IN THE SUPERIOR COURT OF JUDICATURE

THE SUPREME COURT

ACCRA

CORAM: ATUGUBA,J.S.C.(PRESIDING)

DR. DATE-BAH, J.S.C

ANSAH, J.S.C

BONNIE, J.S.C

AKOTO-BAMFO (MRS.), J.S.C

CIVIL MOTION
NO. J5/24/2011

15TH NOVEMBER, 2011

THE REPUBLIC

VRS

THE HIGH COURT, KOFORIDUA

EX-PARTE: KOFI YEBOAH AFFUM

SUBSTITUTED BY OPANIN KWASI AKOMEAH _ _ APPLICANT

1. **OSEADEEYO FRIMPONG MANSO IV.**

2. **THE REGISTRAR, EASTERN REGIONAL**

HOUSE OF CHIEFS. _ _ INTERESTED PARTIES

R U L I N G

ATUGUBA, J.S.C:

I have had the advantage of reading the encyclopaedic ruling of my masterly brother Dr. Date-Bah JSC. As I find myself, with all the respect, unable to agree with everything in his formidable and fulsome judgment I proceed to state my opinion briefly.

As the facts have been fully set out by him I would only refer to them where necessary.

The Accrual of the Applicant's right to apply for Mandamus

0.55 r. 3, as far as relevant to this case, provides as follows:

> "3. Time for making application
>
> (1) An application for judicial review shall be made not later than *six months* from the date of the occurrence of the event giving grounds for making the application."

What then in this case would constitute *"the date of the occurrence of the event giving grounds"* for making the application for mandamus? The operative date for the application would be the date on which the Registrar of the Eastern

Regional House of Chiefs refused to transmit to the National House of Chiefs the chieftaincy forms of the First Interested party submitted on his behalf by the Traditional Council.

It is important to set out in this connection the relevant occurrences. The first interested party submitted his Chieftaincy forms and necessary fees to the Akyem Kotoku Traditional Council on **7/6/1999** for onward transmission to the Eastern Regional House of Chiefs for further transmission to the National House of Chiefs for "gazette notification". In a letter (Exh. AKS4) from his solicitors purportedly dated **2/12/2010** but said (Exh. AKS5) to have been dated **4/11/2010** the 1st interested party enquired whether his said chieftaincy forms had been transmitted to the Eastern Regional House of Chiefs. Exhibit AKS5 dated **9/11/2010** from the traditional Council replied that the said chieftaincy forms had been forwarded to the Eastern Regional House of Chiefs on **7/6/1999.** This assertion is confirmed by Exh. AKS 3.

On **16/12/2010** the 1st interested party, per his solicitors wrote (Exh. AKS6) to the Eastern Regional House of Chiefs enquiring whether the said chieftaincy forms had been transmitted to the National House of Chiefs. On the same **16/12/2010** the Eastern Regional House of Chiefs, replied (exh. AKS 7) that the said forms had not been so transmitted.

The first interested party then filed his mandamus application in the High Court, Koforidua on **17/12/2010.** It is said that time began to run for the purposes of

0.55 r.3(1) of C147 as from the said **16/12/2010**, namely the date on which the 1st interested party was thus informed of the refusal by the 2nd interested party to transmit the 1st interested party's said chieftaincy forms to the National House of Chiefs. If that be right then the 1st interested party has probably set a record in compliance with 0.55 r.3 (1) of C.147 since he filed his mandamus application the very next day, **17/12/2010.**

Mode of Refusal to Act.

If a refusal to act on a request to perform a compellable duty can only be established by express form the situation in this case would begin to be different. However in *Republic v. Chieftaincy Secretariat & Anor; Ex parte Adansi Traditional Council* (1968) GLR 736 at 742 Annan J (as he then was) said, in construing s.1(2) (a) of the Chieftaincy Act, 1961 (Act 81) as follows:

> "Having regard to the clear language of section 1(2) (a) and in the light of exhibit 4, I am compelled to say that there has been *no positive refusal or conduct amounting to a refusal*, on the part of the second respondent to perform the duty cast on him by section 1(2) (a) to take a decision one way or the other. It is clear law that the court will not order mandamus to go where there has been no demand and refusal to perform the public duty enjoined by statute." (e.s)

As depicted by my able brother Dr. Date-Bah JSC in his judgment in this case this court approved this statement of the law in *Republic v. National House of Chiefs, Ex Parte Krukoko II* (2010) SCGLR 134. Indeed holding (4) of the headnote to that decision reads thus:

"(4) … Ordinarily, time within which to apply for *mandamus* should begin to run only after a demand to perform duty had been met with refusal. Where the demand made for the performance of the duty had been found to be premature, *mandamus* would not lie. And the mere fact of non-compliance with a duty would be sufficient ground for the award of *mandamus*, where the applicant had been substantially prejudiced by the respondent's procrastination. On the facts of the instant case, the appellant had more than satisfied the demand and refusal criteria to maintain the application for *mandamus*. Indeed, the conduct of the respondent in delaying to comply with the demand of the appellant and failing to give a direct answer on the demand, was tantamount to a refusal. …"

Constructive notice of Refusal

It is a well-accepted principle of law that refusal to act or do a thing may be express, but can also be constructive, in the form of conduct. A case in point is *Ghana Railway Administration v. Ansah* (1974) 1 GLR 47. In that case the plaintiff had obtained judgment against the defendants and applied to the Attorney-General for a fiat, as required by law, to proceed to execution. After a month, when the fiat was not forthcoming, the plaintiff's solicitor reminded the defendants of the judgment debt. After another bout of silence on the part of the defendants, the plaintiff proceeded to levy execution against the property of the defendant who applied for stay of execution. Edusei J, in holding (1) stated as follows:

