IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

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

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

CIVIL MOTION

NO.J5/22/2014

29TH JULY 2014

THE REPUBLIC

VRS.

THE HIGH COURT (FINANCIAL DIV.) ACCRA

EX PARTE: TWENEBOAH KODUAH - - - APPLICANT

THE EXECUTIVE DIRECTOR - - - INTERESTED PARTY

ECONOMIC AND ORGANISED CRIME OFFICE ,ACCRA

RULING

MAJORITY OPINIONS

GBADEGBE JSC:

My Lords, I have had the advantage of reading in draft the judgment about to be read by my worthy brother, Dotse JSC in these proceedings and much as I think that the said delivery has raised interesting points of law and in particular the need for those responsible for carrying out the objectives of Economic and Organised Crime Office Act, 2010 (Act 804)to comply with the provisions of the law, I am unable for reasons that follow shortly to agree with the conclusion therein reached by him. In my thinking, as certiorari is a discretionary remedy, the applicant by waiting so long is not only out of time by virtue of the rules of this court but applying the decision of this court in the case of **The Republic v High Court, Accra Ex parte Nil Nueh Odonkor**, Suit Number J5/26/2014 dated 22 July 2014 (Unreported)to the facts of this case, I am of the opinion that the period from the making of the order of 19 December 2012 to the date the application herein was filed- 14 March 2014 is too long to ripen such a stale application into an effective application in so far as the ninety days rule goes and accordingly as the applicant has not been able to provide any reasons for such inordinate delay, this should be fatal to the application. This aside, an applicant who seeks to invoke our jurisdiction by way of judicial review in the nature of certiorari is deemed to know the time limit provided by rule 62 of the Supreme Court Rules and yet seeks no order from us extending such time in his favour must face the attributes that arise from such a delay. In my opinion once the application before us is out of time, we cannot inquire into it on the merits. In this regard, notice is taken of the fact that before the applicant's journey out of the jurisdiction of this court, he was indeed aware that his account had been frozen as indeed, he testified to in paragraphs (d) and (e) of his supporting affidavit, a fact which renders his failure to seek an order extending time in his favour quite unacceptable particularly when acting by counsel.

It is observed that although the rules contained in Part Six of CI 16, the Supreme Court Rules, have made no express provision for extension of time in relation to applications that come under this part, I think that the existence of that rule in rule 60 in relation to Part Five, which regulates review applications is a clear indication that the rules recognise the power of the court when so satisfied to extend time in order to enable matters which by virtue of the strict application of the rules are time barred such as the ruling of 19 December 2012 in order to have such applications determined following the grant of extension of time. I do not think that the emerging practice by which counsel basing themselves merely on the allegation of nullity of rulings, judgments and orders refrain from seeking orders for extension of time is a healthy practice having regard to the fact that time limits laid down by law are intended to be strictly applied particularly in cases where no prior application is made to the court for extension of time and in my view without time being extended in favour of the applicant, the consequences of rule 60 must fall because this is a just instance of its falling. I think there is settled judicial opinion to support the contention that a judgment and or order of a court of competent jurisdiction requires competent proceedings to destroy the consequences that flow from it; a principle that recognises due process requirements and the need for parties to avail themselves of remedies that the law provides within the confines of the law. This, in my view is sufficient to dispose of the application in so far as relief 1 relating to the order of 19 December 2012 goes.

I now turn to the ruling of 12 February 2014. The application relating to this which was filed on 14 March 2014 comes within the stipulation of ninety days in rule 62. It has been urged on us that the said ruling in so far as it seeks to confirm the earlier one dated 19 December 2012 was in error and not only that but is an instance of excess of jurisdiction as the conditions precedent to the making of an order for confirmation under section 51 of the law were never present. In my view the application resulting in the order of 12 February 2014

is not directed at the absence if jurisdiction in the High Court to hear the application of the applicant herein to set aside its earlier order of 19 December 2012. On the contrary, the contention appears to be that by not setting aside the decision of 19 December 2012, the court had as it were acted without jurisdiction. This is an urging that I am unable to understand as each of the two orders in relation to judicial review and indeed appeal must be considered separately. The applicant must have thought that once in his opinion there was absence of jurisdiction in the previous order then by failing to set it aside at his instance the court was as it were infected by the jurisdictional absence in the previous order but that is not the correct legal position. As the learned trial judge who heard the application to set aside the order of 19 December 2012 had jurisdiction to deal with the matter, I think that if the applicant was aggrieved by the ruling, his remedy is to appeal there from. I do not think that the collateral attack made on the ruling of 19 December 2012 in the course of the application to set that order aside have the effect of depriving the court which considered the application of jurisdiction in the matter.

