IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA, J.S.C. (PRESIDING)
DATE-BAH (DR), J.S.C.
ANIN YEBOAH, J.S.C.
BAFFOE-BONNIE, J.S.C.
ARYEETEY, J.S.C.

CIVIL MOTION
NO. J8/30/2010
24TH MARCH, 2010

NANA AKOSUA AGYEMANG - - - PLAINTIFF /RESPONDENT
(SUING PER HER LAWFUL ATTORNEY
REV. PIUS AGYEMANG)
H/NO. DN 910/3 CLUB ROAD
OPERA SQUARE
ACCRA

VRS

THE TRUSTEES SYNAGOGUE
CHURCH OF ALL NATIONS
NO. 86 SPINTEX ROAD
NO. 36 TEMA MOTOR WAY
INDUSTRIAL AREA
ACCRA - - - DEFENDANT/ APPELLANT

R U L I N G

ATUGUBA, JSC:

The Defendants/Appellants/Applicants brought before this court a repeat motion for stay of execution pending appeal.

In an affidavit in opposition, deposed to on her behalf, the Plaintiff/Respondent stated in paragraph 5 thereof thus:

> "That at the hearing of this application Counsel for the Plaintiff/Respondent *will raise a preliminary objection* that the instant application is not properly before this Honourable Court"

The Respondent then proceeded in subsequent paragraphs to state further and better particulars of her objection.

When on 16/3/2010 the motion was called counsel for the applicants, Eric Agbolosu, of K-San Chambers objected that the respondent could not be heard as to her preliminary objection since the same had not been served on him. This court drew his attention to the proof of service before the court which states that the affidavit in opposition wherein the preliminary objection was raised has been served on K-San Chambers "through Joseph Osei (the clerk)" on 4/3/2010.

Nonetheless counsel insisted that since the document did not in fact reach him he cannot be said to have been served. We impressed on counsel that in practice service on his clerk is service on him but he stuck to his guns.

Perceiving that there is no readily available authority on the issue we decided to have a written Ruling on it.

The Supreme Court Rules, 1996 C.1.16 do not state how service of a court process can be effected on counsel. However r.5 of C.1.16 provides thus:

> "Where no provision is expressly made by these Rules regarding the practice and procedure which shall apply to any cause or matter before the Court, *the Court*

shall prescribe such practice and procedure as in the opinion of the Court the justice of the cause or matter may require."

It has sometimes been held in this court that where there is ***casus omissus*** in C.1.16 the only course possible is for this court to direct under r.5 what the practice or procedure should be and until that is done, no step is warranted. Nonetheless it is always necessary to bear in mind that the legislature legislates with the existing law in view and is not deemed to alter the same except to the extent provided expressly or by very necessary implication. In this regard the established practices of the courts cannot be discounted in applying the law. Such practices by their very nature may often be reflected by ***communis opnio*** or by ***contemporanea expositio*** in the legal profession, both as to civil and criminal matters alike.

Thus in Rex *v. Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White* (1948) 1 K.B. 195 C.A at 216 Wrottesley L.J forcefully stated thus. "*In the interests of all concerned*, and particularly of litigants, *a long settled practice of a court* of record… *is not to be disturbed except by establishing that a departure from it is necessary in order to do justice to an applicant who can get justice in no other way,* and to whom the court has always had jurisdiction to grant the relief prayed for*. A heavy burden lies, therefore on those who challenge a practice so long settled*."

The legal status of a rule of practice has been put in crisp and hallowed terms by that very embodiment of the law, Lord Devlin, in *Connelly v Director of Public Prosecutions* (1964) A.C 1254 at 1360-1361 thus: "… a rule of practice is … different. *When declared by a court of competent jurisdiction the rule must be followed until that court or a higher court declares it to be obsolete or bad or until it is altered by statute."*

All this shows that the rules of practice declared by the courts do not necessarily stand abrogated by reason of a change of government in the Rules of Court. R.5 of C.1.16 which governs the situation in this case, is of a procedural pedigree of quasi antiquity. It existed in the form of r.38 in the erstwhile Supreme Court Rules 1962 (L.I.218) and has enjoyed consistent re-enactment in subsequent Rules of Court and the cases of

Khoury v Khoury (1971)I GLR 348 C.A and *Konadu v. Yiadom* (1995-96)I GLR 8 S.C establish that pre-existing rules of practice hold good under newly enacted Rules of Court unless they be inconsistent with their provisions.