"no execution could proceed against a statutory corporation under section 6A (1) of Act 232 as inserted by N.R.C.D. 120, s. 1 unless full steps had been

taken to obtain the Attorney-General's fiat and *the fiat had either been granted or refused. The fiat might be refused either expressly or by implication.* Express refusal was where the Attorney-General wrote to the applicant indicating that he had refused to issue the fiat, *but where one month had passed and the Attorney-General had not issued the fiat or written to refuse it, as in the instant case, then it was presumed that he had impliedly refused it. …"(e.s)*

Similarly, in *Republic v. Lands Commission; Ex parte Vanderpuye Orgle Estates Ltd* (1998-99) SCGLR 677 at 727, Acquah JSC (as he then was) held thus:

" Indeed, the unreasonable delay by the Lands Commission in the way they dealt with the problem created by themselves makes it imperative to take legal action to compel them to sit up to their public duty. *For a statutory duty must be performed without unreasonable delay, and if any such delay occurs, mandamus may be employed to enforce the performance of such duty.* Accordingly in *R v. Home Secretary; Ex parte Phansopkar* [1975] QB 603, mandamus was granted on this ground against the Home Secretary, when the Home Office insisted that a would-be immigrant, who was legally entitled to enter England without let or hindrance, should wait for over a year in the queue of applicants for an entry certificate: see also *R v. Governor of Durham Prison, Ex parte Singh* [1984] 1 All ER 983." (e.s)

This principle was approved in the Ex parte Akrofa Krukoko II case, supra. However at page 178 Dotse JSC said :

"Thus, if … the applicant's right has accrued several years ago, and he had been demanding performance of that duty and only recently had a response, time would begin to run from the date of the response. Even then, the type of response received would determine whether time should begin to run immediately or from a reasonable time thereafter. If the learned Justices of the Court of Appeal had critically considered this demand and refusal criteria and how it was in issue in the case before them, they would have come to a different conclusion."

Dotse JSC had however earlier stated at page 177 thus:

" From the appeal record, it is clear that the letter dated 6 February 2004 (on page 25 of the record of appeal) from the lead counsel for the appellant herein, Mr. Adumua-Bossman, to the respondent herein was the letter that was eventually replied by the respondent after so many other failed attempts. This letter, in my estimation, sums up the demands of the appellant that he had repeatedly made to the respondent. The reply by the respondent dated 20 February 2004 (which is on page 27 of the record of appeal) is an acknowledgement. The said letter cannot be described as a refusal of the demand of the appellant, because in it, the respondent stated thus:

"I am directed by the Research Committee of the National House of Chiefs to acknowledge the receipt of your letter date 6 February 2006 on the above subject as well as the letters mentioned therein and to inform you that the matter is receiving the consideration of the house. I am to inform you that the outcome of the deliberations

on the matter will be communicated to you as soon as it is concluded."

The appellant, thereafter waited from 20 February 2004 until 30 August 2004, when he applied for leave for the order of *mandamus*. So far as I am concerned, the period during which the appellant waited unsuccessfully for either the positive or negative response from the respondent was long enough to convince him that the respondent National House of Chiefs did not intend to give any further response. The inability of the respondent to give any further reply to the appellant's demand letter, coupled with the stance taken by the respondent during the pendency of the application in the High Court (reference pages 63-65 of the record of appeal) are enough testimony that the respondent had refused the demand of the appellant."

In my humble view there cannot be two dates of accrual of an *actio pro eadem causa*. Once the refusal of the demand was ascertained from the conduct of inaction the *actio oritur* and the period for bringing the mandamus application begun to run. The subsequent express communication of that refusal merely entrenched the refusal but could not regenerate *eadem actio*.

The import of the above cases goes to show that the law has long recognized conduct as a mode of demonstrating an agreement or refusal to do an act required by law. That being the case, could it be said that the Regional House of Chiefs communicated their refusal to forward the applicant's documents to the National House of Chiefs, solely through the letter dated **16/12/2010**? I think not.

The Regional House of Chiefs had communicated their refusal to act long before **6/12/2010**, by their conduct. The Chieftaincy Act, 1971 (Act 370), section 14 (3) provides thus:

"Section 14 – Membership.

(3) As soon as *practicable* after any change occurs in the membership of a Traditional Council the Council shall notify the Regional House of Chiefs thereof which shall in turn notify the National House of Chiefs and, subject to the following subsection, the National House of Chiefs shall cause the said Register to be altered accordingly." (e.s)

"Practicable" according to the Encarta English Dictionary means capable of being carried out or put into effect.

To put this in proper context, the Traditional Council is required, as soon as it is capable of being done, to forward the applicant's chieftaincy documents to the Regional House of Chiefs. Exh. OFM3 shows clearly that the Traditional Council indeed forwarded the applicant's forms the very day the applicant had submitted same. It follows then that the Regional House of Chiefs was expected to act in like manner and forward the applicant's forms to the National House of Chiefs as soon as it was capable of doing so. In this light, I find it hard to subscribe to my learned brother's view that time began to run when the refusal to act was brought to the knowledge of the applicant by the letter dated **16/12/2010**. The applicant must be deemed to have been put on constructive notice of the refusal by the conduct of the Regional House of Chiefs. After at most a month of waiting, it should have become apparent to the applicant that a failure to forward his forms had taken

place and time should be deemed to have begun to run from then. In my view, time could not be said to have been lying down, waiting for 10 years and over for the Regional House of Chiefs to expressly communicate their refusal. That would set a new record for compliance with time limits. It would mean that applicants can go to sleep on their rights and then suddenly awake from their slumber years after to claim these rights, merely because there was no express communication of a refusal to act. That would be stretching the time limits to their breaking point.

