THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2011

CIVIL APPEAL
SUIT NO:J5/4/2011

16TH MARCH, 2011

CORAM: DR. DATE-BAH JSC (PRESIDING)
DOTSE JSC
YEBOAH JSC
ARYEETEY JSC
AKOTO -BAMFO (MRS) JSC

THE REPUBLIC

VRS

HIGH COURT, ACCRA - RESPONDENT

EX-PARTE – 1. FARID DANIEL SALLOUM - APPLICANTS
2. FAWZI DANIEL SALLOUM
3. FAUAD DANIEL SALLOUM
4. JACOB DANIEL SALLOUM

CHARLES SENYO COKER - INTERESTED PARTY

R U L I N G

ANIN YEBOAH JSC:

The applicants in this case have invoked the supervisory jurisdiction of this court to quash by certiorari the order of the High Court, Accra dated the 29/09/2010. The applicants and the interested party do not dispute the facts of this application.

Briefly, the facts are as follows: On the 29/11/2001 the applicants as plaintiffs instituted an action against one John Wilson Akoto in suit number L653/2001 for reliefs of ejectment, arrears of rent menses profit and interest on the outstanding rent. One Charles Senyo Coker who is the interested party to this application applied to be joined as co-defendant. It appears that the application for joinder though filed on record was not moved and same was accordingly struck out on 20/10/2005 for want of prosecution. No procedural effort was made to either relist or repeat the application. On the 19/04/2006, however, the said Charles Sanyo Coker and Charles Duamoah Bortey commenced as action at the High Court, Accra as suit No. BL 393/06 claiming against the 1st and 3rd applicants herein the reliefs of an order restraining the defendants from ejecting the plaintiff until the determination of the agreement between the plaintiffs and the late Jacob Daniel Salloum, injunction against the defendants and each of their agents, servants, workers, assigns and privies restraining them from interfering with the plaintiff's quite enjoyment of the remaining term of their agreement with Jacob Daniel Salloum ,and cost.

Subsequent to the filing of the writ, the plaintiffs in the suit No.BL393/2006 were granted an interlocutory injunction on the 17/04/2007 by Abada J., restraining the first and third applicants herein. According to the affidavit of the first applicant, after the grant of the interlocutory injunction the parties to the suit have not pursued the action. In the suit No.L653/2001, the said John Wilson Akoto died and was substituted by John Wilson Akoto Jnr. Upon substitution, Entry of judgment was served on him. The interested part to this application filed a Notice of claim on the grounds that the houses in execution were the subject of a pending action in suit No.BL 393/2006: CHARLES SENYO COKER & OR V. FARID DANIEL SALLOUM & OR. The applicants herein filed a motion on notice on 30/10/2009 and prayed the court to set aside the Notice of Claim filed by the interested part herein. The motion was argued before Justice E.B.K Agbloyor of the High Court, Accra who in his ruling

ordered the applicants herein to abide the final determination of suit No. BL 393/2006 before any step is taken against the interested party herein.

The applicants herein, however, on 24/8/2010 filed an application for leave to issue writ of possession against the defendant/judgment/debtor John Wilson Akoto (Jnr) in suit No.L653/2001. The application was granted on 1/09/2010. The record of exhibits shows that on 7/09/2010, the applicants filed the Writ of Possession against Mr. John Wilson Akoto (Jnr) and on 27/09/2010 the writ of possession was only executed against John Wilson Akoto (Jnr) and left out other persons in possession, including the interested party herein. Indeed the applicants suppressed the facts by not disclosing to the court the order made by Abgloyor J.

On 27/09/2010, the very day the writ of possession was executed at the instance of the applicants, the interested party filed a motion Ex parte praying the court presided over by Mr. Justice Abdulai Iddrisu to set aside the writ of possession. In the affidavit in support of the said application sworn to by the interested party, reference was made to the order of Abgloyor J dated the 30/04/2010 and the import of same. It also raised the issue of non-service on the interested party when the applicants wanted to levy execution by writ of possession. The learned judge Mr Justice Abdulai Iddrisu granted the application ex parte and in his ruling dated the 29/09/2010 set aside the execution levied by the applicants. In his ruling the learned judge said as follows:

> "It must be noted that this court took its decision based on the facts that were put before it. It is however revealing that certain facts which were essential and could have assisted the court in its decision were not disclosed to the court.
>
> The court can set aside under its inherent jurisdiction any order which it had been induced to make such as by mistake or even innocent suppression of material facts"

The learned judge proceeded to set aside the execution at the instance of the interested party who was not a party to the original suit"

The applicants who are aggrieved have resorted to this application by invoking the supervisory jurisdictions of this court by complaining on two main grounds as follows:

i. A breach of the principle of audi alteram partem rule.
ii. Error of law (on the face of the record)

In a nutshell, the argument of learned counsel for the applicants is that, as they were the obvious target of the application before the High Court, the learned judge ought to have heard them before vacating the writ of possession and the execution processes at the instance of a non-party to the case from which the execution was levied. They contend that the application made to the court by motion to vacate the writ of possession and the processes of execution ought not to have been made ex-parte but on notice to them.

