IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2014

CORAM: W. A. ATUGUBA JSC (PRESIDING)
J. V. M. DOTSE JSC
N. S. GBADEGBE JSC
A. A. BENIN JSC
J. B. AKAMBA JSC

CIVIL MOTION
No: J5/26/2014

22ND JULY 2014

THE REPUBLIC

VRS

HIGH COURT, ACCRA - RESPONDENT
EX-PARTE

NII NUEH ODONKOR - APPLICANT

THE EXECUTIVE DIRECTOR
ECONOMIC AND ORGANISED CRIME OFFICE
OLD PARLIAMENT HOUSE
HIGH STREET

BANK OF GHANA
HIGH STREET, ACCRA

ECOBANK GHANA LTD
HEAD OFFICE RIDGE,
ACCRA & OTHERS

INTERESTED PARTIES

RULING

ATUGUBA, JSC (FOR THE MAJORITY)

On 22/4/2014 the applicant herein filed this application seeking:

"i. An order of certiorari to bring up into this Court for purposes of being quashed the order of the High court (financial Division) Coram: His Lordship Justice Bright Mensah dated 19th February, 2013 Seizing and Forfeiting the US 22,480 belonging to the Applicant lodged in 024204416729501 (USD ACCOUNT) and 0240034416729501 (GHC ACCOUNT) with the 3rd Respondent to the state.

ii. An order of certiorari to bring up into this Court for the purposes of being quashed the ruling of the High Court Coram His Lordship Justice Bright Mensah dated 14th March, 2014 dismissing the Application to set aside the Order of Seizure and Forfeiture of Tainted Assets.

iii. An order of certiorari to bring up into this Court for the purposes of being quashed the order confirming the continuous freezing of the account of the Applicant held with the 3rd Respondent dated 23rd February, 2013."

There is some fluctuation as to dates. Whilst the applicant dates the first order sought to be quashed the 19th February 2013, the 1st respondent dates it the 19th day of February 2012. Similarly while the applicant dates the third impugned order the 23rd day of February 2013, his exhibit NN01 dates it the 23rd day of February 2012. It is the latter dates that are correct.

In any case it is quite clear that this application has been brought not less than one year after the occurrence of the relevant events called into question by the applicant.

This court has stated time without number that the discretionary nature of the remedy of certiorari is not prejudiced by the incidence of nullity of the proceedings sought to be quashed. This principle has recently been emphasized

in *The Republic v 1. The High Court, Accra 2. Nana Yaa Konadu Exparte Alhaji Abdul Rashid, CM* J5/13/2014 dated 13/2/2014, S.C unreported. Perhaps it is necessary to explain that the mere fact that rules of court on time limits cannot shut out an application in respect of proceedings that are a nullity does not mean the relief sought will be granted *pro tanto*. The discretionary nature of certiorari still applies in relation to it. Since even when an application for certiorari brought within time limits can still be refused for tardiness it would be *pessimi exempli* to hold that tardiness cannot, as a matter of discretion defeat a certiorari application brought outside the statutory time limit. Cases which tend to hold that time for applying for certiorari runs from the date of a refusal to set aside a judgment could not have in their contemplation such an application brought *ex diuturnitate temporis* under the inherent jurisdiction to vacate void orders. Even there abuse of the process has been excepted by this court. See Ampofo v Samanpa (2003-2004) 2 SCGLR 1153.

The applicant's certiorari application relates to the lodgments of various sums of US Dollars into his aforementioned Ghanaian bank accounts peaking to a single deposit of USD 22,500.00. The applicant is said to be a mechanic but he seems to have substituted therefor a new status of farmer.
The sources and purposes of the said lodgments are not well known though it is said that they emanate mostly from foreign females. The applicant had ample time to apply for judicial review but chose to come 2 years later.

In the circumstances I am reluctant to avail the applicant of the discretionary remedy of certiorari in respect of the two aforementioned orders of the High Court (Financial Division).

As regards the prayer to quash the ruling of the said court, dated 14/3/2014 refusing "to set aside the order of seizure and forfeiture of Tainted Assets," it would be invidious to grant the same after the refusal by this court to quash the two aforementioned orders. Such a course would negate the legal implications of the refusal of this court to quash the two aforementioned orders.

