IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA AD 2011

CORAM: BROBBEY (PRESIDING), JSC
ANSAH, JSC
ADINYIRA (MRS.) ,JSC
OWUSU (MS),JSC
YEBOAH, JSC
BONNIE, JSC
GBADEGBE, JSC

CIVIL MOTION
SUIT NO. J7/4/2011
27TH JULY, 2011

CAPTAIN ROBERT MBA TINDANA ---- APPELLANT/APPELLANT/ APPELLANT/APPLICANT

VS.

1. THE CHIEF OF DEFENCE STAFF
2. THE MINISTER OF DEFENCE
3. THE ATTORNEY-GENERAL RESPONDENT/RESPONDENT/ RESPONDENT/RESPONDENT

R U L I N G

ANIN-YEBOAH JSC:

The applicant herein Captain Robert Mba Tindana was a Military Officer commissioned into the Ghana Armed Forces in 1979.

Whilst on peace-keeping operations, he was alleged to have done "an act to the prejudice of good order and discipline" contrary to section 54 of the Armed Forces Act 1962, Act 105. The facts leading to his discharge from the Armed Forces do not appear to be very

necessary for the determination of this application. Some time after his discharge, the applicant instituted proceedings at the High Court (Fast Track Division) seeking several reliefs flowing from what he alleged as breaches of the Armed Forces Act, 1962 Act 105 and violations of his fundamental human rights.

The High Court, on 19/06/2007, dismissed the applicant's action on the basis that the action was caught by the Limitation Act, NRCD 54 and the Transitional Provisions of the 1992 Constitution.

Naturally aggrieved by the decision, the applicant lodged an appeal at the Court of Appeal. The Court of Appeal dismissed the appeal. The Notice of Appeal to the Court of Appeal was filed on the 16/11/2007. At the Court of Appeal, the appeal was dismissed on the merits. The applicant lodged an appeal to the Supreme Court. The Supreme Court after hearing the parties, based on the written submissions of both counsel in the appeal dismissed the appeal on the simple ground that the appeal from the High Court judgment was filed out of time without any extension of time and therefore the Court of Appeal had no jurisdiction to entertain the appeal from the High Court. In the unanimous ruling of the Supreme Court that was read by Justice Gbadegbe, the court pronounced on the competency of the appeal that was determined by the Court of Appeal as follows:

> "The appeal which was filed after three months period provided under rule 9 of the Court of Appeal Rules was plainly incompetent resulting in the absence of jurisdiction in the Court of Appeal to determine it. Consequently, the entire proceedings acquire the attribute of nullity and same are hereby set aside".

The applicant, who is aggrieved by the dismissal of his appeal, has now brought this application inviting this court to review its decision by setting aside the judgment dismissing his appeal on several grounds. For fuller record the grounds for this application as set out as follows:

a) The applicant was not out of time in bringing the appeal to the Court of Appeal.

b) Assuming without conceding that the applicant filed his appeal to the Court of Appeal late in time, that irregularity is waivable and same was waived by the Court of Appeal.

c) The Supreme Court erred when it neglected, contrary to statute and contrary to the principle of audi alteram partem, to hear the applicant before resting its decision

entirely on a fresh ground that was generated by the court itself, leading to a judgment that is contrary to the evidence in the record of proceedings to the effect that any irregularity on the part of the applicant was waived by the Court of Appeal.

d) The Supreme Court erred when it swept under the carpet, crucial issues relating to the interpretation of the Human Rights and indemnity provisions of the 1992 Constitution on substantive Justice, by sheltering under a mere procedural rule that is , in any event, waivable.

On the first ground, the applicant has urged on us that his appeal was not filed out of time. This is based on his interpretation of the reckoning of time in civil matters. The computation of time is statutorily provided for in the various rules of court. In the instant case, the applicable rules are contained in the Court of Appeal Rules, CI 19. The judgment of the High court was delivered on 19/06/2007. By rule 9(1)(b) of the Court of Appeal Rules, the applicant had three months within which to lodge any appeal against the High Court's judgment since the judgment was not interlocutory but final for all purposes except he was granted leave by the High Court or the Court of Appeal under sub rule 4 of the rule.

The applicant did not lodge his appeal within the three months from the delivery of the High Court's judgment. Neither did he seek and obtained an order in his favour to appeal out of time. He contended that as the judgment was delivered on the 19/06/2007 and the legal vacation commenced on 1/08/2007 and ended on 30/09/2007, he was within time. In effect, legal vacations are not reckoned in the computation of time for lodging civil appeals. Learned counsel for the applicant acknowledges that time for filing pleadings and amendment of pleadings are not reckoned during legal vacations. He says a pleading in civil proceedings includes Notice of Appeal as a : "Notice of Appeal is for the purpose of providing notice of what is to be expected at the trial in the Court of Appeal".