The practice in Civil Proceedings is that in pending matters applications are usually made to the court by motion for a grant of any order in terms of the prayers sought in the motion. The rules and practice at the High Court, however, regulates how motions could be either on notice or ex-parte. Order 19 of the High Court (Civil Procedure) Rules of 2004, CI 47 provides guidelines for making applications by motion. For the purposes of this application, reference may be made to Order 19 rule (1) (3) which states as follows:-

"(3) Except where the Rules otherwise provide, no motion shall be made without previous notice to the parties affected"

Order 19 rule (3), however, vests powers in the High Court to entertain motions ex-parte under limited circumstances. Indeed, it is part of the rules and practice that certain motions by their nature ought to be made ex-parte given the circumstances. The learned author of Civil Procedure in Nigeria at page 553 states the position as follows:

"These are two main circumstances which, as decided in Leedo v. Bank of the North [1998] 7 SCNJ 328, an application ex-parte could be made. These are (i) when, from the nature of the application, the interest of the adverse party will not be affected and

(ii) when time is the essence of the application.

In any of these situations a court may rightly exercise its desertion by granting motion ex- parte. But where the motion will affect the interest of the adverse party, a court of law should insist and order that the adverse party be put on notice" (emphasis ours).

The above statement of the law is also supported by a passage in Atkin's Encyclopedia of Court Forms in Civil Proceedings second edition at page 203.

> "Motions may be made either ex parte or upon notice. All motions in an action (other than a motion for judgment) are interlocutory. The general rule is that no motion may be made without previous notice to the parties affected. But the court or judge if satisfied that the delay caused by proceeding in the usual way and giving the necessary notice would or might entail irreparable or serious mischief, may make any order ex- parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the court or judge may think just, leaving any party affected by the order at liberty to move to se it aside"

In our respectful opinion, we think the suppression of the orders made by Agbloyor J notwithstanding, the interested party who was not originally a party to the judgment for which the Writ of possession was sought and granted ought to have given notice to the judgment/creditors when he sought to set aside the execution processes as a party affected by the execution. His not being a party to the substantive case in which a final judgment had been given, makes this situation more serious. How a person who was not originally a party to a case in which what is left is execution can mount an application ex parte under the circumstances of this case to me is not clearly sanctioned by any rule of law or practice. The affidavit which sought to support his application to vacate the orders was very terse.

It did not even disclose any urgency of the matter and any irreparable injury which would have resulted from resorting to the hearing of the application on notice. In any case, the interested party was not ejected from the premises during the enforcement of the writ of possession for him to complain of any urgency under the circumstances.

I freely accept the proposition of law that in motions mounted ex parte, the utmost good faith is required of an applicant. The few cases which come to mind are: R v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de polignac [1917] IKB 486 CA and R v. Accra District Court Magistrate, Ex parte Kuma {1968] GLR 955. But we wonder whether an application to set aside any order which was made by a court of competent jurisdiction by relying on suppressed facts should be made ex parte when there are no prevailing circumstances warranting it to be made ex parte without notice to the person to be affected.

I am not unmindful of the existing saving provisions under Order 81 of CI 47 which has relaxed the strict application of the rules in matters of non-compliance. To us, much depends on the extent of the irregularity of the proceedings and the nature thereof. In this application, the main ground canvassed before us is the breach of the rules of the audi alteram partem rule. The right to be heard in proceedings before a court of law is well established in every common law jurisdiction. It should be taken away only when the rules of court or practice permits it to be so. I do not think that order 81 could be reasonably applied to regulate a basic fundamental error which error has denied a party his constitutional and inalienable right to be

heard in a case in which the applicant had been adjudged a victor in civil proceedings and what is left is execution. No especial circumstances have been shown to exist in the affidavit of the interested party as we have already stated above. To invoke Order 81 to cure this serious fundamental error would bring too much laxity in practice and such situations should be avoided.

In the recent case of IN RE KUMI (Dec'd), KUMI v. NARTEY [2007-2008] SCGLR 723 Sophia Adinyira JSC said at page 632-633 as follows:

> "As said earlier, it is trite law that a person cannot be found guilty or liable on order or judgment unless he had been give fair notice of the trial or proceeding to enable him to appear and defend himself. This is the essence of justice. Failure by a court or tribunal to do so would be a breach of the rules of civil procedure and nature justice.
>
> A judgment or order procured under such circumstances is, in our view a nullity.
>
> (emphasis mine)

Prof. Date-Bah JSC in discussing the scope of Orders 81 of CI 47 observed in the case of REPUBLIC V HIGH COURT; ACCRA, EX PARTE ALLGATE CO. LTD (ALMAGAMATED BANK LTD INTERESTED PARTY) [2007-2008] SCGLR 1041 at page 1052 said:

"This decision is probably a case too far for this jurisdiction. There is binding precedent in this jurisdiction to the contrary, even after the enactment of the new Order 81, r1 of the High Court Rules. For the reasons eloquently articulated by Taylor JSC in AMOAKO V. HANSEN [1987-88] 2 GLR 26 at 43-44, non-service of a process where service of same is required, in my view goes to jurisdiction.

