IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: ALEX B. POKU-ACHEAMPONG JA (PRESIDING)

NOVISI ARYENE JA

AFIA SERWAH ASARE-BOTWE JA

SUIT NO H1/189/2022

DATE: 30TH MARCH, 2023

JULIAN ADOMAKO GYIMAH **1ST PLAINTIFF/APPELLANT**

AYUDAH INVESTMENT LTD. **2ND PLAINTIFF/APPELLANT**

VRS

ZENITH BANK **1ST DEFENDANT/RESP**

JOSEPH KWAME ESSEL **2ND DEFENDANT/RESP.**

J U D G M E N T

NOVISI ARYENE JA:

By judgment delivered on 30th of July 2021, the Commercial Division of the High Court, Accra dismissed Plaintiffs' action against defendants for the following reliefs:

a. *Declaration that defendants breached their fiduciary relations and duty towards plaintiffs*
b. *Declaration that freezing of plaintiffs' accounts by the defendant bank without a court order was wrongful*
c. *General damages for breach of fiduciary relationship*
d. *General damages for wrongful freezing of accounts*

Dissatisfied with the judgment, and alleging that the court proceedings of 30th July 2021 were in breach of the rules of natural justice because it was without notice to them, plaintiffs (hereinafter referred to as appellants) filed an application before the Supreme Court on 29th of October 2021, praying for an order of certiorari to quash the proceedings. On 7th of December 2021, the Supreme Court struck out the application as withdrawn. On 30th of December 2021, appellants applied to the trial court for extension of time to file an appeal against the decision of 30th July 2021. The application faced stiff opposition from defendants (hereinafter referred to as respondents). By ruling delivered on 4th of February 2022, the trial court refused the application, triggering the instant appeal.

The ruling is being assailed under the following grounds of appeal:

I. *The trial judge erred when he refused the leave for an extension of time to file an appeal for reasons that the judgment to be appealed from was a well-considered and reasoned judgment.*
II. *The trial judge erred when he refused to grant leave for an extension of time to file an appeal because plaintiffs/appellants filed his written submission out of time after several adjournments given to enable him file his written submission.*

III. *That the trial judge erred in refusing to grant leave for extension of time to file appeal without justifiable cause.*

Appellants are seeking two reliefs from this court: (i) An order to set aside the ruling refusing leave to file appeal out of time; and (ii) an order to grant appellants leave to file an appeal out of time against the judgment of the trial court dated 30th July, 2021.

Although appellant indicated in the Notice of Appeal that additional grounds will be filed on receipt of the record, none was filed.

Two objections were raised by 2nd respondent to the instant appeal which we deem expedient to address at this stage. At page 5, paragraphs 23 to 27 of counsel's written submissions, he argued that pages 4 to 25 of the written submission filed by appellants were not in the proposed written submission attached to the motion for extension of time. And that appellants "cannot argue something fundamentally different from what they were granted leave to file."

No Reply was filed in response to the submission. A proper reading of Rule 9 (5) of the Court of Appeal Rules, 1997 (C.I 19) would reveal that it is not mandatory for an applicant to attach a proposed written submission to an application for extension of time to file an appeal. The proposed written submission if exhibited, is for purposes of expediency and is intended to demonstrate that the applicant has an arguable appeal and was willing to prosecute it.

Without a doubt, a draft written submission may assist the court in its determination of the application. However, there are several instances where the courts have granted leave for extension of time to appeal without an attached draft written submission.

It is trite that an applicant for leave to file appeal out of time must satisfy two conditions: (i) The supporting affidavit must disclose reasonable excuse why the applicant was not able to file the appeal within the period permitted under the rules; (ii)

The grounds of appeal must prima facie disclose a good cause for the extension of time. See **Almeen Kassarjian v Addy [2003-2004] 2 SCGLR 1031,** where the Supreme Court speaking through Kpegah JSC concerning Rule 15(1) of the Supreme Court Rules 1996 (C.I 16) (which is akin to Rule 9(5) of the Court of Appeal Rules (CI 19) ruled as follows:

> *"…….as a general rule, a request for the exercise of our discretion in such matters, the applicant must satisfactorily explain away his delay; and in addition, demonstrate that his appeal has a good chance of success and that not to allow him more time would be a denial of justice for which this court exists. It would not be inappropriate in the circumstances like this to exhibit the proposed statement to be filed for our consideration."*

It can be inferred from the above pronouncement by the Supreme Court that a draft written submission is not a requirement in an application for extension of time, though its attachment may assist the court make a determination of the application before it.

