IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA - A.D. 2014

CORAM: WOOD (MRS), C.J (PRESIDING)

OWUSU, J.S.C.
DOTSE, J.S.C.
YEBOAH, J.S.C.
AKAMBA, J.S.C.

CIVIL MOTION

NO.J5/2/2014

31ST JULY 2014

THE REPUBLIC

VRS.

THE HIGH COURT (FAST TRACK DIV.) ACCRA

EX PARTE: FRANCIS NII AYIKAI - - - APPLICANT

NII AKOSOKU IV. a. k. a - - - INTERESTED PARTY

(PERCY OKOE ADDY)

R U L I N G

OWUSU (MS), JSC.

The Applicant herein is invoking the supervisory jurisdiction of the court under Article 132 of the constitution by way of Judicial review in an application for an order of certiorari to bring up and quash a judgment of His Lordship E. A. Asante delivered on 23rd of May 2013 in Suit No.AHR 101/2012 entitled:

NII AKOSOKU ---------- PLAINTIFF

VRS

FRANCIS AYIKAI ----------
DEFENDANT

The grounds on which the application is premised are the following:

" (i) The trial Judge committed an error of law apparent on the face of the record by failing to wait for the Supreme Court's appellate determination of the primary issue of the capacity or *locus standi* of the Plaintiff, i.e. the interested Party/Respondent herein, before delivering his substantive judgment on 23rd May 2013.

(ii) ALTERNATIVELY the trial Judge had no jurisdiction to proceed to deliver final judgment in Suit No. ARH.101/2012 entitled NII AKOSOKU IV VRS FRANCIS AYIKAI during the pendency in the Supreme Court of the said preliminary issue of capacity or *locus standi* of the Interested Party.

(iii) The trial Judge had no jurisdiction to make an order adjourning for final judgment the trial before him during the pendency in the Court of Appeal of the motion for a stay of proceedings in Suit No: ARH.101/2012 in his court.

(iv) The trial Judge had no jurisdiction to set aside, as he purported to do, the judgment of the Judicial Committee of the Greater Accra Regional House of Chiefs, Dodowa, dated 17th February 2013, as the instant Suit No. ARH. 101/2012 pending before him did not invoke his supervisory jurisdiction, and he was otherwise acting contrary to section 76 of the Chieftaincy Act, 2008 (Act 759) as well section 57 of the Court's Act, 1993 (Act. 459).

(v) The trial judge committed a breach of the rules of natural justice as well as of Art. 296 of the Constitution by failing to give the Applicant a proper or any prior hearing notice that he was proceeding to give final judgment in Suit No. AHR.101/2012 pending before him.

(vi) In rendering the judgment dated 23rd May 2013 the Judge ignored the estoppel effects in rem in favour of the Appellant herein or his predecessor in office, the judgment of the Supreme Court, respectively dated 6th December, 2005 and 29th April 2010 and also the Court of Appeal; 19th November 2009 all pleaded by the Applicant's Statement of Defence, paragraphs 5, 6,7,10 and 14.

(vii) The trial Judge committed a patent or apparent error in that, as pleaded by paragraphs 8 and 16 of the Appellant's Statement of Defence, he failed to appreciate that the Interested Party was committing a gross abuse of process by re-opening through the instant suit matters which were all *res judicata* by the judgments pleaded."

The application was opposed by the interested party in an affidavit the gist of which is that the applicant has not made out a case for the

court to issue out an *order of certiorari* to quash the judgment of Amoako J. delivered on 23-3-14 as prayed.

Grounds (i) and (ii) are in the alternative. The error of law apparent on the face of the record complained of, is failure on the part of the trial judge to wait for the Supreme Court's appellate determination of the primary issue of the capacity of the plaintiff, the interested party herein before delivering the judgment of 23-05-2013.

At this stage let me briefly recount the events that led to invocation of the supervisory jurisdiction in this application.

