IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA-GHANA

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
YEBOAH, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL MOTION
NO. J5/37/2010
17TH NOVEMBER, 2010

THE REPUBLIC

VRS

HIGH COURT, (LAND DIVISION, COURT 2), ACCRA	**...**	**RESPONDENT**
EX-PARTE: AL-HASSAN LIMITED	**...**	**APPLICANT**
AND		
THADDEUS SORY	**...**	**INTERESTED PARTY**

R U L I N G

ADINYIRA (MRS), JSC:

> *"The right of appeal is jettisoned frequently for an immediate tryst with prerogative proceedings. I think the time has come when the distinction should be punitively maintained."* Per Francois J.A. (as he then was) in The Republic v. Circuit Court Accra; Ex parte Appiah [1982-83] GLR 129 at page 145.

The applicant, Al-Hassan Limited, a real estate development company has invoked the supervisory jurisdiction of the Supreme Court under Article 132 of the Constitution of Ghana, 1992 for an order of certiorari for the purpose of quashing a ruling dated 5 July 2010, of the High Court (Land Division, Court 2) Accra presided over by Justice F.K. Awuah and a further order of prohibition to prevent the said judge from sitting on the Applicant's Motion for an Order of Interlocutory Injunction and the substantive land suit entitled Al-Hassan Limited v. Thaddeus Sory .

The grounds for the application are that:

1) "The Order by the Trial High Court precluding the Applicant from relying on the Applicant's Supplementary Affidavit filed on 4/5/2010 in support of the Motion on Notice filed on 7/4/2010 by the Applicant for an Order of Interlocutory Injunction was a grave violation of the rules of natural justice, especially in its audi alteram partem ambit, as the said Order denied the Applicant the opportunity to respond to the Interested Party's Affidavit filed on 15/4/2010 in opposition to the Applicant's Motion for an Order of Interlocutory Injunction that the trial Judge adjourned to 9/7/2010, not to mention the sequel of such preclusion to Applicant's Motion.
2) While making the Order on 5/7/2010 precluding the Applicant from relying on the Applicant's Supplementary Affidavit filed on 4/5/2010 in support of the Motion on Notice filed on 7/4/2010 by the Applicant for an Order of Interlocutory Injunction, the trial judge, Mr. Justice F.K. Awuah, J, prejudged the issues raised by the Applicant's Motion for an Order of Interlocutory Injunction by making such statements, amongst others, to the effect that:
    1) The Application for Interlocutory Injunction must be taken without the Supplementary Affidavit quickly because the Defendant was suffering hardship. This is a clear indication that the Judge is so biased against the Applicant herein that he has already made up his mind to dismiss the Applicant's application for an Order of Interlocutory Injunction even before same is heard on 9/7/2010;

    2) The Supplementary Affidavit filed on 4/5/2010 by the Applicant was not necessary for the determination of the Motion for Interlocutory Injunction.
    3) The combined effect of the foregoing shows uncalled for bias by the Trial Judge against the Applicant and the Applicant's case pending before him."

Facts

The applicant, commenced legal proceedings at the High Court (Land Division Court 2) Accra against the interested party, claiming a declaration of title to a piece or parcel of

land situated or lying at Dzornaman, East Legon, Accra, recovery of possession, and perpetual injunction among other reliefs. The applicant applied for an order for Interlocutory Injunction to restrain the interested party from continuing with the development of the land.

The interested party contested the application for Interlocutory Injunction by filing an affidavit in opposition and a statement of case. The applicant filed a supplementary affidavit in reaction to the affidavit in opposition of the interested party. The interested party took objection to the supplementary affidavit filed by the applicant on the grounds that it was not warranted by law and filed without leave of the court. This objection came by way of a motion on notice to the High Court to have the supplementary affidavit set aside.

The High Court upheld the objection and set aside the supplementary affidavit with the reasoning that the filing of the supplementary affidavit was not warranted by the relevant rules under Order 25 of the High Court (Civil Procedure) Rules, 2004, (C.I. 47). He held further that since he did not find any material difference between the supplementary affidavit and the affidavit in support of the motion for interlocutory injunction, except the attachment of an affidavit of one Benjamin K. Annan, which he considered irrelevant for the application pending in Court, he was unable to grant him leave to file the process.

Preliminary issue

In his statement of case the interested party indicated that his statement was filed out of time and therefore prayed the court to exercise its discretion to extend the statutory period of 14 days and adopt the present statement. We exercise our discretion under rule 79 of the Supreme Court Rules, 1996, C.I.16 and waive the irregularity.

