IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA-GHANA AD. 2011

CORAM: ATUGUBA, JSC (PRESIDING)
DR. DATE-BAH, JSC
ANSAH, JSC
BAFFOE-BONNIE, JSC
ARYEETEY, JSC

CIVIL MOTION
NO. J5/21/2001
22ND JUNE, 2011

THE REPUBLIC

VRS

THE COURT OF APPEAL
ANTHONY THOMFORD - - - RESPONDENTS

EX PARTE GHANA CHARTERED INSTITUTE OF BANKERS - - - APPLICANT

R U L I N G

DR. DATE-BAH JSC:

The core of the complaint in this application is that when the applicant's appeal came up for hearing before the Court of Appeal, the court, relying exclusively on the Registrar's Certificate that the applicant/appellant had not complied with the requirement of Rule 20(1) of the Court of Appeal Rules (CI 19), struck out its appeal, without giving any opportunity for representations to be made on its behalf by its counsel who were present in court. It claims, therefore, that the *audi alteram partem* rule has been breached. It has accordingly applied to this court for an order

of *certiorari* to quash the order of the Court of Appeal dated 1st November, 2010 striking out the applicant's appeal.

I would like to begin my analysis of the law governing this main issue in this application by referring to the words of one of the Ghanaian judges whom I admire the most, namely Justice A.N.E. Amissah. Amissah JA, sitting in the High Court in 1968, expressed a clear view to the effect that non-compliance with the *audi alteram partem* rule results in nullity of the subsequent proceedings. He said in *Vasquez v Quarshie* [1968] 2 GLR 62 at p. 63 that:

> "But no court is, to my mind, entitled to call upon a plaintiff to proceed with the proof of his claim if it is aware that the defendant has not been notified of the hearing. Similarly rule 17 speaks of the defendant having the action against him dismissed and proving his counterclaim, if any, should the plaintiff not appear. Here again a court which allows this to happen with full knowledge that the plaintiff does not appear only because he is not aware of the proceeding will be offending against the elementary principle of justice which obliges it to hear both parties, or at least give them an opportunity to have their say, before its decision. A court is only entitled to give a judgment in default if the party fails to appear after notice of the proceedings has been given to him. For then it would be justifiable to assume that he does not wish to be heard. It is this party with notice who defaults in appearance who is privileged to come before the court within fourteen days to have the judgment set aside, if he has some substantial reason for failing to appear when he should have. To hold that his brother without notice is also obliged to come before the court within the same time limit would lead to some inequitable results. It is not impossible that he would get to know about the judgment against him long after the fourteen-day period has elapsed. What should he do then? Should he come to the court and ask for an extension of time within which to apply? I think not. His entitlement to

have the judgment set aside in such circumstances is as of right and should not be made dependent on the discretion of the court. A court making a decision in a case where a party does not appear because he has not been notified is doing an act which is a nullity on the ground of absence of jurisdiction. A person who is condemned in his absence in proceedings of which he has no knowledge cannot be limited as to the time within which he may repudiate the decision. Learned counsel attempted to equate a notice served on the first defendant to produce documents at the trial with notice of the trial. But a cursory examination of the notice shows that this cannot be. It contains no notice of the hearing date. A request that you should produce a document when the trial is on is no notice of the time when the trial is to begin or to continue."

Though Amissah JA made his pronouncement in the High Court, this Supreme Court has held several times recently that non-compliance with the *audi alteram partem* rule results in nullity. In *The Republic v High Court, Accra; ex parte Salloum & Ors (Coker, Interested Party),* Suit No. J5/4/2011, unreported judgment of the Supreme Court, delivered on 16th March 2011, Anin Yeboah JSC, delivering the majority opinion of the court, said:

> "The courts in Ghana and elsewhere seriously frown upon breaches of the *audi alteram partem* rule to the extent that no matter the merits of the case, its denial is seen as a basic fundamental error which should nullify proceedings made pursuant to the denial.
>
> … It is our opinion that as this court has in several cases held that a breach of the rules of natural justice renders proceedings a nullity, we will declare that the applicants have sufficiently made a case to warrant our supervisory intervention."

He cited, with approval, the earlier case of *In re Kumi (Dec'd); Kumi v Nartey* [2007-2008] SCGLR 623, where Sophia Adinyira JSC had said at pp. 632-3 that:

"In consonance with the above principles of law, both civil and criminal procedure rules allow a party to have a judgment or order made in any proceedings that took place without notice and in his absence to be set aside. This elementary principle of justice, which obliges a court to hear both parties, or at least give them an opportunity to have their say, before its decision, is of such essence that even where a person has notice of the trial but fails to attend court, he may apply to the court to have a judgment or order made against him set aside. He may do so under Order 36, r. 2 of CI 47 which provides:

"2(1) A judge may set aside or vary, on such terms as are just, a judgment obtained against a party who fails to attend at the trial.

