IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2015

CORAM: ANSAH JSC (PRESIDING)
ADINYIRA (MRS) JSC
DOTSE JSC
ANIN YEBOAH JSC
AKAMBA JSC

CIVIL MOTION
NO.J5/39/2015

30TH JULY 2015

THE REPUBLIC

VRS.

THE COURT OF APPEAL ------ RESPONDENT

ACCRA

EX PARTE EAST DADEKOTOPON ----- APPLICANT

DEVELOPMENT TRUST

№7 OTSWE STREET, AKO ADJEI PARK

LA ACCRA

THE DIRECTOR, SURVEY DIVISION ----- INTERESTED PARTY

LANDS COMMISSION

ACCRA.

RULING

ANIN YEBOAH, JSC:

On the 23rd of July, 2015 we dismissed this application and reserved our reasons which we proceed to deliver.

The applicant herein has invoked the supervisory jurisdiction of this court to quash the judgment of the Court of Appeal, Accra, dated the 13th of March 2014. The facts of this application appear to be devoid of any controversy and are fully captured in the affidavit of one Emmanuel Odoi Yemo the chairman of the applicant trust sworn to on the 11th of June 2014.

The said deponent, Emmanuel Odoi Yemo, in the affidavit in support of this application has deposed to the fact that on 30/07/2012 the applicant filed a motion to commit the Interested Party herein for contempt of court before the High Court, Accra. The first respondent in the said contempt proceedings, one Samuel Quaye Tawiah filed an affidavit in opposition to the motion and sought to challenge the capacity of the applicant herein. The other respondent did not file any process upon service on him of the contempt proceedings.

The High Court entertained arguments on the capacity of the applicant herein and ruled that it had capacity to bring the application for contempt. After the ruling which was delivered on 26/04/2013 the third respondent to the application for contempt lodged an appeal to set aside the ruling of the

trial High Court, Accra. The other respondent described in the contempt proceedings as the first respondent, that is, Samuel Quaye Tawiah did not file any appeal to contest the ruling. On the 3rd of July 2013, the parties affected by the ruling in the contempt proceedings were summoned by the Registrar of the High Court, Accra, to settle the records of appeal as a statutory precedent for prosecution of any civil appeal. The parties complied and as it appears in one of the exhibits in this application, precisely, Exhibit "F", the Registrar of the High Court, Accra, imposed several conditions on the interested party herein to fulfill. According to the applicant, the interested party to this application did not fulfill the conditions of appeal which was statutorily imposed on him by the Registrar of the High Court, Accra. To appreciate the import of what the deponent Emmanuel Odoi Yemo said we reproduce his affidavit in support, specifically paragraph 10, 11, 12 and 13 as this would be appropriate:

> "10. That on 22nd January, 2014 the appeal was set down for hearing and the Court of Appeal adjourned same to 13th March 2014 for judgment.
>
> 11. That subsequently it came to my notice that the Director of Surveys, 3rd respondent/appellant, did not fulfill the conditions of appeal so I caused a search to be conducted which results confirmed that indeed the Director of Surveys did not fulfill the conditions of appeal (Exhibit F).

12. That upon obtaining the search results I caused a Motion of Notice to be filed at the Court of Appeal on 3rd March, 2014 seeking to have the appeal dismissed which motion was fixed for 26th March, 2014 (Exhibit G)"

On hearing the appeal, the Court of Appeal, adjourned to 13th of March, 2014 to deliver its judgment. Thus the Court of Appeal allowed the appeal in favour of the interested party. The applicant complains that the Court of Appeal was aware of the motion to dismiss the appeal when it proceeded to deliver its judgment even though counsel wrote: "out of abundance of caution" to the court to draw the attention of the court to the pending motion fixed for 26th March 2014.

The Court of Appeal ignored the letter and proceeded to deliver the judgment. The interested party herein, however in his affidavit in answer to this application stated in paragraphs 23, 24 and 25 as follows;

"23. That, the 1st respondent, on behalf of the 3rd respondent (described in the ruling as 2nd respondent/appellant after the demise of the original 2nd respondent), paid the cost of settling the records of appeal on 28th August 2013 and was issued with two receipts (totaling GH¢1,000.00) in his name even though he was not the appellant and also because he failed to indicate his status. Attached hereto and marked as Exhibit DSM 4 are copies of the receipts".