In the statement of case accompanying the application, the applicant adopted the definition of pleading provided in Order 82 rule 3 of CI 47 and argues that since the notice of appeal was in its nature a pleading, the court erred in its computation of the three months limitation provided for appeals by taking into account the period of the legal vacation. Order 82 rule 3 defines pleading as **"the formal allegations by the parties to a law suit of their respective claims and defences with the intended purpose of providing notice of what is expected at the trial"**

The above definition, we think agrees with what is generally accepted in most jurisdictions of the term pleading. Reference is made to the definition of pleading in Baron's Law Dictionary, Fifth Edition at page 380 as follows:

> **"PLEADINGS statements, in its logical and legal form of the facts that constitute plaintiff's cause of action and defendant's ground of defence. They are either allegations by the parties affirming or denying certain matters of fact, or other statements by them in support or derogation of certain principles of law, which are intended to have the effect of disclosing to the court or jury the real matter in dispute….**
>
> **At common law, pleadings were a rigorous process of successive statements the aim of which was to progressively narrow the issue. The common law pleadings were the plaintiff's declaration, the defendant's plea, the plaintiff's replication, the defendant's rejoinder, the plaintiff's surrejoinder, the defendant's rebutter, the plaintiff's surrebutter……."**

Ingenious as the argument regarding the classification of a notice of appeal as a pleading seems to be, we think that it loses sight of the fact that a notice of appeal is an originating process that may be likened to a writ of summons, which does not require of the defendant or respondent to file a process specifically in reply or answer to it. It is observed that the purpose of time limits for appealing is to provide certainty as to whether or not an action that has been determined has been put to rest by the parties or is pending by way of a process of judicial correction that is normally brought into being by one of the parties commonly described as an aggrieved party lodging an appeal therefrom to a higher court that seeks to have the decision in respect of which the notice of appeal has been filed set aside after a process of rehearing. The notice of appeal in this regard only initiates the process of appeal and cannot be described as a pleading; for in its nature it does not require the respondent to make by way of answer any "allegation" to the contrary. In our view, a notice of appeal has never qualified as a pleading in any judicial process. The question whether or not such pleadings may be filed in the vacation is a matter regulated by the rules of court. In our view, the contention by learned counsel for the applicant regarding the computation of the time limit for appealing to the Court of Appeal attractive as it might be, is on a careful consideration one that runs contrary to the settled practice of the courts.

To us the crucial issue for determination in this application is whether the Court of Appeal had jurisdiction to hear the appeal on which this court formed the view it had been filed outside the statutory period without any valid extension of time.

That view has not been called in question before us in these proceedings, and therefore in determining the application for review we propose to base our opinion on the fact that it was indeed filed out of time.

It must be stated as trite learning that all appeals are statutorily conferred. See FRIMPONG V POKU [1963] 2 GLR 1 SC, NYE V NYE [1967] GLR 76 CA [full bench] and AGYEI V APRAKU [consolidated] [1977] 1 GLR III CA.

In Ghana, the right to appeal vested in the applicant from the decision of the High Court to the Court of Appeal was conferred by the 1992 Constitution under Article 137 and section 11 of the Court's Act, Act 459 of 1993 and regulated by the Court of Appeal Rules, 1997 (CI 19).

An appellant who is vested with the statutory right of appeal must comply with all provisions of the statute creating such a right. In this case, the applicant's right to appeal is regulated by the Court of Appeal Rules, 1997 CI (19), specifically Rule 9 thereof. The plain language of Rule 9 of CI 19 is that civil appeals in final decisions of the High Court or Circuit Courts ought to be filed within three months from the date the decision was delivered. The appellant herein failed to apply for extension of time after the expiration of the three months. It is equally plain that the applicant filed his appeal outside the three months provided by the rules without extension of time. His argument is that time did not run during the legal vacation. A careful reading of the High Court Rules, specifically Order 80 rule 2 of CI 47 excludes vacations in computation of time only in respect of filing or amending pleadings. Under the old rules, High Court [Civil Procedure] Rules LN 140A of 1954 the position was the same. It therefore follows, that, as Notice of Appeal for all purposes has never been a pleading in any civil litigation in this country or elsewhere, time continues to run for filing appeals during the legal vacation. The appeal lodged outside the three months was therefore outside the statutory period provided for under Rule 9 of CI 19. It is settled on a long line of authorities that an appeal filed outside the statutory period provided under the rules without any valid extension of time is void. See ATTA KWADWO V. BADU [1977] 1 GLR 1 CA, DARKE IX V. DARKE IV [1984 – 86] 1 GLR 481 SC and ZAKARI V NDUN [1968] 1 GLR 1032.