(2) An application made under this rule shall be made within fourteen days after the trial."

However, as explained by Amissah JA in *Vasquez v Quarshie* (supra) in relation to the analogous provision under Order 36, r 18 of the Supreme [High] Court (Civil Procedure) LN 140A), the above rule of a time limit of fourteen days only applies to a party who had notice of the trial. But where in the case of a party who had no notice of the trial he has as of right to apply to have the judgment set aside as the proceedings was without jurisdiction."

Similarly, in *Republic v High Court, Accra; ex parte Allgate Co. Ltd. (Amalgamated Bank Ltd., Interested Party)* [2007-2008] SCGLR 1041, I held that breach of the principle of *audi alteram partem* resulted in loss of jurisdiction. I said at pp. 1052-3 that:

"For the reasons eloquently articulated by Taylor JSC in *Amoakoh v Hansen* [1987-88] 2 GLR 26 at 43-44, non-service of a process where service of same is required, in my view goes to jurisdiction. Non-service implies that *audi alteram partem,* the rule of natural justice is breached. This is fundamental and goes to jurisdiction."

The authorities cited above point to the likelihood that this court will nullify the order made by the Court of Appeal after failing to listen to the applicant's counsel before acting on the basis of the Registrar's Certificate. The Court of Appeal had a discretion under Rule 20(2) of CI 19 to strike out the applicant's appeal or not. The discretion given to the court in Rule 20(2) is only properly exercised when an opportunity is given to an appellant to make representations challenging the Registrar's Certificate, if he or she wishes to do so. Rules 20(1) and (2) read as follows:

> "(1) An appellant shall within three weeks of being notified in Form 6 set out in Part I of the Schedule, that the record is ready, or within the time that the Court may on terms direct, file with the Registrar a written submission of the appellant's case based on the grounds of appeal as set out in the notice of appeal and any other ground that the appellant may file.
>
> (2) Where the appellant does not file the written submission of his case in accordance with sub-rule (1), the Registrar shall certify the failure to the Court by a certificate in the Form 11A set out in Part One of the Schedule and the Court may then order the appeal to be struck out."

The Registrar's certification to the court under Rule 20(2) cannot, in fairness, be considered as irrebutable, since the Registrar can get his facts wrong and the appellant should be given the opportunity to draw the Court of Appeal's attention to facts, if any, which negate the validity of the certificate issued under Rule 20(2). The applicant has applied for several orders consequential on the quashing of the Court of Appeal's order. A more detailed narration of the facts of this case is needed in order to understand why these consequential orders are sought.

The uncontroverted affidavit evidence of Dr. Seth Twum, a legal consultant of the solicitors to the defendant/appellant is to the following effect: the plaintiff brought action against the defendant (the applicant in this case) in the High Court,

Accra, on 20th January 2006. After a full trial, judgment was given against the defendant on 14th September, 2008. On 12th October, 2008, the defendant filed a Notice of Appeal against the judgment. The record of proceedings was settled and all the appropriate fees duly paid by the appellants. On 11th November 2009, one Prosper who claimed to work in the Docket Section of the High Court served a copy of the record of proceedings on the solicitors to the appellants. These solicitors discovered that the record served by Prosper was not certified. The said solicitors sent back the record to the Registry for due certification. This certification was completed on 1st December, 2009. Within 18 days of the record being certified, the appellant's Statement of Case had been prepared and filed. Some 3 months after the filing of the appellant's Statement of Case, there was no response from the respondent. Accordingly, the appellant conducted a search on 12th March, 2010 in the Registry of the Court of Appeal. The search disclosed that the appellant's Statement of Case had not been served because there was insufficient address on it for service. The respondent's Written Submission was eventually filed on 10th May, 2010. Although it was out of time, the appellants did not complain, in the interest of the merits of the appeal being adjudicated upon.

The appellant/applicant contends that its efforts to get the uncertified record certified have been exploited by the respondent to generate confusion in all the subsequent process filed by the appellant.

When the appeal was heard on 14th June, 2010, the Court of Appeal struck out the appellant's Statement of Case, when it accepted the respondent's claim that the appellant's Statement of Case had been filed out of time. The appellant contends that this was an error and makes submissions in support of this contention which it is unnecessary to consider in detail here. In any case, the appellant filed an application for extension of time within which to file its Written Submission of Case. The application contained a prayer that the additional grounds filed subsequent to the delivery of the authenticated record of proceedings be admitted into the record. While the Court of Appeal expressed its willingness to grant the

application for extension of time, it said that a copy of the additional grounds of appeal should be annexed to the application and advised counsel to go back and put her house in order. On 20th August 2010, counsel filed the supplementary affidavit exhibiting the additional grounds of appeal. The matter of extension of time then came up for further hearing on 1st November, 2010. It was the Court of Appeal before whom this matter was placed which made the ruling that:

> "On the basis of the Registrars Certification that the appellant has not complied with the requirement of Rule 20(1) of CI 19 we proceed to strike out the appeal which is accordingly struck out. We award costs assessed at GHc 300.00 against the Plaintiff/Appellant costs to be paid before fresh or further steps be taken."