Before ending this delivery, I wish to comment on one matter of procedure relating to the deposition in support of the application herein. Although counsel generally act on behalf of their clients in a case that turns on the power conferred on a state institution to investigate serious crimes, it is thought that an affidavit from the suspect deserves more weight than one coming from a lawyer as the crucial facts concerning which the reasonable suspicion for his alleged involvement with a serious offence are peculiarly within the knowledge of the suspect. From the facts deposed to, I am surprised that the deponent did swore positively in paragraph 1 of the affidavit in support that those facts are within his knowledge as he never attempted to explain in the slightest degree how he came by those facts. I think from the requirement of the law that an affidavit must contain facts which are within the knowledge of the applicant except as otherwise authorised by law is intended to ensure that cases tried by affidavit have the same effect as those in which oral evidence

is tendered. Examining the processes filed in the matter herein, it is difficult to have an answer to the question why the applicant did not make the affidavit as there is nothing from which to come to the answer. On this ground alone, I think the application would have been faced with a difficulty but as the point was not raised at the hearing, the observations regarding same are intended for future guidance only.

For these reasons, I refuse to yield to the prayer of the applicant before us in these proceedings and proceed to dismiss same.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

AKAMBA, JSC:

I have been privileged to preview the two divergent decisions in these proceedings of my two respected brothers Dotse, JSC and Gbadegbe, JSC. My thinking and study of the record inclines me to the delivery by the latter. Certiorari is a discretionary remedy which is granted upon satisfaction of laid down rules. There is an emerging tendency in practice today to consider that the rules of procedure indeed do no matter so long as an application is placed before the court. Yet the rules of procedure are as integral as the substantive law to the success of the trial process. It is therefore essential that time lines set down under the rules of court are adhered to, to facilitate timely trials. Infringements of these rules without reasonable justification should be met with corresponding sanctions or denials.

Applying our decision in **The Republic vs High Court, Accra; Ex Parte Nii Nueh Odonkor, Suit No J5/26/2014 (unreported)** the long lapse between the order made on 19th December 2012 to the date this application was filed on 14th

March 2014 is too tardy to warrant this courts grant, more so when the applicant had ninety days within which to apply for this remedy. For this reason and those stated by Gbadegbe, JSC I will equally dismiss the application.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

DISSENTING OPINION

DOTSE JSC:

On the 22nd day of July 2014, this court in Suit No: CM J5/26/14 intitutled, ***Republic v High Court, Financial Division, Accra, Ex-parte Nii Nueh Odonkor, Executive Director, Economic and Organised Crime office – Interested Party***, coram: Atuguba JSC presiding, Dotse, Gbadegbe, Benin and Akamba JJSC in a 4 to 1 majority decision in which Dotse JSC dissented, the Court dismissed an application seeking to quash certain decisions of the High Court, Financial Division for breach of the rules of natural justice.

By the principles of stare decisis the majority decision is indeed the ruling of the court and this court is bound to follow that decision in previous decisions such as the one referred to supra. This is especially so in view of the express provisions of article 129 (3) of the Constitution 1992 which provides that whilst the Supreme Court may treat its previous decisions as normally binding it may depart from it when it appears right to do so. In the instant case, the Supreme Court has not shown any inclination to depart from that decision. The result is that, it is therefore a binding decision.

In deciding not to follow the majority decision in the suit just referred to supra, I have considered all the relevant principles and come to the conclusion that the said decision was not a decision that dealt with the merits of the case. Rather, it took a restricted meaning as to what constitutes time, for the purpose of its computation pursuant to applications seeking to invoke the supervisory jurisdiction of this Court and more particularly the determination of when the grounds of the action first arose in terms of Rule 62 of the Supreme Court Rules, 1996 C.I 16.