The Interested Party then as plaintiff claimed against the Applicant herein as Defendant the following reliefs:

> "a) a declaration that the Judicial committee of Greater Accra Regional House of Chiefs had no Jurisdiction to hear at first instance, the matter in Suit No: CT/ERHC/AP.4/80: NII TETTEH AHINAKWA II VRS NII ARYITEY AGBOFU II & ANOR and consequently a (sic) whole of the proceedings in the matter are a nullity.
>
> b) a declaration that the Judgment of the judicial committee of the Greater Accra Regional House of Chiefs dated 17th February, 2003 in the said Suit No: CT/ERHC/80 NII TETTEH AHINAKWA II VRS NII ARYITEY ABGOFU II ANOR (sic) is void for want of Jurisdiction and an order setting aside same.
>
> c) Costs."

The Defendant challenged the capacity of the plaintiff which was thus set down for preliminary trial. The trial court by a ruling delivered on 8/2/2013 held that the plaintiff was clothed with capacity to institute the suit.

The court then set down for legal submission issue (i) of the issues set down for determination i.e. "whether the Judicial committee of the Greater Accra Regional House of Chiefs had jurisdiction to entertain at

first instance the suit No. CT/ERHC/AP/14/80: NII TETTEH AHINAKWA II VRS NII AYITEY AGBOFU & ANOR involving a head of family and a divisional chief."

The Applicant was dissatisfied with the ruling and therefore appealed against it to the Court of Appeal.

He applied for stay of proceedings in the court below in the Court of Appeal which court dismissed same on 8/5/2013. Before then the Court of Appeal has had to adjourn the application sine die because the Interested Party's lawyer had travelled out of the Jurisdiction.

In the meantime, by a letter dated 5th April 2013 counsel for the Applicant had informed the trial court that he has appealed against the ruling of 8/2/2013 on 14/3/2013 and on that same day, he has also filed a motion for stay of proceedings in the trial Fast Track Court.

On 18/04/2013, the trial court in the proceedings of the day, adjourned the matter to 25/04/13 and ordered a copy of the proceedings and hearing notice to be served on Mr. Adumoa Bossman and the Defendant to appear before the court to justify why the application pending before the Court of Appeal which has been adjourned sine die should stop the trial court from proceeding to do its work.

In the meantime, when the ruling of 08/02/13 was delivered, His Lordship ordered the plaintiff to file his written submissions on the issue of jurisdiction set down for legal argument by 25/02/2013 and the Defendant was also to file his by 25/03/2013. The matter was set down for Judgment.

When the time came for Judgment to be delivered according to His Lordship it was only the plaintiff who had filed his submissions on 26/02/13 but the Defendant as at the time the judgment was being delivered had failed to file any written submissions. The trial court

therefore proceeded to deliver its judgment. This was in the absence of the Applicant and his counsel.

In a letter dated 24/4/13, Mr. Adumoa Bossman, on receipt of the court order of 18/4/2013 and the hearing notice, wrote to the court per the Registrar which letter he has exhibited as Ex "F.N.A. 11".

For the purpose of this application it is pertinent to quote the last paragraph of the letter which states that:

> "I would therefore appear in the trial Fast Track High Court on protest and out of courtesy, only to announce that I cannot participate in any proceedings herein as ordered on 18th April 2013. Please bring this letter immediately to the attention of His Lordship E. Amoako Asante J."

On the issue of capacity it is counsel's submission that same is vital to the right to initiate legal proceedings and that since that issue remained undetermined when the Judgment of 23/05/13 was delivered, the court committed an error which is apparent on the face of the record.

Is the error of law if any, complained of, apparent on the face of the Judgment?