The interested party herein went further to depose in the affidavit that the Lands Commission is headed by a solicitor who is a staff of the Attorney-General's Department who is not required to pay filing fees and also enter into bonds for prosecution of appeals. What is on record, however, is that, the Registry of the High Court, Accra on 28-8-13 received an amount of Two Hundred and Fifty Ghana Cedis from one Quaye-Tawiah (who was the first contemnor at the High Court) as "Appeal Deposit" as evidenced by Exhibit DSM 4A annexed to the affidavit of one Joseph Tetteh Odametey, the Director of Survey and Mappings Division of the Lands Commission. Another receipt on record is Exhibit "DSM 4B", evidencing another payment by the same Samuel Quaye Tawiah in the sum of Seven Hundred and Fifty Ghana Cedis as "Appeal Deposit". On the 4th of October 2013, the High Court Registrar issued Civil Form 6 giving notice to the parties that the record of appeal had been dispatched to the Court of Appeal. The Court of Appeal heard the appeal on the merits and allowed it.

Learned counsel, did not appeal against the judgment of the Court of Appeal which set aside the conviction of the appellant for contempt. He has rather invoked our jurisdiction under Article 132 of the 1992 Constitution to quash the judgment of the Court of Appeal dated the 13th March 2014 on two grounds, namely:

1. The appellant (the interested party herein) having failed to fulfill the conditions of Appeal, the appeal was not property before the Court of Appeal and as such the learned justices of Appeal lacked the jurisdiction to give judgment in favour of the appellant.
2. The attention of the Court of Appeal having been drawn to the Motion on Notice filed by the appellant herein on 3rd March, 2014 seeking to have the appeal set aside for want of jurisdiction which motion had been fixed for 26th March, 2014 the learned Justices of Appeal violated the fundamental and constitutional right of the applicant herein to be heard on the motion when they proceeded to give judgment in favour of the appellant on 13th March 2014 thereby rendering the said motion nugatory and pre-emptying same from being heard on the merits"

Before this application could be heard, learned counsel for the interested party sought leave to raise a preliminary objection on the grounds that, the deponent to the affidavit of the interested party, one Emmanuel Odoi Yemo had no capacity to swear to the affidavit and that as the applicant trust's tenure of office had expired it could not legally mount an application of this nature, in that, it had no locus standi in law. This court allowed an application for adduction of evidence and thereafter overruled the preliminary objection and reserved our reasons to be incorporated in this delivery.

This court is of the opinion that in certiorari applications any person who is interested in the outcome of the proceedings could apply as applicant for certiorari as it is in the interest of the citizenry to ensure that the due process of law is observed by adjudicating bodies. This proposition of law has its genesis in our case law from the case of the STATE v ASANTEHENE'S DIVISIONAL COURT BI; EX PARTE KUSADA [1963] 2GLR 238 SC, REPUBLIC v KORLE GONNO DISTRICT MAGISTRATE COURT; EX PARTE AMPOMAH [1991] GLR 353 and more recently the opinion of my esteemed brother Dotse JSC in REPUBLIC v HIGH COURT, HO, EX PARTE BEDIAKO II & ANOR (ODUM & ORS INTERESTED PARTIES) [2011] 2 SCGLR 705 in which the scope of capacity in certiorari applications was amply explained. We therefore hold that as the applicant trust which was at the High Court as the applicant for the contempt proceedings, irrespective of whether the tenure of office of the trustees had expired or not has an interest in the suit which is actively pending in the courts of law and could mount this application. We so overruled the preliminary objection.

As said earlier the applicant has invoked our jurisdiction on two main grounds. On the first ground, counsel's argument appears to be simple. He has urged on us that as the appellant at the Court of Appeal did not fulfill the conditions of appeal imposed on it by the High Court Registrar, the Court

of Appeal lacked jurisdiction to give judgment. Reliance was placed on section 11(7) of the Court's Act, 1993 (Act 459) which provides thus:

> "11(7) The Court of Appeal shall not entertain any appeal unless the appellant has fulfilled all the conditions prescribed in that behalf by the Rules of Court"

Counsel for the applicant proceeded to rely on the case of AGBEYEVU v OCANSEY [2009] SCGLR 703 in which this court pointed out that before civil appeals could be heard the conditions of appeal imposed by the trial court or the lower court must be fulfilled before the appeal could be heard. I said at page 708 as follows:

> "Even though the 1992 Constitution and the Courts Act, 1993 (Act 459), confer statutory rights on the appellant to appeal as of right, his statutory right to appeal is regulated by the rules of court out of which the conditions were imposed on him to fulfill. If on the facts an appellant has failed to comply with the rules regulating the appeal, irrespective of the statutory rights conferred on the appellant by the 1992 Constitution and the Courts Act, 1993 and notwithstanding the merits of the appeal, an appellate court would not proceed to hear the appeal".