In view of the fact that the facts in this case as regards computation of time and when the grounds of action first arose for purposes of applying for certiorari in terms of Rule 62 of C. I. 16, are different from the decision referred to supra, I consider it worthwhile to again dissent and not flout any of the Rules or principles of stare decisis as stated in article 129 (3) of the Constitution 1992.

I therefore proceed to deliver my dissenting ruling as follows, having apprized myself of the opinions of my brothers Gbadegbe and Akamba JJSC.

In this Application, one Tweneboah Koduah, a customer of Ecobank, Kejetia Branch, in Kumasi, hereafter referred to as the Applicant, is seeking the supervisory jurisdiction of this court in the nature of Certiorari, pursuant to article 132 of the Constitution 1992 and rule 61 (1) of the Supreme Court Rules, 1996, C. I. 16, to quash in the main the ruling, orders and or decisions of the High Court, Financial Division, Accra dated 19th December 2012, which is actually dated 28th February 2013 and also 12th February 2014 respectively, upon stated legal grounds as are stated elsewhere in this Ruling.

The Executive Director of the Economic and Organised Crime office is the Interested Party and will hereafter be referred to as such.

FACTS OF THE APPLICATION

The Applicant has had a USD bank account with the Kejetia Branch of Ecobank (GH) Ltd. since 2008 without any allegation of wrongdoing from his bankers. He received a transfer of USD$15,000.00 on 3rd January 2012 from someone he claims was a friend in America, the purpose of which was to support his personal business and for his personal use. He was denied access to the funds by the bank when he attempted to withdraw same after the remittance and was informed that the Interested Party (Executive Director of the Economic and Organised Crime Office) had the account frozen on suspicion of defrauding the remitter by false pretence and the Interested Party needed more time to conduct investigations.

The Interested Party stated that the transfer raised suspicions because the Applicant misspelt the remitter's name. The Interested Party's application for freezing the funds cited several other occasions prior to the aforementioned event where larger sums than anticipated from the Applicant's account opening forms were deposited and summarily withdrawn from the Applicant's account. **The Application for freezing the account states that the Applicant's responses when questioned by the bank about the transfers were found by the bank to be untenable.**

After months of frustration, the Applicant claims that he sought greener pastures and travelled to South Africa. There is evidence on record that the Applicant indeed travelled to South Africa, see exhibit TK. 2, the Visa to South Africa. Upon the Applicant's return, the Interested Party informed him that his account was still frozen because of the ongoing investigation.

On 21st January 2014 the Applicant and his counsel were informed that the funds had been confiscated and transferred to the Interested Party's exhibit account with the Bank of Ghana because of their inability to reach the Applicant. The Applicant's counsel then discovered that the funds had been seized and transferred to the Bank of Ghana via an ex-parte application filed on 15th February 2012. It should be noted that, this was before the Applicant travelled to South Africa.

The application did not state the grounds for the suspicion of the Interested Party nor that the remitter had made a complaint of fraud against the Applicant. The application for the confiscation was first moved on 19th December 2012 but was eventually granted on 28th February 2013.

APPLICATION TO SET ASIDE CONFISCATION ORDER and for defreeze of account and release of funds was filed by Applicant on 23rd January 2014 before the same Financial Division of the High Court.

On 12th February 2014, the High Court rejected the Applicant's application to set aside the confiscation order, holding that the Applicant had adequate information about the transactions and that the application was frivolous. These are the brief facts leading to this certiorari application in this Court.

Based upon the following facts, the Applicant has invoked this Court's supervisory jurisdiction seeking to quash the decisions and or orders of 19th December 2012 actually, 28th February 2013 and 12th February 2014. The instant application was filed before this court on 14th March 2014.

What then are the grounds upon which the Applicant has invoked this very special jurisdiction of this court?

1. Excess of Jurisdiction

That the trial High Court in ordering the confiscation of the Applicant's money as per the orders of 19th December 2012 exceeded its jurisdiction.

2. Breach of the Rules of Natural Justice

Secondly, the Applicant contended that, the orders of confiscation made on 19th December 2012 which actually should read 28th February 2013 and 12th February 2014 were both made without due regard to the rules of natural justice, in that the Applicant was not given a hearing before the orders of 19th December 2012 and 28th February 2013 were made which were subsequently confirmed by the orders of 12th February 2014.