> Non-service implies that audi alteram partem, the rule of natural justice is breached.

This is fundamental and goes to jurisdiction"

In the Ex- parte Allgate Co. Ltd case, supra, His Lordship Professor Date-Bah JSC in his concluding remarks summed up the law at page 1054 as follows:

"To summarise then, where there has been non-compliance with any of the rules contained in the High Court (Civil Procedure) Rules, 2004 (CI 47) such non-compliance is to be regarded as an irregularity that does not result in nullity, unless the non- compliance is also a breach of the constitution or of a stature other than the rules of court or the rules of natural justice or otherwise goes to jurisdiction".

With these binding precedents very current on the law, we are fortified to hold that the irregularity which is acknowledged by all nullified the proceedings which the applicants are complaining of.

The position of the law is that, breach of the basic rules of natural justice as it has happened in this application before us renders the proceeding a nullity. Learned counsel for the applicant has drawn our attention to the recent cases of Republic v. High Court, Bolgatanga:Ex parte Hawa Yakubu [2001-2002] SCGLR 53 and Barclays Bank of Ghana Ltd. v. Ghana Cables Co. Ltd. & Ors. [1998-1999] SCGLR 1 to illustrate how this court frowns upon the beach of the rules of non-service especially in the Ex-parte Hawa Yakubu's case. Indeed, it has been the practice that even if an application is ex parte and the court is of the view that it has to be on notice the court should order for a copy of the motion to be served on the affected party even though the application has been sought ex parte.This practice has the statutory backing under order 19 rule 1 (4) of CI 47. It illustrates how parties ought not to be denied this basic and fundamental right in civil litigation.

Indeed, procedural defects have been cured in various cases if the defects are not fundamental. If the defect is such that a party's rights have been seriously denied as in this case, a court should not apply Order 81. Lack of service of hearing notice for example has always been seen as a fundamental defect. See CRAIG V. KANSSEN [1943] 256 CA, R V. APPEAL COMMITTEE OF COUNTY OF LONDON QUARTER SESSIONS, EX PARTE ROSSI [1956] I ALL ER 670 CA. Equally so, if a party is denied his right to be heard as in this case, it should constitute a fundamental error for the proceedings to be declared a nullity.

The courts in Ghana and elsewhere seriously frown upon breaches of the audi alteram partem rule to the extent that no matter the merits of the case, its denial is seen as a basic fundamental error which should nullify proceedings made pursuant to the denial.

In this application, the facts show clearly that the conduct of the interested party was clearly intended to overreach the statutory rights of the applicants. It is our opinion that as this court has in several cases held that a breach of the rules of natural justice renders proceedings a nullity, we will declare that the applicants have sufficiently made a case to warrant our supervisory intervention. We will therefore grant the application in the terms prayed and declare the proceeding of the High Court dated the 20/09/2010 a nullity for the reasons canvassed above.

On the second ground, we think that as the error complained of has been declared fundamental and this renders the proceedings a nullity, the application also succeeds on the second ground. The application is thus granted as prayed.

[SGD] ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

[SGD] DR. S.K. DATE-BAH

JUSTICE OF THE SUPREME COURT

[SGD] B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

[SGD] V. AKOTO-BAMFO [MRS.]
JUSTICE OF THE SUPREME COURT

JONES DOTSE JSC:

I have had the advantage of reading the lead judgment delivered by my brother Anin-Yeboah Jsc. I have applied myself and my thoughts as best as I can to this opinion, but I am unable to accept the reasoning and the conclusions reached therein. I therefore proceed to deliver the following as my dissenting opinion.

This is an application at the behest of the Applicants herein, seeking an order of certiorari pursuant to article 132 of the Constitution 1992 to quash the order of the High Court, Accra presided over by Alhaji Abdulai Iddrisu J, dated 29th September, 2010 on the following grounds:

1. Breach of the principle of audi alteram partem rule and

2. Error of law on the face of the record

FACTS

The relevant facts pertinent to the instant application are that, on the 29th day of November, 2001 the Applicants herein namely:

Farid Daniel Salloum

Fawzi Daniel Salloum

Fouad Daniel Salloum and

Jacob Daniel Salloum, as plaintiffs, instituted an action in the High Court, Accra, Suit No.L653/2001 against one John Wilson Akoto – as defendant basically for the following reliefs:

a. An order of ejectment or recovery of possession in respect of H/Nos. F 684C/2 and F684/D/2 Osu R E, Accra.

b. Payment of arrears of rent, mesne profits and interest on the arrears of rent which at the time totalled ¢64,720,000.00 (now GH¢6,472.00).

During the pendency of the above suit in the High Court, the interested party herein filed an application on the 20th day of July, 2005 seeking to join the said suit as a co-defendant.

