IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: BARBARA ACKAH-YENSU JA (PRESIDING)

OBENG-MANU JNR JA

RICHARD ADJEI-FRIMPONG JA

SUIT NO. H1/71/2021

DATE; 4TH NOVEMBER, 2021

THE REPUBLIC

VRS

1. **NEWMONT GHANA GOLD LIMITED**
2. **THE MINISTER IN CHARGE OF MINES**
3. **THE ATTORNEY GENERAL** **RESPONDENTS/RESPONDENTS**

EX PARTE

1. **GABRIEL NSIAH ABABIO (NSANAAHENE)**
2. **MAAME AKOSUA KOBI**
3. **MAAME ABIRI**
4. **ABENA ATAA** **APPLICANTS/APPELLANTS**

J U D G M E N T

RICHARD ADJEI-FRIMPONG JA;

This litigation has ensued from the mining exploits of Newmont Ghana Gold Limited, the 1st respondent herein.

Sometime in 2001, the government of Ghana granted a mining lease over a large tract of land in the Kenyasi area in the now Ahafo region to the mining giant. Sequel to the grant, the 1st respondent in February 2004, declared a portion of the land comprised in the lease as a mining area for purposes of its full mining operations. It then embarked on a process to pay compensation for disturbance of surface rights in accordance with the provisions of Section 71 of the Minerals and Mining Law (1986), PNDCL 153, then applicable. The process was said to involve crop enumeration/survey of all farms falling within the mining area and the issuance of crop chit prepared for farm owners and lawful occupiers of the land.

Few years later between 2004 and 2006, based on the crop enumeration/survey, compensations were paid to those captured in the exercise. These are facts that do not admit of any disputation.

Trouble however began when the four appellants herein, who claimed to be owners and lawful occupiers of various portions of the land in the mining area with teak trees and other seasonal crops thereon, were denied payment of compensation, though, according to them, their land had been demarcated and marked for the purpose.

The appellants' relentless demand for compensation over the period, marked by several correspondence traded among them and the respondents, the 2nd and 3rd, being the Minister responsible for mines and the Attorney General respectively, culminated, in the commencement of the judicial review action now on appeal before us.

At the court below, the appellants sought, as applicants, the following reliefs:

a. *A declaration that the applicants are entitled to prompt, fair and adequate compensation from the 1st respondent for the disturbance of the surface rights of the applicants.*

b. *A declaration that the delay by the 1st and/or 2nd respondent to determine the compensation due the applicants as a result of the disturbance of the applicants' surface rights, constitutes a neglect or refusal on the part of the 2nd respondent to determine the compensation due the applicants.*

c. *An order of mandamus directed at the 2nd respondent compelling it to promptly determine and order the 1st respondent to pay the exact compensation due the applicants for the disturbance of the surface rights of the applicants within 30 days.*

d. *An order compelling the 1st respondent to pay the compensation assessed by the 2nd respondent in respect of the disturbance of the applicants' surface rights to the applicants within 7 days after the amount of compensation is assessed.*

e. *Costs, including Solicitors fees on full indemnity basis.*

The quintessence of the appellants' case at the trial which formed the grounds of the judicial review application was that, having pursued the demand for compensation without any success, they instructed their lawyers some time in 2018 to write to the 2nd respondent on the subject of their compensation. In spite of several correspondence, meetings and follow-ups, the 1st respondent still failed to honour their demand.

They therefore caused their lawyers to write to the 2nd respondent calling upon him to discharge his statutory duty to ensure that they were paid prompt and adequate compensation for the disturbance of their surface rights to their lands. The 2nd respondent however failed or neglected to respond to the demands.

It was their case that unless compelled by the court, 1st respondent having evinced a clear intention not to pay the compensation will persist in the conduct, and the 2nd respondent would also neglect to perform his statutory duty of determining the due compensation as there was a clear intention on his part not to do so.

They contended that this was a good case where mandamus lay against the 2nd respondent to perform his statutory duty of assessing or determining the compensation due them for the disturbance of their surface rights.

Resisting the appellants' claim, the 1st respondent narrated that having conducted the crop enumeration/survey and related activities and proceeded to pay compensation between 2004 and 2006 to those whose surface rights were affected, it received correspondence several years later in 2018, from the 2nd and 3rd appellants through their lawyers alleging that they were owners of parcels of lands within the mining area and were thus, entitled to payment of compensation.

Later, in November 2018, the self-same lawyers again wrote, this time on behalf of all four appellants repeating the same demand for payment of compensation, as owners of lands situate at Apinsu and sharing boundary with the Subri River at Subriya and the Ntotroso road to the left at Kenyasi No.2 in Ahafo all within the mining area.

In reaction to the demand, according to the 1st respondent, it conducted investigation into the claim which revealed, that whilst the land mentioned by the appellants fell within the mining area, compensation had already been paid in or about 2005 to all owners and lawful occupiers upon the crop enumeration/survey exercise.

In short, on the basis that compensation had already been paid to those entitled some time, in 2005, 1st respondent did not deem the appellants the true owners and lawful occupiers of the land to be entitled to compensation. This position it had maintained all through the disputation.

It was also contended that the 1st respondent, a limited liability company, was not a public body charged with the discharge of a public duty and was therefore not amenable to the judicial review jurisdiction of the court. Thus, so far as it related to the 1st respondent the application was incompetent.

The case of the 2nd and 3rd respondents hinged on the statutory provision in Section 71 of the erstwhile Minerals and Mining Law (PNDC LAW 153). It was in terms that, the ministerial duty to determine, in consultation with the Lands Valuation Unit of the Lands Commission, compensation due to the landowner or lawful occupier of land, could only arise after the landowner or lawful occupier had applied to the mineral right holder and the two had been unable to agree on the amount payable as compensation.