In that case the appellant had paid part of the deposit as payment for preparation of the record of appeal but subsequently applied to the Registrar for refund of the deposit which the Registrar obliged. The appeal was

subsequently struck out based on the Registrar's submission of Notice of Non-compliance. It took the appellant over one year to apply to restore the appeal which the Court of Appeal dismissed . It was an appeal to the Supreme Court when affirming the rulings of the Court of Appeal that the above proposition of law was laid down.

In this application, it appears that the facts are quite different and are easily distinguishable from the ABEKENU v OCANSEY case, (supra). In this case, the appeal, that is, the substantive appeal was listed before their Lordships at the Court of Appeal, Accra for hearing. It was certainly presumed by Their Lordships that everything was regular for the hearing of the appeal.

In any case, it is not the practice of appellate courts to peruse lower courts' dockets to ascertain whether appeal conditions were fulfilled by the appellant before hearing substantive appeals. In the case of MERAH v OKRAH [1984-86] IGLR 400 Adade JSC at the Court of Appeal said at page 409 as follows:

> "A study of the cases shows that there are two classes of breaches. In one the default is fundamental; it goes to the root of the appeal, and therefore leaves the court with no discretion but to dismiss the appeal in limine. See MOORE v TAYEE (1932), WACA 242 and IN RE DICKINSON; EX PARTE ROSENTHAL [1882] 20 Ch D 315. In the other class, the default is not so fundamental; it affects the prosecution of a

properly filed appeal and in this regard may be referred to for convenience, as procedural: See OGUNMOLA v IGBO [1941] 7 WACA 137 and BOTCHWAY v NASSAR [1946] WACA 23".

The learned judge proceeded to discuss the effect of non-compliance with the fulfillment of conditions of appeal at page 409 under the old rules, that is the (Court of Appeal Rules) LI 218 of 1962 which is very similar to the new rules; as follows:

"An appeal shall be deemed to have been brought when the notice of appeal has been filed in the registry of the court below" The above rule implies that as soon as the notice is filed, within the proper time and, where applicable, with the requisite leave, there is properly filed appeal pending. Everything else that the appellant is required to do

thereafter does not affect the pendency of the appeal, it only related to the procedure or mechanics for bringing the appeal to a hearing.

The authorities will seem to show that defaults in connection with the first stage are fatal. They affect the notice itself, invalidate it and render the appeal void. They affect not the "conditions of appeal as fixed [by the registrar] but … the very existence of the appeal".

As the appeal was deemed pending before the Court of Appeal, the Court of Appeal Rules, 1997, CI 19, rule 16 makes it mandatory that any respondent wishing to raise a preliminary objection to the Civil Appeal must give the

appellant three clear days notice of any preliminary objection setting out the grounds thereof in compliance with FORM 8 in Part I of the rules. In the absence of any notice of preliminary objection at the instance of the respondent to the appeal, the Court of Appeal may proceed to hear the appeal if the first requirement in the MERAH v OKRAH case, supra, is met; that is, when the notice of appeal had been properly filed within the law. There is therefore the presumption of regularity in favour of the appeal and it behoves the applicant as the respondent to the Civil Appeal to have raised a preliminary objection before the Court of Appeal that the conditions of appeal had not been fulfilled by the appellant. This the applicant failed to do. The applicant rather filed a "MOTION ON NOTICE TO DISMISS APPEAL" on 3rd March 2014 and same was listed to be heard on 26th March 2014 when the appeal had already been heard on 22nd January and adjourned for judgment on 13th March 2014. It appears that the applicant herein as the respondent to the appeal before the Court of Appeal did not file any written submissions or raise any preliminary objection in any manner or form as he was enjoined by the rules to do. The motion to dismiss appeal was even placed before the Court of Appeal differently constituted and not seised with the facts of the matter which therefore ordered the motion to be placed before the panel which had heard the substantive appeal.

As pointed out above, the Court of Appeal proceeded to hear the appeal on the strong presumption that everything was regular which is a rule of evidence expressed in Latin as "omnia praesamutur rite esse acta", in the absence of any timeously raised objection that the appeal was not properly before it. It is thus clear that the Court of Appeal did not lack jurisdiction when it proceeded to hear the appeal which indeed did not also destroy its jurisdiction when it delivered its judgment. The first ground of the application is with due respect to counsel is unmeritorious. In any case, our supervisory jurisdiction by way of certiorari has been invoked and the authorities are clear that when an alternative remedy exists, a supervising court may refuse to grant certiorari. In the case of the THE REPUBLIC v HIGH COURT; ……..ACCRA EX PARTE ATTORNEY-GENERAL (OHENE AGYAPONG INTERESTED PARTY) [2014] 2 SCGLR 1204, Date-Bah JSC relying on the settled authorities like: IN RE APPENTENG (DECD), REPUBLIC v HIGH COURT, ACCRA [COMMERCIAL DIVISION] EX PARTE APPENTENG (APPENTENGS INTERESTED PATIES) [2010] SCGLR 327, REPUBLIC v HIGH COURT, ACCRA; EX PARTE ARYEETEY (ANKRAH INTERESTED PARTY) [2003-2004] ISCGLR 410 and REPUBLIC v HIGH COURT, ACCRA; EX PARTE APAIN [2007-2008] SCGLR 72 said at page 1209 thus:

> "…where an applicant has remedy other than certiorari open to him or her, this is a factor that may be taken into account in denying the

applicant the discretionary remedy of certiorari; even if the other preconditions for the grant of the remedy have been established".

Another point worth considering is the conduct of the applicant in the entire proceedings. It is on record that when the applicant obtained a record of the proceedings, errors were detected which were not substantial but were misdescription of the applicant as respondent/appellant, nevertheless the applicant refused to file the written submissions mandatorily required by the Court of Appeal Rules in Civil Appeals. Indeed the applicant never filed any written submission at the Court of Appeal even though the appellants' written submission had been served on counsel on 15/11/2013 before the appeal was heard on the 21st of January 2014. In any case, defective records of appeal are remitted to the lower courts for correction on regular basis and this is a settled practice in hearing appeals.

Another serious matter worth addressing is the conduct of counsel for not appearing before the Court of Appeal to draw its attention to the pending motion but wrote a letter to the court that he had filed a motion to dismiss appeal and requested the Court of Appeal to adjourn the appeal when he was fully aware that the date was fixed for judgment.

In our respectful opinion, we notice that the conduct of counsel for the applicant in the entire appeal before the Court of Appeal amounted to clear disregard for the rules of court and settled practice. We think that the conduct of the applicant is such that our discretion should not be exercised

in his favour as his conduct has disentitled him to the grant of the remedy in the nature of certiorari.

We could have dismissed the application solely on this our opinion on ground one, but learned counsel argued ground two of the application at length in such a manner that we owe him a duty to discuss same in this delivery. Learned counsel for the applicant has complained that as the MOTION TO DISMISS APPEAL was pending before the Court of Appeal it was not right for it to proceed to deliver judgment moreso when he had by EXHIBIT "H" written to the court that he had filed a motion to dismiss the appeal fixed for the 26th of March 2014. Learned counsel further complains that by not adjourning the appeal on the date of delivery of the judgment, the Court of Appeal violated the applicants' fundamental and constitutional right to be heard on the motion.

It appears, however, that learned counsel for the applicant was making a case that there was a clear breach of the "audi alterem partem rule" which to him should nullify the judgment of the Court of Appeal. He sought reliance on the case of REPUBLIC v COURT OF APPEAL & THOMFORD, EX PARTE GHANA CHARTERTED INSTITUTE OF BANKERS [2011] 2 SCGLR 941.

It should be made clear that learned counsel did not avail himself of the opportunity offered to his client as a litigant by the rules of the Court of Appeal. He elected not to file any written submission to answer the case of the appellant but rather took an unprecedented step of refusing to actively

participate in the hearing of the substantive appeal. He elected a course, which with due respect, amounted to a clear disregard for the rules of court and wrote a letter to the Court of Appeal to draw Their Lordships' attention to the pendency of his motion to dismiss the appeal. As it turned out the said motion was not even placed before the original panel hearing the substantive appeal.

From the foregoing it was thus clear that learned counsel for the applicant, with due respect, left the Court of Appeal unassisted in hearing the appeal. There could not be a breach of the audi altarem partem rule when it is clear from the facts that sufficient opportunity was given to a party and was abused by him. Indeed, counsel pursued a course in the whole appeal which was unprecedented and not enuring to the benefit of the applicant.

We find this ground of appeal also as without any merits whatsoever hence we proceeded to dismiss same on the 23rd of July, 2015 with these reasons.

SGD) **ANIN YEBOAH**

JUSTICE OF THE SUPREME COURT

(SGD) **J. ANSAH**

JUSTICE OF THE SUPREME COURT

(SGD) **S. O. A. ADINYIRA (MRS.)**

JUSTICE OF THE SUPREME COURT

(SGD) **V. J. M. DOTSE**

JUSTICE OF THE SUPREME COURT

(SGD) **J. B. AKAMBA**

JUSTICE OF THE SUPREME COURT

COUNSEL

MR. PAUL DEKYI AND JACOB NOYE WITH HIM, FOR THE APPLICANT.

MR. CARIS APPIAH BRAKO FOR THE INTERESTED PARTY .