IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

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

CIVIL MOTION
NO. J5/6/09
3RD FEBRUARY, 2010

THE REPUBLIC - - - RESPONDENT

VRS

THE HIGH COURT, ACCRA
(COMMERCIAL DIVISION)

EX-PARTE: DR. KWABENA APPENTENG - -- APPLICANT

1. **STEPHEN KWAKU ASIEDU APPENTENG**
2. **SAMUEL KWAKU MANU APPENTENG --- INTERESTED**
3. **JONES APPENTENG PARTIES/RESPODENTS**
   HOUSE NO. 66. McCARTHY HILL,
   ACCRA

R U L I N G

ATUGUBA, JSC:-

Briefly stated, the facts of this case are as follows. The applicant until recently, one of the executors of the will of the late Samuel Christian Appenteng, on 18/4/2008 obtained, in a chain of steps, leave for the issue of a writ of possession, in respect of one of the properties of the estate of the said testator. However the purported execution of this writ was obstructed by the interested parties herein. The applicant

thereupon obtained on 22/5/2008 an order for forcible entry and arrest of any person who would seek to obstruct the same. Meanwhile the interested parties had commenced an action on the 16/12/2007 against the interested parties impeaching the purported disposal of the disputed property.

After an initial ex-parte interim injunction on 16/5/2008, the interested parties, on 30/5/2008 brought an application on notice for the same which was adjourned to 16/10/2008 for Ruling. Before the Ruling could be given, the interested parties claim per paragraph 15 of their affidavit herein that "*the applicant herein and 4th Defendant without waiting for the ruling of the Court on 8th day of July 2008 entered the premises threw out the beneficiaries and forcibly removed the machines being used by the said beneficiaries and thereby destroying the said machines and used forklift to remove the machines from the premises into the pavement and left the machines to the mercy of the sun*"

They therefore on 7/8/2008 filed a motion for contempt against them. This contempt motion was heard and the applicants found guilty of contempt by Tanko Amadu J, a judge of the Commercial Division of the High Court, on 20/10/2008.

As the original proceedings of this case had been pending in the ordinary High Court, the applicant contends that (1) Tanko Amadu J as a judge of the Commercial Division had no jurisdiction to hear and determine the contempt application and (2) since they acted on the orders of the High Court Tanko Amadu J was wrong in adjudging them guilty of contempt.

This is a matter which, ***ex facie,*** could have been disposed of by this court upon hearing the motion without adjournment. However the terrain of the manner in which the judicial divisions and judges generally, should operate in the exercise of their jurisdiction is one that has reared its head again strongly and more and more light continues to be shed on it.

This court has held in *Republic v. High Court, Ex parte Yalley (Gyane & Ottor Interested Parties)* [2007-2008]SC GLR 512 that a contempt application is "*a substantive matter standing on its own as a separate cause or matter*." Were the matter to rest there it would appear that Tanko Amadu J, though of the Commercial Division of the High Court, could competently deal with the contempt application herein.

The matter is however complicated by the fact that Tanko Amadu J sat on this matter during the legal vacation upon the authority of the Chief Justice. Exhibit 9a attached to the interested parties' affidavit in opposition reads:

"SCR 33c/Vol.4

OFFICE OF THE JUDICIAL SECRETARY
P. O. BOX 119
Accra, Ghana

9th January, 2009

M. A. F. RIBEIRO & ASSOCIATES
P. O. BOX 1680
78 CASTLE ROAD ADABRAKA
ACCRA

ATTN: MR. Y. OPOKU-ADJAYE

RE: VACATION JUDGES FOR 2008 HIGH COURT

SUIT NO. BL. 259/2007
STEPHEN KWAKU ASIEDU APPENTENG AND OTHERS
KWABENA APPENTENG AND OTHERS

I acknowledge receipt of your letter dated 18th December 2008 on the above subject matter.