It is plain that the discretionary nature of certiorari applies to this prayer sought also. It should be stressed that certiorari is a special and residual remedy which is held in reserve, hence the rule that where there is an equally effective alternative

remedy, resort to certiorari will be refused. As emphasized by Jiagge J.A in *Republic v Anlo Traditional Council; Ex parte Hor II* (1979) GLR 234 C.A at 243:

> "As a matter of practice, *great caution accompanies the exercise* of *discretionary powers under prerogative orders*. The prerogative has been defined as "*The residue of discretionary or arbitrary authority* which at any given time, is legally left in the hands of the Crown: (i.e. State)."

For all the foregoing reasons the application is dismissed.

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

DISSENTING OPINION

DOTSE JSC:-

I have been privileged to have read the opinion of my worthy and respected brother Atuguba JSC and President of the Court to the effect that the instant application has been woefully filed out of time in terms of rule 62 of the Supreme Court Rules 1996, C. I. 16 and therefore ought to be dismissed.

The said opinion has agitated my mind and given me anxious moments and the more I consider it, the more I feel a lot of injustice would be caused the Applicant if I should follow that line of thinking.

I am not unaware that in deciding to write this dissenting opinion, I am in the minority as my brethren have all decided to go along with the decision of Atuguba JSC.

Nonetheless, I am determined to press on to give the reasons why I hold a contrary view and opinion and also why I departed from the views of the majority of the Court.

The 1st Interested Party in this case has contended that the Applicants application has been filed out of time and therefore in flagrant violation of rule 62 of the Supreme Court Rules, 1996 C. I. 16.

The 1st Interested Party also contended that an appeal is a suitable remedy which they claimed the Applicant has already filed.

I will therefore promptly deal with these preliminary issues before I deal with the substantive application.

Notice of Preliminary Objections

I have taken the view that, the instant application has not lapsed under rule 62 of C. I. 16 as contended by the Interested Parties.

It is trite procedure that whenever a party conceived that a decision, ruling or order made or given by a trial court, in this instant the High Court has not been well made out, due to a variety of factors inter alia because a party was not heard or a process which ought to be served had not been served etc, that party

is entitled to go back to the trial court to seek to set aside the order, ruling or decision complained of on stated legal grounds.

It is only after the refusal by the trial court to set the impugned order, ruling or decision aside that the grounds for the application would be deemed to have arisen, thereby necessitating the computation of time.

In determining this issue as to whether this Application has been brought within time as envisaged under rule 62 of C. I. 16, this court will have to consider the effect of the Ruling of the High Court, Financial Division on 14th March 2014, which was a ruling premised upon an application made to the court to set aside its confiscation orders made by the Court.

It should be noted that, it was this Ruling of 14th March 2014which completely shut the door on the Applicant in the pursuit of his rights to get the High Court to overturn the confiscation orders made earlier on.

On the authority of the unanimous decision of the Supreme Court in the case of ***Republic v High Court (Fast Track Division), Accra Ex-parte State Housing Co. Ltd. (No.2) Koranten-Amoako, Interested Party [2009] SCGLR 185***, the 14th of March 2014 is the date time would be deemed to have started running for purposes of computing time pursuant to rule 62 of C.I. 16. Under the circumstances, the Applicant is not out of time as contended by learned counsel for the 1st Interested Party. The preliminary legal objection is therefore overruled as untenable. See also cases of **Republic v High Court, Kumasi; Ex-parte Mobil Oil (Ghana Ltd) Hagan – Interested Party** [2005-2006] SCGLR 312 holding 1 and **Network Computer Systems Ltd. v Intelsat Global Sales and Marketing Ltd. [2012]** 1 SCGLR, 218 at 227 where Atuguba JSC speaking for the majority stated unequivocally that

> *"a Court cannot shut its eyes to the violation of a statute as that would be very contrary to its raison d'etre"*

Secondly, I wish to deal with the widely held view that Certiorari and Appeals are mutually exclusive and cannot be pursued together. This view has been put to permanent rest by the decision of this Court in the case of **Republic v High Court, Cape Coast, Ex-parte Ghana Cocoa Board, (Apotoi III-Interested Party)** [2009] SCGLR 603, per Date-Bah JSC at holding 4, especially

at pages 614 -615 where it was stated convincingly that certiorari and appeals are not mutually exclusive. The two processes can therefore be embarked upon by the same applicant.

