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

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

CIVIL MOTION

NO. J5/10/2015

4TH JUNE 2015

THE REPUBLIC

VRS.

HIGH COURT, JUDGE KUMASI

EX-PARTE: HANSEN KWADWO KODUAH - - APPLICANT

PARAGON INVESTMENT LTD - - INTERESTED PARTY

RULING

AKOTO-BAMFO JSC.:-

On the 19th of January 2015, Adzagli J sitting at the High Court in Kumasi, in giving a ruling in a motion on notice for an order committing for contempt the applicant herein and I other, delivered himself thus:

"If it is for the sake of monetary gain that the 1st Respondent went beyond his professional duties to commit such grave contemptuous acts, it will be the unpleasant duty of this Court to deny him the fruits of that unlawful venture to serve as a deterrent. For this reason the Respondents are each sentenced to a fine of GH¢50,000.00 or in default 3 months imprisonment each.

I further order the Respondents to return all the machinery the subject matter of the preservation order to the place of preservation within 2 weeks if this has not already been done or pay the sum of GHC 1,500,000.00 being the cost of the said machinery."

The applicant registered his protest against the orders of the High Court by promptly filing, firstly, a Notice of Appeal and secondly the application under consideration under article 132 of the 1992 Constitution and Rule 61(1)of CI.16, the Supreme Court Rules; praying for an order of certiorari directed at Adzagli J Kumasi for the purposes of quashing the said ruling in suit no C12/304/2013 and for a further order restraining the learned Judge from the further hearing of the matters arising from his ruling, he additionally prayed this court for an order of stay of proceedings.

The grounds upon which the application rested are set out in a 5 paragraphed Statement as follows:

GROUNDS FOR THE APPLICATION

1. The trial judge committed very significant/fundamental, material, grave and serious non-jurisdictional errors of law patent on the face of the record which are so plain as to make the impugned decision a complete nullity, and which has resulted in a miscarriage of justice to the applicant.

2. The conviction and sentence of the applicant by the trial Judge contravened the Waynesburg legal principles of unreasonableness, irrationality and unconscionability.
3. The trial high court judge in the exercise of his discretionary jurisdiction committed gross breaches/violations and abuses of article 296 (a) and (b) of the 1992 Constitution when he acted arbitrarily, capriciously biased, personal dislike, unfair and without candor in his contempt ruling dated the 15th day of January, 2015.
4. The trial high court judge exceeded his jurisdiction and or otherwise acted without jurisdiction when he made those consequential orders ordering the applicant herein and the 2nd respondent In the contempt proceedings to release the used items, the subject matter of the high court and court of appeal judgments to the interested party herein when those issues were not before him.
5. The ruling of the trial judge was complete nullity to the extent that the trial judge acted ultra vires the Constitution particularly article 296 and further unlawfully construed exhibit IGIT-3 retrospectively.

A brief account of the events leading to this application would undoubtedly be necessary for a fuller appreciation of the issues raised.

The applicant herein, took out a writ of summons in the High court on the instructions of his client, the 2nd respondent in the Committal proceedings on the 13th of July 2012. The defendant, on the face of the writ, was AARSLEFF GH.J.V. ltd.

Thereafter on the 18th of July2012 the Court made interim orders for the preservation of the machinery, the subject matter of the suit upon an application by the applicant.

Prior to the issuance of the writ however, the applicant had, acting upon the instructions of the 2nd respondent in the committal proceedings issued a temporary receipt to Ali Issa ltd. for the sum of GHC 66.000.00 being the cost of 2 used machines. IGT.3 and Exhibit A

The court entered final Judgment in the suit on the 24th of September2012 after which final receipts were issued in respect of the items.

After the interested party herein had unsuccessfully applied for an order to set aside the final judgment, it issued an interpleader summons claiming ownership of the subject matter of the suit disposed of on the 24th of September 2012.

A Judgment in default of appearance was entered in favour of the plaintiff (the interested party herein) on the 23rd of April 2013.

On the basis of the said decision, the interested party set in motion a process for the recovery of the items the subject matter of the two receipts both the temporary and final respectively dated 10th May 2012 and 20 October 2012. The applicant then filed a Notice of Appeal and successfully applied for an order for the preservation of the machinery in issue before the court of appeal.