Thus, in this case where the 1st respondent disputes the ownership of the appellants of the land on the basis that it had already paid compensation to the lawful owners and occupiers who were captured in the crop enumeration/survey way back in 2005, the 2nd respondent's ministerial duty could not be invoked. The appellants' application, to them, was therefore premature.

Now, having considered the arguments advanced on behalf of the parties and considered the various documents placed before him, the learned trial judge dismissed the application.

In particular, he considered that the appellants had not made a case for the declaration they sought. His reasoning was that the parties were shown to have disagreed on whether the appellants were entitled to compensation in the first place not to talk of the quantum of the amount. To him, those were issues to be resolved further by presentation of evidence. Consequently, he thought it erroneous to make the declaration sought as doing so would have amounted to accepting the appellants' case that they were entitled to compensation and ignoring the 1st respondent's demand for further information which the appellants neglected to provide.

He also reached the conclusion that the order of mandamus could not be granted, reasoning that the key requirement of demand and refusal with respect to the 2nd respondent's statutory ministerial duty was not established on the facts of the case.

Aggrieved by these findings and conclusions, the appellants mounted the instant appeal. Their grounds set out in the notice of appeal are as follows:

a. *The judgment is against the weight of affidavit and documentary evidence on record.*
b. *His Lordship fundamentally erred in law when he dismissed the declaratory reliefs sought by the appellants on the grounds that the facts are disputed and divergent and same could not be resolved by way of judicial review.*

   Particulars of error:

   i. *Having determined that there were facts in dispute which could not have been determined by way of judicial review, His Lordship was mandated by Order 55 rule 8(1) of the High Court (Civil Procedure) Rules 2004 (C.I 47) to order the proceedings to continue as if they had been commenced by writ.*
   ii. *His Lordship's fundamental failure to comply with and apply the express mandatory provisions of Order 55 rule 8(1) of the High Court (Civil Procedure) Rules, 2004 (C.I 47) and his subsequent dismissal of the declaratory reliefs sought by the appellants has occasioned a grave miscarriage of justice.*

c. *His Lordship fundamentally misdirected himself, which misdirection resulted in him relying on an ex post facto letter written by the 2nd respondent after the appellants' action for judicial review had been initiated, thereby erroneously coming to the conclusion that the order of mandamus sought by the appellants was premature.*
d. *The judgment dismissing the appellants' judicial review application fundamentally failed to appreciate the notion of judicial review applications in the nature of declaration and mandamus in judicial proceedings and was delivered per incuriam."*

As we can appraise from the grounds set out, the quest of this appeal turns on the exercise of the trial court's judicial review jurisdiction, as it relates, in particular, to the reliefs of declaration and mandamus within the ambit of Order 55 of C.I 47.

We can therefore do no less than analyze the relevant provisions under the rule for purposes of determining whether in broader terms, the learned trial judge, as the appellants would contend, committed any error, first in dismissing the reliefs sought, and second, in failing to order the action to proceed as if it was commenced by a writ of summons.

In this determination, we do apprehend that, the general ground of appeal contained in ground (a) imputes the presence of mixed law and fact and invites us as an appellate court, to examine the record and where relevant resolve issues anew.

Along the same line, learned Counsel for the appellants has treated us to passages from the cases of **DJIN VRS MUSAH BAAKO (2007-2008) SCGLR 686; MARGARET MARY ADJEI VRS THE ATTORNEY GENERAL (2012) GMJ 61; and BONNEY VRS BONNEY (1992-93)2 GBR 779** all on the question of the duty of this court essentially, to examine the totality of the evidence on record to determine whether the findings and conclusions of the trial court were supportable.

In this sense and by our appreciation of the key issues confronting us, we propose to resolve grounds (a), (c) and (d) together and thereafter attend to ground (b) separately.

What then do the appellants' argument on grounds (a), (c) and (d) entail? We have endeavoured to distill them as follows:

First, that the appellants by their affidavit evidence, in particular the supplementary affidavit filed on 27th April 2020 demonstrated that they were the owners and occupiers of the land having deposed to traditional evidence as to how they became such owners and occupiers. The deponent was also available to be cross-examined on the affidavit evidence which was also evidence. The trial judge failed to appreciate the nature of affidavit evidence especially as used in judicial review applications and thereby erred in holding that the appellants could not establish their occupation and ownership of the

land. **THE REPUBLIC VRS HIGH COURT (FINANCIAL DIVISION) ACCRA, EX PARTE XENON INVESMENT CO. LTD, FINANCIAL INTELLIGENCE CENTRE (INTERESTED PARTY)** Civil Motion No. J5/46/2015, 22nd March 2016 cited.

Second, the appellants had shown that they had been in possession of the land right from the beginning. The 1st respondent that claimed to have paid compensation failed to show who it paid compensation to. The appellants could therefore not have supplied the 1st respondent information about their relationship with those who received the compensation as requested. The trial judge thus erred in concluding that the appellants failed to provide any information with regard to the 1st respondent's request as the evidence on record weighed against that finding. **EGYIN VRS AYE (1962)2 GLR 187** cited.