Where leave is granted as in the instant case, the main concern of the court, is not whether it was the proposed written submission attached to the application for extension of time which was filed, as whether the applicant filed the written submission within the terms directed by the court. It bears emphasis that until a written submission was filed, it remained a draft and it was entirely within the right of the applicant to amend or edit same before filing.

2nd respondent who submitted forcefully that an applicant was bound to file the attached proposed written submission and nothing more, failed to cite any case law or authority in support of the submission. Indeed, to accept counsel's submission is to bind an applicant to contents of a proposed written submission which was not before the court. It would also, in our opinion, impose an unnecessary burden on the court which would have to thoroughly read and compare the draft written submission to the

filed one to ensure that they are one and the same. Obviously, this cannot be the intention of the Rules of Court Committee. There is no merit in the objection raised and same is accordingly dismissed.

2nd respondent further raised an objection to the grounds of appeal filed. It was contended that the grounds offend against Rule 8(4) of the Court of Appeal Rules, 1997, (CI 19) and are therefore inadmissible. It was forcefully argued that contrary to the requirements of the rule, appellants failed to provide the particulars of the error of law allegedly committed by the trial judge to enable the court effectively address same. Counsel submitted further that the alleged errors cannot be inferred from the wording of the grounds filed and prayed for the offending grounds to be struck out for non-compliance.

Again, appellants did not find it necessary to respond by way of a Reply to 2nd respondent's submissions on the irregularity of the entire grounds of appeal filed.

The Rule under reference is **Rule 8(4) of the Court of Appeal Rules 1997 (C.I. 19)** which **provides;**

> ***"Where the grounds of an appeal allege misdirection or error in law, particulars of the misdirection or error shall be clearly stated."***

It has been held in a plethora of cases that where misdirection or error of law or fact was alleged, the appellant must clearly and concisely describe to the appellate court and indeed the respondent, the nature of the error complained of. The reason is not farfetched, the opponent must be sufficiently notified of the alleged error to enable him adequately respond to the appeal. It is also in our opinion, intended to set parameters and confine the appellant to the specific grounds under which he mounted the attack on the judgment.

In the celebrated case of **Zambrama v Segbedzi [1992] 2 GLR 221, 221,** where the offending ground was struck out because it simply alleged "misdirection" without specifying how the court misdirected itself, the Court of Appeal held that that it did not meet the requirement of the rules and was inadmissible under the Rules. The court explained that the rule requires that the appellant clearly describe the terms of the error complained of. The court stated the requirement and the rationale thus;

> *"……. The requirement was that the ground stated in the notice of appeal must clearly and concisely indicate in what manner the trial judge misdirected himself either on the law or the facts. The rationale was that a person who was brought to an appellate forum to maintain or defend a verdict or decision which he had got in his favour should understand on what ground it was being impugned……."*

The reasoning was re-echoed in **Dahabieh v S A Turqui & Brothers [2001-2002] SCGLR 498,** where the Supreme Court speaking through Adzoe JSC, explained the rationale for Rule 6 of the Supreme Court Rules 1996, (C.I 16) (which is same as Rule 8 (4) of CI 19) thus:

> *"The intention behind rule 6 of the Supreme Court Rules, 1996 (CI 16), is to narrow the issues on appeal and shorten the hearing by specifying the error made by the lower court or by disclosing whether or not a point at issue had been raised…… With respect to questions of law, it is necessary that the respondent and his lawyers know well in advance what points of law are being raised so that they may prepare their case and marshal their authorities……."*

With the rationale for the Rule in mind, the Supreme Court in **Tetteh v T Chandirams & Co Ghana limited & Ors [2017-2020] 2 SGCLR page 770,** (cited by counsel for 2nd respondent in support of the submission), struck out the defective grounds of appeal

because the alleged errors could not be sufficiently inferred from the wording of the grounds of appeal to enable the court address same.

In the more recent case **of Republic v Ghana National Gas Company ltd; Ex Parte: King City Development Co ltd (Lands Commission Interested Party) Civil Appeal No. H1/233/2020 dated 25th March 2020, (unreported)**, this court (differently constituted) ruled that where the ground of appeal failed to specifically set out the alleged error, but sufficient particulars are discernible from the entire reading of the ground of appeal, the impugned ground would not be held to be in breach of the Rules. Dismissing the objection to the grounds of appeal, the Supreme Court observed that, *"for each of the said grounds, sufficient particulars are discernible from the entire reading of the ground such that a clear understanding of the basis upon which the attack is mounted, is not lost."*

The principle distilled from the cases hereinbefore discussed is that, where the issues for the determination of the appellate court are discernible from the wording of the grounds of appeal, or where the wording of the grounds of appeal sufficiently convey the alleged error and the matters the appellant intend to argue thereunder, failure to particularize the alleged error per se would not render the ground inadmissible.

