**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT OF GHANA**
**ACCRA, 2013**

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

**CIVIL APPEAL**
**No.J4/40/2012**

**6TH FEBRUARY,2013**

**THE REPUBLIC**

**VRS**

**JUDICIAL COMMITTEE OF THE --- RESPONDENT/RESPONDENT**
**GOMOA AKYEMPIM TRADITIONAL /RESPONDENT**
**COUNCIL**

**EX-PARTE: OPANYIN POBEE --- APPLICANT/APPELLANT**
**TUFUHENE ELECT OF APAM /APPLICANT**

**AND**

**E. R. KOJO YOYOO --- INTERESTED PARTY/**
**RESPONDENT /RESPONDENT**

# J U D G M E N T

## ANIN YEBOAH, JSC

This appeal raises for our consideration a point of law that is at the heart of our judicial system and the extent to which non-compliance with it may have the effect of invalidating any decision rendered in a case where such a non-compliance did take place. The said point of law is this: Whether a tribunal that has jurisdiction to determine a subject matter may by pursuing a course of procedure that denies to a party to the cause the right to be heard might thereby act in excess or lack of jurisdiction. Although this principle is of fundamental importance to courts in the exercise of their jurisdiction to determine cases, it appears from the record of appeal with which we are concerned in this matter that the learned justices of the two lower courts did not fully appreciate its import in relation to the application for judicial review in the nature of certiorari. The determination of this point of law in our thinking is not unimportant to procedural law and in particular Judicial Committees of Traditional Councils established by the Chieftaincy Act. The circumstances in which the point for our decision in this appeal arises are briefly stated shortly.

The respondent to this appeal commenced proceedings before the Judicial Committee of Gomoa Akyempim Traditional Council against Supi Kobina Ogyam, Supi Kobina Sekyi and Opanin Opobi alias Bentum claiming the following reliefs:

i. The five sections of the Kakaba Anona family headed by plaintiff are the sole authority to install a Tufuhene for Apam.

ii. The purported acts of confinement of 3rd defendant and his intended installation are unlawful.

iii. General damages for unlawful usurpation of plaintiff's rights

iv. Perpetual injunction restraining defendants their agents, servants, assigns, etc from interfering with plaintiff's rights.

One Supi Kwame Eyiah of Apam died and customarily a successor ought to be installed. According to the appellant, he was by custom the rightful person with authority to nominate a royal for the stool, but the first and second defendants connived to nominate the third defendant to install him as Tufuhene and with the support of the Chief of Apam without the consent of the sub-chiefs of Apam and the Queenmother. He contended that these acts of the defendants and the Chief of Apam was uncustomary, more so, when the late Supi Kwame Eyiah was yet to be buried. As expected of such proceedings the petitioners-respondents filed their statement of defence by which most of the allegations leveled against them were denied.

Before the case could be heard the first and second defendans filed a motion before the Judicial Committee of the Gomoa Akyempim Traditional Council praying the Judicial Committee for their disjoinder. For a detailed record the motion was couched as follows:

***" MOTION ON NOTICE FOR DISJOINDER***

*PLEASE TAKE NOTICE that Honourable Judicial Committee will be moved by NANA EDU-EFRIM X for defendants/applicants herein on Friday the 3rd of April 2009 praying for and to have myself, 1st and 2nd defendants disjoined*

*completely from the suit and for such further order(s) as this Honourable Committee may deem fit."*

In an affidavit sworn to by NANA EDU EFFRIM X (Chief of Apam) it was deposed to that the suit could be contested without those applying for disjoinder and therefore they ought to be struck out. It appeared that no affidavit in answer was filed by the petitioner. When the motion was listed for hearing on 3/4/2009, it was moved and the certified True Copy of the notes recorded appeared as follows:

"Both parties present. Panel members present. Motion on Notice for Disjoinder read by the Registrar at the Open Court. Moved by the Chief of Apam Obotantam Edu Effirim and says in line with his affidavit in support that; he the deponent, the 1st and 2nd defendants/applicants apply to have themselves disjoined from the case completely. This will enable the plaintiff and the 3rd defendant contest their own case before the Judicial Committee to a more level field.

By the plaintiff: I accept the withdrawal in the motion moved by Nana Obotantan Edu Effirim X the said deponent herein.

By the Court: The motion by the applicants is hereby accepted by the Court.

The defendants have completely withdrawn themselves from the case.

ORDER: since the defendants, 1st and 2nd and 4th who elected the 3rd defendant for installation have withdrawn themselves from the

case, then, their election of the 3rd defendant becomes null and void.

Cost: Cost assessed at GH¢500.000 is awarded against the defendants."