Submissions of Learned Counsel for the Applicant

Learned counsel for the Applicant, Alex Afenyo Markin submitted on behalf of the Applicant as follows:

1. That even though the High Court has powers to order confiscation and or seizure of property such as the money in this case pursuant to *Economic and Organised Crime Act, 2010 Act 804* the grant of these orders is based upon the existence of some facts such as the trial of the person and or conviction on stated grounds authorised by law. Learned Counsel in this respect referred copiously to sections *50 (1) (b), (2) and (3) (a) and (b) of the Economic and Organised Crime Act, 2010, Act 804.*

Out of abundance of caution, let me quote in extenso the relevant provisions of the said Act.

"Procedure against property where a person dies or absconds

50. (1) The Executive Director shall apply to the Court for a confiscation order in respect of tainted property if the person from whom the property was seized dies or ***absconds*** *and*

(a) ***there is information alleging commission of a serious offence by that person, and***

(b) a warrant for the arrest of that person is issued in furtherance of that information.

(2) A person is considered to have absconded if reasonable attempts to arrest that person pursuant to the warrant are unsuccessful during the period of three months after the date of issue of the warrant.

(3) ***Where the Executive Director applies for a confiscation order against tainted property under this section, the Court shall, before hearing the application for the confiscation order,***

(a) require notice of the application to be given to the person who appears in the opinion of the Court to have an interest in the property, or

(b) direct notice of the application to be published in the Gazette or a newspaper of national circulation containing the particulars in three publications within three months."

Basing himself on the above provisions, learned counsel for the Applicant submitted that the trial High Court could only have made an order confiscating the property upon any of the following two conditions:

i. When the person i.e. like the Applicant, is on trial for a serious offence pursuant to *section 46 (1) of Act 804* or,

ii. When the person, (i.e. like the Applicant in the present instance) has been convicted of a serious offence pursuant to *section 46 (2) of Act 804*.

In order to bring the full force and effect of the said provisions of Act 804 home, it is desirable to quote them in extenso.

"*Application for confiscation or pecuniary penalty order*

46. (1) ***Where a person is on trial for a serious offence, the Executive Director shall apply to the Court for either or both of the following orders***

(a) ***a confiscation order against property that is deemed to be tainted property, or***

(b) a pecuniary penalty order against the person in respect of benefit derived by that person from the serious offence."

After referring extensively to the said provisions and others referred to supra, learned counsel submitted that, the Applicant herein has neither been put on trial nor convicted of any crime.

Learned counsel for the Applicant, re-enforced his arguments to support the fact that the High Court exceeded its jurisdiction by referring extensively to section 51 of the Eoco Act, Act 804 which provides as follows:-

"*Confiscation order*

51. (1) The Court hearing an application for confiscation of tainted property ***shall infer 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.***

(2) Where the Court orders that property, other than money be confiscated, the Court shall specify in the order the amount that is considered to be the value of the property at the time the order is made.

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

(4) Where the Court makes a confiscation order, the Court shall give directions to give effect to the order."

Learned Counsel referred extensively to the orders made by the court and argued that, the failure of the Applicant to appear before the EOCO does not mean that he has been tried and convicted by a court of competent jurisdiction. Counsel submitted further that, even though the Applicant was supposed to have been served with the Application that led to the orders of 19th December 2012 and 28th February 2013 the fact of the matter is that, he was not served with any of those court processes. Save for the newspaper publications, there is no proof that the Applicant was served by substituted order of any court process.

It is in the light of the above that the argument by learned counsel that no opportunity was given him to be heard before the order to confiscate his money was made by the Court has to be seriously considered.

The requirement of trial of a person for a serious offence under Act 804 are mandatory and cannot be wished away under any circumstance. Besides Act 804, there are constitutional guarantee's of the rights of persons accused of crime.

It is in this respect that the ruling delivered by the High Court on 12th February 2014 ought to be understood and appreciated in terms of the grounds of this application.

Learned Counsel for the Applicant finally prayed this court to grant the application in terms as contained in the motion paper and requested that an order be made defreezing the accounts of the Applicant with the Ecobank Kumasi, Kejetia branch and that the funds in the exhibit account of the Interested Party be transferred to the Applicant.