Third, that the appellants demonstrated that they had fulfilled all the conditions for the grant of mandamus, i.e., that there was a duty imposed by statute on the 2nd respondent to act, the duty was of public nature, there was a right in the applicant to enforce the performance of the duty and that there had been a refusal to perform the duty enjoined by the statute. **REPUBLIC VRS CHIEFTAINCY SECRETARIAT; EX PARTE ADANSI TRADITIONAL COUNCIL (1968) GLR 736; REPUBLIC VRS CHIEF ACCOUNTANT, DISTRICT TREASURY; KUMASI EX PARTE BADU (1971)2 GLR 285 and REPUBLIC (NO.2) VRS NATIONAL HOUSE OF CHIEFS, EX PARTE AKROFA KRUKOKO II (ENIMIL VI INTERESTED PARTY (NO.2) (2010) SCGLR 134** cited.

Therefore, the appellants having demonstrated that they were the owners and occupiers and the 1st respondent having denied them the compensation for disturbance of their surface rights leading to a dispute between the two sides, the 2nd respondent was enjoined by the provisions of the Minerals and Mining Law (PNDC LAW 153) to resolve the dispute. And again, there being evidence that the 2nd respondent was

written to and the 2nd respondent having inordinately delayed in the performance and worse still failed to so perform the statutory duty, a case was made for mandamus to issue.

Fourth, that in refusing the appellants the order of mandamus, the trial judge had acted upon the 2nd respondent's ex post facto letter dated 9th December 2019 (Exhibit RA3) which was written whilst the application was already pending in the trial court. The trial judge misdirected itself in relying on the letter to deny the appellants the relief was mandamus.

To these arguments as one would expect, are responses delivered on behalf of the respondents which we shall refer to, as we proceed on an examination of the foregoing.

The fundamental point we find apposite to make at this stage is that the jurisdiction of judicial review in whatever form pursued is discretionary. This seems a universal principle and a subject of legal pronouncements.

In Halsbury's laws of England, the accomplished authors state the position this way:

> *"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as Mandamus) declaratory orders and injunction are all discretionary. The court has a wide discretion whether to grant relief at all and, if so, what form of relief to grant.*
>
> *In deciding whether to grant relief, the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable and unmeritorious conduct, acquiescence in the irregularity complained of or waiver to of the right to object may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant*

relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question will result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment."

On claims for declaration or injunction, they author:

"An application for a declaration or an injunction may be made by way of an application for judicial review. On such an application, the court may grant the declaration or injunction claimed if it considers that it would be just and convenient for the declaration to on injunction to be granted, having regard to:

(1) The nature of the matters in respect of which relief may be granted by way of mandatory order, a prohibiting order or a quashing order;
(2) The nature of the persons and bodies against whom relief may be granted by such orders, and
(3) All the circumstances of the case."

Vol 1(1), 4th ed., 2001 Reissue, paras 122, page 270 and para 151, page 293.

It will also be right to state, following from the above, that the decision of the trial judge not to grant the orders sought by the appellants, being a discretionary act, it ought to be demonstrated before this appellate court that the discretion was wrongly exercised in the sense that the trial judge acted under a mistake of law, or in disregard of some principle or under misapprehension of the facts or that he took into account irrelevant considerations.

The principles are well settled by a considerable body of case law. In **SAPPOR WIGATAP LTD (2007-2008)1 SCGLR 676 at 679**, Georgina Wood JSC (as he then was) delivered herself thus:

> *"The well-known and time-honoured legal principle is that an appeal against a decision based on the exercise of a court's discretionary jurisdiction would succeed in only those clearly exceptional cases where, in sum, the judge failed to act judicially. The principles clearly enunciated in the two Court of Appeal decisions in* ***Nkrumah v Serwah (1984—86) GLR 190*** *and* ***Ballmoos v Mensah (1984—86)1 GLR 725****, are that an appellate court would interfere with the exercise of discretion where the court below applied wrong principles, or the conclusion reached would work manifest injustice or even that the discretion was exercised on wrong or inadequate material…"*

Applying the same principle in **OWUSU VRS OWUSU-ANSAH & ANOR (2007—2008)2 SCGLR 870 at 877,** Sophia Adinyira JSC cites the House of Lords' decision in **BLUNT VRS BLUNT (1947) AC 817 at 518** for the following passage:

> *"An appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account."*

We note that in his argument before us, Learned Counsel for the appellants did not advert his mind to these salient principles. We cannot however ignore them as they are

crucial to the determination we have been called upon to make, mindful especially, of our duty to proceed with this appeal by way of rehearing.

Unavoidably, we believe the arguments made on behalf of the appellants before us, ought to be subjected to the standards prescribed by these principles in determining ultimately, whether the conclusions of the trial judge were supportable on the facts and the law.

Learned Counsel for the 1st respondent submits thus; *"the appellants have failed to show that the exercise of the trial judge's discretion was exercised or wrong and inadequate material or under misapprehension of fact or that the trial court gave grave weight to irrelevant or unproved matters."* We shall determine whether or not this submission is well grounded.

In declining to exercise the discretion in favour of granting the declaratory reliefs sought, the learned judge analyzed:

> *"I am of the view that while the authority of the court to grant declaratory reliefs in a judicial review is confirmed by Order 55 Rule 2, when the facts are disputed and divergent positions are taken as in this case, it is neither appropriate nor reasonable for the order to be made. In this case I am of the view that it is clear that the parties are unable to agree on whether or not compensation is payable to the applicants and if so, how much they were entitled to. Based on the law, the appropriate step ought to be taken for the issue to be resolved further to the presentation of evidence. To my mind, this court shall be in grievous error if it grants the declaration sought by the applicants because it shall be accepting the applicants' case that they are entitled to compensation and ignoring the 1st respondent's demand for further information,*

which the applicants have neglected to provide. Consequently, the applicants' declaratory reliefs are dismissed."

