IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: BROBBEY, JSC (PRESIDING)
ANSAH, JSC
DOTSE, JSC
ANIN YEBOAH, JSC
BAFFOE-BONNIE, JSC

CIVIL MOTION
J5/7/2010
17TH FEBRUARY, 2010

THE REPUBLIC ...

VRS

HIGH COURT, HUMAH RIGHTS DIV. ACCRA ... RESPONDENT

EX-PARTE: JOSEPHINE AKITA ... APPLICANT

1. **MRS. SALMA F. MANCELL-EGALA**
2. **ATTORNEY GENERAL ... INTERESTED PARTIES**

R U L I N G

BROBBEY, JSC:

This is a ruling on an interlocutory application. The facts which gave rise to the case are as follows: Mancell Vocational Institute (hereinafter referred to as the Institute) was owned by Mrs. Rosamund Mancell who died testate on 14 August 1987. She bequeathed the Institute to her five children. After the necessary probate had been taken, vesting assent was given to the children.

One of the children was Elizabeth Mansa Mancell. She died in 1993, leaving behind three children by name Josephine Akita, Francisca Hammond and Ronald Renee. The three children took over the interest of Elizabeth Mansa Mancell in the estate. In this application, Josephine Akita describes herself as the applicant, the administratrix of the estate of the deceased Elizabeth Mansa Mancell and representative of herself and the two children (as appearing in the suit she brought earlier in the High Court).

In 2006, an agreement was allegedly reached to sell the Institute. It was eventually bought by the Ghana Government through the Ministry of Children and Women's' Affairs. After the purchase price had been agreed upon, the children took action to request the Government to issue five separate cheques for the benefit of the five children. In that action, the children of Elizabeth Mansa Mancell were represented by Josephine Akita the eldest daughter and administratrix of her estate. When the Government complied with the request, the children discontinued the action.

In December 2008, the applicant took action in the Human Rights Division of the High Court to nullify the sale for the sole reason that it was concluded without the knowledge and consent of the children of the deceased Elizabeth Mansa Mancell. It was in that action that the applicant described herself as the eldest daughter, administratrix and representative of herself and the other two children. The respondent is the High Court judge who handled the action which has culminated in this application. The interested parties are the other children of the late Rosamund Mancell and the Ghana government, the purchaser of the Institute. In the High Court, the applicant applied for an interim injunction against the Government and the interested persons in the instant application. The trial judge dismissed the injunction and the entire action. He proceeded to order the Government to take over the Institute. The applicant appealed against the decision of the court. She then filed a motion to restrain the interested parties from acting in any manner inconsistent with the applicants' beneficial interest in

the Institute. The motion was predicated on the appeal filed against the decision of High Court.

The return date for the motion was 11 November 2009. On the 10 November, the High Court registrar served Form 6 on the applicant. Counsel for the applicant took the view that since Form 6 had been served, the Court of Appeal was seised of the case and that the High Court had no jurisdiction over the matter. The High Court judge ruled that he had jurisdiction and dismissed the application for injunction. A writ of possession was issued in favour of the interested parties. The applicant thereafter applied to this court for an order of certiorari to quash the last decision of the High Court for two reasons: Firstly that the High Court judge had no jurisdiction over the case since the issuance of Form 6 automatically transferred the case to the Court of Appeal: Secondly there was a breach of the *audi alteram partem* rule since she was not heard on the motion before the judge and further that an affidavit filed by the interested party was not served on the applicant before the judge disposed of the case.

The first ground turned on the meaning and effect of the Court of Appeal Rules, 1997
(C I 19), r 21 as mended by CI 25 which reads;

" **21. Control of proceedings during pendency of appeal**

After the record of appeal has been transmitted from the court below to the Court, the Court shall be seised of the whole of the proceedings as between the parties and every application shall be made to the Court and not to the court below, but the application may be filed in the court below for transmission to the Court."

Counsel's argument was that the record was transmitted to the Court of Appeal when Form 6 was filed. Thereafter, the case was to be considered as being before the Court of Appeal and no more before the High Court. Against that submission, counsel for the interested parties have contended that the applicant

appealed against the order dismissing the applicant's case in limine and the order dismissing the applicant's application for interlocutory injunction. They maintained that the order to the Government to take over the Institute was not appealed against and therefore could not be affected by the appeal.

In his reply, counsel for the applicant submitted that the application for injunction to prevent the Government from taking over the Institute related to the matter on appeal for if the appeal succeeds, the Government could not take over the property.

The answer to first issue which is on the effect of Form 6 is not in doubt. It has been settled that once Form 6 has been served on the trial court, that court no longer has jurisdiction over the case. At that point of the proceedings, the court with the appropriate jurisdiction will be the Court of Appeal. This has been settled in a number of cases including *Republic* v *High Court, Ho: Ex parte Evangelical Presbyterian Church of Ghana* [1991] 1GLR 323, *Shardey* v *Adametey & Shardey v Martey and anor. (Consolidated)* [1972] 2 GLR 380, etc.

In the instant application, there is no doubt that Form 6 was served on the trial judge. The service effectively ended his jurisdiction over the case. He proceeded to hear the case for the reason that the motion was pending in his court before the Form was served on him. That reason cannot be tenable. Rule 21 anticipated that situation by which aspects of the case would be pending before the trial court. That is why it was provided that should that happen, the trial court was duty bound to transfer it to the appellate court. The Rule was intended to obviate that kind of situation so as to avoid protracting the proceedings unnecessarily. The rule was not intended to prolong the jurisdiction of the trial court which had been curtailed by the service of Form 6.

The second ground for the application in this court based on the *audi alteram partem* rule does not hold water because the applicant has not demonstrated that the trial judge relied on the affidavit in arriving at his conclusions in the judgment

complained against. The argument that he was not heard on the motion should be summarily dismissed. This is because he was aware that the proceedings were to take place before the trial judge but he himself walked out of the proceedings because he was convinced that the court no longer had jurisdiction to proceed with the case. If he were minded to be heard, he could have been heard even if that meant going to the court to protest against the court continuing with the hearing. A person who has been given the opportunity to be heard but deliberately spurned that opportunity to satisfy his own decision to boycott proceedings cannot later complain that the proceedings have proceeded without hearing him and then plead in aid the *audi alteram partem* rule.

The Court of Appeal dismissed the applicant's application for the reason that the grounds of appeal did not cover the order of the trial court granting leave to the Government to take over the Institute. Counsel for the interested parties adopted that reasoning in their arguments in the application before this court. As explained in the arguments of the interested parties, there were three orders made by the trial judge. These were

1. An order dismissing the applicant's application for interim injunction
2. An order dismissing the applicant's case in limine and
3. An order for the Government to take over the Institute.

The applicant appealed against the first two orders. The first two orders were not executable as rightly found by the Court of Appeal and therefore cannot be the foundation for an application for an interim injunction. No appeal was filed against the third order that the Government should take over the Institute. In fact, in the notice of appeal the applicant stated as follows:

> "PART OF THEDECSION COMPLAINED OF:
> The decision of the learned judge refusing the plaintiff's application for interlocutory injunction and the decision dismissing the plaintiff's claim in limine."

There was no reference whatsoever to the order for the Government to take over the Institute.

