IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA – GHANA

CORAM: ATUGUBA, JSC. (PRESIDING)
ANSAH, JSC
OWUSU (MS), JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
NO. J4/37/2010

1ST JUNE, 2011

THE REPUBLIC - - - PLAINTIFF

VRS

NATIONAL HOUSE OF CHIEFS, KUMASI
EX-PARTE NII LARBIE MENSAH IV & ORS. - - - DEFENDANT

J U D G E M E N T.

ATUGUBA, J.S.C:

Facts of the Case

The Appellant herein known in private life as Francis Nii Aryee Addoquaye was enstooled Ablekuma Mantse and Sempe Atofo under the Stool name of Nii Larbie Mensah IV. There was no writ/petition against his installation. As a result, his Chieftaincy Declaration (CD) Forms were duly processed by the Ga Traditional

Council and forwarded to the National House of Chiefs through the Greater-Accra Regional House of Chiefs for his name to be inserted in the National Register of Chiefs. The name of the Appellant was inserted in the national Register of Chiefs on the 23rd day of May 2006 as having been enstooled on the 14th day of April 2000. Sometime in or about September 2006, Adjin Tettey who also claimed that he had been installed as Ablekuma Mantse and Sempe Atofotse under the Stool name of Nii Larbi Mensah IV filed an application for Judicial Review in the nature of mandamus directed at the National House of Chiefs to remove the name of the Appellant from the National Register of Chiefs and insert his name following his recognition by a judgment of the Judicial Committee of the Ga Traditional Council in October 1997.

When the Application came on for hearing the Learned Trial Judge ordered the Interested Party/Appellant/Appellant herein to be joined to the action. After all processes had been filed the matter was heard. The High Court, Kumasi, presided over by His Lordship K. Ansu-Gyeabour granted the Application. Being aggrieved and dissatisfied with the said Ruling, the Interested Party/Appellant appealed to the Court of Appeal. On 12th June 2009, the Court of Appeal dismissed the appeal but varied the costs of GH¢2,000.00 awarded against the National House of Chiefs to GH¢500.00. Being dissatisfied and aggrieved with the said judgment, the Interested Party/Appellant/Appellant lodged the current appeal.

Grounds of Appeal:

Following the grant of an application for Extension of Time within which to file an Appeal, the Interested Party/Appellant/Appellant filed his Notice of Appeal and set down the following Grounds of Appeal:

"a) Their Lordships in the Court of Appeal erred when they rested their

decision on a ground not set out by the Appellant before them and failed to offer the parties opportunity of contesting the case on that ground.

b) Having found from the available evidence on record as a fact that Exhibits 1 & 2 being the Chieftaincy Declaration (C.D.) forms and Letter from the National House of Chiefs were not false because there was no case pending against the Appellant at any forum, which was the gravamen of the Applicant's case before the High Court, Kumasi, their Lordships should have ended the matter, and not to have formulated a ground which was not before their Lordships and proceed to rest their decision thereon without offering the parties any opportunity to contest the case on that ground.

c) There was no ground stated by the Applicant for Order of Mandamus before the High Court Kumasi, that because Appellant herein had a case pending against him before the Judicial Committee of the Ga Traditional Council, the insertion of Appellant's name in the National Register of Chiefs by the National House of Chiefs ought to have been stayed until the petition was disposed of.

d) Having found that there was no legal impediment in the way of Appellant herein, their Lordships ought to have dismissed the Applicant/Respondent's case."

The sum total of the appellant's submissions in this appeal is succinctly summarised in the concluding paragraph of his statement of case filed on 26/4/2010 as follows:

"It is .... submitted that since *the Applicant/Respondent was unable to clear a fundamental hurdle of "demand and Refusal*" his application for

Mandamus was in the first place not properly before the Court and since *he was not able to sustain his claim on the grounds as put forward by him in his supporting Affidavits*, both the High Court and *the Court of Appeal erred when they substituted a different case from that pleaded by the Applicant/Respondent* and proceeded to grant and affirm the Ruling. How did they expect the Respondent and Interested Party/Appellant in our adversary system to answer charges not contained in the grounds for which the relief or remedy was sought?" (e.s)

Prior Demand

On the issue of prior demand before the pursuit of the remedy of mandamus, the relevant law has been stated in the recent decision of this court in *Republic (No. 2) v. National House of Chiefs. Ex parte Akrofa Krukoko II (Enimil VI Interested Party) (No. 2)* [2010] SCGLR 134.