It is argued for the appellants that by the above passage, the trial judge took it that the affidavit evidence adduced by the appellants was no evidence. (EX PARTE XENON INVESTMENT CO. LTD., (supra) wherein the nature of affidavit evidence as captured in Atkins Encyclopedia of Court Forms in Civil Proceedings (2nd ed., Vol. 3) reproduced for our consideration).

To our minds, it seems the argument fails to capture the full context of the trial judge's reasoning. In fact, immediately preceding the above passage, the trial judge had stated:

"Having reviewed the entire record, being the affidavits filed, I am of the respectful view that Counsel for the applicants has taken a simplistic view of the facts and ignored the fact that the 1st respondent does not accept their contention that they are entitled to compensation. Indeed, by Exhibit RA2 the 1st respondent wrote that:

"We do not have records indicating the relationship between your clients and these farmers who alleged to be the owners of the land. As requested, by the company, you have not provided information regarding the relationship between your clients and the farmers listed in the attachment to this letter. We would be grateful if your clients could confirm their relationship with these farmers."

Upon our fuller consideration of the delivery of the trial judge on the point, all we understand him as saying is that, contrary to the appellants' view of the matter, the facts disclosed divergent and disputed positions that had to be determined by further

evidence and not by merely accepting the depositions of say the appellants' as against the respondents'.

By our own assessment of the record, we tend to agree with the trial judge that some of the key matters in issue could not have been determined by affidavit evidence. We demonstrate our position as follows.

In the supplementary affidavit in support, it would be observed that the appellants seek to prove their title to the land by deposing to facts that tend to establish their roots of title to their respective lands.

We reproduce paragraphs 33, 35 and 36 of the supplementary affidavit sworn to by the 2nd respondent as follows:

> *"33. That I am informed by the 1st applicant and hold same to be true that the 1st applicant's land was first settled on by the ancestors of the 1st applicant around the year 1910. The land was later on passed on through inheritance to the great grand uncle in the year 1940. It was then passed on through inheritance to the 1st applicant's father around the year 1960. In or around 1994, the land passed on to the 1st applicants by his father who is the present chief of the Kenyasi No.2 where the present land is situate. The land forms part of a larger tract of land owned by the chief of the Kenyasi No.2. Since then, the 1st applicant has been in actual possession and has in fact farmed on the land till date through the abunu tenancy.*
>
> *35. That the 2nd and 3rd applicants' land was*

first settled on by the 2nd applicant's grandmother by name Adiepena about 70 years ago. Later the 3rd applicant inherited the said land. The land was later passed on to the 2nd applicant by the 3rd applicant after farming on the land for several years in or around early 2004.

36. *That with respect to the 4th applicant's land, I am informed and I hold same to be true that, the land was first settled on by her great grandmother by name Abena Nyarko about 90 years ago. She also farmed on the land and passed it on to her daughter by name Afia Tawiah. Afia Tawiah farmed on the land and passed it on to Abena Ataa around 1990."*

By the above depositions, the appellants themselves clearly admit that they needed to establish that title over those lands was vested in them. That became necessary because of the 1st respondent's position that compensation had already been paid to others who had claimed to be owners of those lands. If therefore the appellants had to succeed that they were the true owners, then their title was somehow put in issue.

From our standpoint, 1st respondent did not need to state in specific terms that the appellants had to prove their title. The demand of the appellants and the basis of the 1st respondent's resistance warranted the proof.

Doubtless, the dispute was not cast in the usual character of a land dispute where parties make rival claims to a subject land. Nonetheless, we think that by the nature of the appellants' claim and the basis of the 1st respondent's resistance, evidence of the quality that proves title to land was required. This we agree with the trial judge, could not be satisfied by the affidavit evidence on record.

Besides, a look at the depositions in paragraphs 33, 35 and 36 reveals that the deponent was alluding to traditional history. Indeed, the depositions in paragraphs 33 and 36 where she deposes to how the 1st and 4th appellants respectively came by the lands, were hearsay.

As we see it, for purposes of proof of the titles of the 1st and 4th appellants, those depositions stood the risk of being struck out as inadmissible hearsay. In any event, no proper cross-examination could have been conducted of the 2nd appellants on those matters and we wonder how the trial judge could make any proper findings based on those depositions.

Learned Counsel for the 1st respondent has argued that the decision of the trial judge not to resolve factual issues as to title to the land in respect of which the appellants were claiming compensation was sound in law.

Whilst Counsel admits that affidavit constitutes some form of evidence, it could not form the basis of the determination of issues as to title to land. He refers to a statement of the self same decision in EX PARTE XENON (supra) thus, *"affidavits are commonly used in interlocutory applications to provide factual basis in support or answer to depositions."*

In any case, Counsel argues, application for judicial review is not suitable for a court resolving contested issues of fact. He cites the decisions in **TWEED VRS PARADES COMMISSION FOR NORTHERN IRELAND [2006] UKHL 53 para 2, ST HELENS BOROUGH COUNCIL VRS MANCHESTER PRIMARY CARE TRUST & ANOR [2008] EWCA Civ. 931 and PS VRS ROYAL BOROUGH OF GREENWICH [2016] EWHC 1967** (Admin) to support the contention.

We feel persuaded by the foregoing submission by Counsel for the 1st respondent. For us, the very nature and scope of judicial review make it an unsuitable mechanism for a court resolving contested issues of fact.

The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application is made, but the decision-making process itself. The principle has been amply stated in the following passage in the case of **CHIEF CONSTABLE OF NORTH WALES POLICE VRS EVANS (1982)3 ALL ER 141:**

> *"It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he had been subjected and it is not part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matters in question."* (page 143).

