**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA**

***CIVIL MOTION***

***NO.J5/17/2010***

***16TH FEBRUARY,2011***

**CORAM: BROBBEY JSC (PRESIDING)**
**DOTSE JSC**
**YEBOAH JSC**
**ARYEETEY JSC**
**GBADEGBE JSC**

**THE REPUBLIC**

**VRS**

**THE HIGH COURT, ACCRA RESPONDENT**

**EX PARTE: CONCORD MEDIA LTD**
**ALFRED OGBAMEY APPLICANTS**

**GHANA PORTS & HARBOURS AUTHORITY**

**BEN OWUSU MENSAH INTERESTED PARTIES**

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# R U L I N G

**ANIN YEBOAH JSC:**

The supervisory jurisdiction of this court has been invoked to prohibit the High Court, Accra from hearing the case intituled as: suit № BD 6/2007: GHANA PORTS & HARBOURS AUTHORITY & ANOTHER V. CONCORD MEDIA LIMITED & ANOTHER and two contempt applications pending before the same judge.

In an affidavit supporting the application, the second defendant to the suit, one ALFRED OGBAMEY, complains against the presiding judge Mr. Justice Benson and catalogued several allegations of judicial impropriety against the said judge.

The first allegation relates to a petition which he lodged at the Chief Justice's office out of which the Chief Justice advised the learned judge to uphold the scales of justice evenly between the parties. The Chief Justice, however, did not transfer the case from Mr. Justice Benson as requested by the applicants herein.

Subsequent to the above event, the deponent stated in the affidavit that on one occasion when the case was called and their lawyer was absent, the said judge made certain comments against the deponent to the effect that he had sent "a bogus petition" to cause the delay of the case. He further deposed to the fact the learned judge has described him as "a very cantankerous person".

The applicants naturally view this comments as a basis for alleging bias, ridicule and prejudice against them. They are of the opinion that given the uncomplimentary remarks by the learned judge they would not get justice from the court and pray this court for an order of prohibition to prevent the learned judge Mr. Justice Benson from proceeding to hear the case. Annexed to the affidavit is a copy of the petition which the applicants sent to the Chief Justice for her intervention.

The application has been opposed by the interested party who is the plaintiff in the action at the High Court in which the second applicant and the Concord Media Limited have been sued for damages for defamation and other ancillary reliefs. On the 30/04/2010, the learned judge himself swore to an affidavit in which he stoutly

denied all the damning allegations of judicial impropriety leveled against him in the affidavit in support. Annexed to the affidavit is a Certified True Copy of the record of proceedings dated the 14/12/2009 showing the submissions of counsel for the interested party. The applicants filed a further affidavit in reply on 14/07/2010 in which they raised concerns about the conduct of the trial judge for swearing to an affidavit in answer to the application. The applicants complain that the learned judge by doing so had descended into the arena of litigation and that this conduct is a manifestation of the suspicion that he would be bias against the applicants.

The practice in such applications is for a registrar of the court sought to be prohibited in the case to swear to the affidavit on behalf of the court. In contentious matters where the facts are in issue, the superintending court may allow an application for the deponents to the affidavits to be cross-examined.

We are of this view in that if in course of hearing an application for judicial review and the court exercising its supervisory jurisdiction grants leave to parties to cross-examine on the affidavits, a judge whose affidavit is on record may also have to be cross-examined. This practice should be deprecated to avoid any attack against the judge.

A short passage from THE SUPREME COURT PRACTICE 1995 edition Volume I page 869 has stated the position as follows:

> "Leave to cross-examine deponents upon their affidavits in judicial review proceedings should be granted where the interests of justice so require (O'REILLY V. MACKMAN) [1983] 2AC 237 per Lord Diplock; only rarely will it be essential in the interest of justice to require the attendance for cross-examination of a deponent from overseas (R V. SECRETARY OF STATE FOR THE HOME DEPARTMENT, EX PARTE KHAWAJA [1984] AC 74"

As the registrar of the court was available for swearing to the affidavit in answer, we do not think it was proper for the learned judge to do so. If as a court of record the registrar could prove facts in issue the judge ought not to have sworn to any affidavit. See FLORENCE V. LAWSON [1851] 17 LT 260 in which it was held that a judge of the

Superior Court should not be called as a witness to prove facts which may be proved equally well by other persons.

