terms as stated above with no order as to costs.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

COUNSEL

K. ADJEI-LARTEY FOR THE DEFENDANT/RESPONDENT/APPLICANT.

ADJABENG AKRASI FOR THE PLAINTIFF/APPELLANT/RESPONDENT.