Submissions of Learned Counsel For The Interested Party

Learned Counsel for the Interested Party, **Jacqueline Avotri** in a three pronged reposte, opposed the Applicant's application for certiorari.

1. The Interested Party in paragraph 4 of their affidavit in opposition deposed to as follows:-

"That at the hearing of the application counsel shall seek leave of the court to raise a preliminary objection on the ground that per the rules of the Supreme Court C. I. 16 as amended by C. I. 24, the time limit within which to bring an application for certiorari has lapsed hence the application is incompetent."

Learned counsel therefore argued that the Applicant is out of time in bringing the said Application in terms of rule 62 of the *Supreme Court Rules, C. I. 16* which provides as follows:-

> *"An application to invoke the supervisory jurisdiction of the court shall be filed within 90 days of the date when the grounds for the application first arose unless time is extended by the court."*

As a result of the above, learned counsel submitted that what the Applicant should have done was to have appealed against the orders complained off. As a colorary to the said objection, learned Counsel for the Interested Party contended that since the Applicant appealed against the ruling of 12th December 2014, the instant Certiorari application should not be entertained.

2. Secondly, learned Counsel for the Interested Party submitted that the learned High Court Judge had jurisdiction to make the confiscation orders under section 51 of Act 804. This is because of a suspicious transaction report that was received by the Interested Party involving the operations of the Applicant at the Kejetia Branch of the Ecobank.

3. Thirdly, learned Counsel for the Interested Party argued that since the Applicant was notified about the freezing of his account at the Bank, he did not make himself available for interrogation. That meant that the Interested Party was not in breach of the rules of natural justice.

It has to be noted that, even though learned Counsel conceded that there has been no prosecution and or conviction of the Applicant by a court of competent jurisdiction, she still insisted that the procedure adopted by the

Interested Party was in compliance with sections 50 (1) and 51 of Act 804 already referred to supra.

On the basis of the above arguments, learned Counsel prayed this court to dismiss the application. See cases of:

1. **Republic v High Court, Accra; Ex-parte F. Salloum GMJ 2011, part 36**
2. **Republic v High Court (Fast Track) Division, Accra; Ex-parte National Lottery Authority, (Ghana Lotto Operators Association and other – Interested Parties 2009 SCGLR 390 at 400**
3. **Republic v High Court, Accra; Ex-parte Aryeetey (Ankrah – Interested Party) [2003-2004] SCGLR 398-410**

In view of the contentions by learned Counsel for the Interested Party that the Applicant's application has lapsed and is out of time pursuant to Rule 62 of C. I. 16 and also that, having appealed against the decision of 12/2/2014, the instant Application for Certiorari is untenable, I have decided to deal with these two legal objections before I commence my discussions on the merits of the 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 Party.

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 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, that party is entitled to go back to the trial court to seek to set aside the order, ruling or decision complained 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 12th

February 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 12/2/2014 which 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.

This is how the learned trial Judge commenced and ended his Ruling of 12/2/2014.

> *"This Applicant has asked the court to set aside its confiscation order made on 19th December 2012…*
>
> *I hold that he had adequate information about these transactions but refused to avail himself. He cannot now come and say he doesn't know anything. I hereby dismiss the action as frivolous and abuse of the Court's process."*

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 12th of February 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 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, the contention by learned Counsel for the Interested Party to the effect that because the Applicant had filed an appeal against the Ruling of the High court dated 12/2/2014 he cannot apply for Certiorari 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 be embarked upon simultaneously.

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

This now brings me to the discussions on the core issues raised in this application; and these are:

1. Whether the procedure followed by the Interested Party in the applications for the confiscation of the Applicant's bank account are cognisable under the EOCO Act, 2010, Act 804.

2. Whether or not the trial High Court erred in granting the orders of 19th December 2012 (28th February 2013) and 12th February 2014, thereby entitling the Applicant to the supervisory jurisdiction of this court to quash the said orders.

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.

Issue 1

It should be noted that, the Interested Party sought to explain its actions and justify same by relying on the failure of the Applicant to assist them in their investigations. That might very well be true. But is that what the law expects them to do?