The applicant's argument to debunk the above proposition of law is that since the Court of Appeal heard the appeal by assuming jurisdiction the Supreme Court ought not to have raised this point against him.

It must be pointed out that the issue of whether or not the appeal was filed outside the statutory period was one which goes to jurisdiction. A jurisdictional issue must be addressed by any court entertaining any proceedings. In this case, the issue of jurisdiction could not have been waived by the Court of Appeal when the appeal was filed outside the three months without any valid extension of time to give life to the appeal. We think that condition precedent to the exercise of the right to appeal within a specified time frame cannot be waived by any court and indeed the power conferred on our courts to extend time in circumstances that they deem fit is a recognition that beyond the statutory indulgence that is expressly authorized by the law maker any appeal filed out of the initial period of three months and in the period allowed for extension of time would be incompetent and could be raised at the hearing of the appeal by the respondent. When this happens, then the order extending time would be set aside. Therefore we do not think it is right to contend that the Court of Appeal waived the issue of the appeal having been filed out of time. Even if the court were to do so, which in law could not be done, we think that the waiver must appear expressly in the record and cannot be inferred from an omission to advert its mind to it.

In our respectful opinion, the learned justices of the Court of Appeal did not advert their minds to the issue of the appeal having been filed out of time. We think that they must have thought that everything was in order particularly as neither counsel raised it for their consideration. The resulting consequence is that they exercised jurisdiction over an appeal that was plainly incompetent. Since it was a jurisdictional issue it could be taken even in the last appellate court and this was rightly done by this court. See - REPUBLIC V ADANSI TRADITIONAL COUNCIL; EX PARTE NANA AKYIE II & OR [1974] 2 GLR 126 CA. As the Court of Appeal lacked jurisdiction to hear the appeal, the parties and the court's failure to raise the point is inconsequential. Lord Esher MR in R V JUSTICES OF ESSEX [1895] 1 Q B 38 said as follows at page 41:

> **"No consent of the parties can give jurisdiction when the conditions are not complied with**"

Another complaint against the judgment of this court is that this court propio motu raised the issue of jurisdiction without offering the parties the opportunity to argue on it. It is trite learning that a court adjudicating any matter may raise a point of law on its own motion. In these proceedings, the point of law raised was jurisdictional.

In as much as we agree with learned counsel that the court ought to have offered the parties the opportunity to address it on the point raised, we are of the considered opinion that the point raised was clearly unanswerable to admit of any legal argument under the circumstances. It would therefore have been an exercise in futility for counsel on both sides to address the court on the point raised.

We conclude this ruling with the words of Fedilis Nwadialo in his celebrated book, CIVIL PROCEDURE IN NIGERIA, 2ND edition at page 772 where he said as follows:

> **"In order to be entitled to exercise a right of appeal, the appellant must come within the provision of the statute creating such a right. It is thus proper for an appellate court to raise the issue of right to appeal SUO MOTU since it is crucial to the appeal and any proceedings leading to a judgment given without jurisdiction is a nullity, however well conducted".**

Regarding the issue of human rights that is raised by the applicant, we think that it can only be raised in an action or proceeding which is competently taken before any court of law. Where, as in this case, the party who seeks to have his claim to having his human rights violated and for that matter seeks appropriate redress brings his action or proceedings outside the time frame provided by the law then in keeping with the requirements of due process which is a condition precedent to the court's exercise of its jurisdiction, it would be unjust and contrary to the reasonable expectations of society if such a claim which is caught by the statute of limitation and therefore improperly constituted were to be dealt with on the merits. The jurisdiction of courts to sit in judgment over parties is derived from statute and where statute says clearly that to be justiciable claims or proceedings should satisfy specific time frames, effect must be given to them in order to give life and meaning to the rule of law, which is the bedrock of our constitutional democracy. The jurisdictional issue does not concern itself with the merits of the appeal if the proceedings are a nullity.

In conclusion, we find no merit in the application to review the decision of this court founded on the legal grounds that a notice of appeal filed outside the statutory period

without a valid extension of time is a nullity and confers no jurisdiction on an appellate court.

The application is therefore dismissed as without merits.

[SGD] ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

[SGD] S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

[SGD] J. ANSAH
JUSTICE OF THE SUPREME COURT

[SGD] S. O. A. ADINYIRA(MRS.)
JUSTICE OF THE SUPREME COURT

[SGD] R. C. OWUSU(MS)
JUSTICE OF THE SUPREME COURT

[SGD] P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

[SGD] N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

COUNSEL:

APPLICANT APPEARS IN PERSON

CECIL ADADEVOH, SENIOR STATE ATTORNEY WITH MISS HELENA FRENCH, ASSISTANT STATE ATTORNEY FOR ALL THE RESPONDENTS.