During the pendency of the appeal, the interested party commenced committal proceedings against the applicant and one other on grounds that they had removed from the place of preservation some of the machinery and disposed of same contrary to the preservation orders made by the High Court and Court of Appeal on the 18th of July 2012 and 24th of July 2013 respectively.

It is the orders made in the committal proceedings which triggered the present application.

It was contended by the applicant that the learned judge committed both jurisdictional and non jurisdictional errors which were patent on the face of the

record in that he neither had the Jurisdiction to hear the contempt application in respect of the orders of the court of appeal nor the power to make the consequential orders so made by him. He further argued that the fine imposed was not only excessive but contrary to the laid down rules on sentencing in contempt applications and was therefore a nullity. The applicant further contended that the learned Judge exceeded his jurisdiction by making orders for the release of the machinery in the committal proceedings.

On his part, learned counsel urged that the application be dismissed since the applicant did not purge his contempt prior to the making of the application and was not therefore entitled to be heard.

He further submitted that there was no error apparent on the face of the record to merit a grant of the orders sought.

The scope of the remedy of certiorari has been set out in several decisions of this court. Its main characteristic being that it is a discretionary remedy used in correcting errors of law on the face of the record ; want or excess of jurisdiction and breach of the rules of natural justice, among others. In Rep V Cape Coast District Magistrate Grade II Ex Parte Amoo 1979 SLR 150. Apaloo CJ said at page 160 " As is well known, the remedy of certiorari is a useful tool in aid of Justice and ought to be used to correct defects of Justice whether they arise from illegality, fraud, breach of the rules of natural Justice, error on the face of the record and the like".

In Tsatsu Tsikata (2005-2006) SC GLR 612, this Court reiterated the principles in these terms "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 the that the error(s) of the law

as alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. A minor, trifling, inconsequential or unimportant error which does not go to the core root of the decision complained of ;or, stated differently, on which the decision does not turn would not attract the courts supervisory jurisdiction." Therefore where the court has no power to deal with the kind of matter at issue nor with a particular person concerned or issues a judgment or order of a kind that it has no power to issue, it could be said to have acted in excess of its jurisdiction.

It is the contention of the applicant that the High Court has no power to punish for contempt where the orders complained of were made by the court of Appeal, nor did it have the power to make orders for the release of the items in awarding sentences in the committal proceedings; he additionally attacked the excessive nature of the sentence and charged that it was harsh and unconscionable.

To this learned counsel for the interested party replied that the applicant had no locus and was not therefore entitled to be heard in this application in so far as the contempt was not purged prior to the making of the application. According to him, the learned High Court Judge acted within jurisdiction and rightly exercised his power and therefore the application ought to fail.

Before going into the merits, we wish to comment on the affidavits filed in this application, the language used and the animosity exhibited by learned counsel.

Practicing lawyers should never lose sight of the fact that they belong an honorable profession which places them on a pedestal in society and such a high standing in society should, at all times be reflected in their language and comportment. It is not for nothing that they address each other as learned friends. They are not only expected to display a deep and scholarly knowledge of the law, they must be seen to have risen above emotional outbursts

particularly in their work, for scholarship and intemperate or abusive language cannot be housed together. Expression must at all times be given to the phrase; learned friend since in ordinary parlance, a friend connotes or conveys the idea of a person liked and respected. One would certainly not treat a friend with disdain!

Is the applicant entitled to be heard particularly when he had not purged his contempt?

Generally it is the position of the law that a person in contempt cannot be heard until he has purged his contempt, for the argument is that having shown no respect for the orders of the court, it would not be proper for the court to exercise its discretion in his favour. Dankwa V Amartey and Anr. 1994/95 GBR 848.

Many exceptions to this rule have been admitted thereby gradually enlarging the rights of a contemnor to be heard.

Thus a person who contests the regularity of the process or service by which he is in contempt can be heard in the absence of a purge. In Gordon V Gordon 1904 Probate Division 163, it was held that the principle that a person in contempt cannot be heard, prima facie applied to voluntary applications ie when the party comes to the Court asking for something but not when he is challenging the order that it was made without jurisdiction or in cases in which all that he is seeking is to be heard in respect of matters of defence. It must be pointed however, that it is not in all matters of defence that the contemnor is entitled to an audience; where the allegation, for instance, is that the court has exercised its jurisdiction wrongly, and then he ought not to be heard.