For the above reason, the application for mandamus in the High Court could have failed as it was filed out of time, having been filed more than six months after the occurrence of the refusal on the part of the Regional House of Chiefs. In saying this I do not, in view of O. 81 r. 1 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) base myself on jurisdictional error but error on the face of the record. As Kaglo J in his ruling took the view that time under O. 55 r. 3 could only run when the interested party had actual or express notice of the refusal of his demand to forward his Chieftaincy Declaration Forms to the National House of Chiefs, he was clearly in error of law for the reasons aforegiven in this Ruling. It stands to reason that the foundation of that decision is infected by the said error and it must therefore be quashed by certiorari.

Good reason for refusal to act

It must be noted here that mandamus is a discretionary remedy. A court may exercise its discretion to deny the grant, even more so when it is found that there

was a good reason behind the refusal to act on the part of whichever public body that had the duty to act.

In *Republic v. Controller and Accountant-General, Ex parte Dizengoff (W. A) Ltd* (1974) 1 GLR 337, the court at page 345 held that even if it is found that the public body had a statutory duty to perform, an application for mandamus can be refused, if the public body had good cause for refusing to perform that duty.

Again in *Republic v. National House of Chiefs, Kumasi and Another, Ex parte Kusi-Apea* (1984-86) 2 GLR 90 C.A., the appellant had issued a writ of mandamus to compel the National House of Chiefs to insert his name in the Register of Chiefs when his status as a chief was still in question. Holding (4) of the Court's judgment stated inter alia that:

> *"A recourse to mandamus when the appellant's status was so dubious and had not been judicially settled or statutorily recognised was a clearly misconceived strategy and the High Court was therefore right in refusing the remedy of an order of mandamus which was a discretionary remedy* given when an applicant's *entitlement was unquestionable* and the only way in the circumstance of doing justice to him." (e.s) See also *Republic v. Gbi Traditional Council; Ex parte Abaka VII* (1995-96) 1 GLR 702

This court indorsed this view in *The Republic v. National House of Chiefs, Kumasi, Ex parte Nii Larbie Mensah IV and Others* J4/37/2010 SC, delivered on 1/6/2011. This court's decision in *In re Oguaa Paramount Stool; Garbrah & Ors v. Central*

Regional House of Chiefs & Haizel (2005-2006) SCGLR 193 further confirms this view.

In this case, Kaglo J in his ruling acknowledges that there is still a petition pending before the Eastern Regional House of Chiefs which relates to the legitimacy of the applicant's enstoolment. In such circumstances, the Regional House of Chiefs had good cause for refusal to forward the applicant's name to the National House of Chiefs, pending the resolution of that petition. The courts, particularly in view of the purposive approach not only to the interpretation but the application of statutes, are not adverse to reasonable supplements to the literal provisions of a statute. Thus, even in constitutional matters, it has been held in *In re the Election of First President, Appiah v. Attorney-General* (1970) 2 G&G 530, C.A. that the Interim Electoral Commissioner rightly imposed a deposit fee of 500 cedis for candidates for the presidential election in order to ward off the intrusion of frivolous persons even though there was no constitutional provision requiring the same.

Again even though this court laid down in *Kwakye v. Attorney-General* (1981) GLR 39 that the jurisdiction of a court can be invoked straightaway, as soon as the cause of action arose or was threatened this court has also held in *Boyefio v. NTHC Properties Ltd.* (1996-97) SCGLR 531 that a statutory provision barring resort to the High Court pending the resolution of disputes of title by the Land Title Registration Committee, is not violative of the High Court's jurisdiction under article 140 of the 1992 Constitution. Very recently, in the celebrated decision of this court in *Brown v. Attorney-General* (2010) SCGLR 183 this court held as per

Holding (2) of the headnote that even though there is no constitutional provision to that effect, Parliament still has the right to reject the budgetary estimates of the Audit Service if the same contain fundamental errors or are inordinately excessive.

It is clear therefore that since Kaglo J in his decision reasoned that "After all the Registrar of the Eastern Regional House of Chiefs in his affidavit in opposition to the application for Mandamus has informed the court that *there was a petition challenging the enstoolment of the Respondent in his application for the Order of Mandamus. But because as I have held already in this ruling, petition challenging installation was not a bar to forwarding the Chieftaincy Declaration Forms (C.D. F.) of the Respondent to the National House of Chiefs, the court granted the application*", that is an error of law on the face of the record which clearly deprives the parties concerned of a legitimate defence to a mandamus application, earlier stated supra, and this also infects the said decision. I need not further multiply the reasons for the success of this application.

Section 27 of the same Act makes an appeal in a chieftaincy matter a stay of execution of the judgment pending the determination of the appeal, unless otherwise ordered.

In the construction of a statute, the entire statute must be read as a whole to give real meaning to the Act. Therefore the spirit or policy of Act 370 must influence the construction of section 14(3) of the same Act. While the National House of Chiefs is required upon notification by the Regional House of Chiefs, to alter the Register of Chiefs, such alteration cannot be done, pursuant to section 27, when there is a pending appeal involving a chieftaincy case. By logical reasoning, the

Regional House of Chiefs must stay any steps towards alteration in the Register until the appeal has been determined.

