

**IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT ACCRA
AD 2015**

**CORAM: ANSAH JSC (PRESIDING)
DOTSE JSC
ANIN YEBOAH JSC
BAFFOE BONNIE JSC
AKOTO- BAMFO (MRS) JSC**

**CIVIL MOTION
No.: J5/9/2015**

18TH MARCH, 2015

THE REPUBLIC

VRS.

HIGH COURT , ACCRA

EX PARTE; DAN ASHIE KOTEY - APPLICANT

A. G. BOADU - INTERESTED PARTY

RULING

ANSAH JSC:

On 17-03-15 this court unanimously dismissed an application by the applicant an order from this court to issue a prohibition order against the trial judge to restrain her from proceeding to hear a matter before her; we intimated to give our reasons for our ruling later. We hereby proceed to do so now.

Pursuant to the provisions of article 132 of the 1992 Constitution, the applicant herein moved this court for an order for prohibition directed at the High Court, Court 23, Accra, presided over by Her Ladyship Mrs. Justice Naa Adoley Azu, prohibiting her from proceeding to hear the case entitled **A.G. Boadu v The Registrar, High Court & others**, suit numbered BMISC 501/2014, pending before her.

The grounds of the application as revealed by the motion paper are that:

1. "There is a real likelihood of bias on the part of Her Ladyship Mrs. Justice Naa Adoley Azu against the case of the defendants, as shown by various statements of Her Ladyship the presiding judge even before the commencement of the hearing of the case proper indicating strongly that the defendants will not get a fair trial.
2. On the 27th November 2014, the 3rd defendant petitioned the office of Her Ladyship the Chief Justice requesting that Her Ladyship Justice Naa Adoley Azu be stopped from hearing the matter and remitting the matter back to Court 8 for hearing by the presiding judge; Her Ladyship the Chief Justice however responded by a letter dated the 3rd November 2014 refusing the petition and advising co-operation with the court for an expeditious and early disposal of the matter;
3. The letter refusing the petition was signed by the First Deputy Judicial Secretary for the Judicial Secretary and the letter indicated that it had attached to it the order of transfer under the signature of

Her Ladyship the Chief Justice herself; however, the attachment was not with the letter and therefore under the circumstances the 3rd defendants' representative went to the Office of the Judicial Secretary on several dates and times to get it but never got it to date; however a hearing notice for the matter dated the 16th December, 2014, was served on the 3rd defendant on the 19th December 2014; however, hearing did not take place on that date and the matter was adjourned to the 9th January 2015; the matter was then adjourned for continuation of the hearing on the 16th January 2015.”

The facts that led to the institution of the present application, as revealed in the supporting affidavit, were that the interested party herein instituted an action per his writ of summons entitled in suit number Number BMISC 506/2014, entitled **AG Boadu v 1) The Registrar, High Court; 2) The Deputy Sheriff, High Court, Accra; 3) Daniel Ashie Kotei**, for the reliefs that:

(i) Plaintiff claims against the defendants jointly and severally a declaration that the demolition of his (2) two storey buildings at Ofankor/Kplangonnno also known as the firing range is unlawful.

(ii) General damages for unlawful destruction of plaintiffs property.

(iii) Special damages.

(iv) Perpetual injunction restraining the defendants their agents, servants and assigns, from interfering with plaintiffs houses at Ofankor/Kplangonoo also known as the firing range.

(v) An order setting aside the default judgment of 31st day of January 1996 in the case of Nii Olai Amontia v Lands Commission & another Suit No: L 776/95.

The facts surrounding the application further allege that as per Exhibit 'DAK5', counsel for the 3rd defendant applied for an order of the court that the documents of title to the lands of both parties be

produced to be superimposed because the demolished buildings were in the boundary area which had been adjudged to belong to the 3rd defendant's family. The plaintiff resisted the application.