In the case of REPUBLIC VRS. NORTHUMBERLAND COMPENSATION APPEALS TRIBUNAL; EX-PARTE: SHAW [1952] 1KB p.357 Morris L. J. had this to say –

> "It is plain that certiorari will not issue as a cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. <u>It exists to correct error of law where revealed on the face of an</u> order or decision, or irregularity, or excess of, Jurisdiction where shown - - - - - - - - - - - - - - - - -"

On the face of the judgment sought to be quashed, there is no such error of law revealed and therefore on that ground, certiorari will not

issue. Alternatively, will the order issue for want of Jurisdiction because of the pendency of the application for stay of proceedings? When the Judgment was delivered, the Court of Appeal has dismissed the application on 8/5/2013. The Judgment was delivered on 23/5/2013. When the Court of Appeal dismissed the application for stay of proceedings, counsel informed the trial court that the Court of Appeal has dismissed the application but he has appealed against the ruling to the Supreme Court on 10/05/2013.

As at 23/5/2013 when the Judgment was delivered, was the appeal properly pending before the Supreme Court? In the affidavit in support of the present application, paragraph 20 in particular it is averred that "on the selfsame 23rd May 2013, the record of appeal to the Supreme Court was, at or about 12:00noon settled by us, the parties, before the Registrar of the Court of Appeal.

Did the settlement take place before the delivery of the Judgment? This is not borne out from the affidavit. Even if it did, has the record of proceedings been transmitted to the Supreme Court registry, for the appeal to be said to be properly pending before the court?

These matters are not borne out from the records. Mere filing of an appeal has ceased to operate as a stay of proceedings and therefore in the absence of a formal order for stay, Amoako J. committed no error of law which will warrant the issuance of an order of certiorari to quash his judgment of 23/05/2013.

In the same breath, the pendency of the appeal, *ipso facto*, did not strip the trial Fast Track Court of its Jurisdiction, want of which, will render the Judgment delivered on 23/05/2013 a nullity for which reason, certiorari will issue.

Both grounds (i) and (ii) will therefore not avail the Applicant.

Ground (iii) is sufficiently taken care of by ground (ii) and same is also dismissed.

On ground (iv), counsel contends that because the suit before the trial court did not invoke its supervisory Jurisdiction, His Lordship did not have jurisdiction to set aside as he purported to do the Judgment of the Judicial Committee of the Greater Accra Regional House of Chiefs dated 17th February 2003.

In this wise, learned counsel referred to the celebrated case of MOSI VRS BAGYINA [1963] 1 GLR 337 in which Akuffo-Addo JSC speaking for the court delivered himself thus:

> "where a judgment or an order is void either because it is given or made without jurisdiction or because it is not warranted by any law or rule or procedure, the party affected is entitled *ex debito justiciae*, to have it set aside, and the court or a judge is under a legal obligation to set aside either *suo motu* or on the application of the party affected. No Judicial discretion arises here. The power of the court or a Judge to set aside any such judgment or order is derived from the inherent jurisdiction of the court to set aside its own void orders and it is irrespective of any expressed power of review vested in the court or a judge, and the constitution, of the court is for this purpose immaterial - - - - - - - - -

He therefore submitted that it is only the selfsame court or Judge which/who has made the void or unwarranted judgment/order that has the jurisdiction to set it aside.

In the suit before the trial Fast Track Court, the plaintiff has sought an order to set aside same following the declarations.

The facts of the case before Amoako J. are not the same as the facts in MOSI VRS BAGYINA for which reason the principle stated above is applicable. In the instant case the trial court has within its Jurisdiction declared the judgment of the Greater Accra Regional House of Chiefs, an inferior tribunal null and void as given without jurisdiction. The order setting aside the judgment is consequential to

the main relief sought which, the court in its inherent jurisdiction could make.

Was the case before Amoako J. "a cause or matter affecting chieftaincy?" Section 76 of the Chieftaincy Act of 2008 (Act. 759) defines "*cause or matter affecting chieftaincy*" and by the said definition, the case before Amoako J. was not "a cause or matter affecting chieftaincy" over which the High Court has no Jurisdiction.

The next ground for the application, is not worthy of consideration at all. Why do I say so? The complaint here is that the judge breached the rules of natural justice as well as Art. 296 of the constitution in that the applicant was not given a proper or any hearing notice that he was proceeding to give final judgment in Suit No. ARH 101/2012 which was pending before him.

