IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2012

CORAM: ATUGUBA, J.S.C. (PRESIDING)
ANSAH, J.S.C.
BAFFOE-BONNIE, J.S.C.
GBADEGBE, J.S.C.
AKOTO-BAMFO (MRS.), J.S.C.

CIVIL MOTION
NO. J5/13/ 2014

13TH FEBRUARY, 2014

IN THE MATTER OF
THE REPUBLIC

VRS

THE HIGH COURT **RESPONDENT**
ACCRA

NANA YAA KONADU **INTERESTED PARTY**
EXPARTE: ALHAJI ABDUL RASHID **APPLICANT**

RULING

ATUGUBA J.S.C.

The facts

The applicant and the interested party were granted a divorce decree on the 23rd day of September, 2009 by the High Court (Court 20), Accra subject to the determination of ancillary reliefs. The applicant having remarried, was minded to bring his new wife to the former matrimonial home. The interested party claiming exclusive ownership of the said home filed a motion on the 4th day of July, 2013 "praying the Court for an order of interlocutory injunction to restrain the Respondent/respondent herein or his agents, privies, assigns and whomsoever from bringing into the matrimonial house, House No. 233, Airport West, Dzorwulu, Accra and any of the buildings listed as being in dispute in this matter, the woman the respondent has recently married, or any other woman to cohabit or live therein or for any purpose and from harassing and intimidating the petitioner pending the final determination of the suit."

The motion eventually came before Elizabeth Ankumah J as vacation judge sitting in High Court (Court 9), Accra. Though the applicant attended court his counsel, Edward Anokye, did not, but sought adjournments on grounds of ill health. Both sides having filed their affidavits the motion was fixed for Ruling on the 2nd day of September, 2013. However, the applicant, on account of the alleged ill health of his said counsel, filed a motion in this (Supreme) Court on the 28th day of September, 2013 per David K. Adade Boafo , " for judicial review by way of an order for Prohibition directed at the High Court, Accra, presided over by Her Ladyship Justice Elizabeth Ankama (sic) restraining the Court from giving a Ruling in respect of an application for an order for interlocutory injunction dated 4th July, 2013, filed by the Interested Party herein which has been fixed for Ruling on 2nd September, 2013, in a Petition entitled Nana Yaa Konadu vrs. Alhaji Abdul

Rashid – Suit No. BDMC 164/09, in which the Applicant herein is Respondent/Respondent therein.

THE GROUNDS FOR THE APPLICATION ARE AS FOLLOWS:

1. The High Court, Accra, a vacation Court, erred by insisting on going ahead to hear and give a Ruling in the absence of counsel for Applicant herein when he had written to the Court indicating that *he wanted to rest during the vacation* and *alluded to his health* in the said letter and thus denying the Applicant a hearing through his counsel.
2. The High Court, Accra erred by issuing a directive to the Applicant's counsel to attend court *when he had provided the Court with a medical report* from the Cardiothoracic Centre at Korle-Bu advising *that he should rest for a month* while taking his medication and in the process denying the Applicant herein a hearing through his counsel particularly when *Applicant's counsel had stated in a letter that he intended filing a supplementary affidavit in opposition but could not do so because of his health.*" (e.s.)

This motion was fixed for hearing on the 22nd day of October 2013 but was struck out on that day pursuant to a notice of withdrawal filed by the applicant's counsel the previous day. In the interim Elizabeth Ankumah J stayed her Ruling, but thereafter the parties were served with notices dated the 28th day of October 2013 for delivery of the Ruling on the 31st day of October 2013; on which day the interested party's aforementioned motion for interlocutory injunction was granted by Elizabeth Ankumah J aforementioned.

Proffered Legal Basis for the Application

The applicant moves this court to quash the said Ruling of Elizabeth Ankumah J dated the 31st day of October 2013 on the ground specified in his motion paper and maintained in his statement of case as follows:

"The ground for the application is that:

1. The High Court (Court 9) Accra, presided over by Her Ladyship Justice Elizabeth Ankumah acted without jurisdiction by proceeding to hear a case on 31st October, 2013, which was pending before High Court 20, Accra, presided over by His Lordship Justice Gyinae and which had not been transferred to that Court, after 30th September, 2013, when vacation Courts had ended their sitting."