In *Jerigoji v. Issah* (1989-90)2 GLR 501 at 508 Benin J said: "The next *important ground raised* by the defendant counsel *is that neither the defendant nor his counsel was served* with a hearing notice to appear at the hearing. *As we have already said the clerk of the defendant's counsel was served. By accepted practice this was good service on counsel…"* Normally when service has to be effected on someone such service has to be personal. See, Kom, Civil Procedure in the High Court, p.23 and *Republic v. Registrar, Medical and Dental Board, Ex parte Christian* (1973)2 GLR 323 C.A. The court however qualified the necessity for personal service by holding that service on the agent put forth by the person in question for the purpose of service is good service. We have no doubt that the clerk of K-San Chambers in this case is such an agent by the accepted practice in this country and therefore the service of the affidavit in opposition in this case on their clerk is good service on them.

When we adjourned for the Ruling in this case the applicants' counsel filed submissions on this matter and has inter alia, argued that in as much as the particulars of the respondent's preliminary objection in this case are not stated, as we understand the contention, on its face but depend on resort to depositions and exhibits of the affidavit in opposition, the same is improper. With industry, he relies on the unreported case of *The Republic v. the Lands Commission & Anor. Ex parte Messrs. (1) Felpong Company Limited & 1 or, Misc* 1323/2001 dated 7/11/2002, a decision of Akamba J.A sitting as a Judge of the High Court. It appears that counsel's appreciation of this decision varies in some respects from the ***ratio decidendi*** of that case. Nonetheless the Gambian authority on which that case turns is more fully set out in *Benyarko v. Central Ghana Conference of Seventh Day Adventist Church* (2001-2002)2 GLR 472 C.A. The facts of this case as summarized in the headnote are as follows:

"The applicants filed a motion at the Court of Appeal for an order to stay execution of a judgment of the court, pending the hearing of their appeal from that judgment by the Supreme Court. At the hearing of the motion, the applicants raised a preliminary objection to the capacity of the respondents. The court, however, did not find any apparent irregularity or defect concerning the respondents' capacity on the motion"

Delivering the unanimous Ruling of the court (Lartey, Akamba and Osei JJ.A), Lartey J.A (as he then was), stated at 474-476 as follows:

"….*since this is a preliminary objection to the hearing of the applicants' motion, the same must conform with the rules governing preliminary objections*. *Rule 16 of the Court of Appeal Rules, 1997 (CI 19) requires the filing of notice of preliminary objection to the hearing of an appeal*. This rule is clearly not applicable in the case before us, which is the hearing of a motion. *The practice relating to motions is that when the applicant attempts to move his motion, all that counsel needs to do is to raise his objection orally. There is thus no obligation to file a notice of preliminary objection in cases other than appeals*.

On this point of preliminary objection we would like to cite with approval the Gambian case of *Kabo Airlines Ltd v The Sheriff* Court of Appeal, Gambia, on 27 March 2002 unreported for its persuasive effect. Stating the purpose of raising preliminary objections, Gelaga-King JA said as follows:

"Let me say at once that the purpose of a preliminary objection, as we understand it is to prevent the application in the notice of motion before the court from being heard on its merits, either on the grounds of irregularity, or for non-compliance with some legal provision or for some other good and sufficient reason. The fundamental and crucial requirement, however, is that any *alleged irregularity, defect or default must be apparent on the face of the notice of motion so that the objector does not have to condescend to the affidavits or other documents*

> *accompanying the motion to support his objection.* In other words, counsel is not permitted at the stage to refer to the affidavits and exhibits. He may only do so, if at all, after the court had disposed of the preliminary objection. If the preliminary objection has no chance of being upheld without calling in aid those documents, then the correct course is for counsel to wait for the applicant to make his application and then oppose it, when he is called upon to reply and when he is at liberty to make use of all the documents.
>
> It should be noted that procedurally the preliminary objection gives to the objector the right to begin and to have the last word, after the other side has replied. Tactically, it has the practical effect of depriving the applicant who is being prevented from moving his motion, of the important procedural right to begin first and have the last word, as he would if he was allowed to argue his motion unimpeded"

(The emphasis is mine.) In the instant motion, the preliminary objection was taken by the applicants. This may be an unusual step coming from the party that filed or initiated the motion for stay and who would under the procedural rules have the right to begin to move his motion unimpeded.