In the same decision, it is prescribed that generally, the power of judicial review is not in the nature of an appeal over the body mandated by law to act. The function of the court, it is said, is to see to it that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty of usurping power.

We are of the view that the decision of the trial judge not to resolve the issue of the appellants' title was in accord with these principles.

Furthermore, we think that by the terms of the depositions in paragraphs 33, 35 and 36 of the supplementary affidavit set out above, the trial judge could not have embarked upon any proper determination of the issue.

We are also in agreement that generally, affidavit evidence is for the purpose of providing factual basis in the determination of interlocutory applications. The XENON INVESTMENT COMPANY LTD., the appellants cited did not decide that affidavit evidence can be resorted to in resolving disputed facts.

Material to the issue before us, that case turned on whether the trial court was right in refusing to rely on an affidavit in support of an earlier application which had been struck out in determining a repeat application. The Supreme Court only disagreed with the course taken by the trial judge.

Given the peculiar facts of the instant case, the decision in the case itself and the passage from the Encyclopedia of Atkin's Court Forms in Civil Proceedings cited are incapable of advancing the appellants' case.

As far as we are concerned, the appellants have not demonstrated adequately, that the trial judge failed to appreciate the nature of affidavit evidence in judicial review application. They have also failed to demonstrate to our satisfaction that the trial judge wrongly exercised his discretion in refusing the declarations sought. We therefore find no good reasons to disturb the conclusion arrived at.

In refusing to grant the order of mandamus, the trial judge upon citing case law on the conditions for the grant of mandamus observed:

> *"From the above exposition of the law, it is clear that for the right to an order of mandamus to accrue the prospective applicant must have inter alia made a demand and same refused and/or deemed to be refused by the public officer, before a party could proceed to court. I note that the applicants' Counsel in his written submission to the court referred to his letters being Exhibits DD2 (A) and DD2 (B) and submitted that the 2nd respondent "failed to perform his duty to determine the compensation payable to the applicants when the matter was referred to him" Counsel further wrote that the 2nd respondent took certain steps but those steps were not the steps required by law. Based on my review of the processes filed*

> *including the affidavits, I am of the respectful opinion that the submission is misleading as it ignored an essential document specifically, Exhibit RA3, dated 9th December 2019… That letter was written from the Ministry of Lands and Natural Resources to the Executive Secretary, Lands Commission Accra and signed by Prof. Patrick Agbesinyale…Though it is clear that the above letter was written a month after the instant application was filed in court, it cannot be denied that the Minister being the 2nd respondent has taken a step to act on the matter. In any case, it is clear that there is no express refusal of the applicants' letter as required by law, rather the applicants took the position that the Minister has failed to act at the time they filed the instant application. To that extent it is my holding that the precondition for the grant pf mandamus has not been met. Based on all the evidence, I agree with Counsel for the 2nd and 3rd respondents that the application is premature and should be refused."*

From the above statement, the trial judge refused the order of mandamus for two reasons, first that from Exhibit RA3, the minister had taken a step to act on the demand of the appellants, and second that there was in any case, no express refusal on the part of the minister to act.

The appellants' contention is that the trial judge misdirected himself on relying on Exhibit RA3, a letter written whilst the application was already pending in court to deny them the relief.

The Learned Chief State Attorney for the 2nd and 3rd respondent does not provide a direct answer to the point about Exhibit RA3, in terms of whether the letter, having

been issued when the court's judicial review jurisdiction had already been invoked, could form any basis for refusing the remedy.

Her response goes as follows; that even if the Exhibit RA3 constituted a belated performance of the minister's duty, the minister could not have acted outside the terms of his statutory mandate as stipulated in Section 71 of the PNDC Law 153 which only mandates the minister to determine compensation when the parties had failed to agree on the amount payable. Thus, in this case that, right from the beginning, the 1st respondent had challenged the claim of the appellants, the minister could not properly go ahead to determine the amount of compensation. Doing so would not only be in breach of the statute, but would also amount to unfair and arbitrary use of ministerial power and in clear breach of Articles 23 and 296 of the 1992 constitution. **XTRA GOLD MINING LIMITED VRS ATTORNEY-GENERAL (J1/23/2015) (2016) GHASC 57** cited.

We proceed to resolve the puzzle by answering the following pair of questions; were the reasons assigned by the trial judge for withholding the order of mandamus grounded in law and if not, do we nonetheless, find justification in the argument of the Chief State Attorney to justify the refusal of the order?

The first part does not require much to answer. We think the trial judge fell in error when he relied on Exhibit RA3 to ground the refusal of the application. We are firm in our belief that for purposes of determining whether the minister had answered the demands of the appellants which was a key ingredient for invoking the supervisory jurisdiction of the trial court relative to mandamus, the materials to consider were those that existed at the time the application was mounted. The trial judge could not have properly relied on Exhibit RA3, a late comer to the application to deny the appellants the relief.

Still under the first part of the question, the trial judge had held that there was no express refusal on the part of the minister to act.

Need the refusal be express? We do not think so. Even unreasonable delay to perform a statutory duty has been held acceptable to found mandamus. See **REPUBLIC VRS COURT OF APPEAL; EX PARTE LANDS COMMISSION (VANDERPUYE ORGLE ESTATES LTD INTERESTED PARTY) (1999-2000) GLR 75**. So also, is a deliberate non-compliance held sufficient.

The illustrious Nigerian author FIDELIS NWADIALO in his work; CIVIL PROCEDURE IN NIGERIA, 2nd edition at page 1054 states on authority:

> *"The person enjoined by to perform the act must have failed upon demand to do it. In other words, the applicant must show that he has demanded performance and that performance must have been refused by the person or body enjoined by law to carry out the duty. The refusal may not be express; a deliberate non-compliance is enough."*

The Learned author cites the Nigerian case of **FAWEHINMI VRS AKILU (1987)4 NWLR 797** for his position. We feel persuaded to adopt this position of the law as our own.