The court ruled that due to the nature of the subject matter of the issues in dispute, the application ought to be refused. However, the court in a volte-face, *“further ordered the parties to submit their plans for the purpose of the preparation of a composite plan to determine the boundaries of the lands in question”*; however, it added that:

“The court further orders that the parties file and exchange the documents that they intend to rely on for the trial. The court will be minded to keep relief 6 in mind at the time of writing judgment. The parties are to file and submit their building plans with their site plans attached for the creation of a composite plan.”

Counsel for the applicants opined that on their face value, these statements would appear to be harmless but when assessed with a measure of judicial jurisprudence, would raise doubts as to the fairness and impartiality of the judge who made them in the course of the trial before her. This was because they revealed a leaning of the judge towards one of the parties to the suit. Counsel wondered how a court would order a building plan to be added to a site plan for a superimposition when the 3rd defendant had no demolished buildings in the area in dispute.

Counsel for the applicant submitted that above all, the trial judge should have declined hearing the matter when she had notice of the petition to her Ladyship the Chief Justice.

The defendant opposed the application.

It is trite learning that prohibition is an order restraining a court or a public authority from acting outside its jurisdiction. ***Black's Law***

Dictionary, 8th Edition, simply defined it to mean: “1 A law or order that forbids a certain action. 2 An extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction”

I must observe that the granting of order of prohibition is discretionary and will be granted to prevent an excess of jurisdiction. A prohibiting order from a high court would order an inferior court or authority not to carry out an *ultra vires* act, i.e. outside its jurisdiction. Furthermore, real likelihood of bias in a judge is ground for granting an order of prohibition against him or her; such likelihood has to be established on the basis of facts duly proved: see **Amadu v Mohammed [2007-2008] SCGLR 58 at 59**.

The subject matter of prohibition is covered by a plethora of judicial authority including **Republic v High Court, Denu; Ex parte Agbesi Awusu II (No 2) (Nyonyo Agboada (Sri III) (interested party) [2003-2004] SCGLR 907**, where this court held that it would automatically grant a prohibition order to prevent a biased judge from hearing a suit before him/her on satisfactory proof of bias or a real likelihood of bias.

In **Republic v High Court, Accra, ex parte Commission on Human Rights and Administrative Justice (Addo interested party) [2003-2004] 312**, this court held that prohibition would lie to prevent a court from exceeding its jurisdiction or reaching a decision which would be quashed subsequently by certiorari.”

And finally, in **Republic v High Court, Kumasi; ex parte Mobil Oil (Ghana) Ltd Hagan (interested party) [2005-2006] SCGLR 312** this court held stated the grounds for the grounds for the grant of an application for an order of prohibition to be a real likelihood of bias and held that:

“(2) At common law, a judge, magistrate or an independent arbitrator would be disqualified from adjudicating whenever

circumstances pointed to a real likelihood of bias, by which was meant “an operative prejudice whether conscious or unconscious in a relation to a party or an issue before him. That would apply in particular where the circumstances pointed to a situation where a decision might be affected by pre-conceived views.”

In the case last mentioned Georgina Wood JSC (as she then was) said at page 339 of the report that: “...where as in the instant case, a judge has unequivocally made known his views about the merits of the critical disputed issues he would be called upon to adjudicate, in a very direct or forthright manner as to suggest prejudice or predetermination, I would think that he must be disqualified on the grounds of a real likelihood or danger or possibility that he would not apply his mind impartially to determining the very matter(s) on which he has formed an unqualified opinion.”

As stated above, the applicant referred this court to the facts which he relied on to discharge the burden of proof which lay on him to prove the allegation of real likelihood of bias against the trial judge and it is these facts which we will consider and determine how far they supported the allegation of bias raised against the judge. In the present application the applicant has founded the application on statements made by the trial judge before the commencement of the proceedings before her. The applicants inferred from them that the defendants would not get a fair hearing at the trial, for which reasons they had petitioned the office of Her Ladyship the Chief Justice for the suit to be transferred from her to another judge for hearing as she was not going to be fair to her the petitioner at the hearing of the suit. It is because of these facts that the application has been made to this court to issue an order to prohibit her from proceeding with the hearing as it was said in **The Republic v High Court Sekondi, ex parte Mensah and others 1994-95 GBR**, per Hayfron-Benjamin JSC, that:

“Where a judge sensed that one or all parties to the litigation has lost confidence in the judge’s impartiality the proper course for such a judge was to decline jurisdiction.”