What I find most worrying about this case is the way counsel for the applicant has chosen to prepare the grounds of appeal without bothering to comply with the provisions regulating grounds of appeal. When preparing an appeal, the rules require that the appellant should be specific in what he seeks by way of relief from the appellate court. This has been made manifest in the Court of Appeal Rules, 1997 (CI 19), r 8 (2) which state inter alia that

"The notice of appeal shall be filed in the Registry of the Court below and shall

(a) Set out the grounds of appeal;
(b) State whether the whole or part only of the decision of the court below is complained of and in the latter case specify the part;
(c) State the nature of the relief sought…."

Similar rules have been emphasized in the High Court (Civil Procedure) Rules, 2004 (CI 47), Order 51, rule 1 (4) which also provide that:

"The notice of appeal shall set out the grounds of appeal and shall state

(a) whether the whole or part only of the decision or order of the court below is complained of, in the latter case specifying the part;
(b) the nature and relief sought …"

It is apparent from these provisions that the necessity to be specific in the grounds of appeal cannot be overemphasized. In spite of these clear provisions, counsel for the applicant chose to prepare the grounds of appeal which glaringly left out the very ground that he is complaining about in this application, namely, the order to allow the Government to take over the Institute. He now comes to this court and argues that the court should not take his grounds of appeal on their face value but should come to his aid by deducing that the grounds he has

filed will indirectly cover the grounds he has not filed. In appeals, the appellant has to declare the reliefs he seeks from the court. In such reliefs, the general practice is to state that the whole of the orders of the trial court should be set aside, cancelled, or interfered with in one way or the other. The reliefs as quoted above do not make any such claim. Counsel could have amended the grounds of appeal but up till now he has failed to do so. Not having appealed against the order for taking over the Institute, he has evinced the intention not to complain against that order. The Court of Appeal was therefore right in dismissing his appeal for the reason that the grounds of appeal do not cover the order to take over the school.

For the above reasons, the application fails and I would dismiss it.

In the case of *Hanna Assi (No 2)* v *Gihoc Refrigeration and Household Products Ltd (No 2)* [2007-2008] SCGLR 16, this court laid down the rule on substantial justice where the facts of the case justify that that should be done. That case held that the trial court was entitled to grant the relief to the defendant who had not filed a counterclaim on that relief. The basis of the decision was that the evidence on the record justified that conclusion. One has to consider the facts on the record before this court in order to do substantial justice to the parties. In the first place, the outcome of this application will not affect the substantive case filed by the applicants which is still pending in the High Court or the Court of Appeal. What really is at stake in this application is whether or not the Government should take over the Institute. If the applicants lose this application, it would mean that the Government may take over the Institute. What that will give rise to is that when the trial court concludes the trial and the applicant wins the case, the parties may take over the Institute, or re-negotiate with the Government on the price or sell it to another buyer. At worst, the Government will be required to refurbish the Institute or put it in a position that can be described, as near as possible, as the status quo ante if the Government has to relinquish its occupation or hold on the Institute. It will all boil down to the question of money. No one can seriously argue that the Government will not have enough money to

refurbish the Institute or put it into the status quo ante if so ordered by the court. And so what is the applicant worried about?

On the other hand, what will be the alternative of preventing the Government from taking over the Institute? The property was bequeathed to five children of the original owner, Rosamund Mancell. Four out of the five children have agreed to sell the Institute. Only one child, who is now represented by her children, opposes the sale.

The purchase price is a huge amount of GHC 13,549, 326, 000. 00. The money belongs to the people of Ghana. This case will no doubt take some time to be disposed of when it has, presumably, to travel from the High Court, the Court of Appeal and the Supreme Court with the possibility of review in the Supreme Court. During the time that the litigation rages on in the courts, what should happen to the peoples' money collected by the children? Should they refund the moneys or keep them till the conclusion of the case in the courts?

The next question is what will happen to the Institute while the litigation goes on? The Institute is a school. It is obvious that those children who support the sale may have collected their moneys. They may not be interested in running the Institute or cannot be made to keep the money and at the same time run the school. That will amount to what the people of Ghana say that one cannot sell one's goat and at the same time hold on to it by grabbing its tail. Allowing the Government to take over the school will benefit the society whose colossal money would otherwise be tied up with the children or the court just because one out of the five children of the original owner of the school has questions to raise with the sale. She is definitely entitled to pursue the litigation to vindicate her rights. But what will she gain by preventing the Government from taking over the school while she pursues her rights in court? Or what will she lose by allowing the Government to take over the school while she pursues her rights in the courts? I leave these questions to be answered by the applicants and those within their family who support her.

In my opinion, this court would not be considered as acting rightly if we allow the money to be tied down and the school allowed to fallow when the alternative of allowing the Government to take over will benefit the school - going community and their parents in this country. In the interest of justice and with the objective of doing substantial justice to all the parties and society at large, the Government should be allowed to take over the school.

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

ANSAH, JSC:-

This application was brought pursuant to Article 132 of the Constitution for an order of certiorari to quash the orders made by the High Court, Accra, Human Rights Division, on 12th November 2009 and a further order prohibiting the said court from taking any proceedings in execution of the order. The grounds for which the application was brought were:

"(i) want of jurisdiction and

(ii) Breach of the audi partem alteram partem rule".

The facts on which the application was brought were stated in the accompanying affidavit, the salient parts of which read as follows:

"3 On 18 December 2008 the applicant commenced in the High Court Accra, Human Rights Division suit Number HRC /9/09, against the interested parties.

4 Following the writ the applicant on 27 January 2009 applied for order of interlocutory injunction against the Interested Parties herein.

5 After hearing the parties, the High Court Human Rights Division (Coram U. P Dery J) on 18 May 2009 not only dismissed the applicant's application for injunction but also dismissed the applicant's suit in limine. The Court thereupon ordered the 2nd Interested Party to recover possession of the school subject matter of dispute.

6 The applicant appealed against the above decision on 18 May 2009…..

X X X

X.

8 On 23 October 2009 the applicant filed a motion on notice for an order restraining the Interested Parties, their agents and assigns, from taking over or acting in any manner inconsistent with the beneficial interest of the estate of Elizabeth Mansah Mancell in Mancell Vocational Institute and its assets pending the final determination of appeal filed by the applicant. The motion was returnable on 11 November 2009. A copy of the applicant's motion for injunction pending appeal is annexed hereto marked as "B".

9 On 10 November 2009, the Registrar of the High Court served on the applicant Civil Form 6 that the record of appeal had been forwarded to the Court of Appeal. A copy of the Civil Form 6 issued on 9 November 2009 served is annexed hereto marked as "C".

X X X

X.

11 The High Court ruled on 12 November 2009 that notwithstanding the service of Form 6 on applicant it had jurisdiction to entertain the applicant's application for injunction pending appeal.

12 The Court proceeded to dismiss the application for injunction pending appeal with costs of GH ¢2,000.00 against the applicant, As a result of the dismissal the court granted the 2nd Interested Party's application for a writ of possession to issue for the recovery of the property in dispute. We have applied for a copy of the ruling and will produce same when we have obtained it….

13 I m advised and verily believe same to be true that upon service on the applicant with Civil Form 6, the High Court ceased to have jurisdiction to entertain any interlocutory application in respect of the appeal.