In this instance it is necessary to give a historical account of some notable events and then put them in context. On the 3rd of February 2012, the Interested Party wrote a letter and informed the Applicant that his bank accounts, financial assets and others have been frozen by EOCO with immediate effect. That same day, the Interested Party also wrote to Ecobank, informing them about the freezing of the Bank account and financial assets of the Applicant pursuant to section 33 (1) of Act 804.

Thereafter, the High Court, Financial Division, Accra on the 20th February 2012 pursuant to an ex-parte motion filed by the Interested Party granted in the main the following orders:-

1. The freezing of the Ecobank Bank account of the Applicant at Kejetia branch, Kumasi.
2. The freezing of other accounts and financial assets of the Respondent pending further investigations.
3. The transfer of funds in the said frozen account into the EOCO DOLLAR EXHIBIT ACCOUNT at the Bank of Ghana.
4. Ecobank was also directed to produce copies of all cheques drawn on the account since its opening and swift messages/transfers into the frozen account.

Thereafter, the Interested Party invited the Applicant to their offices on 29th February 2012 per a letter dated 20th February 2012. The Interested Party

caused a publication in the Daily Graphic of 20th June 2012 inviting the Applicant to assist in the investigations, which he again failed to honour.

In all of the above, the Interested Party has contended that it has reasonable ground to believe that the frozen amount of US$14,989.00 is tainted property realised from the commission of a serious prohibited offence of money laundering and cyber crime.

Are these suspicions without the necessary counter measures of embarking on prosecution and securing a conviction of the Applicant, sufficient justification for the conduct of the Interested Party in virtually flouting the law as is contained in Act 804?

Pursuant to section 33 of Act 804, the Interested Party was right in writing to order the freezing of the accounts of the Applicant. But as is stated in section 33 (2) of the law, the Executive Director of the EOCO shall have to take steps within 14 days in court for a confirmation order.

Secondly, the application for confirmation of the freezing orders pursuant to section *34 (1) & (2) of Act 804* appears to have been properly done.

However, it should be noted that, there are certain conditions that the Court must be satisfied with before it grants the confirmation. These are provided to ensure that the rights of citizens are protected and not abused by officials of EOCO.

For example, under section 35, the court must be satisfied that the Applicant is being investigated for a serious offence and or charged with a serious offence among other conditions.

A perusal of the affidavit in support of this confirmation application indicates that the Interested Party did not make out a good case for the confirmation of the freezing order. No doubt, to date, the Applicant has not been arraigned before any court on any criminal offence. It is to be noted that, the Courts have to assert their rights and offer protection to citizens of this country against any undue interference by EOCO. Since this confirmation order by the Court may be made without notice, the procedure adopted by the Interested Party in procuring it appears to be in tandem with section 34 (1) of Act 804 and therefore proper.

However, under section 35 (2) the Executive Director of EOCO shall inform any person against whom a freezing order has been made within 7 days of the order. Section 38 of Act 804 provides that a freezing order remains valid until

(a) the order is discharged, revoked or varied, and also that it remains in force for 12 months after the date of the order or as is determined by the court or that a confiscation order is made.

Pursuant to the above, the Interested Party on 12th February 2013 filed an application to confiscate tainted assets/proceeds of crime pursuant to section 51 of Act 804 and order 19 of C. I. 47.

The confiscation order under Act 804 is covered by section 51 of the Act. In view of the reference to serious offence which has been used in many of the sections of Act 804 referred to supra, I am of the view that it may be useful to quote in extenso the definition of ***"serious offence"*** and ***"tainted property"*** in section 74 of the Act, which is the definition section.

"Serious offence" *includes*

(a) participation in an organised criminal group, terrorism and terrorist financing, ***money laundering****, human trafficking, people smuggling, sexual exploitation, illicit trafficking in narcotic drugs, illicit arms trafficking, trafficking in stolen and other goods, corruption and bribery,serious fraud, counterfeiting and piracy of products, smuggling, extortion, forgery, insider trading and market manipulation,*

(b) murder, grievous bodily harm, armed robbery or theft where there are predicate offences for a serious offence, and

(c) any other similar offence or related prohibited activity punishable with imprisonment for a period of not less than twelve month;

"tainted property" means property,

(a) used in or in connection with the commission of a serious offence;

(b) derived, obtained or realised as a result of the commission of a serious offence;

From my understanding of the procedures outlined above in Act 804 for the freezing of bank accounts, to confirmation and then to confiscation of the said properties to wit the Bank account, it appears sufficiently that the Interested party followed the required procedure.