I write to inform you that *His Lordship Justice Issifu Omoro Tanko Amadu was authorized to sit as a vacation judge and also to preside over the Land Division Accra during the 2008 Legal vacation*.

JUSTICE ALEX B POKU-ACHEAMPONG

JUDICIAL SECRETARY

CC: Her Ladyship the Chief Justice
Second Deputy Judicial Secretary
Chief Registrar-General"

In our judicial dispensation the legal vacation for the superior courts starts from the 1st day of August and ends on the 30th day of September, though in practice vacation judges are expected to hold on until the legal year ceremonies are over. Specific judges are mandated by the Chief Justice to sit as vacation judges. This means that even though a contempt application is an originating process Tanko Amadu J's authority to sit over it in this case stemmed from the authority conferred on him by the Chief Justice during the legal vacation aforesaid. This would mean that his said authority to sit outside his Division covered the said period of the vacation. Tanko Amadu J however ruled on the contempt application on 20/10/2008 when the legal vacation was long past and gone and his period of authority as a vacation Judge had lapsed. There is no evidence that this matter was thereafter transferred to him in the Commercial Division. It would mean therefore that after the legal vacation the matter would ordinarily fall within the authority of the judge of the court in which the application had been filed.

Indeed the interested parties stand firmly only on the vacation authority of Tanko Amadu J to sit on the matter, to justify his said Ruling.

It is not clear from exhibits KA7 of the applicant and 9a of the interested parties whether this matter was pending in the ordinary High Court or the Lands Division thereof. But what is clear is that it was not filed in the Commercial Division of the High Court. It cannot be said that the administrative identities of the courts are effaced during the legal vacation, though authority to sit may be conferred across them.

In the circumstances it cannot be said that Tanko Amadu J was properly seised of this matter on 20/10/2008 when he determined it.

This would seem to be conclusive of the matter. However this is, ***inter alia***, an application for certiorari. It is well established that this remedy being discretionary a suitor for it, even on the ground of want of jurisdiction, will not obtain it ***ex debito justitiae*** unless he can show that he raised objection to the want of jurisdiction if he was aware of it.

We see no difference to this rule when what is involved in this case smacks of excess, as opposed to want, of jurisdiction. In *R v Imer London Quarter Session; Ex parte D'souza* (1970) AII ER 481, Lord Parker CJ said at 482 thus: "*The remedy by way of certiorari is, of cause discretionary*, and there is authority to be found in *R v. Williams;* Ex parte Phillips (1914) IK B608, to the effect that, *if a party to litigation applies to this court for certiorari, certiorari will not be granted if no objection to the jurisdiction was taken before the court below, unless the party was unaware of the absence of jurisdiction*." This is similar to the principle that if there is absence of a formal authority to the institution of proceedings objection as to them should be taken at an early stage.

It is a similar line of thought that informs those who hold the view that judicial divisions are meant for the convenience of the administration of justice but not to detract from jurisdiction unless objection is raised. See *Wiredu v Mim Timber Co Ltd*. (1963)2 GLR 167 S.C and *Republic v. High Court, Kumasi; Ex parte Ackaah* (1995-1996)I GLR 270 S.C. However as was aptly put by Milett Jas quoted by Lord Nolan in *Imperial Chemical Industries plc v. Colmer* (Inspector of Taxes) (1996)2 AII ER 23 H.L at 29 'In my judgment the Crown's submission *confuses the meaning of the statutory language with its application*. Statutes *are not academic exercises in linguistics. They have external application, affecting real people and actual situations…*' We understand this statement to mean that in applying statutes the realistic facts on the ground must be borne in mind.