On the same point, the Ghanaian apex court has held that the common law requirement of demand and refusal for mandamus to issue could not be applicable in all cases and that it did not apply where a person has by inadvertence omitted do so some act which he was under a duty to do, and the time within which he can do it has passed. See **REPUBLIC (NO.2) VRS NATIONAL HOUSE OF CHIEFS, EX PARTE AKROFA KUKROKO II (ENIMIL VI INTERESTED PARTY (No.2) (2010) SCGLR 134**.

On the strength of the foregoing authorities, the trial judge could not be right in making lack of express refusal a ground to refuse the relief.

This leads us to the second part of the question. Are we accepting the position of the Learned Chief State Attorney?

Section 71 of the PNDC LAW 153 has the following provisions:

(1) The owner or occupier of land subject to a mineral right may apply to the holder of the right for compensation for a disturbance of the rights of the owner and for a damage done to the surface of the land, buildings, works or improvements or to livestock, crops or trees in the area of the mineral operations.

(2) An application for compensation under subsection (1) shall be copied to the Minister and the Land Valuation Board.

(3) The amount of compensation payable under subsection (1) shall, subject to the approval of the Land Valuation Board, be determined by agreement between the parties and if the parties are unable to reach an agreement as to the amount of compensation, the matter shall be referred to the Minister who shall in consultation with the Land Valuation Board determine the compensation payable."

We notice that in his reply to the written submission of the 2nd and 3rd respondents, Counsel for the appellants states that the applicable law is not PNDC LAW 153, but rather, the Minerals and Mining Act, 2006 (Act 703). According to Counsel, the appellants' right accrued after 2006.

That may be one side of looking at the issue. The other side is that, if the 1st respondent declared the land a mining area in 2004, then, that was when the cause of action of those entitled to compensation accrued.

In any event, the controversy is not of any moment. Section 71 of PNDC LAW 153, has been re-enacted by 73 of Act 702. Save that that Land Valuation Board has been replaced with the phrase *"the agency responsible for land valuation"* the provisions under both laws are the same.

It is clear from the subsection (3) that first, subject to the approval of the Land Valuation Board, the compensation payable will have to be agreed between the parties, in this case the appellants and 1st respondent. It is when the parties have been unable to reach an agreement as to the amount of compensation that the matter is referred to the minister who shall in consultation with the Land Valuation Board, determine the compensation payable.

In our well-considered view, in this case where, by the 1st respondent's claim that it had already paid compensation to those entitled and that the appellants were not entitled to compensation, the statutory mandate of the minister which is clearly to determine, (in consultation with the Land Valuation Board), the amount payable could not be invoked. If it was invoked, it could not be lawfully exercised as the minister would be engaging in an illegality in the face of the 1st respondent's resistance which had occasioned a dispute.

The case of **REPUBLIC VRS CHIEF ACCOUNTANT, DISTRICT TREASURY, EX PARTE BADU (1971)2 GLR 285** has the following headnote:

> *"(1) An order of mandamus lies against public officials in the performance of their public duty or quasi-public legal duty, to require them to carry out their duty. The order is not meant to review or control what such officials have done or what they do, but to compel them to act. It is not a mode of trying questions as to whether an act professedly done in pursuance of a statute was really justified. The order will only issue if the duty required to be performed can be legally done. (emphasis ours) Ex parte Nash (1850)15 Q.B 92 and R v Eastbourne Corporation (1900)83 LT 338 applied."*

See also **REPUBLIC VRS INSPECTOR GENERAL OF POLICE, EX PARTE HANSEN (1992)2 GLR 174**.

Learned Counsel for the appellants argues that the provisions in Section 71 do not limit the mandate of the minister to determining amount of compensation payable. He thinks that the minister's mandate covers all matters about compensation including acting as an arbiter. According to him that is the meaning gathered when the entire provisions are read as whole.

We see the force Counsel puts in the contention, but we are unable to accept it. Had the law maker intended such a wide mandate for the minister on issues of compensation including dispute resolution, we believe that would have been specifically provided for in the law.

We also consider that, the prescribed involvement of the Land Valuation Board in the provisions is a clear indication that the law maker did not intend anything than determination and assessment of values.

We wholly accept the submission of the Learned Chief State Attorney on behalf of the 2nd and 3rd respondents that whilst there was a real dispute between the appellants as to whether any compensation was payable, the minister could not be called upon to determine the amount payable. We are certain that the minister has no statutory duty to resolve issues of title to land.

As we have demonstrated, though we find the reasons why the trial judge withheld the order of mandamus unacceptable, we nonetheless find good grounds in the above submission to conclude that so far as that relief was concerned, the application was premature and that a grant of same would not be proper in law.

In the end, having examined all the facts as well as the various correspondence traded by the parties and on our consideration of the law, we think grounds (a) (c) and (d) must fail.

Now we come to ground (b) which raises a very important question of civil procedure not commonly brought up in our regular discourse. It turns on the provisions in Order 55 rule 8 of the High Court (Civil Procedure) Rules, CI 47. The provisions are as follows:

> *"8. (1) In an application for the relief of injunction,*
>
> *declaration or damages, if the Court considers that the relief should not be granted on an application for judicial review but might have been granted if sought in an action commenced by writ by the applicant at the time the application was made, it may instead of refusing the application order the proceedings to continue as if they had been commenced by writ.*
>
> *(2) Where the Court makes an order under*
> *subrule (1) for the proceedings to continue it may direct that the parties shall settle the issues for trial and give such further directions for the conduct of the proceedings as it may consider necessary for the just and expeditious disposal of the matter."*

Reading the decision of the trial judge, it is clear to us that he did not consider the provision at all. He appears to have dismissed the application simpliciter. It has nonetheless become incumbent upon us to determine whether the rule was applicable and that, not applying it was erroneous.