Of course, the reaction from the respondent was to oppose the application on the terse ground that nothing in the applicant’s affidavit in support of the application, constituted a real likelihood of bias.

The issue of bias thus formed the basis of the application before us. The statements alleged to have been made by the trial judge have been referred to in this delivery already and the basic issue raised thereby is: even if the judge was proved to have made those statements, would it be reasonable to infer from them that she (the judge) was actually biased towards one of the parties before her, (that was to say the defendant), so that he was not likely to have a fair hearing from her?

The issue of bias was considered in **Nana Yeboa-Kodie Asare II & 1 or. v Nana Kwaku Addai & 7 ors unreported, Rev. Motion J7/20/2014, Supreme Court, dated 12/02/2015**. This court held that the English House of Lords tried to resolve the conflicts in the definition of what constituted bias when it got the opportunity in **R v Gough 1993 AC 646**. The court laid down the following approach to be followed by a court in deciding whether to set aside a decision of an inferior tribunal on account of bias. These are:

“1 The reviewing court should first identify all the circumstances relevant to the issue of bias.

2 The reviewing court should not then consider the effect that those circumstances would have upon a reasonable observer, rather,

3 It should itself decide whether, in the light of the relevant circumstances there was a real danger that the inferior tribunal was biased.

After referring to the ***R v Gough*** case (supra) Benin JSC, who read the majority judgment, cited **In re Medicaments and related classes of Goods (No. 2) (2001) TLR 84** in which the English Court of Appeal came up with a test for determining ‘bias’ at page 85 of the report where Lord Philips MR said: “The court had first to ascertain all the circumstances which had a bearing on the suggestion that the judge was biased. It then had to ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased... Thus for bias to succeed or prevail, there must be proof of actual bias, in the form of pecuniary benefit to the judicial officer. It could also be proved by interest of a proprietary nature which may lead or amount to a real likelihood of bias. And it must also arise from the circumstances of the situation which a fair-minded and objective may conclude that there was a real danger or real possibility of bias”.

A fact which was laid bare and made obvious in this application was that there was no allegation or imputation of a pecuniary or proprietary interest leveled against the trial judge; the objection was taken against certain remarks she made before the trial. Giving the most anxious consideration to the words used (details of which have been referred to above), and any other circumstances of the case, I do not think in my opinion that any fair-minded and informed observer would consider the views or directions given by the judge and referred to above, a real danger or a real possibility of bias as alleged against her. That was even so when one takes a most charitable view of her utterances. Or when one recognizes the change in her request for what she had said earlier.

Even when one takes cognizance of the change of direction by the judge and calls it a contradiction, the issue was would that per se be enough grounds to lead to a conclusion that the judge was

biased or there was a real likelihood of bias in favor of the 3rd defendant?

In our view what the judge said was not of any sufficient weight to establish any proof on the balance of probabilities that, there was a real likelihood of bias on her part for or against any of the parties before her. She obviously did not make any definitive pronouncement on the merits of the suit before her awaiting hearing on its merits or anything having a semblance of a prejudgment or predetermination of the issues before her or at all, which would be enough to invoke our supervisory jurisdiction to prohibit her from proceeding further to hear and determine the issues raised in the suit (before her).

It was for all these reasons that we unanimously dismissed the application to invoke our supervisory jurisdiction in the matter to prohibit the judge from hearing the matter before her.

J. ANSAH

JUSTICE OF THE SUPREME COURT

V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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