The facts on the ground show that if the administrative checks put in place by legislation such as the Chief Justice's power of transfer of cases between courts and judges are not enforced chaos, forum shopping and combustible disharmony among

judges would ruin or mar the administration of justice in this country. Thus in *Republic v. High Court, Cape Coast; Ex parte Marwan Kort.* (1998-99) SC GLR 833 this court was called upon to enforce section 21(3) of the Courts' Act, 1993 (Act 459).
It is as follows:

> "21(3) *An appeal* under this section *against a decision of a Community Tribunal* shall, subject to any transfer directed by the Chief Justice, *be made to the Judge of the High Court exercising jurisdiction over the area of jurisdiction of the Community Tribunal.*"

The facts of the case as stated in the headnote are, as far as relevant, as follows:

> "The applicant sued the interested party (hereafter referred as the respondent) in *the Agona Swedru Community Tribunal* and obtained judgment for arrears of rent and an order for ejectment against him. The respondent first lodged an appeal in the Agona Swedru High Court against the judgment. He then applied for a stay of execution of the judgment. However, the application was dismissed by the community tribunal. Subsequently, *the respondent lodged another appeal in the Cape Coast High Court being a High Court in the same region as that of the Agona Swedru High Court*. The respondent repeated his earlier application for stay of execution in the Cape Coast High Court. The applicant was served with the motion paper and supporting affidavit. However, he failed to respond to same by filing an affidavit in opposition; *he also* failed to attend court on the date the application was to be heard."

Although I had some misgivings about the wording of the provision, I did not dissent. This court held as per holding (2) of the headnote as follows:

> "(2) Except where the Chief Justice had exercised his power of transfer to have the respondent's appeal transferred from Agona Swedru High Court to the Cape Coast High Court under section 21(3) of the Courts Act, 1993 (Act 459), *the Cape Coast High Court could not be the proper forum to entertain the appeal and its accompanying motion for stay of execution*- emanating from the Agona Swedru Community Tribunal. *The Cape Coast High Court judge had erred in assuming jurisdiction in the matter*."

The mood of the court in the case was vividly conveyed by Hayfron-Benjamin JSC as per the headnote thus:

> "*Per Charles Hayfron-Benjamin JSC*. The fact that *there are two High Courts in the same region does not mean that a prospective applicant may elect in which High Court and in what town he may prefer his appeal*… In my… opinion the prospective appellant is not put to his election. *His duty is to file his appeal in the High Court nearest to the community tribunal within the region and, where inconvenient, apply to the Chief Justice for the transfer of the appeal to any other high court*. It was not open to the respondent to elect in which of the High Courts – Cape Coast or Agona Swedru – to prefer his appeal. Agona Swedru High Court was the venue for his appeal and the trial judge in the Cape Cost High Court should have been put on enquiry as to the propriety of the appeal and the subsequent application for stay of execution before the court."(e.s)

A similar vice had to be contended with in *Soro v Frans* (2005-2006) SC GLR 1003 and again in *The Republic v. High Court Judge (Fast Track Division) Accra; Ex parte Quaye & Anor (Yovonoo & Ors Interested Parties)* (2005-2006) SC GLR 660. A more gruesome picture has been painted in the *Ex parte Yalley* case, supra At p.516 Mrs. Georgina Wood C.J describing the facts of the case said:

> "The facts leading to this application are quite straightforward. In September 2006, the applicant caused a writ of summons to be issued against the defendants (the interested parties in the instant application) in respect of a plot of land he claimed the defendants have trespassed on, and successfully applied for an order of interim injunction against them for the statutory ten day maximum period.
>
> On 1 November 2006, however, the defendants, the interested parties initiated contempt proceedings against the applicant. …. *the contempt application was placed before Mrs. Justice Owusu-Arhin,* where, in line with court management practices, it continued to be managed by her court clerk during the period she was away on leave. Indeed, when the matter came up in her absence on 15

November 2006, it was accordingly adjourned, in the presence of both parties to 18 January 2007 by the court clerk.