That case plainly approved the exception stated in *Halsbury's Laws of England* (4th ed) para, 156 at 259 as follows:

"156. **Demand for performance must precede application**. As a general rule the order will not be granted unless the party complained of has known what it was he required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the *mandamus* desires to enforce, and that that demand was met by a refusal. *The requirement, however, that before the court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it cannot be applicable in all possible cases, and does not apply where a person has by inadvertence omitted to do some act which he was*

under a duty to do, and where the time within which he can do it has passed." (e.s)

Duty to act fairly and reasonably

In *Republic v The President National House of Chiefs. Ex parte Akyeamfour II* (1982-83) GLR 10 C.A it was stated and held as in the headnote thereof as follows:

"The appellant and the respondent were rival claimants to the Asokore stool. The appellant, claiming to be the rightful Asokorehene, paid his customary fees, swore the customary oath of allegiance before the Omanhene of the New Juaben Traditional Area and subsequently had his name registered in the register of the National House of Chiefs as well as published in the Local Government Bulletin in 1971. The respondent, also claiming to be the rightful occupant of the same stool, later instituted proceedings to stop the further publication of the appellant's name in the Gazette. *During the pendency of the respondent's action, the appellant's name was re-submitted for publication but was struck out*. Meanwhile, the respondent's name had been published and gazetted in 1975. Consequently, the appellant brought an application in the High Court seeking an order of certiorari to remove the name of the respondent from the National Register of Chiefs as well as the Local Government Bulletin of 20 June 1975 for the purpose of quashing same. The High Court refused the application. On appeal,

Held, dismissing the appeal: *the duty to maintain a register as laid down in* section 50 (1) of the Chieftaincy Act, 1971 (Act 370) and the discretion given by *section 50(2) to the national House of Chiefs (N.H.C.) to insert in the register certain information relating to chieftaincy which it might consider necessary or which might be considered desirable by the Act or*

other legislation such as the insertion of the name of a chief under section 48(3) were all purely administrative functions. The act made no provision for hearing objections to the registration functions of the N.H.C. *The N.H.C., in the exercise of its registration functions, did not act judicially since there was no obligation on it to hear evidence from both sides in the event of a dispute, and come to a judicial decision.* All its functions, were associated with factual recording and did not extend to adjudicating on the merits. Thus, *although the N.H.C. had a duty to act honestly and fairly, it was a moral rather than a legal duty*.

Per Francois J.A. [T]he houses of chiefs have their judicial functions through their judicial committees in the determination of constitutional issues regarding chieftaincy – in fact they possess exclusive jurisdiction. *The need to keep the two functions, judicial and administrative, separate and distinct cannot therefore be over-emphasised. It would be invidious for the house to assume an investigative and inquisitorial role in the exercise of purely collating information for the register* when it may be called upon in its judicial capacity to determine the merits of issues affecting the same contesting chiefs. This would be the surest way to stultify the Act. ”

In this case at the time of the insertion of the appellant's name in the national register of chiefs, article 23 of the 1992 Constitution bound the National House of Chiefs in its administrative capacity as follows:

“23. Administrative justice

Administrative bodies and *administrative* officials *shall act fairly and reasonably* and comply with the requirements imposed on them by law and *persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal*.”(e.s)

The 2nd respondent's reliance on article 23 of the Constitution clearly arises from the facts pleaded by him. See *Donkor v. Wih* (1989-90)1 GLR 178 C.A.

In the face of this intervening constitutional provision it is doubtful whether the 2nd respondent (originally the applicant) in this case would still be bound by the common law precondition of making a prior demand before applying for mandamus, see by analogy *Kwakye v. Attorney-General* (1981) GLR 9 S.C wherein this court invalidated the condition of prior one month's notice to the Attorney-General before suing the Republic under the State Proceedings (Amendment) Decree, 1969 (N.L.C.D. 352) as being contrary to the plaintiff's right to proceed as of right under article 2(1) of the 1979 Constitution. It must be borne in mind also that article 11(6) of the Constitution requires the existing law, inclusive of course of the common law under article 11(1) (e), to be "*construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution.*" In view of article 11(6) of the constitution the law as stated in *Ex parte Akyeamfour II*, supra, will have to be read ***mutatis mutandis*** so as to give way to article 23. Certain situations of postponed invocation of the court's jurisdiction however are compatible with the constitution, see *Boyefio v N.T.H.C Properties Ltd.* (1997-1998)1GLR 768. Where however the clog of postponement of access to the courts is not very necessary, as here, the same cannot be tolerated.

