**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA**

**CORAM: BENIN, J.S.C. SITTING AS A SINGLE JUSTICE OF THE SUPREME COURT**

**CIVIL MOTION NO.J8/2/2015**

**19TH DECEMBER 2014**

**IN THE MATTER OF**

**THE REPUBLIC**

**VRS.**

**THE HIGH COURT (COM. DIV.) KUMASI**

**EX PARTE:** ***FIRST ATLANTIC BANK LIMITED*** **- - - APPLICANT**

1. ***AGYEI BAFFOUR AND SONS LTD.***
2. ***BAFFOUR YAW AGYEI***
3. ***JAMES KWAKU OPPONG*** **- - - INTERESTED PARTIES**

## RULING

## BENIN, JSC:-

Currently pending before the Supreme Court is an application for an order of certiorari to quash a decision of the High Court, Commercial Division, Kumasi. The interested parties have since filed their statement of casein response to one filed by the applicant. By the present application, the applicant seeks an extension of time within which to file a reply to the interested parties' statement of case,

relying on Rule 79 of the Supreme Court Rules, 1996 (C.I. 16). The reason proffered for the delay in the affidavit in supportis that counsel for the applicant was indisposed hence his inability to complete the draft reply within the time stipulated by the rules. They therefore want the court to waive the non-compliance with the rules and admit the reply.

The application appeared at first glance to be harmless requiring little or no opposition. However, the interested parties have seriously opposed the application. I am thus obliged to examine the merits of the competing arguments. The affidavit in opposition raises several issues; the relevant ones are summed up as follows:

i. That the application is unknown to the rules of the court and to that extent it ought to be dismissed at the threshold-paragraph 3;
ii. That the relief sought is misconceived, nebulous and absolutely without a legal basis-paragraph 4;
iii. The application does not disclose a valid and subsisting Chambers registration number and same is incompetent, void and infringes the law and should be dismissed in limine-paragraph 5;
iv. The affidavit in support is fundamentally defective and the supposed deponent is not a proper person to depose to the affidavit-paragraph 6;
v. There is no evidence in support of counsel's indisposition-paragraph 8;
vi. The rules of court must be scrupulously followed-paragraphs 10-12.

By virtue of Rule 64(2) of C.I. 16 the applicant was entitled to file a reply within seven days of being served with the respondent's statement of case. The applicant concedes they were out of time hence the application for extension of time. Counsel for the applicant also conceded that there is no explicit provision under C.I. 16 enabling a defaulting party to apply for extension of time to file a reply under rule 64. However, in counsel's view rule 79 gives the court ample discretionary power to allow a party to file a process out of time. He reiterated the sole reason for the default to be his own ill health. Counsel alluded to the fact that this is a discretionary remedy, hence the court should not shut them out on a

mere technicality having regard to the serious nature of the point raised in the main application for certiorari which is a breach of the rules of natural justice.

For his part counsel for the interested parties said there is a specific provision for reply to respondent's statement of case, therefore general provision like rule 79 cannot be applied. The application before the court is alien to the rules; he cited in support the case of **Iddrissu v. Amartey (2009) SCGLR 670.** Before I proceed any further I must observe that the present application is distinguishable from the principle in Iddrissu v. Amartey, supra. The reason is that in the present case the process sought to be filed, namely a reply to the respondent's statement of case, is known to the rules, rule 64(2); whereas in the Iddrissu v. Amartey case, supra, the process that was filed was completely unknown to the rules. That was why the court held no court could validly grant leave to legitimize the unknown process. The court went on to hold that the processes a court could grant leave to file were those that have been legitimately provided for under the rules but which a party could not comply with on time. Most notably the court also decided that a court mightgrant leave to file a process in order to do substantial justice depending on the circumstances of each case.

I must state that where the rules do not specifically prohibit the doing of an act, the court is left with discretion to allow the act to be done in the interest of justice. That justifies the presence of rule 79 in C.I. 16. Thus where, as in this application, the rules are silent whether after seven days the court could grant an extension of time to an applicant to file a reply, it is left to the discretion of the court to waive or not the non-compliance by the applicant. The court will thus examine the facts and circumstances of the case in coming to a decision. No hard and fast predetermined rules or even guidelines will apply. I therefore hold that notwithstanding the lack of an express provision for extension of time to file a reply under rule 64(2), the court could exercise its discretion to waive non-compliance with time and grant an extension under rule 79, as same is not prohibited by any rule.

On the fact that the chamber registration number was not endorsed on the process, I have taken note of the arguments. I have also taken note of the fact

that it is the subject of the certiorari application before the Supreme Court. For the purposes of this application it suffices for me to say that counsel for the applicant has since exhibited the certificate of registration which shows it was in existence at the time of filing the process in this court. I will thus dismiss the present objection. The Supreme Court will have the opportunity to make authoritative pronouncement on it when the main application is argued before it.

Now to the merits of the application. In an application whereby the court's discretion is to be exercised when a party is applying out of time, certain considerations come into play. To begin with, the applicant must give satisfactory reason/s for the delay. Next, if he clears the first hurdle he must satisfy the court that in the light of the reason/s given, the delay is not inordinate. Besides these two factors which I consider to be imperative, the court may consider other factors like bona fides.

In this application the sole reason given for the delay is that counsel was indisposed due to ill-health. Counsel for the interested parties said this was a bare assertion which was unsupported. That is a serious point to take, for oftentimes some practitioners of the law take things for granted. They think they could just come to court and say they were not medically fit and get away with it. I am afraid it is not the case because time is of the essence in court proceedings. If counsel was sick as he claims, he ought to produce some form of evidence by way of proof to satisfy the court that he was indeed sick. A bare assertion of illness without more would not suffice. Thus no acceptable or satisfactory reason for the delay in filing the reply has been proffered in this case and for that reason I do not think it is necessary to consider any other factor/s. Consequently I am not able to exercise the discretion to grant an extension of time to file a reply; I dismiss the application accordingly.

**(SGD) A. A. BENIN**

**JUSTICE OF THE SUPREME COURT**

**COUNSEL**

DANIYAL ABDUL KARIM ESQ. FOR THE APPLICANT.

KWASI AFRIFA ESQ. FOR THE INTERESTED PARTIES.