Mr. Adumua-Bossman, has in Exhibit "F.N.A." informed the court that he could not participate in the proceedings before the court. Where therefore he and his client disabled themselves from being heard in the proceedings, he cannot turn round and accuse the court of having breached the rules of natural justice. Indeed the hearing notice and the order of 18/04/2013 were served both on counsel and the Applicant who chose not to take part in the proceedings.

See the case of the REPUBLIC VRS HIGH COURT [FAST TRACK DIVISION] ACCRA; EX PARTE: STATE HOUSING CO. LTD (NO.*2); (*KORANTEN- AMOAKO; INTERESTED PARTY)[2009] SCGLR 185.

I have considered grounds (vi) and (vii) of the application and in my opinion they are not grounds for application for an order of certiorari. If anything at all, these grounds will suffice in an appeal. Certiorari will not issue if the error complained of is not apparent on the face of the records. Where the error can be detected only from reading through the records, the remedy, if any lies in an appeal.

In the case of REPUBLIC VRS NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL already referred to, Morris L. J. had this to say that:

> "It is plain that certiorari will not issue as a cloak of an appeal in disguise - - - - - - - - - - - -"

Ground (vi) complains of the trial Judge ignoring the estoppel effects in rem of judgments of the Supreme Court, Court of Appeal and Supreme Court again dated 6th December 2005, 19th November 2009 and 29th April 2010 respectively all of which were pleaded by the Applicant in his statement of Defence.

> "A court of competent Jurisdiction may decide questions before it rightly or wrongly. Procedures for correcting wrong decisions exist. The procedure of appeal is one such avenue for redress. But the remedies of appeal and certiorari are different and must not be blurred- - - - - - - -- - - - - -"
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> See the case of the REPUBLIC VRS ACCRA CIRCUIT COURT: EX-PARTE APPIAH [1982 – 83] 1 GLR 129 at page 143, dictum of Francois J. A. (as he then was).

The Applicant's appeal on the issue of capacity is still pending in the Court of Appeal. If it succeeds, its effect will be the same as what he seeks to achieve in this application if it succeeds.

I am very mindful of the law that certiorari and appeals are not alternative remedies but mutually exclusive. However, I think this application seeks to put unnecessary fetter on the Jurisdiction of the Court of Appeal.

In any case, the Applicant has not succeeded in making a case for the grant of an order of certiorari and the application is accordingly dismissed.

R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

JONES DOTSE JSC:

I have been privileged to have read before hand for the last time the well reasoned and erudite ruling delivered by my respected sister *(whom I affectionately call Obaahema or Daavi) Rose Owusu JSC*, who takes a bow after 25 years of distinguished and meritorious service from the superior court bench, six (6) of these have been on the Supreme court.

I have been privileged to have worked with her for four (4) years at the Court of Appeal and for six (6) years at the Supreme Court, where she was regarded as leader of our delegation which only few members of the court understood.

Ms. Owusu is very well known for her capacity for detail, hard work and her greatest attribute is her great quest to ensure for truth and justice which sometimes portray her as being conservative.

In the ruling just delivered by her and to which I concur, my sister has once again displayed her appetite for detail, truth, justice and above all that zeal to unravel difficult issues and speak her mind fearlessly.

I can only conclude this concurring valedictory judgment by my sister by stating that I will continue to cherish the values you stood for, your boldness, courage, ability to deal with difficult cases with ease and above all, your extreme humility.

Many generations of Judges, lawyers and law students will continue to benefit from the many incisive and elucidating judgments that you have delivered during your tenure on the Bench.

I will conclude this concurring opinion with the following quotation which indeed indicates that I wish you well on your retirement.

"The secret of the future is here in the present. If you pay attention to the present, you can improve upon it. And, if you improve on the present, what comes later will also be better. Each day, in itself, brings with it an eternity". By Paulo Coelho, (The Alchemist)."

May the Good Lord bless and keep you and let his favour shine upon you on your retirement.

J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

G. T. WOOD (MRS)

CHIEF JUSTICE

ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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