With this principle as a guide, we now proceed to discuss the grounds of appeal being impugned by 2nd respondent to ascertain whether they offend against Rule 8(4) of CI 19 as alleged.

GROUND (i) "*The trial judge erred when he refused the leave for an extension of time to file an appeal for reasons that the judgment to be appealed from was a well-considered and reasoned judgment."*

We have given careful thought to submissions by counsel on the issue of irregularity of this ground of the appeal, but we note that the ground of appeal does not merely allege

an error in the ruling of the trial judge. In our considered opinion, reference to the reason given by the trial court for refusing the application namely ***"that the judgment to be appealed from was a well-considered and reasoned judgment"*** adequately disclose issues which appellants intend to canvass under that ground of the appeal. The issue to be considered in our view is whether the reason given by the court was sufficient for the court not to exercise its discretion in favour of the appellant.

GROUND (ii) *"The trial judge erred when he refused to grant leave for extension of time to file an appeal because plaintiffs/appellants filed his written submission out of time after several adjournments given to enable him file his written submission."*

It can be discerned from the wording of this ground of the appeal that the alleged error also has to do with the reason assigned by the trial court for refusing the application being that "**plaintiffs/appellants filed his written submission out of time after several adjournments given to enable him file his written submission"**. To the extent that the alleged error in the Ruling is clearly captured in the ground of appeal, it is our view that the wording provides sufficient information to enable respondent file an answer. We are satisfied that the ground of appeal meets the requirement of the Rule.

GROUND (iii) *"That the trial judge erred in refusing to grant leave for extension of time to file appeal, without justifiable cause."*

Like the first two grounds of appeal, although this third ground of the appeal also does not specifically set out particulars of the alleged error, it is our view that, read in its entirety, it is discernible from the wording of this ground of appeal that appellant is alleging that the trial court gave no legally justifiable reasons for refusing the application.

Applying the principle garnered from the cases hereinbefore discussed, we rule that the particulars of the alleged error are sufficiently discernible from the wording of the grounds of appeal. Accordingly, we reject the submission that the formulation of the grounds of the appeal sins against Rule 8(4) and admit all the three grounds of appeal for our consideration in this appeal**.**

The decision whether or not to grant an application for extension of time is a matter entirely within the discretion of the court. A careful reading of the grounds of appeal would reveal that the instant appeal turns on an alleged improper exercise of discretion. The onus is on the appellant to demonstrate to this court that in refusing the application, the trial judge improperly exercised his discretion.

For a proper appreciation of the issue this court is called upon to address, we reproduce hereunder the Ruling being assailed in this appeal as follows:

> *"I have heard the parties to this application and state that this court set down dates for the filing of written submissions and delivery of judgment ie 9th April, 2021 and 23rd April 2021.*
>
> *As at 23rd April, 2021, when the court ought to have delivered judgment, the applicants had not filed their written submissions, neither were they in court. This compelled the court to change its plans. Several adjournments thereafter were taken to accommodate the applicants.*
>
> *On the 18th June, this court adjourned to 9th July, 2021 and again adjourned to 21st July, 2021 for judgment. On all these dates, the applicants were absent, neither had there been a written submission filed.*
>
> *Eventually, on the 30th July, 2021, the court gave its judgment. Along this period, counsel for the applicants had appeared in court one day and informed the court he had been unwell and prayed to be given time to file*

the written submission. This court graciously agreed to that. That period also fell within the space of the adjournments.

I hold the view that even as late as October, 2021, the applicants could have filed their appeal, but they elected another option which has built in time pushing them out of time thereby.

I have considered my judgment and hold the view that it is well considered and consequently I refuse this application and same is dismissed."

In addressing the grounds of appeal, we are mindful of the principle that an appellate court must not interfere with the exercise of discretion by the trial court unless it is satisfied that the trial judge wrongly exercised its discretion or applied wrong principles or can be said to have reached a wrong conclusion which would work manifest injustice between the parties, or that it took into consideration matters which it should not have taken into consideration. See **Nartey Tokoli v Valco (No 3) [1989-90] 530** (where the case of **Crentsil v Crentsil [1962] 2 GLR 171 at 175** was cited with approval). The court ruled thus;

"It is a rule of law deep rooted and well-established that the court of appeal will not interfere with the exercise of the court's discretion save in exceptional circumstances."