In the case of *Republic v. Akuaku II; Ex parte Chayi II (1991) 2 GLR 163*, the combined effect of sections 14(3) and 27 were visibly at work. The facts as set out in the headnotes provide thus:

> "The applicant claimed to be the chief or Wetsoyi of the Tekperbiawe Division of the Ada Traditional Area. The respondent was the paramount chief of the said traditional area and president of the Ada Traditional Council (A.T.C.). The applicant's case was that he was duly nominated and elected as chief of Tekperbiawe in 1984. Shortly after his installation, one A. started passing himself off as Wetsoyi of Tekperbiawe. *Following an action by the elders who installed the applicant, the judicial committee of the A.T.C. declared the applicant the lawful chief of Tekperbiawe and granted an injunction against A. from holding himself out as Wetsoyi. A. and others appealed to the Greater Accra Regional House of Chiefs against that decision.* Whilst the appeal was still pending, the applicant was in 1987 recognised by the government as Wetsoyi of Tekperbiawe by a Gazette notice. The applicant contending that as a newly installed and recognised chief he was entitled to be invited by the registrar of the A.T.C. on the instructions of the respondent to take his seat in the said council but that the respondent had failed, neglected and refused to have him so invited, applied to the High Court for an order of mandamus to compel the respondent to ensure the assertion of his rights as a member of the A.T.C.

The respondent resisted the application on the grounds that by section 27 of the Chieftaincy Act, 1971 (Act 370) as amended by the Chieftaincy (Amendment) (No. 2) Decree, 1973 (N.R.C.D. 226), an appeal to the National House of Chiefs or the Regional House of Chiefs against a final judgment or order "shall operate as a stay of execution of the judgment or order appealed against... Therefore pending the outcome of the appeal, he was precluded from inviting the applicant to the meetings of the council." (e.s)

Holding (1) considered the effect of section 14 among others:

"(1) the combined effect of sections 13, 14 and 16 of the Chieftaincy Act, 1971 (Act 370) would seem to place on the respondent in his capacity as the president the duty of summoning members of the Ada Traditional Council (A.T.C.) to its meetings, and also notifying the Greater Accra Regional House of Chiefs (G.A.R.H.C.) of any changes that might occur in the membership of the council. Accordingly, if the applicant was qualified to be a member of the A.T.C. it was the respondent who should set in motion the administrative procedures which would be gone through before the applicant could exercise his rights as such member. Consequently, *if the applicant was without dispute duly installed as the chief* and he also notified the respondent as the president of the A.T.C. of his installation as such chief of Wetsoyi of Tekperbiawe, who it was undisputed should be a member of the council, then it would be the duty of the council under the direction of its president to notify the G.A.R.H.C. of the applicant's installation in accordance with section 14(3) of Act 370. *That duty was mandatory.* Such a notification would set the machinery in motion to

enable the National House of Chiefs amend the national register of chiefs and thus put the name of the applicant on it. Therefore *if there was no dispute about the status of the applicant* and the respondent had refused to set the machinery in motion, the applicant would, in those circumstances, be entitled to the court's assistance in the nature of an order of mandamus to enable him exercise his rights under Act 370. *Republic v. Volta Regional House of Chiefs; Ex parte Kanya II* (1975) 1 GLR 448 cited." (e.s)

Holding (4) then considered the effect of section 27 of Act 370, vis-à-vis the requirement to enter a chief's name in the Register:

"(4) There was no doubt that there was something in the appeal pending before the Greater Accra Regional House of Chiefs to be stayed because an order of injunction was made against A, one of the opponents of the applicant, who had appealed against that order of injunction. It was obvious that by section 27 of Act 370 as amended, that order was automatically stayed in the appeal. The trial judge was therefore right in refusing the application, although one would disagree with his reasons for the refusal. *The applicant could therefore not act in respect of the instant chieftaincy matter until the appeal pending at the Greater Accra Regional House of Chiefs had been determined."(e.s)*

It is clear then, that while the law imposes a duty on the Traditional Council and the Regional House of Chiefs to ensure the prompt forwarding of a chief's forms to the National House of Chiefs, this process must stop in its tracks if an appeal which affects an applicant's enstoolment exists. It stands to reason that the

Register of the National House of Chiefs must be kept sacred and free of persons whose enstoolment might not have been legitimate. Section 27 ensures that this sanctity is safeguarded.

In any case, article 23 of the 1992 Constitution imposes a duty on administrative bodies and administrative officials to act fairly and reasonably. This constitutional provision must necessarily overtake any interpretation of the chieftaincy registration provisions of Act 370 which results in an outcome contrary to the requirement of fairness and reasonableness.

For the above reasons, I would grant this application.

[SGD] W. A. ATUGUBA
[JUSTICE OF THE SUPREME COURT]

DR. DATE-BAH JSC:

On the 12th January 2011, His Lordship Kaglo J, sitting in the High Court, Koforidua, granted an order of *mandamus* against the Registrar of the Eastern Region House of Chiefs to transmit forthwith to the National House of Chiefs the

forms that the First Interested Party in the present suit had lodged with him. The Applicant in this suit, being aggrieved by that ruling, brought an application before the same judge for the order of *mandamus* to be set aside. The grounds of this application were that the order adversely affected the interests of his family and himself, but he had not been given notice of the application and that it had not been brought in good faith. The Applicant contended that the *mandamus* application amounted to deceiving the court since the applicant for *mandamus* was aware that there was a chieftaincy petition pending which sought to nullify the purported enstoolment of the applicant for *mandamus*, namely, the First Interested Party in the current suit..

Kaglo J refused to set aside the order of *mandamus*, holding that the pendency of a petition challenging the First Interested Party's installation was not a bar to the forwarding of his Chieftaincy Declaration Forms to the National House of Chiefs. Having failed to secure redress before the High Court, the Applicant has now applied to this Court to invoke its supervisory jurisdiction to quash the order of *mandamus* granted by Kaglo J. The original Applicant died before the hearing of this application by this Court and was substituted with the current Applicant by an order of this Court granted on 20th May 2011.