Submissions by Parties

The applicant in its statement of case alleges that the order of the High Court in setting aside its supplementary affidavit in support of the Motion for Interlocutory Injunction pending before the Court; denied it the opportunity to respond to the Interested Party's Affidavit in opposition; and that this preclusion was a grave violation of the audi alteram partem rule of natural justice. Furthermore, the rules of natural justice require the High Court Judge to act fairly and reasonably, and so he ought to have allowed the applicant to be heard on its supplementary affidavit in order to respond the allegation averred to in the Interested Party's affidavit in opposition. He concluded that:

> "The preclusion of the Applicant's Supplementary affidavit aforesaid by the order of the High Court handed down on 5/7/2010 is a stab in the back of natural

> justice and same ought to be quashed by an order of certiorari emanating from this Honorable Supreme Court."

In response, the interested party stated that both parties were heard and if the Applicant was dissatisfied with the reasoning of the court his remedy was to appeal against the ruling. He stated further that:

> "It is our submission that it is stretching the rules of natural justice to absurd limits if it is contended as Applicant suggests in its present application that once a court takes the view after hearing a party that that a party ought not to rely on a particular document then the court has breached the audi alteram partem rule of natural justice."

The rules of natural justice

It is a basic principle of common law that certiorari and prohibition would automatically be granted to quash a judgment or prevent a biased judge from hearing a suit upon satisfactory proof of the breach of any principles of the rules of natural justice. Accordingly proof of a breach of any of the rules of natural justice is a proper ground for grant of certiorari and prohibition independent of grounds of error on the face of the record or excess of jurisdiction. See *the Republic v. High Court Accra; Ex parte Agbesi Awusu II (No.2) (Nyonyo Agboada Sri III) Interested Party [2003-2004] 2SCGLR 907.*

There is a plethora of authorities in respect of the rules of natural justice providing the minimum standards of fair decision-making by the common law on adjudicating bodies. These include the principles that parties should be given prior notice and an opportunity to be heard, the requirement to act fairly and reasonably and an entitlement to an unbiased decision maker. Counsel for the Applicant referred us to the cases of *The Republic v. High Court, Denu; Ex parte Agbesi Awusu ii (No.2) (Nyonyo Agboada (Sri III) Interested Party [2002-2004] SCGLR 907; Aboagye v. Ghana Commercial Bank [2001-2002]SCGLR796 at 806 and Awuni v West African Examination Council [2003-2004] 1SCGLR 471.*

Date-Bah JSC in the *Ex parte Awusu II (No.2)* (supra) at pages 924 to 925 stated:

> "Natural justice or procedural fairness demands not only that those affected by a decision should be given prior notice and an opportunity to be heard (audi alteram partem rule), but also that there should be an entitlement to an unbiased decision maker (nemo index causae suae and allied ideas)"

Consideration

The applicant's complaint is that the learned judge is in breach of both ambits of the rule of natural justice, namely the audi alteram partem rule and the nemo index causae suae rule.

Breach of the Audi alteram partem rule

In applying the above rules and authorities, our first focus is whether Justice Awuah breached the audi alteram partem rule by setting aside the supplementary affidavit. On the face of the ruling complained of, it is clear that both parties were heard on the issue as to whether or not the supplementary affidavit filed on behalf of the Applicant could be admitted as part of the process for determining the motion for interlocutory injunction. In our opinion the High Court judge having heard both parties beforehand acted fairly and within jurisdiction to determine the issue. It was a matter entirely within his discretion as required under Order 81 of the *High Court (Civil Procedure) Rules,* 2004, (C.I. 47). The learned judge may well be wrong in the decision made, but the avenue of remedy open to the applicant in such circumstances is not by way of certiorari. A complaint that there has been an improper exercise of the discretionary jurisdiction is insufficient A charge that a court has improperly misconceived a point of law or misdirected itself cannot per se constitute sufficient ground for the grant of certiorari, in the absence of any jurisdictional error on the face of the record. Even then that is not the complaint by the applicant before us.

We take notice of the fact that the motion for Interlocutory Injunction is still pending before the High Court and in the circumstances the Applicant still has a chance and the right to be heard on his application. Though the Judge by the order of 5/7/2010 has set aside the supplementary affidavit in answer to the affidavit in opposition there are other procedures that his counsel could possibly adopt under the rules of procedure and the law of evidence to challenge any of the facts deposed to in the affidavit in opposition to his motion.

We hold that from the circumstances of this case the High Court Judge did not breach the audi alteram partem rule. If the applicant disagreed with the decision, the remedy open to him in the circumstances of this case, was by way of appeal, not by certiorari to quash that ruling. There is the need to keep the distinction between appeals and certiorari.