In his application in support of the application for joinder, the interested party deposed to the following pertinent facts:

> *"In or about July 1990, the said Mr. Akoto introduced me to the original owner of the said flats, Jacob Daniel Salloum".*
>
> *"The said Mr. Jacob Daniel Salloum leased the said two flats to me"*

"The plaintiffs are very much aware that I am the occupant of the said flats and occupy the same as tenants of Mr. Jacob Daniel Salloum.

"In or about the year 1993, the plaintiffs herein brought a suit against us at the then Community Tribunal at Osu and Labadi but later abandoned the action when we challenged their capacity".

All the above depositions are contained in Exhibit I, attached by the Applicants herein to their application in support of this certiorari application.

The interested party was however unable to pursue his application for joinder, which was later struck out for want of prosecution on 20th October, 2005.

Later, on or the 19th day of April 2006, the Interested party and one Charles Duamorh Bortey instituted a substantive action, suit No. BL 393/06 in the High Court, Accra against Farid Daniel Salloum and Fouad Daniel Salloum, the 1st and 3rd Applicants herein.

The reliefs claimed by the Interested Party and Charles Bortey were:

a. An order restraining the defendants from ejecting the plaintiff's ***until the determination of the agreement between the plaintiff and the late Jacob Daniel Salloum.***

b. Injunction against the defendants, their and each of their agents, servants, workmen, assigns and privies ***restraining them from interfering with the plaintiffs quiet enjoyment of the remaining term of their agreement with Jacob Daniel Salloum.***

The interested party and another, were accordingly granted an Interlocutory injunction on 17th April 2007 – reference exhibit 3, in the following terms:-

> *"Upon hearing Anthony Desewu Esq., Counsel for and on behalf of the plaintiffs/Applicants herein, and Joseph Nkrumah, Esq., Counsel for and on behalf of the Defendants/Respondents herein; it is hereby ordered that the* ***defendants herein be and are hereby restrained from ejecting the plaintiffs until the determination of this suit. It is hereby further ordered that the defendant herein, their agents, servants, workmen, assigns and privies be and are hereby restrained from interfering with the plaintiffs quiet enjoyment of the premises until the final hearing and determination of this suit."***

(Reference to plaintiff are to the Interested Party, and defendants to the 1st and 3rd applicants).The original defendant in Suit No L 653/2001 John Wilson Akoto died and was accordingly substituted by his son John Wilson Akoto Jnr. by order of the court dated 22nd October 2008, reference exhibit 4.

The case proceeded to trial and the final judgment was pronounced by Agbloyor J, on the 29th day of January 2009 who delivered judgment in the case in favour of the plaintiffs therein, applicants herein, by granting all the reliefs they had claimed.

The Interested Party on the 13th day of February 2009 filed a Notice of claim pursuant to order 44 r. 12 of C. I 47 reference exhibit 6.

Thereafter, an application was filed by the Applicants herein to dismiss the Notice of Claim, whereas the Interested party disputed and opposed same.

Agbloyor J, in a considered ruling dated 30th April, 2010 stated in part as follows:

> *"The claimant wants this court to pronounce on his interest in the property as a tenant in the alleged agreement between him and one Jacob Daniel Salloum to occupy the property* ***in issue for a period expanding between 1st January 1991 to December 2015.*** *To protect the same interest he filed suit No. BL 393/2006 against the plaintiffs claiming reliefs for an order restraining the defendants from ejecting him from the property until the agreement determined by affidavit evidence in this court.* ***He should therefore pursue Suit No BL 393/2006 to its logical conclusion by calling evidence in a full dressed trial.*** *Because of that suit this court cannot order the filing of a fresh suit in this court as mandated by order 44 rule 13 (1) (b) of C. I. 47.*
>
> ***The defendants in that case who are plaintiffs/applicants herein should abide the final determination of that suit before they take any step with regard to the claimant's status vis a vis the subject property. More especially, they should abide by the interlocutory injunction slapped on them on 17th April, 2007 by a High Court then presided over by Abada J until final determination of that suit."***

The applicants herein, then filed a motion ex-parte on the 24/8/2010 for leave to issue a writ of possession in respect of the premises the subject

matter of Suit No. L653/2001 in respect of which they had judgment. This application was granted by an Accra High Court differently constituted from Agbloyor J on 1st September, 2010. The Applicants proved that they filed a praecipe for a writ of possession and were later put into possession by execution of the writ of possession on 27/9/2010.

The applicants in paragraph 19 of their affidavit in support of the instant application deposed as follows:

> ***"That the applicants herein, being mindful of an interlocutory injunction restraining them from ejecting the interested party herein in Suit No. BL 393/2006 which is still pending before an Accra High Court was very careful and did not have, the interested party ejected from the property under execution."***

The crux of the instant application is that, the High Court Accra, presided over by Alhaji Iddrisu J, on the 29th day of September 2010 upon an ex-parte application filed by the Interested Party herein, set aside its earlier order dated 1st/9/2010 which granted leave to the applicants for a writ of possession.

The Applicants therefore contend that by so doing, the orders contained in the decision of 29/9/2010 have breached the *audi alteram partem* principle of the rules of natural justice as they were not given a hearing and that there is also an error of law on the face of the record.