A significant fact in this case is that the First Interested Party in this case submitted his Chieftanincy Declaration Forms to his Traditional Council as far back as 1999, more than 10 years before the date of the grant of the order of *mandamus.*

It is to be remembered that the suit before us is not an appeal but an application for *certiorari.* Accordingly, for the Applicant to succeed, he needs to demonstrate more than a mere error of law *simpliciter.* The principles governing this Court's

approach to such applications were summarised as follows in *Republic v High Court (Commercial Division) Ex Parte The Trust Bank (Ampomah Photo Lab and 3 ors, Interested Parties)* [2009] SCGLR 164, at p.169-171:

> "The current law on when the prerogative writs will be available from the Supreme Court to supervise the superior courts in respect of their errors of law was restated and then fine-tuned in the *Republic v High Court Accra, Ex Parte CHRAJ* [2003-2004] SCGLR 1 and *Republic v Court of Appeal, Ex Parte Tsatsu Tsikata* [2005-2006] SCGLR 612, respectively. In my view, the combined effect of these two authorities results in a statement of the law which is desirable and should be re-affirmed. This Court should endeavour not to backslide into excessive supervisory intervention over the High Court in relation to its errors of law. Appeals are better suited for resolving errors of law. In the *Ex Parte CHRAJ* case, this Court, speaking through me, sought to reset the clock on this aspect of the law (as stated at pages 345-346) as follows:
>
> "The Ruling of this Court in this case, it is hoped, provides a response to the above invitation to restate the law on this matter. The restatement of the law may be summarised as follows: where the High Court (or for that matter the Court of Appeal) makes a non-jurisdictional error of law which is not patent on the face of the record (within the meaning already discussed), the avenue for redress open to an aggrieved party is an appeal, not judicial review. In this regard, an error of law made by the High Court or the Court of Appeal is not to be regarded as taking the judge outside the court's

jurisdiction, unless the court has acted ultra vires the Constitution or an express statutory restriction validly imposed on it. To the extent that this restatement of the law is inconsistent with any previous decision of this Supreme Court, this Court should be regarded as departing from its previous decision or decisions concerned, pursuant to Article 129(3) of the 1992 Constitution. Any previous decisions of other courts inconsistent with this restatement are overruled."

In the *the Ex Parte Tsatsu Tsikata* case, Wood JSC, as she then was, said (at p. 619 of the Report):

> "The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then, that the error(s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. The error of law must be one on which the decision depends. A minor, trifling, inconsequential or unimportant error, or for that matter an error which does not go to the core or root of the decision complained of; or stated differently, on which the decision does not turn, would not attract the court's supervisory jurisdiction."

> The combined effect of these two authorities, it seems to me, is that even where a High Court makes a non-jurisdictional error which is patent on the face of the record, it will not be a ground for the exercise of the supervisory jurisdiction of this court unless the error is fundamental. Only fundamental non-jurisdictional error can found the exercise of this court's supervisory jurisdiction. "

Mandamus lies to compel a respondent to perform a specified duty in public law. As Lord Diplock said in the celebrated case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p. 409, in relation to judicial review in general:

> "For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to take decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers which have one or another of the consequences" earlier mentioned by his Lordship.

On the facts of this case, the duty in public law which is sought to be enforced is that of the Registrar of the Eastern Region House of Chiefs, the Second Interested Party in this case, under the Chieftaincy Act, 1971 (Act 370) to transmit Chieftaincy Declaration Forms to the National House of Chiefs. Section 14(3) of the Act provides that:

> "As soon as practicable after a change occurs in the membership of a traditional council, the council shall notify the Regional House of Chiefs which shall in turn notify the National House of Chiefs and,

subject to subsection (4), the National House of Chiefs shall cause the Register to be altered accordingly."

Anterkyi J., sitting at the High Court, Ho, held, in *Republic v Volta Region House of Chiefs, Ex parte Kanya II* [1975] 1 GLR 448, that in consequence of this provision and others in the Chieftaincy Act 1971, the Regional House of Chiefs was under a statutory obligation to forward a chief's registration details to the National House of Chiefs. In the current case, Kaglo J similarly held, as already stated above, that the Registrar of the Eastern Region House of Chiefs owed a duty to transmit the First Interested Party's forms to the National House of Chiefs.

The grounds on which the Applicant has based his challenge of the order of *mandamus* by the High Court are:

1. Lack of jurisdiction; and
2. Error apparent on the face of the record.

The Applicant's submission on the High Court's lack of jurisdiction is based on Order 55, r.3(1) of the High Court (Civil Procedure) Rules, which states that:

"(1) An application for judicial review shall be made not later than six months from the date of the occurrence of the event giving grounds for making the application."

The Applicant contends that since the First Interested Party, through his Traditional Council, submitted his Chieftaincy Declaration Forms on 7th June, 1999 to the Registrar of the Regional House of Chiefs who failed to act as required of him, the filing of his application for *mandamus* on 7th January 2011 was eleven years and one month out of time. The High Court, accordingly, lacked jurisdiction to entertain the application. The Applicant cites *Republic v National House of*

Chiefs & Ors, Ex Parte Faibil III & Ors [1984-86] 2 GLR 731 to buttress his contention. In this case, Wiredu JA (as he then was) held that the High Court (Civil Procedure) Rules, 1954 (LN 140A) had set down a six-month time limit within which an application for *mandamus* could be brought. Accordingly, an application brought seven years after the events in question, without an extension of time, was statutorily out of time and could not be entertained.