Be that as it may and in conformity with the authority cited above, one is inclined to pose the question whether the issue of capacity or lack of it raised by the applicant is apparent on the face of the motion? It seems to us that there is no apparent wrong on the face of the motion as to the respondents' capacity so as to bring the respondents under the scrutiny of the rule. To succeed in establishing a case of lack of capacity, counsel for the applicants would need to call in aid documents filed in support of the motion paper and other exhibits. It cannot be said at this stage that on the face of the notice of motion, it is apparent that there is an irregularity or defect concerning the respondents' capacity to warrant any intervention by this court by way of preliminary objection."

The reliance on this authority can be qualified in several ways. The first is that non compliance with the rules of practice declared by the courts is not outside the provisions of r.79 of C.1. 16. It is as follows:

> "Where a party to any proceedings before the Court *fails to comply* with any provision of these Rules or with the terms of any order or direction given or with *any rule of practice or procedure directed or determined by the Court*, the failure to comply shall be a bar to further prosecution of proceedings *unless the court considers that the non-compliance should be waived."*

See *Dei XI v. Darke XII* (1991)2 GLR 318 S.C at 326 per Adade JSC, holding that "*such practice or procedural rules, when infringed, may be excused under rule 66 of C.1.13*."
See also *Essilfie v Anafo* (1992)2 GLR 654 SC at 663 per Archer C.J.

It is of course notorious that r.66 of C.1.13 is the same as r.79 of C.1.16. Whether a breach of a rule of practice should be held to be fatal or result in the proceeding being set aside as irregular or waived, depends on the circumstances of the case, prejudice to the other side being a strong factor. This is trite law. The second is that where a jurisdictional point is involved a breach of a rule of practice or procedure can hardly debar a preliminary objection, notwithstanding that evidence may have to be called by way of affidavit or otherwise. Thus in *Republic v High Court, Accra; Ex parte Adjei* (194-86)I GLR 511 S.C at 515 Sowah C.J was constrained to say thus:

> "…Counsel for the applicant *in moving his motion raised an objection to the jurisdiction of the court to sit*. It must be observed that *the objection was raised without notice to the respondent or the court.* In *ordinary circumstances* the court would *not have entertained the objection but it thought it was so fundamental that it should be heard*."

Again in *Amoo v Electoral Commission* (1997-1998)2 GLR 858 C.A the Court of Appeal held that the trial judge was right in taking evidence and determining whether the

preliminary objection raised by the motion of the 1st respondent as to the competency of the election petition therein, was sustainable.

The legislative mood of C.1.16 towards non compliance with the procedure for raising a preliminary objection is captured by r.17(5) which is the only rule on the issue of preliminary objections. It leaves the fate of a breach thereof entirely to this court's discretion.

In our view the notice of the preliminary objection in the affidavit in opposition in this case goes to the jurisdiction of this court to entertain the applicants' motion for stay of execution and it matters not that it is based on depositions as to facts. In any case the applicants' motion for stay of execution before us, ***ex facie***, is provocative of the preliminary objection herein since it avowedly prays "*for stay of Execution of the Judgment of the High Court…"* whereas r.20 of C.1.16 relates to "…*a stay of execution or of proceedings* under *the judgment or decision appealed against*…" There are several decisions of this court which ***prima facie*** shake the competence of this application. The respondent's preliminary objection cannot therefore be said to flout the rule of practice relating to the raising of a preliminary objection to a motion.

The other contentions of counsel are either plainly misconceived or premature and therefore, with regard to the latter, need not be further considered in this Ruling and at this stage. For all the foregoing reasons we overrule the objections of counsel against our entertainment of the respondent's preliminary objection herein.

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
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