The appellant/applicant contends that there was no basis for the Registrar's Certificate and that the notice issued by him was false. The appeal had not been listed for hearing, as the motion for extension of time to file the Statement of Case had not yet been taken. The appeal was thus not ready to be heard.

Without going into the full details of the appellant/applicant's dissatisfaction with the conduct of the Registrar, I would like to stress that what is significant, for the purposes of the present application, is that had the Court of Appeal allowed counsel for the appellant to be heard on the 1st November 2010, they could have brought to the attention of the court matters that could have affected the exercise of their discretion. This reinforces the correctness of insisting on the application of the *audi alteram partem* rule and its legal consequences.

Regarding the Notice of Intention to Rely on Preliminary Objection filed by counsel for the second respondent, the notice relies on Rule 62 of CI 16 which stipulates that applications for the exercise of the supervisory jurisdiction of this court shall be filed within 90 days of the date when the grounds for the application first arose, unless the time is extended by this Court. This Rule however has been held not to apply where the subject-matter of the application is a decision which is a nullity. The passage from Amissah JA's judgment in *Vasquez v Quarshie*

(supra) says as much. My brother Atuguba JSC also comes to the same conclusion in *Republic v High Court (Fast Track Division) Accra; ex parte Speedline Stevedoring Co. Ltd. (Dolphyne Interested Party)* [2007-2008] SCGLR 102, where, delivering the judgment of the court, he stated that (at p. 106):

> "But we do not think that even if the certiorari decision by this court was founded on an application brought out of time the same was thereby vitiated as a nullity. This is because time limits cannot apply to cases or judgments or orders which are a nullity. The celebrated case of <u>*Mosi v Bagyina*</u> [1963] 1GLR 337, SC so decided."

Accordingly, the preliminary objection based on an alleged violation of Rule 62 of the Supreme Court Rules fails.

[SGD] DR. S. K. DATE-BAH
[JUSTICE OF THE SUPREME COURT]

<u>ATUGUBA, J.S.C</u>:

I have had the advantage of reading the masterly Ruling of my brother Dr. Date-Bah JSC and I agree that the preliminary objection fails. It is fairly well settled that time limits do not affect the courts' inherent jurisdiction to vacate orders that are a nullity.

The question that arises therefore is whether a breach of the rules of audi ***alteram partem*** sounds in nullity. It is trite law that these rules are regarded as fundamental and jurisdictional and that the courts will read them into statutes though they be silent as to them. Thus in *Aidoo v Commissioner of Police (No. 3)* (1964) GLR 354 at 359 S.C Ollennu JSC delivering the Judgment of the court concerning the wide revisionary powers of the High Court under sections 59-60 of the Courts Act 1960,(C.A.4) over sentences passed by district courts, said:

"*Every discretion given to a court or judge must be judicially exercised, that is, exercised in such a manner, to use the oft repeated expression, so that justice must not only be done thereby, but that it must manifestly be seen to have been done*. This is particularly so where the exercise of the discretion may produce a penal effect upon a party against whom it is exercised.

It is a well settled rule of procedure of the common law as well as of our customary law,that no person shall be condemned without being given the opportunity to answer any complaints made against him. The customary law principle in this regard is embodied in the Akan adage, Tieni mienu, meaning hear both sides; the Ga affirmation ke anuu mo gbeianshishi le agbee le, meaning, never condemn any one to death whose explanation you have not heard; and the Ewe adage, Ela manotsia awede menuneo, meaning literally, an animal is never killed without being offered water to drink. *The principle laid down in each of those sayings in short is, that it is unjust to decide a matter against a person without first hearing what that person has to say in explanation to allegations made against him.*"(e.s)

Continuing at p. 360 he said"

"Now the affidavit of the respondent disclosed that *in making the order appealed from, his lordship he Chief Justice acted upon certain representations made to him by the Director of Public Prosecutions; yet before the penal order was made against him, the appellant was not given the opportunity of knowing what those representations were, and was not heard in reply to them*. This violates the fundamental principle of justice which is jealously guarded both by the common law and the customary law. In those circumstances justice cannot appear to have been done. In other words the discretion was not exercised judicially. The order therefore cannot stand."

I am myself a shareholder of this reasoning in *Republic v. High Court(Fast Track Division) Accra Ex parte State Housing Co. Ltd. (No. 1) (Barnor Interested Party)* (2009) SCGLR 177 though in a subsequent case I watered it down in view of O.81 of C.1.47.