The appellant's position on this point is as clearly set out in the particulars of error under that ground of appeal.

In sum, it is that, the trial judge having found that there were facts in dispute which could not be resolved by judicial review, was mandated by the provision in Order 55 rule 8 to order the proceedings to continue as if they had been commenced by writ and that not doing so has occasioned a grave miscarriage of justice to the appellants.

Whilst it would be necessary to consider whether or not the non-application of the provision, i.e., not ordering the proceedings to continue as if the action was commenced by a writ has occasioned a miscarriage of justice, the more fundamental question is whether the provisions were applicable to the situation and could have been invoked. If the latter question is answered in the negative, then the former does not arise.

Counsel for the appellants in his submission before us cites a number of cases for the simple position that a court of law is enjoined to apply and follow the law and not to ignore it.

In principle, we do not disagree with Counsel on this proposition. It would therefore serve no useful purpose to attempt an excurses of the passages to which we have been referred. Merely listing the cases for the record will suffice. **PATRICK AKOMANYI VRS HANNA BUCKMAN; Civil Appeal No. j4/43/2013, 26th February, 2014; NORTEY (NO.2) VRS AFRICAN INSTITUTE OF JOURNALISM AND COMMUNICATION & ORS (NO.2) (2013-2014)1 SCGLR 703; AGYEMAN (SUBSTITUTED BY) BANAHENE VRS ANANE (2013-2014)1 SCGLR 703; REPUBLIC VRS HIGH COURT (FAST TRACK DIVISION) ACCRA; EX PARTE NATIONAL LOTTERY AUTHORITY (GHANA LOTTO OPERATORS ASSOCIATION & ORS INTERESTED PARTIES; BOAKYE VRS TUTUYEHENE (2007-2008)2 SCGLR 1041 and REPUBLIC VRS HIGH**

COURT. KOFORIDUA; EX PARTE ASARE (BABA JAMAL & ORS INTERESTED PARTIES) (2009) SCGLR 460.

Further, for the position that the non-application of the rule was an error that has occasioned a miscarriage of justice, the case of **ACHORO VRS AKANFELA & ANOR (1996-97) SCGLR 209** has been cited for the elements to show a miscarriage of justice.

It is Counsel's submission that the dismissal of the declaratory relief without allowing the action to proceed as prescribed by the Order 55 rule 8 denied the appellants the justice of having their case determined on merits and hence occasioned grave miscarriage of justice.

In a sharp riposte, Counsel for the 1st respondent gives a couple of reasons why the provisions were inapplicable to the situation and as such their non-application was not erroneous and could not have occasioned a miscarriage of justice.

First, Counsel points out that the rule covers cases where an applicant in a judicial review application seeks a private law remedy in a judicial review application such that the relief sought is one that can be granted in action commenced by a writ without amendment. Thus, if the relief claimed in the judicial review application cannot be granted in an action commenced by a writ without amendment, then the court ought not to exercise its discretion to order the proceedings to continue as if it was begun by a writ. **R VRS EAST BERKSHIRE HEALTH AUTHORITY, EX PARTE WALSH (1985) QB 152 C.A** cited.

Counsel explains that in the instant case, the appellants in addition to the declaration, had sought mandamus which was a public law remedy. To proceed as if the action was commenced by a writ would mean reconstituting their claim by an amendment which the rule does not cover. Reconstituting the claim which involves mandamus, a public

law remedy would lead to chaos and an abuse of the court's process and the trial judge, could not have ordered the case to proceed as if commenced by a writ.

Another reason as we understand Counsel, is dictated by the provisions of the statute. It is that, assuming the appellants were those entitled to compensation, they would not have been entitled to issue a writ. This is because under the statute (Act 703) there are step-by-step provisions in resolving issues of compensation payment which includes an application to the High Court where a party is dissatisfied with the determination by the minister of the compensation payable. Such application will be in the form of originating notice of motion and not a writ. Therefore going by their claim that they were entitled to compensation, those were the provisions the appellants would have been entitled to resort to.

In effect, according to Counsel, in all the circumstances of the case, the trial judge could not have properly ordered the proceedings to continue as if it was an action commenced by a writ.

The first point we note of the provisions in Order 55 rule 8 is that their application is at the discretion of the court. We say so to correct the impression we gather from Counsel for the appellants' submission, which is suggestive of the rule as mandatory.

We do appraise that, like many of the reliefs that may be granted or orders that may be made under Order 55, the provisions under rule 8 are couched not in any mandatory terms.

The English law provision on the subject, said to have been introduced into their rules for the first time in 1977 and which is *in pari materia* with our rule is contained in their RSC, Order 53 rule 9(5) as follows:

> *"Where the relief sought is a declaration, an injunction or damages and the court considers that it should not be granted on an application for*

judicial review but it might have been granted if it had been sought in an action begun by writ by the applicant at the time of making the application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ…"

As the provision is *in pari materia* with our Order 55 rule 8, the obvious course to take, given the apparent paucity of a local judicial pronouncement on our provision, is to consider how the provision has received application in that jurisdiction and direct our path accordingly.