12 The assumption of jurisdiction by the court to determine the applicant's motion for injunction pending appeal is contrary to law and without jurisdiction".
The above paragraphs are a summary of one leg upon which the application was founded.
The other leg was that the 2nd Interested Party filed an affidavit in opposition of the application for injunction which was not served on the applicant before the hearing. That was a breach of the "*audi alteram partem*" rule of natural justice.

In his affidavit in opposition to the application the 1st interested party admitted paragraphs 4 and 5 of the averments in the affidavit in support quoted above and stated that the High Court made three orders namely:
"1 An order dismissing the applicant's application for interim injunction,
2 The dismissal of the applicant's case in limine, and
3 An order for the Government of Ghana to take over the Mancell Institute.

There was no appeal against the third order and so did not form part of the record of appeal; its legality or otherwise was therefore not on appeal.

I may pause here and refer to rule 21 of the Court of Appeal Rules 1997, CI 19 (as amended by CI 25) in extenso, as it was referred to copiously by the applicant. It read:
????"21 Control of proceedings during pendency of appeal.

After the after the record of appeal has been transmitted from the court below to the Court, the Court shall be seised of the whole of the proceedings as between the parties and every application shall be made

to the Court and not the court below but any application may be filed in the court below for transmission to the Court."

The rule is not difficult to understand and it received judicial interpretation in *Shardey v Adamtey & Shardey v Martey and anor. (Consolidated) [1972] 2 GLR 380* that:

"1 Where an appeal has been entered by the registrar the Court below becomes functus officio not only as regards the judgment in the case, but also in connection with all proceedings that may be taken by either party after delivery of judgment. The jurisdiction of the court below is clearly ousted and the mandatory words of rules 21 of L.I. 218 are that every application shall be made to the Court and not to the court below". See also *Rep. v High Court, Ho, ex parte Evangelical Presbyterian Church of Ghana [1991] 1 GLR 323*.

Substitute rule the 'Court of Appeal Rules 1997, CI 19' for 'L.I. 218' and also 'after an appeal has been transmitted from the court below' for 'an appeal has been entered by the Registrar of the court below' and the above interpretation in *Shardey v Adamtey and Ex parte Evangelical Presbyterian Church (supra)* is applicable in this appeal.

The applicant traced the chronology of the case and stated that on 18/12/08 the applicant commenced proceedings and subsequently applied for an order of interlocutory injunction against the interested parties namely, Mrs. Salma Mancel Egala and the Attorney General. After hearing the application, the trial Judge dismissed both the motion for injunction and the whole action in limine and ordered the interested parties to recover possession of the school. The applicant appealed against the ruling of the High Court and applied for an order of stay of execution of the ruling. The High Court refused the application for stay whereupon it was repeated at the Court of Appeal. It was once again refused.

Undaunted by these misfortunes, the applicant filed for an interim injunction to restrain the respondents, interested parties herein, their agents, privies and assigns from taking over the school. The motion was made returnable on 11/11/09 and two days prior to that date the Registrar of the High Court issued

Civil Form 6 to inform the parties that the record of appeal proceedings had been forwarded to the Registrar of the Court of Appeal. The Registrar was obviously proceeding under and in compliance with the rules of the Court of Appeal, Rule 14 of C.I. 19 to be precise. The fact of the transmission of the record of the record of proceeding was also brought to the notice of the High Court Judge. He was of the view that notwithstanding the transmission of the record to the Court of Appeal, he still had the jurisdiction to hear the application for it had been filed before the transmission.

The view taken by the judge in assuming jurisdiction accepted by the respondent and the opposing view by counsel for the applicant raise the legal issue which must be carefully considered namely, when does the jurisdiction of the High Court to entertain an application in a suit after it had passed judgment and the matter goes on appeal end?

The Rules of court are not silent on the matter. One such rule which I consider to be relevant is the Court of Appeal Rules, 1997, CI 19, where it was provided in Rule 21 quoted above.

By this rule, the High Court retains jurisdiction when the record is not ready for transmission or has for any reason not been transmitted to the Court of Appeal, with the corollary that as soon as it has been transmitted to the Court of Appeal, then its jurisdiction to entertain any application is curtailed except that whatever is meant for the Court of Appeal but was filed in the High Court must be forwarded to the latter court.. That the record has been transmitted to the Court of Appeal is a point so forcefully made by the applicant herein which point has not been impugned in any way by the respondent.

The submission in reply by the respondent needs to be examined carefully. It was that the part of the order sought to be stayed by the application was not the subject of appeal to the Court of Appeal. The submission presupposes that the subject matter of the application must be shown to have been, or, was closely related to the substance of the appeal. That necessitates the gist of the appeal to be considered.

The grounds of appeal were that:

> "i. The learned judge was wrong in law in holding that the devise of Mancell Vocational Institute and its assets in the will of Mrs. Rosamond Mancell was to the beneficiaries thereof as joint tenants;
>
> ii. The learned judge was wrong in law in holding that the plaintiff had no capacity to maintain her action;
> iii. The learned judge erred in not granting the plaintiff's application for interlocutory injunction.

Other grounds of appeal to be filed upon receipt of a copy of the record of appeal."

No such other ground(s) have so far been filed. The appeal was for the purpose that the order of the judge to dismiss the plaintiff's case in limine be reversed and the plaintiff's application for interlocutory injunction granted. In my candid opinion there was a close relation between the substance of the appeal and the application for interlocutory application as both affected the estate of Mrs. Mancell deceased. That being so it meant the High Court having by its ruling dismissed the suit in limine (including the application for interim injunction) has taken a step that was likely to have an effect on the appeal before the Court of Appeal. If it was considered that when the judge gave this ruling the record of proceedings had been transmitted to the Registrar of the Court of Appeal and had been brought to his notice, then that the application was pending before him before the Civil Form 6 was filed was no answer to the fact that by the rule of court in Rule 21 of the Court of Appeal Rules, his competence to entertain the application was frozen 'instanta'.

Thus, I must also express my opinion that it is unacceptable that there was no relationship between the application for injunction before the High Court Judge and the appeal to the Court of Appeal. There was and any submission to the contrary must be rejected.

By his proceeding to deal with the application before him in the full face of rule 21 of CI 19 was a clear case of exceeding his jurisdiction an error of law commonly called an illegality, a ground for a successful application for certiorari.
It was certainly unimpressive that the order for the recovery of possession of the Institute by the 2nd interested party, to wit the Attorney General, was not on appeal and only the two other orders by the High Court were so the High Court judge could deal with it. This is because of the rather sweeping definition given to the 'record' in Rule 67 of CI 19 as meaning:

> "…the aggregate of papers relating to the appeal including the pleading, proceedings, evidence and judgment to be laid before the Court of Appeal on the hearing of the appeal."