By the said order, the Judicial Committee had as it were determined the claim before it although no evidence was taken from the parties to the suit. Feeling aggrieved by the procedure that resulted in a judgment being entered against him without a hearing, the appellant herein on 22/06/2009, filed a motion praying for an order of judicial review in the nature of certiorari directed at the Judicial Committee of the Gomoa Akyempim Traditional Council for the purpose of bringing up into the High Court, Cape-Coast its order of 3/4/2009 made in the matter to which this appeal relates for the purpose of it being quashed. The complaint against the order of 3/4/2009 was that as the said Judicial Committee did not hear the substantive suit on its merits the order was null and void. The application for certiorari was opposed on the grounds that it was within the competency of the Judicial Committee to make the order sought to be quashed. It was further argued that as long as the Judicial Committee acted within its jurisdiction the proper remedy was an appeal and that accordingly resort to the supervisory jurisdiction of the court was inappropriate.

In its decision dated 30 July 2009, the High Court, Cape-Coast dismissed the application with cost. It appears from the said decision that the High Court upheld the submissions that the matter in terms of the grounds raised by the applicant was properly cognizable by an appeal and not judicial review. Aggrieved by the decision the appellant unsuccessfully appealed to the Court of Appeal, Accra. The Court of

Appeal by its judgment of 3 February 2011 reached the same conclusion on the reliefs open to the appellant and consequently dismissed the appeal. The appellant lodged this appeal to seek the reversal of the judgment of the Court of Appeal on four grounds set out in the notice of appeal as follows:

a) The learned judges of the Court of Appeal erred in upholding the procedure adopted by the trial Judicial Committee as not amounting to a breach of the rules of natural justice.

b) The learned judges of the Court of Appeal erred in deciding the appeal based on the merits of the case before the Judicial Committee instead of on the procedure adopted thereon.

c) The learned judges of the Court of Appeal erred in not indentifying the real issues for determination before the Judicial Committee.

In arguing ground one, learned counsel for the appellant contended that the judicial committee had in making the order the subject-matter of this appeal breached the requirement of due process that no man be condemned without a hearing. It is settled that the said proposition is a fundamental principle which has assumed importance as one of the cornerstones of any civilized judicial system. Unfortunately, the two lower courts, with due respect to their Lordships, did not consider the grievous nature of the complaint on which the application was mounted. On the contrary, they appeared by implication to have endorsed the procedure of the Judicial Committee which had the effect of substantially determining the plaint before them without affording the appellant herein the opportunity of being heard.

That the Judicial Committee did not indeed, offer any opportunity to the respondent-applicant (the appellant herein) to give evidence in answer to the claims made against him as expected under Regulation 6 of the Chieftaincy (Proceedings and Functions) (Traditional Councils) Regulations 1972, LI 798 is clear from a careful reading of the proceedings that resulted in the order that touches and concerns these proceedings. The record before us does not reveal that the appellant waived his right to give evidence and in the absence of any statutory authority supportive of the course of conduct adopted by the Judicial Committee, there is no discretion in any tribunal composed of reasonable persons as indeed this court is so composed of to reach any other conclusion in the matter than to accede to the application for judicial review.

To deny a party the opportunity to prove his case under the circumstances of this case offends the basic rules of natural justice. It is trite learning that the Judicial Committee is an inferior tribunal. No where in the various statutes on chieftaincy and its institutions has it been spelt out that a Judicial Committee can proceed to deny a party hearing as it was done in this case. It being so, the denial to the appellant of this basic right has the effect of invalidating the decision and indeed, the proceedings on which it was founded.

As a breach of the audi alteram partem rule constitutes a serious fundamental error, the High Court in the exercise of its jurisdiction under both Article 141 of the 1992 Constitution and section 16 of the Courts' Act, Act 459 of 1993 should have quashed the proceedings of the 3/04/2009. See REPUBLIC V HIGH COURT ACCRA; EX PARTE OSAFO [2011] 2 SCGLR 966, REPUBLIC V HIGH COURT ACCRA; EX PARTE SALLOUM (SENYO COKER INTERESTED PARTY [2011] I SCGLR 574) and REPUBLIC V HIGH

COURT ACCRA ;EX PARTE NII OKAIDJA III [NII AYI BONE II INTESTESTED PARTY] unreported judgment of the Supreme Court in Civil motion Nº JS/3/2013 datedJ5/33013 which are very recent expositions of the applicable legal position. There does not appear from the record of appeal any legitimate answer to the complaint of the appellant.

We would have been content to rest our judgment here but in view of the fact that we are differing from the two lower courts on the remedy available to a party in the circumstances of this appeal, we shall give the matter further consideration. Turning to the second ground of appeal, it is not disputed that the matter before the Gomoa Akeympim Traditional Council's Judicial Committee was a Chieftaincy matter. It is equally plain that the Judicial Committee was exclusively seised with jurisdiction to entertain the matter. It has recently been held in three landmark cases; notably: REPUBLIC V HIGH COURT, ACCRA; EX PARTE INDUSTRIALISATION FUND FOR DEVELOPING COUNTRIES [2003-4] I SCGLR 348, REPUBLIC V HIGH COURT ACCRA; EX PARTE CHRAJ [ADDO INTERESTED PARTY] [2003-2004] I SCGLR 312 and REPUBLIC V COURT OF APPEAL EX PARTE TSATSU TSIKATA [2005-2006] SCGLR 612 that when a Superior Court such as the High Court while acting within its jurisdiction commits errors of law which are not so patent and do not go to jurisdiction, the proceedings based thereon are not liable to be nullified by an order of Certiorari but are remedied by appeal. Even as regards superior courts the position is well settled without conflict of judicial opinion that the proceedings are amenable to certiorari if the tribunal whilst acting within its jurisdiction ignores the basic rules of natural justice and in consequentially veers into the realm of excess or absence of jurisdiction.