In *Republic v National Hous*e *of Chiefs, Ex Parte Krukoko II* [2010] SCGLR 134, I doubted the interpretation put by the learned judge on the rule of court in question and said (at p. 163 *et seq.*):

> "In any case, even if the *Faibil* case were decided after 1993, this Court would have the authority to overrule it and we hereby do so. Order 59 Rule 3 of LN 140A should not have been interpreted to apply to applications for *mandamus.* Moreover, without necessarily here determining this point on time limits for *mandamus* applications under the 1954 Rules conclusively, even if there were a rule of practice or of the common law laying down a time limit, that time limit should run from the date of refusal to comply with a demand, as I will explain next in this judgment.
>
> The final principle of law that this Court needs to examine relates to the contention by the applicant/appellant in his Statement of Case that the prerogative writ of *mandamus* depends on demand and refusal: that is, a demand by an aggrieved applicant on an official to perform a public duty owed to that applicant and a distinct refusal or reluctance to comply with the applicant's demand. If this Court confirms that a demand and refusal are generally preconditions to

the invocation of *mandamus*, this would have an impact on the time limit within which an application for *mandamus* may be made. Time would begin to run not from the date of occurrence of the act or omission complained of, but rather from the date of refusal to comply with the demand made by the aggrieved applicant in relation to that act or omission.

The facts of the leading case of *Republic v National House of Chiefs and Others; Ex parte Faibil III and Others* [1984-86] 2 GLR 731 illustrate what is at stake. In this case, two Divisional Chiefs from the Wasa Fiase Traditional Area in the Western Region applied to the High Court, Accra, for *mandamus* to remove the name of their Omanhene from the National Register of Chiefs. Their application was brought in 1982, but their complaint related to acts that took place in 1975. Their Omanhene had been enstooled in 1975. The Western Region House of Chiefs had transmitted a report of his enstoolment to the National House of Chiefs, together with a warning letter that a petition had been filed against his enstoolment and installation by the Queenmother of the Traditional Area. The Omanhene's enstoolment, in spite of the warning letter, was published in the *Local Government Bulletin* of June 1975. The applicants in the case had supported the enstoolment of the Omanhene, in their capacity as kingmakers and divisional chiefs of the traditional area. Their application for *mandamus* in 1982 was based on the fact the Omanhene's enstoolment was disputed and therefore should not have been *Gazetted.* There was no evidence that the applicants made any demand for the removal of the

Omanhene from the Register and that this demand had been refused. Although, the trial court judge granted the applicants the *mandamus* they sought, the Court of Appeal allowed an appeal against his decision. The Court did not however advert to the issue of demand and refusal, when it decided to dismiss their application.

In contrast, in *Republic v Chieftaincy Secretariat & Anor; Ex Parte Adansi Traditional Council* [1968] GLR 736, Annan J. , as he then was, stated the law as follows (at p. 742):

> "Having regard to the clear language of section 1 (2) (a) and in the light of exhibit 4, I am compelled to say that there has been no positive refusal or conduct amounting to a refusal, on the part of the second respondent to perform the duty cast on him by section 1 (2) (a) to take a decision one way or the other. It is clear law that the court will not order mandamus to go where there has been no demand and refusal to perform the public duty enjoined by statute."

To Annan J, therefore, a demand and refusal were preconditions to the grant of *mandamus.* Similarly, Asare Korang JA in the first judgment of the Court of Appeal in this case of *The Republic v National House of Chiefs; Ex Parte Odeneho A. Krukoko II (Osagyefo Kwamena Enimil VI, Interested Party)*, a decision of the Court of Appeal dated 11th November, 2005 (at p. 131 of the Record) explained his understanding of the law on *mandamus* as follows:

> "In this appeal, I would summaries the purport and scope of the reliefs sought by the Respondent and the Interested Party in this manner:
>
> > "Is Mandamus a remedy available to the Applicant in all the circumstances of this case?"
> >
> > What then are circumstances? Before answering this question, I would first grant that since Mandamus requires as a precondition a demand for the performance of a duty and an unequivocal refusal of one party to not comply, the ruling of Abrahams J. cannot be regarded as Res Judicata since he did not embark on an enquiry as to whether there was a demand and a refusal, that is to say, an enquiry on the merits."
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> This statement of the law I consider sound."

This passage from the *Ex Parte Krukoko* case demonstrates that, as a general rule, admittedly with some exceptions, *mandamus* lies with effect from the date of communication of the refusal by an official or public body to carry out a demand for the discharge of his or its public duty. On the facts of the current case, what is significant is not, therefore, the date on which the First Interested Party submitted his Chieftaincy Declaration Forms, but when refusal by the Registrar to transmit them to the National House of Chiefs came to his knowledge.

On this issue, the First Interested Party in his Affidavit in Opposition to this motion deposed to the following facts: after his installation, he caused to be submitted to his Traditional Council, on 7th June 1999, the requisite forms and fees for transmission to the Regional House of Chiefs and through it to the National House of Chiefs. The said forms were duly forwarded to the Regional House of Chiefs on the same day. After waiting for a very long time to receive his copy of the Gazette notification, he caused his lawyers to write to his Traditional Council to inquire about the status of his documents. The Registrar of his Traditional Council informed him by letter addressed to his lawyers that he had duly transmitted the First Interested Party's forms to the Regional House of Chiefs. His lawyers accordingly wrote to the Second Interested Party to inquire about the status of his documents. The Second Interested Party by a letter dated 16th December 2010 informed him for the first time of the former's decision not to transmit the documents to the National House of Chiefs.

The First Interested Party deposed to his surprise that such a decision had been taken by the Second Interested Party without it being communicated to either his Traditional Council or to him. No reasons having been stated in the letter of 16th December for this decision, he instructed his solicitors to apply for an order of *mandamus* to compel the transmission of his forms to the National House of Chiefs.