However, on 17/6/2010 one MARK WILFRED KOBABO KWARA, the chief Registrar of the High court , Accra swore to an affidavit on behalf of the judge. He stoutly denied the allegations of judicial impropriety leveled against the judge. Annexed to his affidavit is the proceeding of the court on the 14/12/2009, the day the said judge allegedly made the uncomplimentary comments against the applicants.

The gravamen of the allegations of bias and prejudice could be found in paragraph 10 of the affidavit in support of the application. For a fuller record paragraphs 10 and 11 thereof are reproduced below;

> "10. That on the 14th day of December 2009 at a hearing of the suit in the High Court and open court, the learned judge exhibited bias and prejudice towards me.
>
> 11. That on the said date, when the suit was called, my counsel was not available and when the learned judge asked me of the whereabouts of my counsel I informed him that he is on his way to court"

These depositions were denied and in further answer the proceedings of that day, that is, the 14th day of December 2009 was exhibited to show that one Eric Atieku was indeed present as a lawyer for the applicants herein. We find this as disturbing as allegations of judicial impropriety were made out of the deposition which on the face of the record is not true. Allegations to warrant our intervention by way of prohibition must be proved in the same way as in every civil proceedings where averments are denied and proof is required. We do not wish to proceed to discuss this standard of proof in more detail than to refer to the case of ATTORNEY – GENERAL V. SALLAH [1970] CC 54 in which the court held per Amissah JA as follows:

> "In objections like the instant one, evidence is not often required because the facts, which are often true, are uncontroverted. But where the facts are controverted as in the instance application, they must be proved. The standard of proof required should at least reach that required in civil cases" (emphasis ours)

The allegations were not proved to our satisfaction as required by the standard set out under section 12 of the Evidence Act, 1975 NRCD 323.

In their statement of case, learned counsel for the applicants referred us to the current pronouncement on the law governing the intervention of the Supreme Court in matters of this nature. All the cases cited; IN RE APPENTEN (Dec'd); REPUBLIC V. HIGH COURT, ACCRA, EX PARTE APPENTEN & ANOR [2005 – 2006] SCGLR 18 and REPUBLIC V. HIGH COURT , EX PARTE MOBIL OIL (GHANA) LTD, (HAGAN INTERSTED PARTY) [2005 – 2006] SCGLR 312 restate the common law position on disqualification of justices on grounds of bias or prejudice. We are, however, of the opinion that the facts on which the law could be applied do not exist in this application for the reasons given above.

We therefore proceed to dismiss the application for prohibition against learned judge.

**[SGD] ANIN YEBOAH**
**JUSTICE OF THE SUPREME COURT**

## CONCURRING OPINION

**JONES DOTSE JSC:**

I have had the prior honour and advantage of reading the ruling just delivered by my brother Anin-Yeboah JSC.

Even though I agree with the conclusion reached in the matter that the application to prohibit the learned trial Judge from hearing this matter be dismissed, I am constrained to make the following comments in support of the ruling and also for the guidance of trial court Judges. In the case of

***Republic vrs High Court, Denu, Ex-parte Agbesi Awusu II No 1 (Nyonyo Agboada Sri III) Interested Party [2003-2004] SCGLR 864***, the Supreme Court set out conditions for the grant of prohibition against a trial Judge on a charge of bias or real likelihood of bias. The court stated thus:

> ***"A charge of bias or real likelihood of bias must be satisfactorily proved on balance of probabilities by the person alleging same. Whether there existed a real likelihood of bias or apparent bias was an issue of fact determinable on a case to case basis."***

From the facts of this case, the applicant with respect has not been able to establish with any degree of particularity the various allegations constituting bias against the learned trial Judge. It should be noted that the applicant needed to have done more to prove the allegations contained therein.

Judges must as a rule desist from engaging in acrimonious exchanges between them and Counsel or the party in cases before them. This is because, as human beings, a Judge who does not exercise discernment and makes comments as it were showing his anger one way or the other will create a situation where the party alleging bias would find it difficult to accept the fact that he will have a fair trial in his court.

Apart from the affidavit sworn to by the trial Judge in this application I find no such evidence in support of open acrimony by the trial judge towards the applicant.

I will therefore concur with the ruling of Anin-Yeboah JSC.

**[SGD] J. V. M. DOTSE**

**JUSTICE OF THE SUPREME COURT**

**GBADEGBE JSC:**

I have had the advantage of reading before-hand the draft of the judgment about to be delivered by my brother Anin- Yeboah JSC and I agree with him that the application herein be dismissed. But like my brother Dotse JSC I think that the application raises some points of procedural importance wherefore I wish to express my decision in the following words for future guidance in applications of this nature.