For starters, we refer to the following statement of Lord Diplock in **O'REILLY VRS MACKMAN (1982)3 ALL ER 1124** at page 1133 which throws some light on the rule:

"So Ord 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be most appropriate in the light of what emerged on the hearing of the application, can be granted him. If what should emerge is that his complaint is not of an infringement of his rights in that entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject of judicial review, the court has the power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ."

Another feature of the rule is contained in the speech of Sir John Donaldson MR in the case of **R VRS EAST BERKSHIRE HEALTH AUTHORITY, EX PARTE WALSH (1984) ALL ER 425** (a case Counsel for the 1st respondent referred to) at 432:

> *"There remains the alternative of allowing the matter to proceed pursuant to Order 53 r 9(5) as if [it] had been [sought in an action] begun by writ. This is an anti-technicality rule. It is designed to preserve the position of an applicant for relief who finds that the basis of that relief is private law rather than public law. It is not designed to allow him to amend and to claim different relief."*

A gist of EX PARTE SHAW as we can distill from the facts is that the applicant, a senior nursing officer employed by the Health Authority, who had been dismissed, sought a judicial review to impugn his dismissal on the grounds that the district nursing officer who dismissed him had exceeded her powers under the law. The trial judge considered his employment by the Health Authority in public law terms and took the position that the applicants' rights were of public nature to entitle him to seek public law remedies. Alternatively, he held the applicant could continue with the action as though it had been begun by a writ.

The position was overturned on appeal for the reason that the employment was an ordinary private law master-servant relationship which did not entitle the applicant to public law remedies.

Significantly, to the alternative right to proceed with the matter as though begun by writ, the appellate court reasoned that the only relief sought was certiorari which was a public law relief and rule 9(5) was not applicable. It was explained that the rule was designed to preserve the position of an applicant who intended to seek the same relief in private law proceedings as he had already sought by his application for judicial review and not intended to permit him amend and to claim a different relief. Therefore, since the applicant's only relief was certiorari, a public law remedy, it would be inappropriate for the rule to avail him.

Finally in **IRC VRS ROSSMINSTER LTD (1980)1 ALL ER 104**, the House of Lords speaking through Lord Scarman observed of the rule thus:

> *"Judicial review is now the procedure for obtaining relief by way of prerogative order, i.e., mandamus, prohibition or certiorari. But it is not confined to such relief; an applicant may now obtain a declaration or injunction in any case where in the opinion of the court 'it would be just and convenient for the declaration or injunction to be granted on an application for judicial review'. Further, on an application, the court may award damages, provided that the court is satisfied that damages could have been awarded, had the applicant proceeded by action… And where the relief sought is a declaration, an injunction or damages but the court considers it should not be granted on an application for judicial review, the court may order the proceedings to continue as if they had been begun by writ. Thus, the application for judicial review, where a declaration, an injunction or damages are sought, is a summary way of obtaining a remedy which could have been obtained at trial in an action begun by writ; and it is available only where in all the circumstances it is just and convenient."*

Guided by the above pronouncements on the rule in English law, we must be clear in our minds that the provisions in our Order 55 rule 8 cannot be easily invoked and that it only affords a relief to an applicant who would otherwise suffer a dismissal of his private law remedy on mere technical grounds.

From what we gather, we state the following as the benchmarks to guide the application of the rule:

First, the relief sought in the judicial review application should be a declaration, injunction or damages. It may not be a single relief but by reason of constraints on amendment and for the sake of convenience as will be noted from other conditions, any additional relief ought to be a private law remedy.

Second, the right said to be infringed upon for which the application for judicial review was brought must be of private law nature.

Third, the court must have found that the claim is not proper for protection in public law.

Fourth, for purposes of continuation of the action as if begun by writ, it must not be necessary to amend the claim and to seek different relief.

Fifth and above all, in the exercise of its discretion, the court must find it just and convenient to make the order.

Now, against this background, we think the instant case could not pass for an order under the rule. The appellants sought declaration in addition to mandamus which was a public law remedy. The action could not have continued as if begun by a writ without the claim not being amended. As Counsel for the 1st respondent has argued, the appellants' claim must have to be re-constituted which the rule does not allow. Thus, the mixture of both public and private law remedies in the appellants' claim renders it unfit for the application of the rule. Again it will definitely not pass the just and convenient test of the rule.

We are also persuaded by the argument of Counsel for the 1st respondent that the statute has prescribed-step-by-step procedure for a claimant who claims to be entitled to compensation to follow. The appellants who claim to be entitled to compensation could better avail themselves of the provision in which case the issuance of a writ does not arise as the statute provides for an application as the procedural mechanism.

We think that in all the circumstances of the case, all the parties would be better served the course of justice if the order was not made than otherwise.

For the foregoing reasons, we think ground (b) must also fail.

In conclusion, we sum up our position thus, the trial judge's decision not to grant the declarations sought by the appellants was justifiable. Further, even though we have expressed our disagreement with the reasons assigned by the trial judge for withholding the grant of mandamus, we nonetheless find other good grounds including those contained in the submission of the Learned Chief State Attorney representing the 2nd and 3rd respondents to support the refusal of the order. We have also discussed the terms of Order 55 rule 8 of C.I 47 and reached the conclusion that the case did not meet the benchmarks for the application of the rule. In the final analysis, we think that the appeal lacks merit. We affirm the decision of the Court below and dismiss the appeal in its entirety

SGD

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JUSTICE RICHARD ADJEI-FRIMPONG

(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE .....

JUSTICE BARBARA ACKAH- YENSU

(JUSTICE OF THE COURT OF APPEAL)

SGD

I ALSO AGREE .....

JUSTICE OBENG-MANU JNR.

(JUSTICE OF THE COURT OF APPEAL)

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