Curiously counsel for both sides rely, inter alia, on this court's decision in *In Re Appenteng (Decd), Republic v. High Court, Accra (Commercial Division), Ex parte Appenteng (Appentengs Interested Parties) [2010] SCGLR 327*. The applicant relies on the earlier part of that decision which holds that a vacation judge's jurisdiction is limited to the vacation period whilst the Interested Party relies on the latter part of that decision to the effect that certiorari being discretionary the applicant's conduct for example, in failing to raise objection to the jurisdiction of the court, can disentitle him to that remedy.

The Conduct of the Applicant

The conduct of the applicant in the proceedings herein sought to be impugned by certiorari calls for scrutiny. It is trite law that equitable principles are much the same as the grounds for exercising a discretionary power. The following court note, as per exhibit "NYK1", is relevant:

"**PARTIES**

Petitioner absent

Respondent present

COUNSEL

Mr. C.K. Koka for the petitioner/applicant

BY COURT

Counsel for the respondent refused to come to court, at the last adjourned date, he said he was sick. Today he has presented a letter from Cardio Centre that he should take rest for four weeks. The respondent is alleged to have said he will do all that he can so I do not sit on this case, he denies it. *His lawyer is also seen around.* I have a feeling they are just trying to delay the hearing of the motion on notice of interlocutory injunction preventing the respondent from bringing into the matrimonial house or any of the buildings listed, his newly married bride and to stop the respondent from harassing and intimidating the petitioner.

The parties have filed their affidavits supported by statement of case. The *respondent* has also *filed supplementary affidavit in opposition* dated 31st July.

Case adjourned to 2nd September, 2013 for ruling.

JUSTICE ELIZABETH ANKUMAH (MRS.)

JUSTICE OF THE HIGH COURT." (e.s.)

Though the applicant appears to contest the veracity of the judge's comment, inter alia, that "*His sick lawyer is also seen around*" he proffers no evidence against this solemn judicial statement of fact in a court record, which, on authority, should carry much weight.

In any event the judge's observations as to a desire by the applicant per his counsel to delay the hearing of the motion are borne out on the facts. We observe firstly that there is no indication that counsel for the applicant has no associates or juniors in his chambers who could handle the motion in his stead. Even if that is so the applicant could have instructed another counsel, as he did for the purpose of his prohibition motion to this court, to handle the motion for interim injunction before Elizabeth Ankumah J, especially as vacation matters are normally urgent.

Again, going by the sequence of the facts of this case, upon the service on him of the notice dated the 28th day of October, 2013 for Ruling on the motion for injunction, it should have been clear to the applicant and his counsel that since it was Elizabeth Ankumah J who had earlier set it down on the 26th day of August, 2013 for Ruling on the 2nd day of September 2013 (as per Exhibit "NYK1", supra) she was the judge who was going to deliver the Ruling on the said motion once the applicant's obstructive motion to this court for prohibition against the same had been struck out by this court as withdrawn on the 22nd day of October 2013. Yet the applicant did not apply to this court for prohibition on the ground that Elizabeth Ankumah J's vacation jurisdiction over the matter had lapsed.

Consequently the applicant's conduct culpably frustrated the determination of the said motion before Elizabeth Ankumah J before the expiration of the vacation period. Secondly, he had another equally effective remedy, aforesaid of applying for prohibition against the delivery of the impugned Ruling of Elizabeth Ankumah J, thereby not only raising objection to her lack of jurisdiction but preventing its exercise; but did not avail himself of it, thereby aiding and abetting , as it were, the alleged unjurisdictional Ruling by Elizabeth Ankumah J.