Where, for instance, it is suggested, as in the instant application, that the order may have been made without jurisdiction, and it is apparent on its face; the Court will ordinarily entertain the objection to the order even though the

person making it is in contempt. In such a case, the fact that the person is in contempt would not deprive him of his right to be heard.

The applicant's position is that the learned Judge acted without jurisdiction in that since the orders complained of, were made by the Court of Appeal, the High Court had no power to commit him in that Court.

Contempt, it is trite learning is any conduct that tends to bring the authority and administration of the law into disrepute or disregard or tends to interfere with the course of justice. It is an offence against the court and the community. The former is therefore vested with power to punish . Rep V Liberty Press ltd and Ors. 1968 GLR 123.

Was the contempt application properly before the High Court?

The orders which grounded the committal proceedings before Adzagli J were made by both the High Court and the Court of Appeal. The High Court order is dated the 18th of July 2012, according to its terms the orders were to operate until the determination of the suit. The orders of the Court of Appeal were made on the 24th of July 2013.

The motion for contempt was filed on 2nd of December 2013

I wish to deal firstly with the orders made by the court of Appeal.

It is without a doubt that the orders, the subject of the committal proceedings were made by the Court of Appeal; could the High Court then properly have been seized with jurisdiction?

In Rep V Liberty Press ltd. 1968 GLR 123, an issue arose as to whether contempt committed before the court of appeal could properly be heard by the High Court. It was held that there was one Supreme Court of Judicature which consisted of the High Court and the Court of Appeal and that the Court

of Appeal not being different from the High Court, contempt of one court amounted to contempt of all the courts constituting the Supreme Court of Judicature.

The position in the liberty case has however changed with the coming into force of the 1992 Constitution article 126(1) of which provides:

126 (1) The Judiciary shall consist of

a. The Superior Courts of Judicature comprising
i. The Supreme Court;
ii. The Court of Appeal; and
iii. The High Court and the Regional Tribunals.
b. Such lower courts or tribunals as Parliament may by law establish.

2. The Superior Courts shall be superior courts of record and shall have power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of this constitution.

Therefore unlike the position in the Liberty case era in which there was one Supreme Court of Judicature comprising of the Court of Appeal and High Court and which the Supreme Court was vested with the authority to commit for contempt of itself, Article 126(1) clearly demonstrates that there are several designated superior Courts of Judicature; each court being vested with the power to commit for contempt to itself. This was clearly depicted the use of the word THEMSELVES as opposed to ITSELF that the power was not intended to belong collectively to the creature known as the superior courts but to each court that has the designation of a superior court.

The courts comprising the Superior Courts were clearly set out, the Supreme Court, the Court of Appeal and the High Court.

The words are clear and admit of no ambiguity that each of the courts set down under article 126(1) has the power to commit persons whose conduct tends to bring it into disrepute.

If the orders complained were made by the Court of Appeal, which under Article 126(2) has the power to commit for contempt to itself; then it follows that the High Court which committed the applicant had no such power and therefore acted without jurisdiction and in contravention of the express provisions of the article 126(2) of the 1992 Constitution.

The proceedings were therefore a nullity.

As noted, Adzagli J dealt with two separate orders; the 18th of July 2012 order for preservation made by the High Court but however bundled the two together for the purposes of the ruling. Since contempt is of a quasi-criminal character and therefore the standard of proof is higher, that is, proof beyond reasonable doubt, the offending acts must be dealt with separately; each under a different "count" as it were; this must be reflected in both the conviction and the sentencing. None of these procedural rules were adopted He inelegantly lumped them together, a procedure unwarranted by the rules.

The orders for preservation made by the learned judge, Gynae J on the 18th of July 2012, were to be in force until the final determination of the suit before the court. On the evidence, final Judgment was entered on the 24th of September 2012. An attempt at setting same aside was unsuccessful. The interim order accordingly lapsed. Therefore at the time the motion for contempt was filed on the 2nd of December 2013, there was no existing order capable of being disobeyed so as to ground an application for contempt. Indeed the learned judge must have come upon this realization for at page 8 of his Ruling, this is how he put it; "As noted above the preservation order was to last pending the final determination of the substantive suit. Once a final

judgment is delivered, it is my opinion, that the interim order preserving the res litiga lapses. I am not aware of any rule of law or procedure that compels a successful litigant to bring an application for the release of the subject matter of the litigation, the subject of an interim order to him. In my opinion therefore the whole application for the release of the properties to the 2nd respondent after the judgment was unnecessary and uncalled for; it is plainly superfluous and cannot amount to contempt of Court ".