In his Statement of Case in support of his Affidavit in Opposition to this application, the First Interested Party points to the fact that since the decision in *Ex Parte Faibil III* case (*supra),* the language governing time limits in applications for *mandamus* under the High Court Rules has changed from "the date of the proceeding" sought to be challenged (under Order 59 of the repealed High Court

(Civil Procedure) Rules, 1954) to the "date of the occurrence of the event giving grounds for making the application" in the current Order 55 r 3(1) of the High Court (Civil Procedure) Rules 2004 (CI 47). He contends that, on the basis of the new language, the time for the filing of a *mandamus* application does not begin to run from when the impugned decision is made, but from when the relevant party has notice of the decision.

I think that this is a reasonable interpretation to put on the language of Order 55 rule 3(1). Thus I hold that, until the Second Interested Party's letter of 16th December 2010, the event giving grounds for the making of the application for *mandamus* had not yet occurred. Accordingly, the *mandamus* application of the First Interested Party was not made out of time. It follows, then, that the Applicant's challenge to the jurisdiction of the Kaglo J., the learned High Court Judge, is flawed and it is dismissed.

What needs to be considered next, though, is whether the excessive delay by the First Interested Party before inquiring about the fate of his forms is a factor that the learned High Court Judge should have considered before exercising his discretion in his favour. This Court has always stressed that *mandamus* and the other prerogative orders are discretionary and that among the factors that may be considered in denying the remedy is the tardiness of the applicant. However, what is before this Court is not an application for *mandamus*, but rather for *certiorari* directed at the outcome of the exercise by the learned High Court Judge of his discretion whether or not to grant the order of *mandamus*. This Court cannot, and should not, quash that order merely because it would have exercised that discretion differently. A higher standard is required. That order can only be

quashed, as already explained above, if the High Court judge had no jurisdiction, or if he committed a fundamental error of law patent on the face of the record.

I do not consider that the learned High Court judge's failure to advert to the tardiness of the First Interested Party in inquiring about the fate of his forms comes within the category of a fundamental error of law on the face of the record. Indeed, the Applicant did not make any such argument. It was rather the Court, *suo motu,* which pressed the Applicant on the significance of the tardiness in this regard.

However, in fairness, it is acknowledged that the Applicant did formulate some arguments relating to the First Interested Party's excessive delay, which were, however, not expressed to be based on either of the stipulated grounds of the application. In his Statement of Case, he had this passage:

> "Respectfully, I also wish to state that the learned judge failed or ignored the guidelines and warnings given to judges called upon to issue prerogative writs contained in a long line of cases. It has often been advised by this Court that mandamus being a discretionary remedy, a judge should consider the equities involved and if necessary make some inquisition. In the case of REPUBLIC V NATIONAL HOUSE OF CHIEFS AND OTHERS, EX PARTE FAIBIL III AND OTHERS [1984-86] 2 GLT 731-762 holding 3 states as follows:
>
> (3)The trial judge had failed to consider the discretionary nature of the application for mandamus. He ought to have weighed the equities in the case before deciding either to exercise the court's discretion in favour of granting or refusing the application. Two matters militated against the

exercise of that discretion: The first was the tardy nature of the application and second the bad faith shown by the conduct of the respondents."

The Supreme Court in *In Re Oguaa Paramount Stool, Garbrah v Central Regional House of Chiefs* [2005-2006] SCGLR 193 also stressed the discretionary nature of *mandamus* and the need to weigh up the equities of a case, including tardiness. Whilst the principle of law articulated above in the *Ex Parte Faibil III* and the *In Re Oguaa Paramount Stool* cases (*supra*) is correct, it should be stressed that that case was an appeal from the High Court, and not, as here, an application to invoke the supervisory jurisdiction of this Court. A lower court's failure to advert to and apply the right principle of law in exercising a discretion may serve as a successful ground of appeal for its decision to be overturned on appeal, but that same ground may not necessarily qualify as the kind of fundamental error on the face of the record that is necessary to invoke successfully this Court's supervisory jurisdiction, apart from cases of lack of jurisdiction. On the facts of this case, I do not consider that the learned High Court judge's failure to indicate that he had taken the First Interested Party's tardiness into account in exercising his discretion amounted to a sufficient ground for the quashing of his decision by *certiorari.*

Besides his ground on the High Court's lack of jurisdiction, which has been held above not to be justified, the Applicant also made an argument that the learned judge had made an error of law apparent on the face of the record. However, the contention was merely a re-packaging of the first ground as follows in his Statement of Case:

"The second ground for this application is that the error of law complained of is apparent on the face of the record. In the case of

> REPUBLIC VRS COURT OF APPEAL, ACCRA; EX PARTE TSATSU TSIKATA [2005-2006] SCGLR 612 your Lordships gave guidelines as to the meaning of errors on the face of the record which would attract the intervention of judicial review. Respectfully, I submit that from the 1st interested party's own affidavit and his supporting documents vis a vis the ruling of the court granting the application, it is apparent that the application had been brought over 11 years after the statutory period required and therefore the court ought to have declined the prayer."

This argument is no different from the one that I rejected above in connection with the ground on lack of jurisdiction. It is accordingly also dismissed.

Finally, I will deal with the Applicant's contention that the rules of natural justice were breached in this case. Apart from the two express grounds on which he based his Statement of Case, he also makes the following argument in his Statement of Case:

> "My Lords we also wish to state that the court breached the rules of natural justice in not giving an opportunity to be heard by the applicant knowing that the order would affect him. From the ruling Exhibit KYA 3 the judge was informed in open court that a petition had been issued against the enstoolment of the 1st interested party yet the court ignored that and peremptorily granted the order. That clearly is in breach of or *(sic)* Order 55 rule 5 of CI 47 which places a mandatory obligation on a court to direct service of any such motion on any person who may be directly affected by the motion."