In these circumstances the applicant's conduct should disentitle him to the discretionary remedy of certiorari. The unanimous decision of this court in *Republic v. High Court; Accra; Ex parte Attorney-General (Ohene Agyapong Interested Party)* [2012] 2 SCGLR 1204 is very apposite to the present application and bears quotation in extenso. In that case at 1207 to 1209 the eminent Dr. Date-Bah JSC delivering the Ruling of this court masterly stated the law thus:

"The remedy of certiorari has always been discretionary. The authors of *De Smith , Woolf and Jowell's Principles of Judicial Review* (1999) , in discussing the historical development of judicial review remedies and procedures, make the following pronouncement (at page 530) in relation to the four prerogative writs of *certiorari, mandamus, prohibition, and habeas corpus*

> "Though the four writs had acquired their 'prerogative' characteristics by the middle of the seventeenth century, strangely it was not until a century later, in 1759, that anybody (Mansfield) seems to have thought of classifying the writs as a group. Those shared characteristics included the following:
>
> 1) *They were not writs of course which could be purchased by or on behalf of any applicant from the Royal Chancery;* they could not be had for the asking, but *proper cause had to be shown to the satisfaction of the court why they should issue.*
> 2) *The award of the prerogative writs usually lay within the discretion of the court. The court was entitled to refuse certiorari and mandamus to applicants if they had been guilty of unreasonable delay or misconduct*

> *or if an adequate alternative remedy existed, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal* or an omission to perform a public duty. But although none of the prerogative writs was a writ of course, not all were discretionary. Prohibition, for example, issued as of right in certain cases; and habeas corpus *ad subjiciendum*, the most famous of them all was a writ of right which issued *ex debito justitiae* when the applicant had satisfied the court that his detention was unlawful. *These two, therefore, were not in the fullest sense writs of grace...*"

This court has on numerous occasions *accepted and stressed the above-mentioned discretionary character of the remedy of certiorari*. For instance, in *Republic v. High Court, Denu; Ex parte Agbesi Awusu II (No.2) (Nyonyo Agboada (Sri III) Interested Party) [2003-2004] 2 SCGLR 907*, Atuguba JSC explained (at 914) that:

> "It is well-known that certiorari is a discretionary remedy and therefore it does not necessarily follow that when the technical grounds upon which certiorari lies are established, it will be *pro tanto* granted."

Kpegah JSC has also said, in *Republic v. High Court, Accra; Ex parte Aryeetey (Ankrah Interested Party) [2003-2004] 1 SCGLR 398* at 410, that:

> "Needless for us to say that certiorari is a [discretionary] remedy and the conduct of an applicant can disentitle him to the remedy."

In *Republic v High Court, Accra; Ex parte Tetteh Apain [2007-2008] 1 SCGLR 72,* Atuguba JSC, delivering the ruling of the Supreme Court, said (as stated at page 75):

> "In any case, an order of certiorari, as has often been said, is a discretionary remedy. Therefore assuming that the High Court should not have proceeded in the matter pending the determination of the applicant's application for prohibition pending before this court, as the applicant could have applied to the Court of Appeal for an interim order to prevent the trial court from proceeding pending the determination of his application for stay of proceedings thereat, he had another remedy open to him which was not less convenient but which he failed to pursue. The applicant was clearly forum-shopping, which is an abuse of the process of this court. In the circumstances, this court ought to shut the doors of the discretionary remedy of certiorari against the applicant and we hereby so do."

In this last case, Atuguba JSC is making the point that where an applicant has a remedy other than *certiorari* open to him or her, this is a factor that may be taken into account in denying the applicant the discretionary remedy of *certiorari*, even if the other preconditions for the grant of the remedy have been established. The existence of an alternative remedy is one of the factors that a court can rely on to exercise its judgment against the grant of certiorari. See, for instance, Barraclough v. Brown [1897] AC 615. Also in *In re Appenteng (Decd); Republic v. High Court, Accra (Commercial Division); Ex*

parte Appenteng (Appentengs Interested Parties) 2010 SCGLR 327, Atuguba JSC again delivering the ruling of the Supreme Court, said (as stated at page 339):

> "Against a background such as this, we have no difficulty in holding that though *certiorari* is a discretionary remedy, the omission of a party to raise objection to a proceeding in an inappropriate forum should disentitle the applicant to that remedy where the omission was wilful and an abuse of the process of the court." ..."

For all these reasons, the application is hereby dismissed.

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) J ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

CONUSEL
J. OPPOKU - AGYEI FOR THE APPLICANT
OSAFO BUABENG FOR THE INTERESTERED PARTY