The above therefore dismisses the said contentions raised by the 1st Interested Party in this respect.

That being the case it is clear that, based on the authorities mentioned supra, the date the cause of action arose for the purposes of the instant Certiorari application is 14th March 2014 when the learned High Court Judge refused to set aside the previous and earlier orders for Seizure and Forfeiture of Tainted Assets dated 19th February 2013, 23rd February 2013 or 28th February 2013 respectively.

On the basis of the above, I am of the considered opinion that the Applicant's application has been filed within time and needs to be considered.

What then are the facts of this Application?

Applicant had one USD account and one cedi account with Ecobank (Gh) Limited since May 2003. In November 2011, the Applicant received USD22,500.00 (he claims it was a personal loan to support his business). When the Applicant attempted to access the funds from the November 2011 transaction, the bank denied him access on the grounds that the Applicant was being investigated for money laundering and cyber-crime by the 1st Interested Party (The Executive Director of Economic and Organised Crime Office) pursuant to a suspicious Transaction Report (STR) filed by the 3rd Interested Party. The Applicant believed that the reason the Branch Manager had filed the Suspicious Transaction Report which led to the investigation was solely based on the Applicant's Rastafarian appearance. This fact has not been substantiated.

The Interested Party sent a letter by registered mail dated 7th February 2012 inviting the Applicant to assist in investigations on 14th February 2012 but the Applicant did not show up. The Applicant left for Togo for greener pastures and returned in November 2013 to find that his accounts were still frozen. When the Applicant and his Counsel obtained a meeting with representatives of the Interested Party in January 2014, he was informed that his funds had been transferred to the Interested Party's exhibit account, held with the 2nd Interested Party (the Bank of Ghana) because of the 1st Interested Party's inability to reach

the Applicant in his absence. When the Applicant's Counsel applied for legal proceedings, it was discovered that the Applicant's funds were seized and forfeited to the state by an ex-parte motion filed in February 2013. Further scrutiny revealed that the 1st Interested Party **did not provide any evidence that the Applicant's funds were tainted or the proceeds of a serious crime**.

Bright Mensah J, the learned trial Judge refused the Applicant's application to the High Court on 14th March 2014 seeking to set aside the previous orders which froze the accounts.

With these facts at the background, I deem it quite expedient to give some preliminary observations in this case as the basis of my philosophical understanding of the role of the Courts, that of EOCO and how the rights of the citizens of this country are to be guided by provisions of the Constitution 1992 and the Economic and Organised Crime Act, 2010, Act 804.

Preliminary Observations

The preamble to Act 804 states as follows:

> *"An Act to establish an Economic and Organised Crime Office as a specialised agency to monitor and investigate economic and organised crime and on the authority of the Attorney-General prosecute these offences to recover the proceeds of crime and provide for related matters."*

There is therefore no doubt that there is the urgent need for all countries in the modern world to enact and implement legislations which will ensure that the fight against organised crime, money laundering and terrorist financing are taken up on a higher level to make our country and the world at large a much safer and secured place than it is now.

I have perused Act 804 several times and I cannot but agree that there is the need for such a legal regime. The provisions of Act 804, actually re-emphasise the opening paragraph of the Foreword to the *World Bank Reference Guide to Anti-money Laundering and Combating the Financing of Terrorism, 2nd Edition* and supplement on Special Recommendation IX, authored by Paul Allan Schott, which reads as follows:-

"Efforts to launder money and finance terrorism have been evolving rapidly in recent years in response to heightened counter measures. The international community has witnessed the use of increasingly sophisticated methods to move illicit funds through financial systems across the globe and has acknowledged the need for improved multilateral cooperation to fight these criminal activities."

I believe it was in response to addressing the concerns raised in the foreword to the World Bank Reference Guide to Anti money Laundering and Combating the Financing of Terrorism that Act 804 and similar other laws in the modern and civilized world have been enacted.