It was these that were transmitted to the Court of Appeal under Rule 14 (1) of CI 19. What was more the applicant did not close all doors available to him in formulating his grounds of appeal against the ruling by the High Court judge when he intimated that further grounds of appeal would be filed upon receipt of the record of proceedings. He could later amend the grounds of appeal by adding an appeal against the order for the recovery of possession of the Institute or taken even suo motu by the court, at any stage of the proceedings: see *GIHOC Refrigeration and household Products v Jean Hannah Assi [2005-2006] SCGLR 458. These* days and age administration of justice thrives on doing substantial justice in deserving cases more than hemmed in by strict and narrow interpretation of rules which the late Prof. Ocran called *'technicism'* which are nothing "but technicalities of the law", at 492 of the report. When the matter was reviewed sub nom. *Hanna Assi (No 2) v Gihoc Refrigeration Household Products Ltd (No. 2) [2007-2008] SCGLR 16,* the court held that the majority of the ordinary bench of this court erred in affirming the decision of the Court of Appeal which had held that the trial court had no jurisdiction to grant certain reliefs for there had not been counterclaimed for. This court held that the reliefs had been clearly established on the evidence before it. Orders 28 r12 and 63 r6 of the old High Court (Civil Procedure Rules) 95 (L.N. 140 A), allow a court or a judge to

amend all defect or error in any proceedings at any time as the court or judge may think necessary for the purpose of determining the real question or issue raised by or depending on the proceedings. The court may also in all causes or matters make any order it may consider necessary for doing justice irrespective of whether the order had been asked for by the person entitled to it or not, provided there was evidence led in support thereof.

I opine I have sufficiently explained myself in holding that the application succeeds and certiorari shall lie against the decision by the High Court given on 12 November 2009. Consequently, the judgment of the High Court given on that day, is hereby ordered to be brought up to this court towards the end that it be quashed and same is quashed

J. ANSAH
JUSTICE OF THE SUPREME COURT

DOTSE, JSC:-

INTRODUCTION

When I consider the family relationship between the Applicant herein and the 1st Interested Party herein, then my inability to comprehend why it has not been possible for the parties to reach some modicum of understanding reaches a crescendo.

The following passage, taken from the writings of THOMAS JEFFERSON on October 26th 1801 to MARY JEFFERSON EPPES has reinforced my belief that it is rather in the family that bonding is stronger and where individuals get protection and love from. This is what THOMAS JEFFERSON said:

> "I have here company enough, part of which is very friendly, part well enough disposed, part secretly hostile, and a constant succession of

strangers, but this only serves to get rid of life, not to enjoy it; it is in the love of one's family that heartfelt happiness is known. I feel it when we are all together and when alone, beyond what can be imagined"

It is my very best hope that when all the dust and hullabaloo about the intrigues in this protracted case has settled, the family tree which is on the verge of breaking will be straightened up to give meaning to the passage that it is in the love of one's family that heartfelt happiness is known.

What then are the facts of this case?

In this motion which seeks to invoke the supervisory jurisdiction of this honourable court, the applicant prays for an order of certiorari directed at the High Court, (Human Rights Division), presided over by His Lordship, Justice Paul Uuter Dery. The purpose is to bring up to this court and to have quashed the orders of that court dated the 12th day of November, 2009 on the following grounds;

i. Want of jurisdiction and;
ii. Breach of audi alteram partem rule.

For clarity of thought and a logical resolution of the issues raised in this application, I will entirely recount the facts (as on the record) which led to the present application.

The Plaintiff filed a writ in the High Court on behalf of herself and two other siblings against the Attorney-General and Mrs Salma Frances Mancell-Egala, seeking to set aside the sale of their interest in a property known as Mancell Vocational Institute. It is not in dispute that the Plaintiffs are the children of Miss Elizabeth Mansa Mancell, who died intestate on 27th October 1993. Miss Elizabeth Mancell (deceased) is survived by four other siblings, namely Mrs. Rosemond Dsane-Selby, Kobina Idun-Sackey, Victoria Mancell and Mrs. Salma Frances Mancell-Egala and they are all children of Mrs. Rosemond Mancell, the original owner of Mancell Vocational Institute who died testate on the 14th of August 1987.

By her will, clause 8 to be exact, Mrs Rosemond Mancell devised to all her five children a school known as Mancell Vocational Institute.

According to the Plaintiff, and unknown to her siblings and herself, the surviving children of Mrs. Rosemond Mancell, based on an agreement executed between them and dated 16th June 2006, (appendix E in their affidavit) purported to assign Mancell Vocational Institute to the Government of Ghana represented by the Ministry of Women's and Children's Affairs. It was this lack of consent on their part to the purported sale of the Institute which spawned the writ.

The reliefs endorsed on the writ read as follows:

a. Declaration that the purported sale in May 2008 by the 1st Defendant to the Government of Ghana of Mancell Vocational Institute without the consent of the children of Elizabeth Mansa Mancell (deceased) is a nullity.
b. An order setting aside the purported sale referred to above
c. An order of perpetual injunction restraining the Government of Ghana, its agents and assigns from taking over or acting in any manner inconsistent with the beneficial interest of the children of Elizabeth Mansa Mancell in Mancell Vocational Institute, Kumasi.

In an application for interlocutory injunction pending the hearing of the suit, the Court presided over by Justice U.P Dery refused the application and dismissed the entire action. In his ruling on the matter, the judge proffered the following reasons for his action and I will reproduce the relevant portions.

> "Before going into the merits of the motion, one has to determine a crucial issue and that is whether the devise of Mrs. Rosemond Mancell of the school to her children was one to which they were to hold as tenants in common or joint tenants. The features of the two joint ownerships are different with different legal consequences. A tenancy of ownership in common arises when owners have community of possession but distinct and several titles to their shares which need not necessarily be equal, and

there is no right of survivorship between them. A joint tenancy on the other hand is created where the same interest in real or personal property is passed by the same conveyance to two or more persons in the same right with right of survivorship…

The document in issue in this case is a will, a legal document in which Mrs. Rosemond Mancell, a very industrious woman during her lifetime made. This court is called upon to give effect to clause 8 in her "last will and testament" The said clause reads thus; "I give the Mancell Vocational Institute in Kumasi together with all fixed assets to all my children" The question is whether the intention of Mrs Rosemond Mancell is that her children should hold the devised property as tenants in common or joint tenants? In clause 4 of the same will, the testatrix devised a house situated at Akwatia Line, Kumasi to her two daughters namely Victoria and Mansa Mancell (that is Plaintiff's mother) to hold as TENANTS IN COMMON. The will is contained in seventeen (17) clauses of which fifteen (15) clauses are devises. Out of the 15 clauses, it is only four (4) clauses (Clauses 4,8,13,16) that the testatrix devised some properties to joint owners. Apart from clause 4 where the joint owners are two of her children named above, in the other three clauses, the devises went to all her children. Again, apart from clause 4 in which the testatrix said the joint owners should hold the property as tenants in common, in the other three, the testatrix is silent as to the type of joint ownership. As the Supreme Court stated in In Re Atta (Decd); Kwako v Tawiah [2001-2002] SCGLR 461 at 486 (supra) as well as the other authorities which make up the fourth rule indicated hereinbefore, the court must examine the whole of the will of Mrs Rosamond Mancell in order to discover her intention in clause 8. Since in clause 4 the testatrix specified that the joint owners therein should hold the property as tenants in common, it goes without saying that in the other clauses of joint ownership, namely clauses 8,13 and 16 where she was silent, she intended that they hold same as joint tenants. If she wanted any of these three categories of joint owners to hold the properties therein as tenants in common she would have said so

as she did in the case of clause 4. It follows therefore that Mancell Vocational institute which the testatrix devised to all her children in clause 8 was intended for the children to hold same as joint tenants and not tenants in common. The Plaintiff's mother who was one of the joint tenants passed away on 27-10-1993. As indicated above, one of the features of joint tenancy is the right of survivorship. That being the case, the Plaintiffs' mother's share went to the surviving children of the testatrix. The Plaintiff and her siblings therefore have no interest in the school"

Next, is this most startling observation made by the judge, and again I will reproduce it verbatim for better appreciation.