In the recent case of REPUBLIC V HGIH COURT, ACCRA EX PARTE SALLOUM Supra, it was held at page 585 as follows:

> "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"

As the Judicial Committee denied the appellant his constitutional right to be heard in the proceedings, the High Court's supervisory jurisdiction was rightly invoked by the appellant and the proceedings was a nullity irrespective of the fact that the Judicial Committee was acting within its jurisdiction. The point here is that it is of the utmost importance to the exercise of the authority to determine cases that the requirements of due process are complied with before any decision is entered in a matter. Such is the place of the requirement of due process at the heart of any judicial system that it cannot be waved off as the Judicial Committee purported to do and was unhappily sanctioned, so to say by, the two lower superior courts. No court has the jurisdiction to determine a cause without affording to the parties and in particular the party adversely affected by its decision a reasonable opportunity to be heard and we know of no instance in which such a deprivation has been upheld by our courts. On the facts, this is a proper instance for the court's intervention in the exercise of its supervisory jurisdiction in order to give effect to the salutary principle of the right of hearing.

The Judicial Committee whilst seised with the matter destroyed its jurisdiction by the procedure it adopted before making the order, the subject matter of these proceedings. As was pointed out in the case of REPUBLIC V DISTRICT MAGISTRATE, ACCRA; EX PARTE ADIO [1972] 2 GLR 125 when Archer JA as he then was, said at page 132:

> "It is of vital importance to appreciate that when the term "excess of jurisdiction" is used, it may mean that from the inception of the case, the court has no jurisdiction whatsoever because the nature of the case or the value involved is beyond its jurisdiction. But it may also mean that although the court has jurisdiction to hear the case, the orders which the court can pronounce are restricted by statute. If an order is therefore beyond the powers of the court, it is perfectly correct to say that it has exceeded its jurisdiction."(Emphasis ours)

Under such circumstances it would be just and proper for the prerogative writ of certiorari to issue without resort to an appeal. Both lower courts, with due respect were in error for denying the appellant the relief sought by way of certiorari. We venture to say that the gravamen of the appellant's complaint may also be a good ground of appeal but that in itself has never been held to be a bar to the mounting of an application for judicial review in the nature of certiorari. See: The Republic v Keta District Magistrate; Ex- parte Hedo [1971] 2 GLR 459. At page 464, Francois J (as he then was) pronounced on the propriety of the remedies of appeal and certiorari arising out of the same facts as follows:

"Finally, I say that it is well established that the remedies of certiorari and appeal are not mutually exclusive one of the other, but can be both exercised by an aggrieved party……"

Before we end this delivery, there is one matter to which we wish to refer for the guidance of Judicial Committees. It is the emerging practice of Judicial Committees going outside customary law and practices in determining causes or matters before them. As far back as 1979 the Court of Appeal [Full bench] in the case of NYAMEKYE V TAWIAH [1979] GLR 265 had the opportunity to sound this word of caution to them that proceedings before them should be devoid of procedural technicalities in the following words:

"The policy underlying the statutory conferment of both original and appellate jurisdiction in Chieftaincy Disputes on Traditional Tribunals was that the personnel of those courts were by reason of their background and training knowledgeable in indigenous law and custom to completely determine those matters.

Where they sought to resolve issues which demanded the application of customary law by resort to the subtleties of English Common Law, e.g. joinder of parties and burden of proof, their expertise was doubtful and as this case showed, they founded in the result"( Emphasis ours)

We find it necessary to re-echo the admonition of Apaloo CJ in the above case in this appeal in view of the procedural steps taken at the trial by the Judicial Committee regarding the two petitioners- respondents whose application for "disjoinder", that was granted, opened the door for the making of the order, the subject-matter of this appeal. The rules of procedure governing Judicial Committees are expressed in very simple and comprehensible language to assist litigants and the tribunals to administer justice without resort to technicalities in procedure as pointed out in the above cited case. The "motion for disjoinder" is not sanctioned by the rules of the superior court and one cannot comprehend how it crept into the practice before Judicial Committees such as to have been utilised the Judicial Committee of Gomoa Akyempim Traditional Council in the manner that has unfolded in the proceedings before us.

In the result, the appeal is hereby allowed.

**(SGD) ANIN YEBOAH**
**JUSTICE OF THE SUPREME COURT**

**(SGD) J. ANSAH**
**JUSTICE OF THE SUPREME COURT**

**(SGD) P. BAFFOE BONNIE**
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