However, it has to be noted and observed that the enactment of Act 804, does not absolve the staff of the Economic and Organised Crime office and the Attorney-General's Department from following due process. In addition to the issue of due process, the Constitution 1992 has detailed provisions designed to protect persons from arbitrariness, breach of the rules of natural justice, protection against unlawful deprivation of property among several other rights which are designed to ensure fair trial. See article 19 of the Constitution 1992.

Since Act 804 is in its formative years, a great deal of caution and circumspection is required from the staff of the relevant investigating agencies and the officers who will implement the law against suspected criminals. The bedrock of our criminal justice system is that, a person is presumed innocent until proven guilty.

It is in this respect that the rules of natural justice which have also formed part of our basic laws must not only be adhered to, but seen to be scrupulously observed.

In this respect, the courts have a very important role to play in ensuring that the operatives of Act 804 do not take the citizens of Ghana for granted. The courts must therefore ensure that in the implementation and execution of Act 804, the words of the statute are interpreted taking into account relevant constitutional provisions guaranteeing fair trial among others and also best practices in criminal jurisprudence.

Any laxity on the part of the courts can either lead to the office of EOCO becoming a monster which may become too powerful and difficult to rein it in, or that suspected criminals may also have a field day thereby threatening the stability and safety not only of Ghana, but the global world if there is extreme laxity in the enforcing the law. There is therefore the need for a delicate balance to be exercised by the Courts to ensure that there is equilibrium such that law abiding citizens are protected whilst ***due process*** is used to deal with those who fall foul of the law. With the above observations let me now deal with the substantive issues in this ruling.

From the facts of this application, as has been briefly narrated supra, and the preliminary observations stated above, it is necessary at this stage to bring all these issues into context vis-à-vis the reliefs which the Applicant seeks against the Interested Parties herein.

It is not in dispute that the Applicant seeks an order of Certiorari to bring up into this Court for the purposes of being quashed the orders of the High Court, Financial Division, presided over by Bright Mensah J dated 19th February 2013, which seized and forfeited an amount of USD 22,480 belonging to the Applicant lodged with the Ecobank, that of 23rd February 2013, which confirmed the continued freezing and seizure of the said account that of 28th February 2013 and lastly the orders of 14th March 2014 which dismissed application to set aside the said seizure and confiscation orders of 19th, 23rd and 28th February 2013 already referred to supra.

Grounds of the Application

1. Excess of Jurisdiction

That the learned High Court Judge exceeded his jurisdiction when he ordered the seizure and forfeiture of the sum of USD 22,480 belonging to the Applicant lodged with the 3rd Interested Party when he was neither on trial for a serious offence under Act 804 nor had been convicted of same.

2. That the orders of seizure and forfeiture, dated variously, i.e. 19th February 2013, 23rd February 2013, 28th February 2013 and 14th March 2014 were all made in breach of the rules of natural justice.

In view of the limited time available to articulate my views in this case, I wish to state the following very briefly as the legal analysis of the issues raised for determination in this application. These are;

1. Whether the Applicant is entitled to the reliefs he claims vis-à-vis the applicable laws in Act 804?

2. Whether or not the Applicant was denied his basic human rights i.e. rules of natural justice, denying him an opportunity to be heard before confiscating his property.

Whilst Section 23 authorises the Interested Party to forfeit the Applicant's property to the Republic in the event that the owner (the Applicant) does not claim the property by giving notice in writing to the Executive Director within a month of seizure, it would be impossible for a party to give notice that his property has been seized if that party has not been provided proper notice of the seizure itself. As a result, though it is not explicitly stated in the Act, Section 23 will only come into play if the Applicant had been provided with adequate notice pursuant to Section 47 of Act 804 thereof.

Section 23 of the Act (the section under which the application for seizure was made by the 1st Interested Party) states that currency may be seized but only if there is

> "(b) reasonable grounds to suspect that
>
> (i) the currency is the proceeds of a crime, or
>
> (ii) the currency is intended by the person for use in the commission of a serious offence, or
>
> (c) if the holder of the currency is unable to provide satisfactory explanation for the source of the currency"

Whilst there may be a valid argument to be made that there were reasonable grounds to suspect that the Applicant was involved in a serious crime, these grounds were insufficiently substantiated and the court failed to follow the prescribed procedures in inferring from these grounds pursuant to section 51.