In order to put the instant application in proper perspective it will be desirable to quote the reasons which the learned trial Judge gave for vacating his earlier orders of 1st September, 2010.

It must be noted that in this ruling, the learned Judge expressed surprise at the conduct of learned counsel for the applicants who concealed relevant information from the court.

For example, the learned Judge specifically mentioned the interlocutory injunction granted by Abada J, on 17th April 2007 which is still subsisting as well as Agbloyor J's ruling of 30th April, 2010.

Based upon these two orders or decisions, Alhaji Abdulla Iddrisu J, stated as follows:-

> *"It has not been shown that the ruling mentioned above has been set aside or even challenged. It therefore means that the ruling is in operation and is valid until it is set aside. It must be noted that this court took its decision based on the facts that were put before it. It is however revealing that* ***certain facts which were essential and could have assisted the court in its decision were not disclosed to the court.***
>
> *This court can set aside under its inherent jurisdiction any order which it had been induced to make such as by mistake or even innocent suppression of material facts.*
>
> *I therefore set aside the order of this court which was made on 1st September, 2010 granting leave to the Applicant in that case to recover possession of H/No. F684C/2 and F684D/2 and its subsequent execution. The parties are to abide by the ruling of this court delivered on 30th April, 2010 by my brother Justice Agbloyor."*

The above are the raw facts of this certiorari application before the court.

What must be noted are the following:

1. The applicants herein, have a valid judgment against John Wilson Akoto Jnr in respect of the premises in suit No. L 653/2001.

2. The Interested party also has a valid interlocutory injunction order dated 17/4/2007 granted by Abada J, restraining 1st and 3rd Applicants therein from interfering with the interested party's enjoyment of that part of the premises he occupies.

3. **The Applicants and the Interested party are bound and estopped by the order of Agbloyor J, dated 30/4/2010 from executing the final judgment entered in their favour against the interested party until the final determination of Suit No. BL 393/2006.**

4. **The Applicant's themselves have admitted in their affidavit in support that the interested party is in occupation of portions of the premises for which reason by virtue of the orders referred to supra, they have decided not to execute the judgment against him.**

   The necessary and logical deduction that can be made therefore is that, the presence of the Interested Party in the portion of the property he occupies before the execution of the writ of possession by the applicants has been admitted by them. This means the interested party is entitled to continue to occupy his portion until the final determination of the case. The applicants will

therefore not lose anything if the order of execution is set aside in that instance.

By way of further explanation, what this means is that, if the Applicants herein contend that they have not executed the writ of possession against the Interested Party in respect of the premises which he occupies, then by logical deduction, nothing would be lost by the applicants if the execution of the order of the writ of possession in so far as it touches and concerns the interested Party is set aside.

RECEPTION OF ARGUMENTS IN THIS COURT

It must also be noted that upon the reception of arguments in this case, the court held that the interested Party herein, having filed his statement of case outside the statutory period allowed under the rules without leave of the court, and not seeking to regularise same until after the conclusion of the arguments of learned Counsel for the applicants, the said statement of case cannot be used and relied upon in this case. This was because the point had been raised and argued against him. This ruling is therefore premised upon the facts of the case and the exposition of the law as contained only in the statement of case of the applicants.

GROUNDS OF APPLICATION

In his statement of case, learned Counsel for the Applicants stated thus:

> *"The Interested Party's ex-parte application made on the 27th September, 2010 which was granted on 29th September, 2010 even though he was not a party to the suit was an error on the face of the record. The effect of the decision of the High Court, Accra on that date was to set aside the final judgment entered*

against John Wilson Akoto (Jnr) on 29th January by a stranger to a suit without giving the applicants herein any opportunity to be heard even though they were the plaintiff/judgment/creditors in that suit."

From the above, the Applicants have reiterated their two prong argument in this case, and these are:

1. Breach of the principles of *audi alteram partem* and

2. Error of law on the face of the record

It is important to deal with and dispose off the contention that the Interested Party herein is a stranger to the case.

Admittedly, the interested party is in stricto sensu not a party in the suit No. L653/2001. But it has to be noted that, he not only filed a Notice of Claim in that suit when the applicants herein proceeded to have their judgment executed without giving him a Notice, but he successfully obtained a ruling from the High Court, which restrained the Applicants from executing the judgment against the interested party, without abiding the result of Suit No. BL393/2006 as directed by Agbloyor J.

In addition to the above, the orders made by the High Court were such that, the fortunes of the suit filed later by the Interested Party against 1st and 3rd Applicants herein, suit No. BL393/2006 were inextricably linked to suit No L653/2001.

Considering the above scenario to the fact that the interested party successfully secured an important ruling in his favour as a claimant, then it becomes clear that the said interested party cannot under any stretch of imagination be described as a stranger to suit No L653/2001.

In considering whether a party is a stranger to a suit or not, care must be taken to ensure that the telescope is not centred only on the primary parties in the suit. If that is done, a lot of injustice will be done other persons whose interests and claims are linked one way or the other to the actual suit before the court. For instance, in the instant case, it is quite clear that the Interested Party, being a tenant in the premises the subject matter in Suit No. L653/2001 who has on his own secured an interlocutory injunction to restrain the Applicants herein from disturbing his quiet enjoyment of the said premises in Suit No. BL 393/2006, cannot be said to be a stranger.

