IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2012

CORAM: DR. DATE-BAH JSC (PRESIDING)
ANSAH, JSC
YEBOAH, JSC
GBADEGBE, JSC
BAMFO,(MRS) JSC

CIVIL MOTION.
No. J5/16/2012

4TH JULY,2012

THE REPUBLIC

VRS

HIGH COURT,ACCRA
EX-PARTE; ATTORNEY GENERAL ..... APPLICANT

KENNEDY OHENE AGYAPONG ..... INTERESTED PARTY

R U L I N G

DR DATE-BAH JSC:

This is the unanimous ruling of the Court. The remedy of *certiorari* has always been a discretionary one. The authors of De Smith, Woolf & Jowell's Principles of

Judicial Review (1999), in discussing the historical development of judicial review remedies and procedures, make the following pronouncement (at p. 530) in relation to the four prerogative writs of *certiorari, mandamus, prohibition, and habeas corpus*:

> "Though the four writs had acquired their "prerogative" characteristics by the middle of the seventeenth century, strangely it was not until a century later, in 1759, that anybody (Mansfield) seems to have thought of classifying the writs as a group. Those shared characteristics included the following:
>
> 1) They were not writs of course which could be purchased by or on behalf of any applicant from the Royal Chancery; they could not be had for the asking, but proper cause had to be shown to the satisfaction of the court why they should issue.
> 2) The award of the prerogative writs usually lay within the discretion of the court. The court was entitled to refuse certiorari and mandamus to applicants if they had been guilty of unreasonable delay or misconduct or if an adequate alternative remedy existed, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty. But although none of the prerogative writs was a writ of course, not all were discretionary. Prohibition, for example, issued as of right in certain cases; and habeas corpus *ad subjiciendum,* the most famous of them all, was a writ of right which issued *ex debito justitiae* when the applicant had satisfied the court that his detention was unlawful. These two writs, therefore, were not in the fullest sense writs of grace.
> 3) …"

This Court has on numerous occasions accepted and stressed the above-mentioned discretionary character of the remedy of *certiorari.* For instance, in *Republic v High Court, Denu; ex parte Agbesi Awusu II (No. 2) (Nyonyo Agboada*

(Sri III) Interested Party) [2003-2004] 2 SCGLR 907, Atuguba JSC explained (at p. 914) that:

> "It is well-known that *certiorari* is a discretionary remedy and therefore it does not follow that when the technical grounds upon which *certiorari* lies are established, it will be *pro tanto* granted."

Kpegah JSC has also said, in *Republic v High Court, Accra; ex parte Aryeetey (Ankrah Interested Party)* [2003-2004] 1 SCGLR 398 at p. 410, that:

> "Needless for us to say that *certiorari* is a discretional (*sic)* remedy and the conduct of an applicant can disentitle him to the remedy."

in *Republic v High Court, Accra; Ex parte Tetteh Apain* [2007-2008] SCGLR 72, Atuguba JSC, delivering the ruling of the Supreme Court, said (at p. 75):

> "In any case, an order of certiorari, as has often been said, is a discretionary remedy. Therefore assuming that the High Court should not have proceeded in the matter pending the determination of the applicant's application for prohibition pending before this court, as the applicant could have applied to the Court of Appeal for an interim order to prevent the trial court from proceeding pending the determination of his application for stay of proceedings thereat, he had another remedy open to him which was not less convenient but which he failed to pursue. The applicant was clearly forum-shopping, which is an abuse of the process of this court. In the circumstances, this court ought to shut the doors of the discretionary remedy of certiorari against the applicant and we hereby so do."

In this last case, Atuguba JSC is making the point that where an applicant has a remedy other than *certiorari* open to him or her, this is a factor that may be taken into account in denying the applicant the discretionary remedy that is *certiorari,* even if the other preconditions for the grant of the remedy have been established. The existence of an alternative remedy is one of the factors that a

court can rely on to exercise its judgment against the grant of *certiorari.* (See, for instance, *Barraclough v Brown* [1897] AC 615.)