Soon after this adjournment, *the interested parties, through their counsel, succeeded in having the registrar of the court not only abridge the date by bringing it forward to 14 December 2006, but without an order from the Chief Justice, caused the matter to be transferred to an entirely different court and placed before a new judge.*

The new judge ordered a bench warrant to issue against the applicant when he failed to attend court on 14 December 2006. *As if not to be outdone in what we may describe as a game of charades, the applicant in turn maneuvered and made an appearance before yet an entirely different judge sitting in another court, who rescinded the bench warrant*. Subsequently, *the judge who issued the original warrant of arrest, nonetheless, and on 22 January 2007, made further orders of arrest against the applicant."*

In granting the ***certiorari*** application she, at 517 unburdened herself thus:

"The arguments raise a number of primary and secondary issues. Basically, it calls for an interpretation of section 10(1)-(3) of the Courts Act, 1993 (Act 459), as amended by the Courts (Amendment) Act, 2002 (Act 620), s 7 and sched. The broad issue we would have to resolve is what is the proper construction to be placed on this important statutory provision, in the context of the word "case" as appears in section 104?

It is imperative that we clearly spell out the parameters of this law, for reasons that will become evident in due course. Indeed, our first quick reaction is that it is these very chaotic events which bedeviled the contempt application, happenings which, in our view, amount to nothing more than the parties, with the active connivance of their counsel and registrar having gone forum shopping for judges of their choice, which underscores the importance of these statutory

provisions. Paradoxically, it is these self-same matters that would assist us to unravel the true and proper construction of section 104 of the Act 459.

Indeed, if we must eliminate the specter of perceived judicial manipulation and other negative acts or conduct that are alleged to be stalking, as it were, our judicial corridors, then it is absolutely critical that all the principal powers who drive the system, particularly, judges, ought strictly to ensure compliance with the provisions in section 104 which are clearly intended to inject order, transparency, accountability and sanity into the entire justice system. We find that the provisions in section 104 are intended to promote credibility, general efficiency and should be allowed to function as such."

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. Such is the case here. The fact that Tanko Amadu J was exceeding his authority after the effluxion of the vacation period did not seem to have bothered the applicant until his Ruling turned out to be adverse to him. Were it to have been in his favour he would have celebrated it.

In *Obadzen II v. Onanka II* (1982-83) GLR 46 C.A the Court of Appeal by a majority of 2-1sustained the trial by the High Court of a case in which the procedure by which the High Court could have taken over and heard the case, which had been commenced in a district court, had not been properly followed; holding that the important thing to consider is that the High Court has an enhanced concurrent jurisdiction over the subject matter. If the Court of Appeal could go that far on an appeal which is not a discretionary jurisdiction how much stronger is the present case which involves the discretionary remedy of certiorari.

In this case the applicant did not take objection to the continuance of the matter by Tanko Amadu J unlike the applicant in the *Ex parte Quaye* case, supra. The applicant

by that failure is ***particeps delicti*** and it would be an abuse of the process to allow his application.

In deciding this case we are not oblivious of the rule of law that an unpurged contemnor should not be heard, at least with regard to the same matter before he purges his contempt. But we agree with Oliver J in *Midland Bank Trust Co Ltd v Green (No. 3)* (1979)2 AII ER 193 that a contemnor can always take proceedings against an order made without jurisdiction. We further support his view that a court has discretion to hear or not to hear a contemnor. Otherwise if the rule against hearing a contemnor were an absolute one it would run counter to the well established maxim that ***actus curiae neminem gravabit***. Again Oliver J's views accord with the settled judicial view that even when proceedings are rendered final and conclusive by statute, the courts still can intervene where they are infected by want of jurisdiction except in the face of a total ouster clause. See *Republic v. Special Tribunal; Ex parte Forson* (1980) GLR 529 and *Kwakye v. Attorney-General (1981) GLR 944 S.C.*

As to the contention that the judge is wrong in holding that contempt has been committed, we cannot find any error on the face of the Ruling to ground certiorari.

For all the foregoing reasons we would dismiss this application.

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

J. ANSAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

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