In order to act fairly and reasonably in this case the National House of Chiefs before entering the appellant's name in the National register of chiefs should have diligently investigated the CD Forms for the purpose emanating from the Ga Traditional Council and the Greater Accra Regional House of Chiefs as required

by paragraph 56 of the House of Chiefs Standing Orders (Revised) 1991. It is an onerous duty and though holding that there was a default in this respect we do not indict the National House of Chiefs of recklessness. The 2nd respondent did not know of the events to his detriment culminating in the entry of his rival's name in the national register of chiefs on 23/5/2006 until he saw a publication of it in the Daily Graphic of 24/6/2006 when his opportunity and duty of raising issues and in effect demanding compliance with article 23 of the constitution had passed. In that sense it can be said that the 2nd respondent was absolved from the common law duty of making a prior demand and being met with a refusal, even if that duty can still be said in the face of article 23 of the Constitution to subsist.

In any event it has frequently been said that where mandamus cannot lie an order may lie, see *In re Maude and Michelin* (1970) 2 G&G 38. Even without this principle, this court has time without number held that the reliefs open to a party who invokes the supervisory jurisdiction of this court, which is in ***pari materia*** with the supervisory jurisdiction of the High Court, is not limited to the traditional prerogative writs or any particular remedies for that matter. See *Accra Regional Complex Ltd. v. Lands Commission* (2007-2008) SCGLR 108, and *In re Appenteng (Decd). Republic v. High Court, Accra; Ex parte Appenteng and Another* (2005-2006) SCGLR 18. It is clear therefore that the courts below were right in making an order as the justice of this case demands.

As to the contention that the courts below decided this case on a ground not pleaded by the 2nd respondent (as applicant), the same is misconceived. Even though the second respondent initially based his case on the premise that he was the adjudged chief of Ablekuma by dint of a decision of the Ga Traditional Council, he also pleaded that as a result of the quashing of that decision the

chieftaincy petition against him was still pending before that Traditional Council and since it related to the same stool claimed by the appellant it was unfair for the National House of Chiefs in those circumstances to treat the appellant as the undisputed chief of Ablekuma and insert his name in the national register of chiefs accordingly. It is obvious that on a full reading and construction of the pleadings in this case the 2nd respondent pleaded his case in the alternative form, namely, that he is the incumbent chief of Ablekuma or in the alternative that he is the chief thereof though his position is ***sub judice*** and that as his enstoolment long preceeded that of the appellant, the scales ought to be kept even as regards entries in the national register of chiefs until the dispute concerning the stool is resolved. Certainly the rival claim of the 2nd respondent to the same stool affects the status of the appellant.

In any case the appellant did not move to strike out any of the appellant's pleadings as being improper but litigated the same with the 2nd respondent. No surprise or unfairness arises against him in these circumstances.

Accordingly there is no miscarriage of justice and under O. 81 of the High Court (Civil Procedure) Rules, 2004 the proceedings and the pursuant judgments of the courts below in this case hold good. See *Hanna Assi (No. 2) v. Gihoc Refrigeration & Household Products Ltd. (No. 2)* (2007-2008)I SCGLR 16, *Boakye v. Tutuyehene* (2007-2008) SCGLR 970*, Ackah v. Pergah Transport Ltd* (2010) SCGLR 728 and *Republic v. High Court, (Human Rights Division) Accra Ex parte Akita(Mancell-Egala & Attorney-General Interested Parties) (*2010) SCGLR 374. Any contrary view or decision is ***per incuriam*** or overruled.

For all the foregoing reasons the appeal is dismissed.

[SGD] W. A. ATUGUBA
JUSTICE OF THE SUPEME COURT

"" J. ANSAH
JUSTICE OF THE SUPEME COURT

"" R. C. OWUSU [MS].
JUSTICE OF THE SUPEME COURT

"" N. S. GBADEGBE
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