"Counsel for Plaintiff has referred the court to Section 14(3) of the Conveyancing Decree, 1973 (NRCD 175) and suggests that by that section the testatrix intends that the beneficiaries should hold the property in clause 8 of the will as tenants in common. I disagree with him. Section 14(3) of NRCD 175 states as follows:

> "A conveyance of an interest in land to two or more persons, shall create an interest in common and not a joint tenancy, unless it is expressed in such conveyance that the transferees shall take jointly, or as joint tenants, or to them and the survivor of them, **or unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy."** (my emphasis)"

As I have indicated earlier in this ruling, from the tenor of the will, it is clear that the testatrix intended to create an interest in joint tenancy not an interest in common. In coming to the conclusion that the children of Mrs. Rosamond Mancell are to hold the school as joint tenants, I am not oblivious of the fact that certain transactions evidenced in writing and other documents create the impression that the devise is one of tenancy in common. Notable among these documents are:

a. The agreement dated 16-06-2006 made between the surviving children of the late Mrs. Rosamond Mancell in which it is stated that they are the majority of the beneficiaries of Mancell Vocational Institute. This obviously means the estate of Elizabeth Mansa Mancell, presumably, one of the beneficiaries, is not party to the said agreement.

b. The unsigned sale agreement between the beneficiaries of the school and the government of the Republic of Ghana **also mentioned the Plaintiff as one of the beneficiaries.**

c. The notice of payment into court filed at the Tema High Court by the lawyers of the 1st Defendant in which it is stated that the money paid was **money due to the Plaintiffs in that suit. The Plaintiffs in that suit included the Plaintiff in this suit and her siblings.**

d. The affidavits of the 1st Defendant as well as the statement of case of his counsel **all suggest that the Plaintiff and her siblings are beneficiaries of the school**; and

e. Various correspondences concerning the management and takeover of the school, also purport to **admit that the Plaintiff and her siblings are beneficiaries of the school.**

The above impression arises as a result of the erroneous construction of clause 8 of the will. Had the parties appreciated the proper construction of the said clause. **Since the Plaintiff and her siblings have no share in Mancell Vocational Institute, they have no capacity to mount this action in the first place. Having no capacity to mount this action also means the present *motion is baseless* for it is now trite learning that an applicant in a motion for interlocutory injunction must show that he has a legal right to protect**- See American Cynamid v Ethicon (1975) ALL ER 504; Vanderpuye v Nartey (1977) 1 GLR 428; GPRTU v Danful (1995-96) 1 GLR 24. The Plaintiff/applicant not having any legal right to protect is not entitled to an order of interlocutory injunction. Furthermore, although this ruling is in respect of an

interlocutory application, once it is established that the Plaintiff lacks capacity to institute this action the court has power to **dismiss** the entire action even at this stage" (Emphasis mine)

It can be gleaned from the records that after the judge gave the ruling and dismissed the whole action, 2nd Defendant made an oral application for an order for the Government of Ghana to take over the school, which order was granted the same day as follows;

"BY COURT: Application granted. It is hereby ordered that the Government of Ghana takes over the school (Mancell Vocational Institute, Kumasi) immediately."

As is to be expected, the Plaintiff seeing her whole action disintegrate at this interim juncture quickly filed a notice of appeal in the Court of Appeal that same day.

The grounds of Appeal were stated as follows

(i) The learned judge was wrong in law in holding that the devise of Mancell Vocational Institute and its assets in the will of Mrs. Rosamond Mancell was to the beneficiaries thereof as joint tenants;

(ii) The learned judge was wrong in law in holding that the Plaintiff had no capacity to maintain her action.

(iii) The learned judge erred in dismissing the Plaintiff's claim in limine

(iv) The learned judge erred in not granting the Plaintiff's application for interlocutory injunction.

RELIEF SOUGHT FROM THE COURT OF APPEAL

"The order of the learned judge dismissing the plaintiff's case in limine be reversed and the plaintiff's application for interlocutory injunction be granted."

Awaiting the hearing of the appeal, Plaintiff brought an application for stay of execution pending appeal in the High Court. The learned trial judge ruled that there was nothing executable in his earlier ruling to be the subject of an application for stay of execution and refused the application on the 3rd day of July 2009.

The application was repeated in the Court of Appeal, which also upheld the learned trial judge's decision that there was nothing executable in the order granted. The Court of Appeal was of the considered opinion that there were two separate decisions made that day and the second one which was the order for the Government of Ghana to take over the school was not before them. This is what the Court said;

> "From the processes filed in the application, it is obvious that two decisions were delivered by the High Court on the 18th May, 2009. The first is the main ruling which refused the application for injunction and dismissing the applicant's action in limine. The second is the order that the Government of Ghana should take over Mancell Vocational Institute immediately. Indeed it is the first decision that the applicant exhibited in this proceeding as exhibit LQ4. We have carefully read the said ruling marked LQ4 and observed that no where in that ruling did the court order the Ghana Government to take over the institute in Kumasi. Ironically, this is the ruling which applicant wants this court to stay, hence its exhibition by the applicant."

On October 23rd 2009, Plaintiff again filed an application in the High Court **for an order restraining the Defendants and their agents and assigns from taking over or acting in any manner inconsistent with the beneficial interest of the estate of Elizabeth Mansa Mancell in Mancell Vocational Institute** pending the final determination of the appeal.

The record indicates that on the day the application was set down for hearing, i.e. 11th November 2009, Counsel for the applicant informed the court that he had

been served with the Civil Form 6 the previous day and therefore the High Court lacked the jurisdiction to hear the application. Plaintiff also indicated that he had not been served with the Defendant Respondent's affidavit in opposition to his application. The learned trial judge nevertheless was of the opinion that he was fully clad with jurisdiction and after arguments were advanced, proceeded to adjourn to the next day to give a ruling on the application. Counsel for the applicant, also firmly certain that the judge was wrongfully assuming jurisdiction informed the court he was not going to be party to the proceedings of the next day. The learned trial High Court judge however went ahead the next day to give a ruling and declined to grant the Plaintiff's application. It was this series of events that has led to the present application invoking this court's supervisory jurisdiction and the orders sought to be quashed.

There has been a lot of learning and exposition recently on when certiorari will be granted by the Supreme Court to quash an order or decision of the Court of Appeal or High Court.

IN REPUBLIC V COURT OF APPEAL, ACCRA; EX PARTE TSATSU TSIKATA [2005-2006] SCGLR 619 the Supreme Court speaking unanimously through Georgina Wood JSC(as she then was) explained what could be categorised as errors as follows:

> "The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then, that the error(s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. The error of law must be one on which the decision depends. A minor, trifling, inconsequential or unimportant error, or for that matter an error which does not go to the core or root of the decision complained of; or stated differently, on which the decision does not turn, would not attract the court's supervisory intervention. Also, where the proceedings are regular,

the charge that the court has misread or misconceived a point of law or misdirected itself, does not per se constitute a sufficient ground for the grant of the order. Similarly, the complaint that there has been an improper exercise of the discretionary jurisdiction is clearly insufficient.

In the instant application, the Applicants have argued that the learned trial High Court Judge lacked jurisdiction after he was notified that Civil Form 6 had been served in respect of the appeal filed against his judgment and also acted in breach of the audi alteram partem rule by denying the applicants a hearing.