Also, in *In re Appenteng (Decd); Republic v High Court, Accra (Commercial Division); Ex parte Appenteng* [2010] SCGLR 327, Atugaba JSC, again delivering the ruling of the Supreme Court, said (at p. 339):

> "Against a background such as this, we have no difficulty in holding that though *certiorari* is a discretionary remedy, the omission of a party to raise objection to a proceeding in an inappropriate forum should disentitle the applicant to that remedy where the omission was willful and an abuse of the process of the court."

This *dictum* is relevant to the facts before this court in this application. The Attorney-General is seeking to quash proceedings that he himself has initiated before the High Court against the interested party. After initiating the proceedings before the High Court and that Court had assumed jurisdiction over the matter, without any objection on his part, he has now turned round to apply to the Supreme Court to quash those same proceedings that he himself has initiated, on the ground that the High Court lacks jurisdiction in the matter.

The grounds for his application as stated on his motion paper are as follows:

1. "The High Court committed jurisdictional error through want of jurisdiction when it purported to assume jurisdiction in the matter before it.
2. The High Court lacked jurisdiction to grant bail in the matter."

By an affidavit sworn to by Anthony Rexford Wiredu, Principal State Attorney, the applicant contends that the said Mr. Wiredu prepared committal processes (bill of indictment together with the facts of the case) to file in the Registry of the District Court, Adjabeng, Accra, in a case entitled *The Republic v Kennedy Ohene Agyapong.* The said processes were filed on 18th April at the District Court, but when the case was called the District Magistrate declined jurisdiction, after listening to the legal submissions on behalf of the applicant and the accused. Mr. Wiredu further deposed that on 19th April 2012, on the directions of the District Court, Adjabeng and for the avoidance of doubt, he prepared two sets of

processes; one for filing in the registry of the District Court, Accra, and the other for filing in a division of the High Court, Accra. Both sets of processes were handed over to the relevant judicial officers for filing in the appropriate forum. Consequent on the filing of the process in the High Court, the High Court assumed jurisdiction in the matter by taking the plea of the accused person. It also granted the accused bail, upon an oral application made by his counsel.

The applicant's argument is that the processes, being committal processes, had been filed in the wrong court. He maintains that they should have been filed in the District Court and not in the High Court and therefore the High Court has wrongfully assumed jurisdiction.

The interested party has in turn deposed to an affidavit opposing the application, in which he challenges the facts of the case as narrated in the affidavit of Mr. Wiredu, the Principal State Attorney. He swears that what was filed in the High Court was a charge sheet and not an indictment. He contends that the Principal State Attorney cannot in good faith and in all conscience say that the processes filed in the High Court ought to have been filed at the District Court. He states that if the Principal State Attorney intended to commence committal proceedings, he ought to have complied with the provisions of section 182 of the Criminal and Other Offences (Procedure) Act 1960 (Act 30), which provides for the Court and the accused to be furnished with not only a bill of indictment, but also a summary of evidence and a list of the documents and things the prosecution proposes to put in evidence at the trial. The interested party further deposes to the fact that the Charge Sheet had as its heading:

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Furthermore, it had no bill of indictment or summary of evidence annexed to it as evidence that the Principal State Attorney intended a trial on indictment. In paragraph 17 of his affidavit, the interested party states that:

"Assuming without admitting that the case was filed in the wrong Court, then it was due to the Heading of the Charge Sheet prepared by the Prosecutor and he cannot therefore be allowed to take advantage of his own wrong-doing."

He further states in paragraphs 22, 23 and 24 that:

> "22. This application is targeted at the bail granted me and nothing more and therefore have *(sic)* been brought in very bad faith. This Court ought not therefore to exercise its discretion in favour of the applicant.
>
> 23. I am advised by Counsel and verily believe same to be true that the Learned Principal State Attorney has other remedies open to him in rectifying any anomaly caused by himself. There are options available to the Prosecutor to withdraw charges or do other things to bring the proceedings to a halt. Therefore, he does not need to apply to the Highest Court of this Land for a relief which he himself can grant.
>
> 24. I am advised by Counsel and verily believe same to be true that the wrong which the Learned Principal State Attorney is complaining about was created by him. He acquiesced in the proceedings and failed to take objection and therefore he is deemed to have waived his right to complain."