This argument is misconceived and was adequately dealt with in the learned High Court Judge's ruling on the Applicant's motion to set aside the order of *mandamus*. The obligation of the Regional House of Chiefs under the Chieftaincy Act, 1971 to transmit Chieftaincy Declaration Forms received from a Traditional Council to the National House of Chiefs is a public duty which is quite distinct from its obligations under the parallel statutory and constitutional track for dealing with chieftaincy disputes and therefore the two tracks need to be kept separate. This view of the law is supported by *In Re Oguaa Paramount Stool, Garbrah v Central Regional House of Chiefs* [2005-2006] SCGLR 193, where the Supreme Court held that the act of registration or non-registration of a chief's name by the National House of Chiefs is an administrative act of the House, distinct from its judicial acts. To insist on a *mandamus* application relating to the duty to transmit Chieftaincy Declaration Forms to the National House of Chiefs being served on the parties to a chieftaincy dispute affecting the declarant chief would lead to the track of public duty under the Chieftaincy Act 1971 being intertwined with the track of the judicial resolution of chieftaincy disputes, resulting in a complicated legal situation which would be difficult to manage. I do not think that it was the intention of the Chieftaincy Act 1971 (Act 370) to inject chieftaincy disputes into prerogative writ applications. The learned High Court judge was therefore right to hold in his Ruling of 30th March 2011, refusing to set aside the earlier order of *mandamus* that he had made, that a petition challenging an installation of a chief is not a bar to forwarding that chief's Chieftaincy Declaration Forms to the National House of Chiefs. To my mind, there was no obligation to serve the *mandamus* application on the Applicant because he was not, in terms of the civil procedure rules, when purposively construed, an interested party in that application. Accordingly, the *audi alteram partem* is not

applicable to the facts of this case. If the Applicant's chieftaincy petition succeeded later, whatever had been entered in the register by the National House of Chiefs would be undone by the House, pursuant to its powers under the Chieftaincy Act.

For the reasons stated above, I would dismiss the application to invoke the supervisory jurisdiction of this Court to quash the order of *mandamus* granted by Kaglo J. on 12th December, 2010.

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

ANSAH JSC:

I had the opportunity to read before hand the opinions just delivered by my esteemed brethren and agreed with the facts as read by them. I most respectfully concur with the opinion of Atuguba JSC, and do hereby state in brief my reasons for doing so.

In this application for judicial review of the order of the High Court, Koforidua, coram Kaglo J, one of the grounds proffered was that the application (for mandamus) was brought outside the six month time limit within which the application should have been made, as ordained by Order 55, 3 (1) of the High Court (Civil Procedure) Rules, 2004, C.I. 47, and that by the failure to comply with the time limited for such applications the grant was thereby vitiated; one of the basic issues was whether or not the conditions for the grant was satisfied. The condition in question is the one constituted by a 'refusal'

A reading of the statement of case by the applicant reveals that the applicant was of the firm belief that there was a refusal to perform a public duty thus warranting the application for mandamus, which in turn vitiated the ruling by the court to grant the order of mandamus or refuse to set it aside later by the court. That in turn tended to rob the court of jurisdiction to deal with the application

In their learned treatise *'Administrative Law', Eighth Edition* by Sir William Wade and Christopher Forsyth, the learned authors wrote in *treating* the topic 'Mandamus' under the 'Prerogative remedies' at page 615 sub title 'requirement of demand and refusal', that

"It has been said to be an imperative rule that an applicant for mandamus must have first made an express demand to the defaulting authority, calling upon it to perform its duty and that the authority must have refused. But these formalities are usually fulfilled by the conduct of the parties prior to the application, and refusal to perform the duty is readily implied from conduct, see the State (Modern Homes Ltd) v Dublin Corporation 1953 IR 202".

The authority went on to state that:

"The court does not insist on this condition where it is unsuitable. As Channel J said:

The requirement that before the court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable to all possible cases. Obviously it cannot apply where a person has by inadvertence omitted to do some act which he has a duty to do and where the time within which he can do it has passed." See R v Hunley Revising Barrister [1912] 3 KB 518, at 531.

The most important consideration is that a refusal may legitimately be inferred from the conduct of the person who has to perform the legal duty.

As the facts of this case show there was a time lapse of a whole ten years (from 1999 to sometime in 2010) within which the Registrar maintained a total inactivity or silence constituted by neither refusing nor transmitting the CDF forms onward to the National House of Chiefs for registration. In those

circumstances, it will be reasonable to infer a refusal to comply with the duty to transmit the forms in discharge of the legal duty to do so, from his conduct.

My views in this wise concur with those of Atuguba JSC and I am also in agreement with his conclusion that the application for certiorari to quash the decision of the High Court should be granted for the reasons given.

[SGD] J. ANSAH
[JUSTICE OF THE SUPREME COURT]

BONNIE J.S.C.

I have had benefit of reading the opinions of my eminent brothers Atuguba,JSC and Dr. Date-Bah, JSC. I wish to associate myself with the reasons given by the president Atuguba, JSC in his opinion and say that the application should be granted.

[SGD] P. BAFFOE-BONNIE
[JUSTICE OF THE SUPREME COURT]

AKOTO- BAMFO, (MRS.) J.S.C.

I have read the opportunity of reading beforehand the opinions delivered by my esteemed brothers, Atuguba and Prof. Date-Bah JJSC.

I am in agreement with the opinion of my brother Atuguba JSC and would accordingly grant the application.

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

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