In this case, there is no dispute the Applicant in this court has filed an appeal against the Ruling of the High Court, dated 18th May, 2009 in terms already referred to supra, Learned Counsel for the Applicant has averred in paragraph 10 of the affidavit in support of the certiorari application as follows:

> "On 11th November, 2009, I appeared in court and informed the court of the fact that the applicant had been served with Civil Form 6 and that by Rule 21 of the Court of Appeal Rules, the Court of Appeal had become seised of all the proceedings, and that the High Court lacked jurisdiction to entertain the applicant's application pending appeal"

One would have expected the learned trial judge to tread cautiously after the said information had been given him. This is because jurisdiction is a condition precedent to the assumption of any court to determine any case brought before it. Therefore if the lack, want or excess of jurisdiction is raised before any court of law, it should not be treated as a fanciful or trifling objection as was done by the learned trial judge in the instant case. Since jurisdiction is so basic to the foundation of any court's powers to determine any matter before it, issues regarding jurisdiction must be properly investigated and dealt with by the Court before it can proceed with the trial or hearing of the suit. What the trial judge should have done was to make enquiries about the claim that Civil Form 6 had been served in the case from the Registrar of his own court, or from the Registrar

of the Court of Appeal before proceeding to deal with the case in the peremptory manner and or indecent haste with which he dealt with the case.

For example, if the learned trial judge had critically adverted his mind to the total effect of rule 21 of the Court of Appeal Rules, 1997, C.I. 19, he would have been much more circumspect in the decision he made in the case. This rule 21 states as follows:

> "After the record of appeal has been transmitted from the court below to the court, the court shall be seised of the whole proceedings as between the parties and every application shall be made to the court and not to the court below, but any application may be filed in the Court below for transmission to the court"

It is also very instructive to note the sub-heading of this rule 21 which is "control of proceedings during pendency of appeal"

Rule 67 of C.I. 19, which is the interpretation section of the instrument defines "court" as means the Court of Appeal and "court below" means the court from which the appeal is brought.

The meaning of Rule 21 of C.I. 19 as I understand it is that, if during the pendency of an appeal, the record of appeal has been transmitted from the court below, in this case the trial High Court, to the Court of Appeal, it is the court of appeal that shall be responsible for hearing and determining any application that will be filed. If however, any application is filed in the High Court, that application will be transmitted to the court of appeal for hearing and determination. The clear meaning is that, once the Civil Form 6 has been served on the counsel for the Appellant, in this case the applicant, it means the record of appeal, which by definition constitutes the aggregate of papers relating to an appeal including the pleadings, proceedings, evidence and judgment have been laid before the court of appeal, the court below which is the High Court has no jurisdiction whatsoever to entertain the application that had been filed before it.

It does not really matter that it had been filed before the High Court since as at that time the appeal record had not been transmitted to the court of appeal. I am therefore of the firm opinion and conviction that the High Court lacked jurisdiction in the matter, and wrongly assumed jurisdiction in the case. I am emboldened by the decision of the Supreme Court in the case of **REPUBLIC v HIGH COURT, HO ex parte EVANGELICAL PRESBYTERIAN CHURCH OF GHANA [1991] 1 GLR 323,** where the court in construing an analogous provision in the repealed Court of Appeal Rules, LI 218 held as follows:

> "… by the provision of rule 21 of the court of appeal rules, 1962 (LI 218) the High Court ceased to have jurisdiction to entertain any application relative to the subject-matter of appeal as soon as the appeal was entered in the cause list of the Court of Appeal… Pending entry, however, the High Court "was the proper forum for such applications"

Secondly, I am of the opinion also that, having delivered the ruling appealed against on 18th May, 2009, and decided that the entire suit of the Applicant be dismissed on grounds of capacity, the learned trial judge had become functus officio to have even considered the oral application requesting for the vesting of the Mancell Vocational Institute in the Government of Ghana. See **ATTORNEY-GENERAL v FAROE ATLANTIC CO. LTD [2005-2006] SCGLR 271**, Holding 3. Under Order 19 rules 1,2 &3 of the High Court (Civil Procedure) Rules 2004, C.I. 47, all applications to the Court must be made by motion supported by affidavit. This can either be ex-parte or on notice. The application that was made to the court sins against this procedure and is therefore flawed.

Thirdly, it is clear from the affidavit evidence and statement of case filed that the affidavit in opposition filed by the 2nd Interested Party had, as at 12th November, 2009 when the ruling was delivered by the trial High Court dismissing the Applicant's application for restraint of the A-G, that the application had not been served on the Applicant.

That being the case, it is unclear if the contents of that affidavit informed the learned trial judge to dismiss the Applicant's application. In such a situation, I will

consider the rights of the Applicant to be afforded an opportunity to a hearing of having been breached.
I will accordingly grant the certiorari on the basis of breach of the audi alteram partem rule as well as on jurisdictional grounds.

In this application, I have carefully considered the submissions of all counsel in their respective statements of case and affidavits. Having apprised myself of all the relevant exhibits attached to the application, I am convinced that the Notice of Appeal filed by the Applicant against the first ruling of the trial court on 18th May, 2009 is all encompassing to have a total effect on the second ruling provided it is even considered valid.

In order to consider whether the appeal will have any effect on the entire suit or not, reference must first be made to the reliefs that the applicants claimed before the trial court. These reliefs had been referred to supra, and can briefly be summarised as follows:

(i) Declaration that the purported sale of Mancell Vocational Institute by the 1st Interested Party without the consent of the applicants is a nullity
(ii) An order to set aside the purported sale
(iii) Perpetual injunction restraining the 2nd Interested Party, (GOG) from taking over the Institute in a manner inconsistent with the rights of the applicants.

The application for injunction was premised on the above reliefs and by the ruling of 18th May, 2009, the entire action of the applicants was dismissed in its entirety.

From the way and manner the grounds of appeal have been formulated, there is no doubt that it has the effect of resurrecting the entire suit if successful. For example, the ruling on whether the devise of Mancell Vocational Institute was to the beneficiaries thereof as joint tenants or tenants in common is a formidable ground of appeal in view of the Supreme Court decision in **Fenuku & Anor v John Teye & Anor [2001-2002] SCGLR 985** where the majority of the

Supreme Court made very profound pronouncements on the provisions of Section 14(3) of the Conveyancing Act, 1973, NRCD 175 and its effect on joint tenancy and tenancy in common.

Then there is the ground of appeal attacking the holding that the Applicant had no capacity to maintain the action. As a matter of fact, all the remaining grounds of appeal if sustained will have the surgical effect of resurrecting the Applicant's claims before the court and that means the court will have to pronounce on whether the Mancell Vocational Institute ought to be vested in the Government of Ghana (GOG) without the consent or interest of the applicants being taken into consideration.

The Supreme Court as the court of last resort, should strive to do substantial justice in all cases brought before it and avoid strict reliance on technicalities. For example, whether a ruling or judgment is executable or non-executable; or whether the applicant has appealed against this or that ruling or judgment has to be considered in a general and all embracing sense.

As the apex court, we should consider in detail the total effect our decisions are likely to have on the body of laws and rules of procedure which govern the practice of the law before our courts.