The points made in these three paragraphs are quite telling and render it unnecessary to determine whether on the facts of this case the High Court had jurisdiction or not. This is because the Attorney-General has in his own hands and control a "remedy" that he can deploy to achieve the same result as if this court had granted him the relief of *certiorari.* That "remedy" is *nolle prosequi* which is provided for in section 54 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) in the following terms:

> "(1) In any criminal case, and at any stage of a criminal case before verdict or judgment, and in the case of preliminary proceedings before the District Court, whether the accused has or has not been committed for trial, the Attorney-General may enter a *nolle prosequi*, either by stating in Court

or by informing the Court in writing that the Republic does not intend to continue the proceedings.

(2) Where the Attorney-General enters a *nolle prosequi* under subsection (1),

(a) the accused shall be discharged immediately in respect of the charge for which the *nolle prosequi* is entered, or

(b) the accused shall be discharged where the accused has been committed to prison, or

(c) the recognisances of the accused shall be discharged where the accused is on bail.

(3) The discharge of the accused shall not operate as a bar to any subsequent proceedings against the accused in respect of the same case.

(4) Where the accused is not before the Court when the *nolle prosequi* is entered the registrar or clerk of the Court shall ensure that notice in writing of the entry of the *nolle prosequi* is given to the keeper of the prison in which the accused is detained and where the accused has been committed for trial, to the District Court by which he was so committed.

(5) The District Court shall cause a similar notice in writing to be given to any witness bound over to prosecute and to their sureties, and also to the accused and the sureties of the accused where the accused has been admitted to bail."

From these provisions, it is clear that the Attorney-General can achieve the same nullification of the proceedings before the High Court which he seeks from this Court by exercising this statutory power of *nolle prosequi* conferred on him. The discharge of an accused consequent on the exercise of the power of *nolle prosequi* is equivalent to wiping the slate clean, as far as the discontinued proceedings are concerned. This is, of course, without prejudice to restarting fresh proceedings against the accused, on the same facts. In these circumstances,

it would be inappropriate for this Court to exercise its discretion in the applicant's favour to grant him an order of *certiorari,* when he himself is able help himself lawfully. The grant of *certiorari,* on the facts of this case, is unnecessary. Secondly, it would be extremely odd for an applicant who has invoked the jurisdiction of the High Court and who has not objected to the jurisdiction of the High Court, before that court, to be allowed to quash the proceedings that he himself has initiated by a *certiorari* order issued from this Court. In support of this view, it would be apposite to cite the observation of Atuguba JSC in *In re Appenteng (Decd); Republic v. High Court, Accra (Commercial Division); ex parte Appenteng (Appentengs Interested Parties)* [2010] SCGLR 327 where he said (at p. 334):

> "It is well-established that this remedy being discretionary, a suitor for it, even on the ground of want or excess of jurisdiction, will not obtain it *ex debitio justitiae* unless he can show that he had raised an objection to the want of jurisdiction if he was aware of it."

The applicant here, by his conduct, has clearly acquiesced in whatever want of jurisdiction attended the High Court's conduct of this case. Whilst such acquiescence may not cure any want of jurisdiction, it can found the basis for a negative exercise of discretion in relation to the grant of an order of *certiorari*. We would like to reiterate that we have deliberately not examined the merits of the argument of the applicant that the High Court lacks jurisdiction in this case. Given our view of this case, it is unnecessary to go into the merits of that issue.

For these reasons, we consider that the Honourable Attorney-General's application for "an order of Judicial Review in the nature of Certiorari directed at the High Court, Accra to quash the order of that Court presided over by His Lordship Justice Charles Quist and given on the 19th day of April, 2012 in a case entitled *The Republic vrs. Kennedy Ohene Agyapong* SUIT NO. ST 36/2012" should be dismissed and it is hereby dismissed.

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

[SGD] J. ANSAH
JUSTICE OF THE SUPREME COURT

[SGD] ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

[SGD] N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

[SGD] V. AKOTO-BAMFO [MRS.]
JUSTICE OF THE SUPREME COURT

COUNSEL;

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ASIAMAH SAMPONG (PSA), JOHN TULASI OFORI (ASA), OWUSU AMEYAW(ASA) FOR THE REPUBLIC.

AYIKOI OTOO WITH FRANK DAVIS AND ATTA AKYEA FOR THE INTERESTED PARTY.