No wonder learned counsel for the Applicants in their Statement of Case in the best traditions of the Bar conceded the fact that the order of Agbloyor J, made on 30th April, 2010 directed the Applicants to abide the final determination of the suit before any action could be taken against the Interested party.

When therefore, in clear breach of the said directives the interested party was ejected pursuant to an execution of a writ of possession emanating from the said court, the interested party has nowhere to turn to except the very court that made the orders and apply to have them set aside.

Similar facts arose in the case of ***Republic v High Court, Accra Ex-parte Anyan, (Platinum Holdings – Interested party) [2009] SCGLR 255*** .

In this case, the applicant and the Interested party were sub-lessees of Edward Nassar & Co Limited. Edward Nassar & Co, themselves held leases in respect of larger plots of land leased to them by the Government of Ghana. Later, the interested party sued the applicant

and obtained a judgment against him for a declaration of title to a plot of the land that had been specifically marked and identified which it claimed formed part of the sub-lease it had obtained from the head lessee, Edward Nassar.

This plot of land was in the same area as the plots of land sublet to both the applicant and the interested party by Edward Nassar and Co.

After obtaining the judgment, the interested party took steps to execute the judgment by applying for a writ of possession. This was granted by the trial court. The applicant however alleged that in executing the writ of possession, the interested party had entered into another property belonging to him other than that in respect of which he had been granted judgment. He therefore brought interpleader proceedings in the High Court against the attachment of the property contending that the property had been wrongly attached by the interested party.

In his ruling, the trial Judge found that the property attached by the interested party was not the one in respect of which the interested party had judgment.

The trial Judge however held that the applicant no longer had any interest in the property which was wrongly attached by the interested party.

Aggrieved by that decision, the applicant then brought proceedings in the Supreme Court for an order of Certiorari on the grounds of want or excess of jurisdiction contending that, the applicant as the claimant had no interest in the subject matter of the interpleader proceedings.

The Supreme Court unanimously held per R.C Owusu (Ms)JSC dismissing the application for certiorari on the following grounds:

..."It was when property had been attached normally under a writ of fieri facias ***that a person other than the defendant who claimed an interest in it could interplead. In cases (like the instant case) where the execution was wrongful or irregular, the proper relief available was to have the writ of execution set aside.***

Per curiam: If by the application, the claimant's title was in issue then the trial Judge was perfectly acting within his jurisdiction when he pronounced on it. Under those circumstances if he commits any error which is not patent on the face of the record, certiorari will not issue by way of remedy. Under those circumstances the aggrieved party's remedy lies in an appeal".

The similarities between the ex-parte Anyan case and this case are many and are enumerated as follows:

1. Both relate to post-judgment execution proceedings

2. Both relate to steps taken by one party to set aside property that was considered to have been wrongly attached.

3. The Supreme Court as it were confirmed that the right procedure to adopt under these circumstances was to have the execution set aside.

4. In the instant case, setting aside the writ of possession was exactly what the interested party did, albeit by an ex-parte process.

Under these circumstances, the interested party, once he was a claimant in the earlier proceedings cannot be said to be a stranger in the case. He certainly is not, he has an interest in the case.

As a final court of this country, the Supreme Court should endeavour to do substantial justice to all parties and manner of persons all the time, provided their claims were not out of tune with the issues before the court. See ***Hanna Assi (No.2) v GIHOC Refrigeration & Household Products Ltd. [2007-2008] 1, SCGLR 16*** review decision per Prof. Ocran JSC of blessed memory, and which was applied also in the case of ***Fosua & Adu-Poku v Dufie (deceased) & Adu-Poku Mensah [2009] SCGLR 310 at 352.***

I will therefore for the reasons articulated supra and also on account of the duty cast on courts of law to do substantial justice dismiss the issue that the interested party is a stranger to the case.

DENIAL OF RIGHT TO BE HEARD

There is however no doubt that the applicants herein were not heard before the court vacated it's previous orders made granting them a writ of possession, because of the procedure that was adopted.

It must be noted that, the application filed by the interested party to the court was an ex-parte application. This in terms of procedure meant that it was only a one sided application in which only the applicant is seeking the courts intervention, in emergency situations or others in which no harm would be caused the other party if they are not heard. Under the

High Court (Civil Procedure) Rules 2004, C. I. 47 the type of applications which can be brought as ex-parte have been clearly stated.

Order 19 r 1(1) of the *High Court (Civil Procedure) Rules, 2004, C. I. 47* provides as follows:

> ***"Every application in pending proceedings shall be made by motion."***

Order 19 r 1 (3) on the other hand provides thus:

> ***"Except where these Rules otherwise provide, no motion shall be made without previous notice to the parties affected."***

From the above, it is clear that with the introduction of C.I. 47, the procedure to initiate any applications in any pending action before the courts, has been simplified by limiting it to the process referred to and known as a motion.