However, in the pursuit of those procedures, there are some condition precedents which have to be applicable before a confiscation order can be made.

For example, section 51 of Act 804 makes it quite clear and apparent that the court in hearing an application for the confiscation of tainted property shall infer from the record of proceedings,

a. that the property was used to facilitate or aid the commission of a serious offence and

b. that the property was derived or obtained or realised as a result of the serious offence.

In the instant case, there are no record of proceedings save the proceedings that have been prepared as a result of the freezing and confirmation of the freezing of the accounts of the Applicant.

My candid understanding of the said provisions is that there ought to have been a prosecution of the Applicant before a court of competent jurisdiction which should have established any of the following:-

i. The existence of a record of proceedings involving the Applicant and the relevant criminal charges and or offences.

ii. An inference from the record of proceedings establishing that the property, in this instant, the funds in the bank account was used to facilitate or aid the commissioning of a serious offence.

iii. That the person has had full possession or control of the property immediately before his arrest.

iv. That the person is on trial

v. That the person has been convicted of an offence of serious offence.

vi. That the property was derived or obtained from the serious offence for which he is either on trial or has been convicted.

vii. The Court in considering a confiscation application, shall have regard to the gravity of the offence.

This by itself connotes the fact that, the arraignment and prosecution of a person whose property or asset is the subject matter of an application for confiscation under section 51 of Act 804 is a sine qua non, or a condition precedent.

In the instant case, once learned counsel for the Interested Party has conceded that the Applicant has since 2012 when the Suspicious Transaction Report (STR) was filed, there has been no prosecution and conviction of the Applicant, that should have informed them not to press on with their untenable position in law.

I am therefore of the view that, even though the procedure adopted by the Interested Party in seeking the confiscation was in order, the conditions precedent to the grant of the said application pursuant to section 51 of Act 804 were woefully absent.

Under the circumstances, the learned High Court Judge should have refused the invitation made to it to grant the confiscation application. This is because there was no real, imagined or putative grounds upon which the said application should have been sustained.

Having decided that the grant of the confiscation order pursuant to section 51 of Act 804 was made without any basis, and therefore same is null and void, there is the need to consider provisions in section *50 (1) , (3) (a) and (b) of Act 804* already referred to supra.

This is because this deals with *Procedure for Confiscation where the person Absconds.*

This need has arisen because of the claim that the Applicant sometime during the investigations absconded.

A perusal of the relevant provisions in section 50 of Act 804 make it quite clear that, before the Executive Director of EOCO can proceed to apply for confiscation order against a tainted property, there is the need for requirement of notice to be given to all persons who have interest, and a

further directive for publication in the Gazette or three publications within three months in a newspaper having wide circulation.

Considering the above provisions against the background of the facts of the instant case, there is clear evidence that the confiscation order cannot also be justified under section 50 of Act 804.

This is because as at now, the funds in the Bank Account have not been declared as a tainted property and there has not been the requisite number of publications in a newspaper within the timeframe mentioned in the law.

It is therefore clear that, the Interested Party cannot under any circumstances justify the order for confiscation of the funds in the bank account of the Applicant at the Kejetia branch of Ecobank.

To conclude this matter, I wish to reiterate my earlier comments that the provisions in Act 804, must be read together with the Constitution 1992 especially the provisions in article 19 of the Constitution which deal with *Fair Trial* during criminal prosecutions.

Similarly, article 296 on exercise of discretionary power whenever this was granted in the Constitution 1992 or in any other law such as the EOCO Act 804 has to be taken into serious consideration.

Taking all the above into consideration, one would observe that if the Applicant had been arraigned and tried before a court of competent jurisdiction on any criminal offence, then the constitutional protections that accused persons are granted would have availed the Applicant.

However, as things stand now, there is absolutely no basis for a court of law to presume and assume that the Applicant had been arraigned, tried and convicted on offences stipulated in Act 804 thereby entitling the Interested Party to proceed to confiscate property of the Applicant which is protected under article 18 (2) of the Constitution 1992.