See also *University of Ceylon v Fernando* (1960)I WLR 223 P.C. But in the common law world generally the position is not uniform as to the effect of a breach of the rules of ***audi alteram partem.*** Thus in *Asor II v Amegboe* (1978) GLR 153 C.A at 157 Azu Crabbe C.J quoted Lord Denning M. R (the initial champion of the nullity principle) in *F. Hoffman-La Roche & Co v. Secretary of State for Trade and Industry* [1974]3 WLR 104 H.L, as saying at the Court of Appeal level of the case,.."*failure to observe the rules of natural justice does not render a decision or order or report absolutely void in the sense that it is a nullity..."*

However, in my view, in Ghana what clinches this issue is article 296 of the 1992 Constitution. It is a follows:

> "**296. Exercise of discretionary power**
>
> Where in this Constitution *or in any other law* discretionary power is vested in any person or authority,
>
> (a) that discretionary power *shall be deemed to imply a duty to be fair and candid;*
>
> (b) *the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law*; and
>
> (c) where the person or authority is not a Justice or other judicial officer, there shall be published by constitutional instrument or statutory instrument, Regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."

The terms of this provision are mandatory and obviously require observance of the rules of natural justice, especially the ***audi alteram partem*** rule involved here.

The rule has therefore been elevated to constitutional pedestal and its breach has the constitutional consequences laid down in articles 1 and 2 of the Constiutiton, namely such breach voids the act in question.

But it is not all over. The courts are anxious that no unfair advantage should be taken of any law. See *Amuzu v Oklikah* (1998-99)SC GLR 141. Accordingly even in relation to the ***audi alteram partem*** rule this court was constrained to hold in *Akuffo-Addo v Catheline* (1992)1 GLR 377 S.C as per headnote (2) as follows:

> "(2) The proviso not rule 8(6) of the Court of Appeal Rules, 1962 (LI 218) which required the Court of Appeal not to rest a decision on a ground not canvassed by the appellant unless the respondent had been given sufficient opportunity to controvert that ground, should not be given an interpretation which would inhibit or stultify the rule that an appeal "shall be by way of rehearing." *The proviso could not be said to imply an absolute prohibition*; in certain *special or exceptional circumstances*, it would not apply. Accordingly, it could be said that the Court of Appeal should not decide in favour of an appellant on a ground not put forward by him unless the court was satisfied beyond doubt, first, that it had before it all the facts or materials bearing upon the contention being taken by it ***suo motu***; and secondly, that *the point was such that no satisfactory or meaningful explanation or legal contention could be advanced by the party against whom the point was being taken even if an opportunity was given him to present an explanation or legal argument.* Accordingly, even though in the instant case there was indeed no ground filed by the defendants which could be said to be a complaint against the trial court's decision to decree title to

the Kaneshie house in the plaintiff when there had been no claim to such relief, since on the evidence the claim had never been before the trial court, the judge had no jurisdiction to pronounce on same. *Accordingly, since the decree was a nullity, the Court of Appeal's hands could not be stayed, when it decided to act* ***suo motu*** *in the matter, by the invocation of the proviso to rule 8(6) of LI 218 to inhibit its inherent jurisdiction*."(e.s)

It is interesting that Osei-Hwere JSC who when a Justice of the High Court took a similar view in *Essilfie v Ghana Ports Authority* (1980) GLR 469, radically disagreed with this holding.

In view of this court's decision in *Hanna Assi (No. 2) v. Gihoc Refrigeration & Household Products Ltd* (2007-2008)1 SCGLR 16 the reasoning in the holding (2) quoted above may not hold now with regard to the omission to make a particular claim, but it could be relevant to other situations.

Conclusion

I would conclude by holding that since under the common law the purposive rule of applying the common law is observed and conveyed by the ***maxim cessante ratione cessat lex ipsa*** and the same principle has been adopted by this court with regard to statutory and constitutional interpretation and the 1992 Constitution itself expressly requires (see for example article 17(4)(d), that its spirit should be observed), where there is clearly no defence against an order made by a court, that situation does not evoke unfairness against the person to whom it relates even if he was not heard before the same was made. In such a case the court should not be bound to set it aside, ***ex debito justitiae***. However, in this case the applicant has a plethora of causes to show as to why his appeal ought not to be struck out upon the Registrar's summons. Therefore the failure to hear him out on it is prima facie an infraction of the ***audi alteram partem*** rule as embraced by article 296 and can void the peremptory striking out of his appeal and time under the Rules of this court cannot shut him out from pursuing his motion herein.

For these reasons I would also overrule the preliminary objection.

Motion to proceed.

[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] B. T. ARYEETEY
[JUSTICE OF THE SUPREME COURT]

COUNSEL;

MISS AUDREY TWUM FOR THE APPLICANT.
GODFRED YEBOAH-DAME FOR THE 2ND RESPONDENT.