We have before us a notice of motion by the applicant invoking our supervisory jurisdiction in prohibiting the High Court Accra and in particular Benson J from hearing the case entitled *Ghana Ports & Harbours Authority & Another* v *Concord Media & Another* as well as two motions in the cause that are pending before him for contempt of court. In the supporting affidavit, the deponent accused the presiding judge of having in the course of deliberations before him referred to a previous petition that he had authored to Her Ladyship the chief Justice seeking a transfer of the matter from the said judge as " a bogus petition". The said deposition also alleged of and concerning the judge that he had described the witness as "a cantankerous person". Based on the said allegations, the applicants were apprehensive that the learned judge had lost his impartiality as the words on which the application was based were prejudicial to a fair consideration of the matters before him as an adjudicator. Not unexpectedly, the application has been vehemently opposed by the interested party, the plaintiff in the action before the High Court that is based on an alleged libelous publication.

I observe of the substance of the allegation that they appear to be such that if proved by the applicant would raise an issue of a reasonable likelihood of bias against the learned judge. In cases of this nature the burden of proving the allegation made against the judge rests on the applicants and the mere fact that proof in these instances is ordinarily by means of affidavits does not in the least relax the evidential burden contained in the rules of Evidence as

contained in section 12 of the Evidence Act, NRCD 323. Although in practice the court rarely in applications for judicial review grants leave to the parties to cross-examine deponents , where the re has been a denial of the allegation against the judge and there is no request according to the existing practice by the applicant for leave to cross-examine the respondent on the facts on which the right to prohibition is based then it appears that the first hurdle of establishing the basic facts that give rise to the court's intervention in granting the order of prohibition has not been met and therefore the applicant might be said not to have discharged the burden of proof o him. See- *Attorney General* v *Sallah* [1970] CC 54.

In the case before us, based on the controverted depositions, I am unable to reach the conclusion that the words attributed to the judge were actually uttered by him from the bench in the course of the exercise of his functions. In coming to this view of the matter, I am not disregarding the presumption of regularity which attaches to the exercise of official acts. In the course of the hearing, the applicants deposed to a further affidavit that made available to the court the record of the proceedings of 14 December 2009 at which the learned judge of the High Court is alleged to have spoken the words attributed to him. In my view, the said record does not portray the learned judge in the way urged against him and it being a document that has been tendered as it were by the applicant, its effect is to contradict his allegations particularly in the absence of any credible challenge to the correctness of the minutes by way of an affidavit in falsification of the record. It is interesting to note that although there was a lawyer on the record as representing the applicants herein (respondents in the proceedings of 14 December 2009), the applicant has offered no explanation for not producing any evidence from him in support of the very serious allegations against the trial Judge. In my view, the said counsel is a compellable witness and the failure to call him has the dire consequence that goes ordinarily with the failure to call a material witness by parties.

There is also the argument by the applicant that when the processes were served on the respondent, the learned judge swore to an affidavit in answer to the application by which he descended into the arena of the dispute and accordingly has demonstrated such prejudice that ought to disentitle him from continuing to adjudicate in the matter. In my opinion, the application is based on the allegations of 14 December 2009 I open court and consequently any act subsequent to that date cannot be legitimately called in aid by the applicant to sustain the application. For the applicant to succeed in the matter herein, he is limited to the complaint of that day and not afterwards. It is observed that in the course of the proceedings before us we directed that the affidavit of the learned judge be struck out as it offended against section 65 of the Evidence Act, NRCD 323 that seeks to protect the common law right of privilege attaching to judges and adjudicators. In making the said order regarding the deposition of the learned judge we were applying a long established rule of the common law that precludes superior court judges from testifying about matters that occurred in the course of the exercise of their judicial functions. See: *Florence* v *Lawson* (1851) 17 LT 260. Having had the said deposition that was sworn to in error by the learned trial judge struck out, I think that it is no longer a competent process that could be relied on by the applicant to sustain his application and for this reason also reject his argument regarding its effect on the matter before us for determination.

**[SGD] S. GBADEGBE J.S.C**

**JUSTICE OF THE SUPREME COURT**

**[SGD] S. A. BROBBEY**

**JUSTICE OF THE SUPREME COURT**

**[SGD] B. T. ARYEETEY**

**JUSTICE OF THE SUPREME COURT**

**COUNSEL**

**EGBERT FAIBILLE JNR. FOR THE APPLICANT**

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