It is therefore clear that once the Applicant has not been prosecuted on any criminal offence or convicted, the procedures adopted by the Interested Party in proceeding to freeze, confirm the freezing and confiscate same is contrary to constitutional protections granted citizens including the Applicant herein in article 18 (2) of the Constitution and Act 804 itself.

Issue 2

Breach of the Rules of Natural Justice

As I have already stated our criminal jurisprudence has been founded on the *audi alteram partem* principle of the rules of natural justice, which requires that everyone must be given a hearing and reasonable opportunity to defend himself before he is convicted. In otherwords, you are presumed innocent until proven guilty. It is in this respect that Act 804 requires that Notice be given in confiscation applications which have the capacity to permanently deprive you of the use of your property.

From the facts of the case, the Applicant can be said to have been evasive or illusive to start of and really not co-operating with the Interested Party. That notwithstanding, the responsibility is still cast on them to establish the guilt or otherwise of the Applicant in a Court of competent jurisdiction as prescribed under the Constitution 1992 and Act 804.

Assuming without admitting that the Applicant refused to make himself available for investigations, the question that begs for an answer is this, since January 2012 or thereabout, what has the investigations conducted by the Interested Party revealed?

They have not pointed to any wrongdoing or criminal conduct on the part of the Applicant. If really these investigations had made findings of a criminal nature against the Applicant, nothing prevented them from proceeding to prosecute him in his absence after giving the requisite notice. Article 19 (3) of the Constitution 1992 provides as follows:-

> "*The trial of a person charged with a criminal offence shall take place in his presence unless:-*
>
> *(a) he refuses to appear before the court for the trial to be conducted in his presence after he has been duly notified of the trial; or…"*

The above in my opinion constitute sufficient authority for the Interested Party to proceed against the Applicant by arraigning him before the court to face charges of a serious offence or obtaining assets with tainted property as defined in Act 804. Not having established the guilt of the Applicant, there is absolutely no basis for any court to proceed to confiscate the properties after an acknowledgment by the Court that the Applicant seriously contended that

he has not been served with the Notice of Motion for Confiscation of the bank account.

It has to be noted further that, the dictum of Kpegah JSC in the case of ***Republic v High Court, Accra, Ex-parte Aryeetey (Ankrah- Interested Party)*** [2003-2004] SCGLR 398-410 cannot apply in this instance because the Interested Party is in breach of the relevant provisions of Act 804. This enjoins them to establish the criminality and guilt of the Applicant before proceeding with confiscation applications.

The authorities are therefore quite settled that whenever a person who ought to be given a hearing in his defence has been denied, thereby breaching the rules of natural justice, Certiorari would lie to quash any such proceedings and order. See the following cases for their full force and effect:

1. **Republic v High Court, Accra; Ex-parte Salloum (Senyo Coker – Interested Party) [2011] 1 SCGLR 574**
2. **Enekwa & Others v KNUST [2009] SCGLR 242, holding 2**
3. **Republic v High Court, Sekondi; Ex-parte Ampong [2011] 2 SCGLR 716**

Once the confiscation orders have been premised upon the assumption that the Applicant has committed criminal offences for which he has not been tried and convicted, confiscation orders based upon such gross violations of the basic rights of the Applicant cannot be lightly glossed over.

In such circumstances, it is certain that the Applicant has sufficiently made a case for the grant of the order of Certiorari which he has asked for.

Conclusion

In the premises, I will grant the Applicant's prayer of Certiorari and bring up into this Court for the purposes of being quashed the ruling and orders of the High Court, Financial Division dated 12th February 2014 and by necessary implication all the preceding orders and rulings having a bearing in the case dated 19th December 2012 and 12th February 2013.

I will also order that the Applicant's account at Kejetia, Kumasi Branch of Ecobank be and is hereby defrozen and an order directed at the Interested Party to release the funds of the Applicant transferred from the Ecobank account at Kejetia branch, Kumasi into the EOCO exhibit account at the Bank of Ghana to him forthwith. The Interested Party herein is to ensure that the above orders are carried out.

(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 INTERESTED PARTY.