In order to confiscate property under Act 804, the court hearing an application for confiscation of tainted property must follow the procedures set out in section 51 of the Act.

In this context, the Court that confirmed the seizure of the Applicant's property failed to follow the procedures. Pursuant to section 51 (1), in order to confirm such a confiscation, there must be an inference by the court from the **record of proceedings**

(a) that the property was used to facilitate or aid the commission of a serious offence if it was in the person's possession at the time of or immediately before the arrest of the person for the serious offence for which the person is on trial or convicted, and

(b) that the property was derived, obtained or realised as a result of the serious offence if it was acquired by the person before, during or within a reasonable time after the period of the serious offence of which the person is on trial or convicted, and the Court is satisfied that the income of that person from sources unrelated to a serious offence cannot reasonably account for the acquisition of that property in the absence of evidence to the contrary."

The Applicant in this case was not arrested, charged with, tried or convicted of any offence, let alone a serious offence. There were never any allegations made by the 1st Interested Party that would legitimise the confiscation order other than vague and unfounded assertions of suspicious account activity.

Section 3 further states that

(3) "The Court shall have regard to the gravity of the offence in considering whether a confiscation order should be made."

These sections together indicate that the lawmakers did not intend for Courts to take these confiscation orders lightly and that the intent was to only allow for confiscations of personal property when founded allegations are made within a reasonable period of investigation. A state institution like EOCO, with it's vast resources and immense powers under Act 804 cannot claim not being able to conclude investigations within a reasonable time.

Section 24 of the Act provides support for the notion that criminality of the Applicant should have been established if the 1st Interested Party wished to legally retain the funds. Section 24 states:

(1) An authorized officer of the Office or any other public officer authorized by the Executive Director shall seize property if the officer has reasonable grounds to suspect that the property is the proceeds of a serious offence.

(2) The Executive Director shall direct the authorised officer to release the seized property to the person from whom it was seized if no charges are proffered against the person within fourteen (14) working days after the seizure."

As there were no charges proffered against the Applicant within 14 working days of the initial seizure, the funds should have been returned to his account.

Conclusion

In this respect, the orders made on 14th March 2014 refusing to set aside the initial seizure and confirmation of seizure should not have been made. In otherwords, the application to set aside should have been granted by the High Court.

From the above discussions and analysis, it is clear that the Applicant had never been arrested, arraigned before any court on a charge of serious offence or obtaining and or acquiring property with tainted property and or convicted.

Granted that the 1st Interested Party has powers under Act 804 to freeze, seize and confiscate and or forfeit properties of persons being investigated, the law does not give them blanket powers.

These powers are to be exercised according to due process. Due process connotes that there will be an investigation, arrest, arraignment and possibly conviction.

It also has to be observed that there are constitutional provisions in the Constitution 1992 e.g. article 19 and 296 thereof which protect any citizen or person charged with a criminal offence.

It is therefore my contention that the failure of the 1st Interested Party to follow due process in these particular cases smacks of arbitrariness which is tantamount to denial of the basic human rights of the Applicant and others who find themselves in similar situation.

Granted that the Applicant had completely absconded from the jurisdiction after initial investigations were commenced, it is my opinion that article 19 (3) (a) of the Constitution 1992 could have been used to prosecute him in absentia if they were minded to do so.

Under the premises, it is very clear that the Applicant should be entitled to the reliefs he claims because the grounds of the application have been sustained.

Accordingly, I will direct that the proceedings and orders of the *High Court, Financial Division in Suit No. FT RM 54/12* intitutled **The Executive Director Economic and Organised Crime Office v Nii Nueh Odonkor** dated 19th February 2013, 23rd February 2013, 28th February 2013 and 14th March 2014 respectively be brought up and same are accordingly quashed.

(SGD) J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

COUNSEL

HON. ALEXANDER KWAMENA AFENYO MARKIN ESQ. WITH HIM MISS BERNINA KORKOR OKUTU FOR THE APPLICANT.

JACQUELINE AVOTRI FOR THE 1ST INTERESTED PARTY.

ERNEST OSEI-AFFUL FOR THE 3RD INTERESTED PARTY