Even if it could be argued that the learned judge rightly heard the application with respect to the orders made by the High Court, having regard to the manner in which the learned Judge dealt with the application, (it is impossible to segregate them); suffice as to say however that on the face of the record, it is evident that the learned Judge exceeded his jurisdiction for the fines imposed were not only excessive but had no correlation to the term of imprisonment. Furthermore the order for the release of the items was made without jurisdiction thus meriting an order for the quashing of same.

We would accordingly grant the orders prayed

Let the ruling of Adzagli of the High Court, Kumasi, Ashanti Region be brought for the purposes of quashing and same is hereby quashed.

(SGD) V. AKOTO BAMFO (MRS.)

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH,JSC:-

I have had the opportunity of reading the draft opinion of my esteemed sister Akoto-Bamfo, JSC. I agree with her that the application be granted but I have decided to add few words of my own as regards a phenomenon which is creeping into the legal practice in Civil Matters which are listed before us for adjudication on regular basis.

It is the statutory requirement that in application which are brought before our courts, affidavit evidence offer the factual support for the determination of the applications. The High Court [Civil Procedure] Rules CU 47 of 2004 makes it mandatory under Order 20 Rule 8 that affidavit shall contain only facts that the deponent can prove, unless any provision of these rules provides that it may contain a statement of information or belief or both.

The affidavit in answer to this application which was sworn to by counsel for the interested party was at the hearing of this application a matter of concern. Learned counsel seized the opportunity to depose to matters which were, indeed, not factual but sought to attack the character of the applicant in a manner which defied every reasoning that both the deponent and that the applicant are lawyers and for that matter belong to the same honourable profession. I have found it proper not to state the actual depositions in the said offensive affidavit in which were stated factual matters in a serious matter like this in which a lawyer of some

standing was committed for contempt and sentenced at the High court, Kumasi. Counsel in the affidavit descended heavily on the applicant and painted him as a person unfit to belong to this profession, which is, perhaps the most honourable profession.

It was pointed out to counsel why he elected to pursue such a personal attack on the applicant in a manner which defied every reasoning at the bar of this court. Counsel however apologized but given the gravity of the offensive words used, we thought the apology was not enough as his client who invoked the court's jurisdiction for contempt at the High Court could easily be the deponent to the affidavit in answer. It must be pointed out that the Civil Procedure Rules, that is, Order 20 Rule 9 of C.I.47 of 2004 abhors such practice. The said rule states as follows:

"SCANDALOUS AND IRRELEVANT MATTER IN AFFIDAVIT".

"9. The court may order any matter which is scandalous, offensive, irrelevant or otherwise oppressive to be struck out of an affidavit"

The above rule regarding the contents of affidavits was completely ignored by counsel for the interested party who only used the opportunity to hurl unprintable insults on the applicant. In the authoritative book on procedure, that is Atkins Encyclopedia of **Court Forms in Civil Proceedings** (Second Edition) Volume 3, at page 324, the learned authors stated the position of law as follows:

"The court may order to be struck out any affidavit in any matter which is scandalous, irrelevant or otherwise oppressive. **Matter is scandalous if it is indecent or offensive, or included for the purpose of abusing or prejudicing the opposite party, or is unduly lengthy".**

In support of the above proposition are cases like; ROSSAGE v ROSSAGE [1960]1 ALL ER 600, CHRISTIE v CHRISTIE [1873] 8 ch App 503 and CASHIN v CRADOCK [1876], 3 ch D 376.

The power to strike out any dispositions in an affidavit is inherent in the court itself as it is the duty of the court to maintain ethical standards in the profession so that litigation would be conducted in a manner devoid of indecent attacks on opponents or parties to the litigation. See ROSSAGE v ROSSAGE (supra).

I think that lawyers owe it as a duty to assist the court in maintaining that litigation is conducted in a manner which would project the profession as the most honourable one. Care must be taken not to abuse the privileges and immunities conferred on lawyers by law only to pursue a course not befitting the ethics of the profession in pursuit of justice for litigants.

(SGD.) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD.) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD.) P. BAFFOE-BONNIE

JUSTICE OF THE SUPREME COURT

(SGD.) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

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