Since the lower courts and other superior courts are expected to take guidance from the Supreme Court, it is important for this court to consider the total effect of some processes filed in the court before decisions are delivered in the cases. For example, if the appeal filed against the ruling of 18th May 2009 should succeed, and the property, the subject matter of that suit, the Mancell Vocational Institute is allowed to go to a third party, what then will be the effect of the successful appeal?

This is why sometimes, I feel there is the need for this court to revisit its principles of refusing to stay execution in non-executable judgments, even if it is apparent that by such a refusal, the successful party or respondent will go into executing that judgment which is still on appeal. In **HANNA ASSI v GIHOC REFRIDGERATION & HOUSEHOLD PRODUCTS LTD No.2 [2007-2008]**

SCGLR 16, the review panel, this Court made very progressive and authoritative pronouncements such as the following, which I consider as the philosophical underpinnings that should regulate, guide and direct the decisions of this court.

In the HANNA ASSI No. 2 case just referred to supra, the majority of the review panel of the Supreme Court held as follows:

> "A decision touching on jurisdiction, if wrong, was a fundamental error which could lead to injustice and was clearly a ground for review. In the instant case, the majority of the ordinary bench erred in affirming the decision of the Court of Appeal which had held that in the absence of a counter-claim, the trial court had no jurisdiction to grant the reliefs of declaration of title and recovery of possession of the disputed property to the defendant, i.e. the applicant. Those reliefs were clearly established on the evidence. In such a situation, the essential consideration was whether there was surprise or unjust denial of opportunity to meet the matters concerned. In the absence of such unsatisfactory features, it would be unjust to allow the majority decision to stand"

Elaborating further on this majority review decision, Prof. Modibo Ocran (JSC) of blessed memory stated in unequivocal terms the philosophical basis of the decision in the following terms:

> "The basic concern is that reviews should be motivated by a desire to do justice in circumstances where the failure to intervene would amount to a miscarriage of justice. The question was asked at a point in our last hearing, "what is justice" I would refer to justice in this context not simply in the Aristotelian sense of commutative or rectifiable justice, but more importantly to justice as an external standard by which we measure the inner quality of the law itself."

This clearly means that this court or any other court for that matter can on appeal such as in the instant case, construe the effect of the appeal generally to admit of the rights and interest of the parties in the Mancell Vocational Institute. Any attempt to brush this issue aside and pretend that it does not arise is wrong and unacceptable.

Applying the above as a guide, I will grant the application sought by the Applicant. Wood C.J, in her lead opinion in the unreported case of **THE REPUBLIC**
VS AUTOMATED FAST TRACK HIGH COURT No. 4 (ACCRA) EX-PARTE STATE HOUSING COMPANY LTD-APPLICANT
MRS. DINAH KORANTEN AMOAKO –Interested Party dated 26th February 2009 laid down the guidelines in determining the question of when a judge is clothed with jurisdiction in a matter as follows;

> "It does appear to me then that ordinarily, a judge's first conclusive claim to jurisdiction, whether express or implied, is the date of the decision that he or she does indeed have jurisdiction, not the date on which an objection, if any, whether formal or informal is raised. I would not make the date on which the objection is raised the reference point, the reason being that even when a formal legal objection to jurisdiction is raised, under normal circumstances, the judge must assume jurisdiction to determine that jurisdictional question. The date the judge proceeds to hear and determine that jurisdictional question then cannot be the reference point, but the date on which the judge rules that he or she has jurisdiction and perhaps proceeds to exercise it. Even so I hesitate to present this as the inflexible rule of law".

Applying these guidelines, to the facts of this case would mean that the judge assumed jurisdiction on the 12th of November, 2009, three days after Civil Form 6 had been served on the applicant. Clearly therefore, the assumption of jurisdiction after it was brought to the notice of the learned trial judge that Civil Form 6 had

been served meant that from that point, he lacked jurisdiction to entertain the application.

Accordingly, the orders made by the learned trial judge are hereby quashed and the application he dismissed is restored to the list to be put before the High Court for hearing.

J. V.M. DOTSE
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH, JSC:-

The facts of this case have been accurately captured in the opinion of my learned brother Dotse JSC and I need not repeat same.

The applicant herein has invoked the supervisory jurisdiction of the Supreme Court to quash by certiorari the ruling of the High Court , Accra, Human Rights Division dated the 12/11/2009 and for an order of prohibition to prevent the court from proceeding to levy execution pending the determination of this application.

I have carefully considered the opinion of my brother Dotse JSC but for once I am unable to agree with him on some few issues in his opinion.

From the facts of this application, it is indeed true that the Civil Form 6 was served on the applicant on 10/11/2009. I agree with learned counsel for the applicant that upon the service of Civil Form 6 the High Court or Circuit Court where the civil appeal emanated should not entertain any application. Rule 21 of the Court of Appeal Rules 1997 CI 19 as amended by CI 25 would have concluded

the matter but I find from the facts of this case that the appeal which was lodged by the applicant did not cover the whole proceedings of the High Court.

In civil proceedings, a party who has suffered adverse ruling or judgment is not under any obligation to appeal. If he elects to exercise his constitutional or statutory right of appeal, his appeal from the ruling or the judgment is governed by statutory rules. An appeal has always been defined as an application to a higher (appellate) court to review a decision of a lower court with the aim of finding out whether on the facts or the law or both, the lower court arrived at a correct decision. It is thus a continuation of the original action and not a fresh proceeding.

A party is thus enjoined by law and rules regulating appeals to indicate on the Civil Form 1 in the Notice of Appeal: the part of decision of the lower court complained of, the grounds of appeal and the reliefs sought from the appellate court. In practice, these are vital and in most appeals they limit the Court of Appeal to determine the part of the judgment/ruling complained of. A party is at liberty to indicate whether he is appealing against the whole judgment or ruling. He is also at liberty to indicate that he is appealing against only a part of the ruling or judgment. In the case of **BANK OF WEST AFRICA LTD V DARKO** [1970] CC 74, the appellant appealed against cost only and nothing else. In such a case, the Court of Appeal is disabled form re-opening the matter on the merits. The court is thus limited only to the part complained of except in exceptional circumstances like the issue of jurisdiction and any matter that may be very fundamental to the proceedings.

In the appeal that was lodged in the case culminating in this application, the applicant as the appellant complained of only two formal orders made by the learned High Court judge stated in exhibit "A" as follows:

> "2. PART OF THE DECISION COMPLAINED OF:

The decision of the learned judge refusing the Plaintiff's application for interlocutory injunction and the decision dismissing the plaintiff's case in limine"

As at the time of deciding this application, the applicant as the appellant had not on record amended the above orders complained of. The Court of Appeal before which the appeal is pending is thus limited to determine the two orders complained of by the appellant. The last order which is an order for the Government of Ghana to take over the Mancell Institute was left out for reasons probably known to the applicant. From Exhibit SF4, it is clear that the Court of Appeal dismissed the motion for stay of execution on the grounds that the first two orders which were the only orders complained of were not the subjects of the substantive appeal and as they were not enforceable orders they could not stay execution.