Similarly, order 19 rule 1 (3) categorically states that unless otherwise provided, no motion shall be made without notice to the other side or party to be affected thereby. This means that if in the opinion of the party initiating the application by motion, any other party will be affected by the result thereof, then the rules provide that such a party must be given notice to enable his side of the case also to be heard. This is to ensure that the audi alteram partem rule is complied with.

But that is not the end of the procedure outlined and mandated by the rules of procedure.

Order 19 rules 3 (1) (2) & (3) of C. I. 47 which deals specifically with ex-parte motions provides thus:

1. Subject to rule 1 sub rule (3), an application by motion may be made ex-parte where any of these rules provides or where, having regard to the circumstances, the court considers it proper to permit the application to be made."

2. "The court may make an order ex-parte on such terms and subject to such undertaking as it considers just where it is satisfied that delay caused by proceeding in the ordinary way would or might entail irreparable damage or serious mischief."

3. "The Court shall not grant an application made ex-parte under subrule 2 unless the applicant shows to the satisfaction of the court good reason for making the application ex-parte and the precise nature of the irreparable damage or serious mischief which will be occasioned by proceeding in the ordinary way."

4. "The court in its discretion may refuse to hear an application ex-parte and may direct that notice shall be given to all the parties affected by the application."

I have decided to expatiate on the procedure allowed under the rules of procedure for initiation ex-parte motions, because the process sought to be quashed by the applicant was an ex-parte motion.

By the clear words of order 19 rule 3 (1) the circumstances under which an ex-parte motion may be applied for are:

i. Where under the rules of procedure contained in C. I. 47 or any other enactment, the procedure for doing so has been clearly stated as permitted by an ex-parte process.

ii. Where having regard to the circumstances of that particular case, the court is satisfied that it is proper to permit the procedure of the motion by an ex-parte process.

iii. There is however a rider, contained in order 19 r 3 (2) that a court in granting an ex-parte motion may grant it upon terms or subject to such undertaking as it considers just. In making such a decision, a court is to consider what damage or mischief would be caused if the process is initiated by giving notice to the other party.

iv. The court is also enjoined under order 19 r 3 (3) of C. I. 47 not to grant any ex-parte application unless the applicant shows good reason to the satisfaction of the court and the precise nature of the irreparable damage or serious mischief that will be caused if the party should proceed in the ordinary way by giving notice.

In the instant case, I have already given an exhaustive background of the facts of this case.

The interested party, it must be noted had two valid subsisting orders granted by the High Court which any court desirous of ensuring that justice is done must enforce and or comply with.

Besides, the applicants themselves have been mandated specifically by the orders of Agbloyor J, made on 30/4/2010 requesting them to abide the determination of a pending suit in Suit No BL 393/2006 which was still pending in the High Court.

It is now history that the applicants herein concealed from the court all the relevant and material information from the court when they applied ex-parte for the writ of possession.

By ejecting the interested party from the premises, a step they were injuncted from proceeding with until certain processes had been complied with, can the applicants legitimately apply to this court for this discretionary remedy?

My answer is a simple no. This is because, in my opinion, the interested party by his ex-parte application had been able to show not only by depositions in an affidavit, but by proof of documentary evidence to wit: relevant court orders that he is not expected to be ejected from the premises. These court documents and orders by themselves, speak volumes and have far reaching effect.

Under the premises, I ask myself this question, will the applicants have an answer to these documents emanating as they are from a court of competent jurisdiction? Certainly not.

Indeed they have not offered any explanation for their fraudulent conduct in concealing these vital, material and relevant information from the court when they applied for the writ of possession.

I am therefore satisfied that the court which granted the ex-parte order setting aside the writ of possession acted within its powers and was duly satisfied under the circumstances before it made the order,

the failure of the court not to have limited the operation of the ex-parte order notwithstanding.

In coming to the conclusion I have reached in this matter, I have been guided by the fact that courts of law exist to do substantial justice at all times. In the interest of justice, equity and fairness, this court as the final court of the land should strive to do substantial justice provided that will not result in an unconstitutionality or wreck injustice on either party.

From the proven and undisputed facts of this case, a lot of injustice and hardship will be caused the interested party if the application is granted. With the granting of the application, there is no guarantee that the interested party will not be shown the exit from the premises he occupies which will be in clear breach of the orders of the High Court. I cannot preside over such a wilful and flagrant abuse of the powers and sanctity of courts of competent jurisdiction.

Since this court has all the powers of the High Court and beyond, I would have preferred a situation where the court would evaluate the facts of the case and give a decision by directing the parties as to what to do in order to do substantial justice, for example by ensuring that the applicants comply with their undertaking that the interested party will not be ejected and directing the expeditious and speedy disposal of the pending case. This in my opinion is in accord with the dictates of substantial justice than restricting oneself to the doctrinaire approach of breach of the audi alteram partem rule, which is non-existent in this case.

I am of the view that assuming the decision of the trial court to grant the ex-parte motion amounted to denying the applicants an opportunity to be heard which is denied, is it such an irregularity that is so fundamental that it cannot be cured by order 81 r. 1 of the High Court (Civil Procedure) Rules, C. I. 47?