It is trite that an application for extension of time to file an appeal is a prayer by the appellant to the court to exercise its discretion in his favour. In the circumstances, this court can only interfere with the trial court's exercise of discretion if the appellant demonstrates that the discretion was improperly exercised.

Arguing the appeal, counsel referred us to the provisions of Rule 8(4) of C.I 19 (this should rather be Rule 9(4) of C.I 19), and submitted that under the rules where an appellant fails to file an appeal within three months from the date of the final judgment,

he has another three months within which to apply for extension of time. Citing the Supreme Court case of **Doku v Presbyterian Church of Ghana [2005-2006] SCGLR 700,** it was submitted that since the judgment was delivered on 30th of July 2021, the application for extension of time filed on 30th of December 2021, was within the time limits of the rules of court and ought to have been granted.

It was further submitted that the supporting affidavit to the application for extension of time satisfied the requirements of sub-rule 5 of Rule 9 of C.I 19, in that the exhibited notice of appeal disclosed "good and substantial reasons for the application" as well as arguable points of law. Accordingly, the court erred when it refused the application on grounds that its decision was well-considered and reasoned. It was further argued that the refusal of the application on grounds that appellant failed to file their written address despite being given several opportunities by way of adjournments, was erroneous. Finally, counsel argued that the trial court did not give any justifiable reason for refusing the application.

Explaining the delay, it was argued that notice of the date of judgment was not served on appellants and that the supporting affidavit disclosed reasons why appellants did not file the appeal within time. Citing the case of **R v Appeal Committee of London Quarter Sessions Ex parte Rossi [1957] 1 All ER 670** and **Barclays Bank of Ghana ltd v Ghana Cable Company ltd [1998-99] SCGLR 1**, it was submitted that the proceedings of 30th July 2021, were void on grounds of breach of the rules of natural justice. And that the position of the law is that the reading of a judgment was a proceeding to which all parties must be present or given the opportunity to be present. Referring to the Supreme Court case of **Doris Naadu Nartey v Christian Kumi [2007] DLSC 2439,** counsel argued that failure to serve hearing notice to notify a party of a proceeding is a breach of the rules of natural justice, and that the judgment which was read without

notice to appellants, is good and substantial reason to warrant grant of extension of time to appeal.

Counsel further referred to the proposed grounds of appeal attached to the application for extension of time, and submitted that there were arguable points of law for the consideration of the appellate court and prayed for leave to file same.

In response to the submissions, counsel for 1st respondent argued that the trial judge took into consideration dates set by the court for filing of written addresses by counsel and for delivery of the judgment. And that in rejecting the reasons appellant canvassed for the delay, the trial court also considered the various adjournments granted by the court to enable appellants file their submissions. On authority of **Koranteng II v Klu [1993-94] 1 GLR 280**, counsel prayed for ground (1) of the appeal to be dismissed because the judgment of the trial court was well reasoned. It was argued that appellants failed to attend court on the initial date of 23rd April 2021, scheduled for the judgment accordingly, the alleged breach of the rules of natural justice was without merit.

On his part, counsel for 2nd respondent submitted that appellants' supporting affidavit for extension of time to file appeal did not meet the legal threshold under Rule 9(5) of CI. 19 as to induce the trial court to exercise its discretion in their favour. And that appellants failed to demonstrate to the trial court that they had a good and substantial reason for the appeal.

It was also argued that the supporting affidavit was deposed to by a clerk in the chambers of counsel for appellants who lacked personal knowledge of facts deposed to. Further, that in clear breach of Order 20 Rules 8 (1) and (2) of the High Court Civil Procedure Rules, 2004, (C.I 47), the clerk deposed to facts in paragraphs 4 and 5 of the supporting affidavit, which he could not prove, and made bare depositions unsupported by evidence. Counsel concluded that although the said depositions were

denied by 2nd respondent in his affidavit in opposition, appellants failed to establish the allegations by filing supplementary affidavit in support and are deemed to have admitted the depositions in the affidavit in opposition.