Distinction between Appeal and Certiorari

Francois J.A. (as he then was) stated in the case of *The Republic v. Circuit Court Accra; Ex parte Appiah [1982-83] GLR 129* at page 145 that:

> "The right of appeal is jettisoned frequently for an immediate tryst with prerogative proceedings. I think the time has come when the distinction should be punitively maintained."

It is our thinking that parties fancy prerogative proceedings as it is faster and concise. The only record required for prerogative proceedings are the document that initiated the proceedings, the pleadings if any and the adjudication. See *R v.Northumberland Compensation Appeal Tribunal; Ex parte Shaw [1952] 1 K.B. 338* at p.352, C.A. cited with approval in *Ex parte Appiah (supra).*What seems to be oblivious to parties and their lawyers is that the Supreme Court sparingly exercises its supervisory jurisdiction over a superior court and it does so only where there is a clear fundamental non-jurisdictional error or a breach of the rules of natural justice. Unlike an appellate court, the Court in its supervisory role cannot interfere merely because a decision is wrong in law.

This Court restated the law regarding the exercise of its supervisory jurisdiction over the superior courts of judicature in two cases of *The Republic v, High Court Accra; Ex parte Commission on Human Rights and Administrative Justice (CHRAJ) (Addo Interested Party) [2003-2004] 1 SCGLR 312* at pages 345 to 346 per Date-Bah JSC ; and *The Republic v. Court of Appeal, Accra; Ex parte Tsatsu Tsikata [2005-2006] SCGLR 612* at 619 per Georgina Wood JSC (as she then was). The legal principles laid down in these two cases were subsequently summarized by Date-Bah JSC in the case of *The Republic v. High Court (Commercial Division) Accra; Ex parte The Trust Bank Ltd. (Ampomah Photo lab Ltd. & Three Others (Interested Parties) [2009] SCGLR 164* at page 169 of the Report as follows:

> "The combined effect of these two authorities, it seems to me, is that even where a High Court makes a non-jurisdictional error which is patent on the face of the record, it will not be a ground for the exercise of the supervisory jurisdiction of this Court unless the error is fundamental. Only fundamental non-jurisdictional error can found the exercise of this court's jurisdiction."

This distinction between certiorari and appeals was drawn by the eminent Bamford - Addo JSC (as she then was) in the case of *The Republic v. High Court Accra; Ex parte Industrialization Fund For Development Countries and Another; [2003-2004] SCGLR 348.* She said at page 354 that:

> "It is to be noted that there is a clear distinction between certiorari and appeal, which is lost on litigants and their lawyers. When the High Court, a Superior Court, is acting within its jurisdiction, its erroneous decision is normally corrected on appeal whether the error is one of fact or law. Certiorari however is a

> discretionary remedy, which would issue to correct a clear error of law on the face of the ruling of the court, or an error which amounts to lack of jurisdiction in the court so as to make the decision a nullity. In the case of error not apparent on the face of the ruling or those of fact the avenue is by way of appeal."

Francois J.A. (as he then was) also stated at page 143 in *Ex parte Appiah* (supra) that:

> "The remedies of appeal and certiorari are different and must not be blurred. [That] certiorari and appeals are not alternative remedies but are mutually exclusive".

As stated earlier if the applicant was dissatisfied with the decision of the High Court, the remedy open to him in the circumstances of this case, was by way of appeal to the Court of Appeal, and not by invoking our supervisory jurisdiction.

For the above reasons the writ of certiorari does not lie to quash the ruling of 5 July 2010, the application is misconceived and it is refused.

Breach of the nemo index causae suae rule

The Applicant further seeks an order of Prohibition restraining the High Court Judge from hearing the motion of interim injunction and the substantive land suit, due to some statements he made during the delivery of his ruling exhibiting bias against it.

The supervisory jurisdiction of this Court will be exercised to ensure that no superior court judge decides a case where there is bias or a real likelihood of bias. However a charge of bias or the likelihood of bias has to be established on balance of probability by the person alleging same. The test which has been applied to the determination of whether there is apparent bias is the real likelihood of bias test. See Adzanku *v. Galenku [1974 1 GLR 198* at 202 and *The Republic v. High Court, Denu; Ex parte Agbesi Awusu (No.1) (Nyonyo Agboada (Sri III) Interested Party [2002-2004] SCGLR 864 at page 894*

We therefore need to review carefully the evidence which has been put forward by the Applicant in support of the allegation of bias against Justice Awuah, to find out whether there is or is not under the circumstances a real likelihood of bias.