My attention has been drawn to the unanimous decision of this court in the case of Republic vrs High Court, ex-parte Allgate Co. Ltd. (Amalgamated Bank Ltd – Interested Party) 2007-2008 1041.

I have perused the said judgment and discovered that the court in coming to their decision endorsed an earlier decision in the case of ***Amoako v Hansen [1987-88] 2 GLR 26 at 43-44.***

I have also apprized myself of an earlier decision given by the same court in ***Boakye v Tutuyehene [2007-2008] SCGLR 970***, given almost a year before the decision in the *ex-parte Allgate case* was delivered. In the earlier case of *Boakye v Tutuyehene*, the decision in *Amoako v Hansen* appears to have been reversed.

In the Boakye case referred to supra, Dr. Twum JSC as he then was emphatically stated thus:

> **"Further, the new order 81 has made it clear that perhaps apart from *lack of jurisdiction in its true and strict sense*, any other wrong step taken in any legal suit should not have the effect of nullifying the judgment or the proceedings".**

Having perused the entire decision in the ex-parte Allgate and the Boakye cases, I am of the considered opinion that, the facts and the

circumstances of this case are strikingly different from the circumstances that necessitated the decision in the ex-parte Allgate case.

I am therefore of the considered view that the learned High Court Judge had jurisdiction to have entertained the ex-parte application and there was no need to have heard the applicants, since they were not parties therein. I certainly approve of the practical approach adopted by the court in the *Boakye v Tutuyehene case.*

In real terms, I am of the considered view that in order to ensure that the effect of order 81, r.1 of C.I. 47 is not neutralised to such an extent that the policy and philosophical underpinnings behind the passage of the *High Court (Civil Procedure) Rules 2004, C. I. 47* are not undermined, then order 1 r (2) must be seen to be complied with both in the letter and spirit. Order 1 r (2) states as follows:

> "*These rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided."*

From the above, it is quite clear that much as proceedings in the High Court under C. I. 47 are to be expedited so as to avoid delays, they are also meant to promote effective justice and ensure that disputes between parties are completely and effectively determined in real terms.

In that respect therefore, I think the principle in the decision in *Boakye v Tutuyehene* should be considered on a case by case basis and perhaps

in this case it will be observed that, a restricted application of the decision is necessary in order to do substantial justice.

I am therefore of the considered view that, the learned High Court Judge had jurisdiction to have entertained the ex-parte application and there was therefore no need to have heard the applicants, as they were not parties therein.

In the ex-parte Anyan case already referred to supra, Justice Rose Owusu (Ms) JSC, delivering the unanimous judgment of the court, and relying on celebrated cases like :

> ***Republic v High Court, Accra: Ex-parte Appiah [2000] SCGLR 389,***
>
> ***Republic v High Court, Accra: Ex-parte Industrialisation Fund for Developing Countries [2003-2004] 1 SCGLR 384 and***
>
> ***The Republic v Court of Appeal, Accra: ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612***

held on pages 262-263 as follows:

> "*The law is well settled that the supervisory jurisdiction of the court under article 132 of the 1992 Constitution is exercised only* ***in those manifestly plain, obvious and clear cases where there are patent and obvious errors of law on the face of the record which error must go to the jurisdiction of the court so as to make the decision of the court a nullity."***

There is therefore nothing patent on the record in the instant case to make the decision of the trial court a nullity such that the supervisory jurisdiction of the court can be invoked.

It is also important to observe that, it is one thing for a court to have jurisdiction and another thing for the court to have exceeded its jurisdiction in the course of the proceedings, or failing to comply with the requirements of natural justice i.e. the *audi alteram partem* principle which demands that every party must be given an opportunity to be heard before he or she is condemned, during the course of hearing a matter in respect of which the court had jurisdiction. See the case of ***R v Northumberland Compensation Appeal Tribunal, Ex-parte Shaw 1952 1 KB 338*** and

Republic v High Court, Accra: Ex-parte Commission on Human rights and Administrative Justice – Addo, Interested party [2003-2004] 1 SCGLR 312.

The principle involved here is that, although a court like the High Court in the instant case might commence an inquiry with clear jurisdictional powers, it might lose those powers where it commits any of the errors mentioned therein, i.e. exceeding its jurisdiction by making orders in excess of its powers or not affording an opportunity to the parties in the case to be heard etc, this list could be endless.

The important thing however is for a court such as this Supreme Court to embark on a critical analysis and survey to find out whether the court below breached any rule of practice in its determination of the rights of the parties.

In the instant case, I find no such thing existing and will dismiss the application.

The learned trial High Court Judge did not breach the *audi alteram partem* rule of the principle of natural justice. This is because the application before him was for an ex-parte application which he granted. He was not obliged to afford the applicants a hearing.

For the above reasons, I will dismiss this application seeking to invoke the supervisory jurisdiction of this court to quash the decision and orders contained in the orders of the High Court dated 29th September, 2010.

[SGD] J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

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