I find from the above that as the applicant had elected not to complain of the order for the take over of the Mancell Institute by the Government of Ghana there was an opportunity for the interested parties to accordingly proceed to enforce the order if they so wish. In paragraph 11 of the affidavit in opposition to the motion sworn to by **MRS. SALMA FRANCES MANCELL-EGALA** on 1/12/2009 and filed on the same date, she deposed as follows:

"11. The said order for the 2nd Defendant to take over the Institute is dated 18th May, 2009 and as at today Six months after the ruling, the Applicant has not filed an appeal against the said order"

In my opinion, the interested parties were not barred from enforcing the judgment which was not the subject of any appeal known to the law and indeed had not been complained of by the applicant in any form whatsoever.

Learned counsel for the applicant had cited the case of the **REPUBLIC VERUS HIGH COURT HO, EX PARTE EVANGELICAL PRESBYTARIAN CHURCH OF**

[GHANA] IGLR 323 to support his contention that at the time Civil Form 6 was issued the High Court was functus officio. The above case was decided under the old Court of Appeal rules, as counsel rightly pointed out, but the rule was repeated virtually verbatim under Rule 21 of CI 19 of 1997 as amended by CI 25. I consider the above case as correctly decided and the rule does not to me, call for any interpretation as its provisions are clear and unambiguous. My only worry with the adoption of the above case, is that, the order sought to be enforced in this case is not a subject of appeal. In practice, in civil appeals relating to final judgments, appellants normally complain against the whole judgment in the notice of appeal. In such cases, there would be nothing left by way of execution, etc for the victorious party if execution is stayed. In this present case which the applicant had for reasons known to herself abandoned perhaps the most crucial order in the case made by the trial judge, I think the interested parties were not to fold their arms and await the outcome of the appeal through the hierarchy of the Courts if they were desirous of proceeding to take steps to enforce the order not complained of and which to me was never the subject of any appeal. In any case, the trial court is the only court for the execution or enforcement of the order which was not the subject of the appeal and not the Court of Appeal.

I agree that the appeal if successful may affect the ground of appeal not complained of but that does not preclude the interested parties from proceeding to enforce the judgment, more so when no appeal was lodged against that order. In the case of **CHAHIN & SONS V EPOPE PRINTING PRESS** [1963] IGLR 163 SC A 24 – Crabbe – Jsc [as he then was] after subjecting virtually all the known authorities on execution said at page 172 as follows:

> "It seems to me that even if an appeal is pending a party can act on the faith of an existing judgment unless the court makes an order for stay of execution or injunction. An act that is consistent with the last existing judgment does not become unlawful by the subsequent reversal of the judgment on which reliance was placed"

On whether erroneous judgment could be executed, it was held at holding 3 of the case as follows:

> "An erroneous judgment is only voidable and even though an appeal may be pending execution lies on it as a matter of course unless a stay is granted by the court. An erroneous judgment creates estoppel between the parties to it, and when it is reversed, it cannot be treated as though it never existed. Thus a person "acting under the authority of the court", or "in reliance on ", or "on the faith of" a judgment which is subsequently reversed is protected"

The question is: if a voidable judgment could be executed even though an appeal against it may be pending, what becomes of an order of a court of competent jurisdiction that has not been a subject of appeal? I venture to answer that in the circumstances of this case, the interested party in whose favour the order was made is at liberty to enforce it irrespective of the pending appeal. In any case, the motion for stay of execution was dismissed on the grounds I have stated above.

Learned counsel for the applicant's motion for injunction to me concerned only the two orders complained of in the appeal to the Court of Appeal. It could not have covered the third order which the applicant deliberately left out and by implication had no quarrel with it. I will on my part take a solitary stance and dismiss the application to issue certiorari to quash the whole proceedings as advocated for by counsel for the applicant.

Another ground based on the lack of service of the affidavit in opposition was well argued by learned counsel for the applicant. He placed reliance on the **REPUBLIC V HIGH COURT, CAPE COAST; EX PARTE MARWAN KORT**. [1998-99] SC GLR 833 which established the principle that if a court relied on affidavit which had not been served on the other party to arrive at a decision so reached out to be quashed. It is not the case of the applicant that her affidavit was not before the judgment when the application was considered. Her case is that the affidavit of the first interested party was not on record when the trial

judge heard the application. In this case, there was nothing in the face of the ruling that the learned trial judge relied on and used the affidavit to the detriment of the applicant. This case therefore does not to me offer any assistance to the applicant. Indeed Acquah (JSC) (as he then was) said at page 841 as follows:

> "It must be pointed out that the judge was perfectly entitled to hear the motion without the supplementary affidavit, as that motion had already been served on the other party. The error committed by the judge was her reliance on and use of the supplementary affidavit which had not been served on the other party"

I would have gone the whole hog with counsel for the applicant if the trial judge had indeed relied on the affidavit of the first interested party to rule against the plaintiff under the circumstances. This was not so in the case.

It is for the above reasons that I find myself unable to agree with my brother on the issues raised in this application. I will on my part, for the reasons canvassed in this opinion, proceed to dismiss the application.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

BAFFOE-BONNIE, JSC:-

I have had the benefit of reading before hand the opinions of my learned brothers Jones Dotse, and Ansah JJSC in support of the grant of the application for

certiorari. Like my brothers Brobbey JSC and Anin Yeboah JSC, I am unable to support the grant of the application for reasons I will presently give.

I have no doubt at all in my mind about the fact that with the issuance of form six by the registrar pursuant to rule 14(2) of C.I. 19 an appeal will be deemed to have been entered in the Court of Appeal and that thereafter the appeal will be regulated by rule 21 of C.I. 19. In fact this rule which is a verbatim repetition of rule 21of L.I.218 was given judicial interpretation in the case of Adamptey & Shardey V. Martey and Another(consolidated)1972, 2 GLR as follows;

"where an appeal has been entered by the registrar the court below becomes functus officio not only as regards the judgment in the case, but also in connection with all proceedings that may be taken by either party after delivery of judgment. The jurisdiction of the court below is clearly ousted and the mandatory words of rules 21 of L.I. 218 are that every application should be made to the court and not to the court below"

But my view is that when, for reasons known to himself, the applicant herein chose not to appeal against the express order of the court which directed the Government of Ghana to take over the Mancell's Girls Vocational Institute, she left the door open for the respondent to go into execution in respect of that order. By parity of reasoning, since that order was not being specifically appealed it could not have been affected by the proceedings for which form 6 had been issued.
The right to appeal is guaranteed by the constitution. But the right to exercise this constitutionally guaranteed right is best left to the individual to take advantage of. If therefore a party chooses to appeal certain orders leaving other orders not appealed against, it will not be an exercise in 'technism' or technicality for this court to pin him down to what he himself has chosen to appeal against.
I am not unmindful of the fact that the applicant intimated in his notice of appeal that further grounds of appeal would be filed upon receipt of the record of proceedings and so he could later amend the grounds of appeal. But my answer to this is that the notice of appeal always indicates what part of the

decision/order is being appealed against while the grounds of appeal indicates the reasons for challenging that particular order. So where a particular order is not being challenged how does an amendment of the grounds affect that order?
It is my view that the trial judges jurisdiction was not ousted with the issuance of form 6 because the issue before him was not affected by the proceedings for which the form 6 had been issued. I will therefore refuse to grant the application for certiorari.

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

COUNSEL

KIZITO BEYUO FOR THE APPLICANT.

KWAME BOAFO AKUFFO BEING LED BY SOMUAH ASAMOAH, FOR THE 1ST INTERESTED PARTY.

CECIL ADADEVOH (SSA) FOR THA ATTORNEY GENERAL.