It will be recalled that the pronouncements that the Applicant complains they suggest the impartiality of the judge were contained in two statements which were in the following terms:

3) While making the Order on 5/7/2010 precluding the Applicant from relying on the Applicant's Supplementary Affidavit filed on 4/5/2010 in support of the

Motion on Notice filed on 7/4/2010 by the Applicant for an Order of Interlocutory Injunction, the trial judge, Mr. Justice F.K. Awuah, J, prejudged the issues raised by the Applicant's Motion for an Order of Interlocutory Injunction by making such statements, amongst others, to the effect that:

1) The Application for Interlocutory Injunction must be taken without the Supplementary Affidavit quickly because the Defendant was suffering hardship. This is a clear indication that the Judge is so biased against the Applicant herein that he has already made up his mind to dismiss the Applicant's application for an Order of Interlocutory Injunction even before same is heard on 9/7/2010;
2) The Supplementary Affidavit filed on 4/5/2010 by the Applicant was not necessary for the determination of the Motion for Interlocutory Injunction.

The combined effect of the foregoing shows uncalled for bias by the Trial Judge against the Applicant and the Applicant's case pending before him."

Counsel for the applicant contends in his statement of case that:

> "It is true that (the) statements made by (the) High Court Judge at the time of handing down his order dated 5/7/2010 were obiter. But in the view of the applicant, those statements made it impossible for the judge to bring a completely impartial mind to bear upon his determination of the application for interlocutory injunction pending before him as well as the actual substantive land suit."

With respect to the first statement, the Interested Party stoutly denied in an affidavit in opposition to this application and at the hearing before us that such statement was made and that Mr. Sonny Mould a director of the Applicant who deposed to these facts though not present in Court the day the ruling was given failed to disclose his source of information of the facts he deposed to in his supplementary affidavit.

We have examined the ruling of the Court dated 5 July 2010 and it is clear on the face of the record that no representative of the Applicant, a limited liability company, was present in Court on the said date. Furthermore the statement complained of is not contained in the record. Accordingly we hold that there is no evidence to substantiate the alleged prejudicial statement.

Regarding the second statement we find that words to that effect formed part of the reasoning for setting aside the supplementary affidavit in the ruling of 5/7/2010. For clarity we set out the statement in the context that it was made. They are as follows:

"In the final analysis, the court is inclined to grant the instant application brought at the instance of the Defendant for the following reasons:

a) That the filing of the supplementary affidavit is not warranted under Order 25 of C.I. 47
b) That the Plaintiff failed to seek leave of the Court before filing same
c) **The Court does not find the said supplementary affidavit dominant and crucial for the determination of the pending interlocutory injunction as same is substantially the same as the main affidavit in support.**(Emphasis mine)

The supplementary affidavit of the Plaintiff filed on 4 May 2010 is hereby set aside for the purpose of the interlocutory injunction"

We fail to see how the words complained of (highlighted above) "shows uncalled for bias by the Trial Judge against the Applicant and the Applicant's case pending before him," as is being claimed by the Applicant. The Judge was giving reasons for issuing that order and there is no such evidence before us to suggest that the judge was biased or a suspicion of a real likelihood of bias. If the Applicant was dissatisfied with the reasoning, the remedy then open to Counsel is to challenge the ruling on appeal to the Court of Appeal rather than to invoke the supervisory jurisdiction of the Supreme Court.

It would be absurd to issue an order of prohibition to restrain a judge of the superior court from exercising his judicial function simply because he has ruled to exclude a document or a piece of evidence that a party seeks to rely on in support of his or her case. A court of competent jurisdiction may decide questions before it rightly or wrongly. The appeal process exists for correcting all errors as to the facts and to the law made by a High Court. Unless of course there is substantiated evidence constituting legal bias such as the personal interest of the judge in the subject matter, relationship between the judge and counsel or one of the parties, or in some other way his conduct or behavior that may give rise to a suspicion that he is not impartial. Such instances would automatically disqualify a judge from hearing the case. In such circumstances the prerogative writs of certiorari and prohibition will respectively lie to quash the proceedings and orders made by such a judge and to restrain the judge from continuing with the case.

Speaking generally, we are of the view that short of appealing against interlocutory decisions made by a trial court during the pendency of a case, a party by his counsel may prudently find other ways of making out his case as provided by the rules of procedure and the law of evidence. A counsel must have an intuitive recognition of

what the circumstances of the case require as it unfolds itself before the court. This may help to expedite proceedings in court and minimize the delays that have characterized the administration of justice in this country.

We do not find any evidence to substantiate the allegation of bias or a real likelihood of bias against Justice Awuah. In the result the application for the issue of the order of prohibition against the High Court Judge is refused.

For the above reasons the application for the orders of certiorari and prohibition fails.

The application is dismissed.

S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

N. S. GBADEGBE
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