With respect to depositions by counsel's clerk, a cursory reading of the supporting affidavit shows that there is no indication as to how the said facts deposed to came to the knowledge of the clerk. Interestingly, the records show that no objection was raised by counsel for 2nd respondent to the said irregularity at the trial to enable appellants respond to same. Addressing this issue of irregularity, we find the decision in the case of **Republic v High Court Accra; Ex parte Allgate Co ltd. (Amalgamated Bank ltd interested party) [2007-2008] SCGLR 1041,** a useful guide. In that case, the Supreme Court ruled that non-compliance is to be regarded as an irregularity that does not result in nullity, unless it is also a breach of the Constitution, a statute other than the rules of court or the rules of natural justice or otherwise goes to jurisdiction. On authority of Ex parte Allgate (supra) we rule that the said irregularity is curable under order 81 of CI 47.

Back to the substantive appeal. Appeal is by way of rehearing as provided under Rule 8(1) of CI 19. See **Nkrumah v Ataa [1972] 2 GLR 13** where the court explained that whenever an appeal is said to be by way of rehearing, it means no more than that the appellate court is in the same position as if the rehearing were the original.

Rule 9(5) under which the application for extension of time was brought, explicitly states that an application must be supported by an affidavit which must disclose good and substantial reasons for the application, and the grounds of appeal must prima facie show good cause for the extension of time to be granted. In addressing the grounds of appeal and in ascertaining whether or not the trial court exercised its discretion judicially, we shall consider whether the trial court applied these principles.

We commence our discourse by referring to the affidavit in support of the motion for extension of time which can be found at pages 25 and 26 of the ROA. Appellants deposed that they were unable to file the appeal within time because they became aware of the judgment three months after its delivery. Attached to the supporting affidavit was the proposed notice of appeal in which appellants, to our mind, raised arguable points of law for determination on appeal. In the proposed notice of appeal, the judgment was impugned on grounds that the trial court erred in affirming that 1st respondent could freeze appellants' account without an express order from a court of law. And also that the court erred in holding that the 2nd respondent had filed a counterclaim when none existed.

The application was opposed on grounds that the appellants failed to demonstrate any special circumstances to warrant a favorable ruling from the court. The assertion that they were not served with hearing notice of the date for the judgment was denied in the affidavit in opposition.

Undoubtedly, a plaintiff who has brought a defendant to court, must be vigilant and diligent in prosecuting his case. A reasonable man who was absent from court on the scheduled judgment day without any excuse to the court, would follow up from the Registry of the court to find out what transpired that day.

Having said that, we note that the court was silent on the alleged non- service of hearing notice. Respondents who opposed the application, also failed to demonstrate that notice of the adjourned judgment date of 30th July 2021, was served on appellants.

Appeal is a creature of statute, and time is of the essence, hence where an applicant in an application for extension of time contends that he was not given hearing notice of the date of judgment and cites lack of knowledge of the judgment as a reason for the delay in filing the appeal, it is incumbent on the court to take that assertion into consideration

in making a determination. A careful reading of the ruling would show that the trial court placed so much weight on the delay of appellants in filing their written address and their failure to take advantage of the several adjournments granted them to do so, and was rather silent on appellants' assertion that notice was not given to them.

The records show that appellants filed an application to the Supreme Court on 29th of October 2021 for an order of certiorari to quash the proceedings of 30th July 2021 on grounds of breach of the rules of natural justice. It was after the Supreme Court had struck out the application as withdrawn that appellant filed the application for extension of time before the trial court. The application was filed on 30th of December 2021, a month before the expiry of the six month period, and therefore within the time provided under Rule 9(4) of CI 19.

Refusing the application for extension of time, the trial court referred to appellant's decision to apply for an order of certiorari and ruled thus;

> *"I hold the view that even as late as October, 2021, the applicants could have filed their appeal but they elected another option which has built in time pushing them out of time thereby."*

Clearly, in refusing the application, the trial court attributed the delay to appellants' decision to apply for an order of certiorari. The question to address at this stage is whether in coming to this conclusion, the trial judge properly exercised his discretion.

It has been submitted on behalf of appellants that the option to apply for certiorari to quash the decision and the option to appeal against the decision, both availed appellants. And that the decision to apply for an order of certiorari cannot be used by the trial court as a ground for refusing the application for extension of time especially when the applicant was within the six month period permissible under the rules.

It bears emphasis that certiorari and appeal are two different remedies. They are mutually exclusive and not alternative. Accordingly, nothing prevented appellants from filing an appeal and the application for certiorari together on the 29th of October, 2021 to ensure that they were within time. However where as in the instant case, upon further consideration, appellants decided to abandon the remedy of certiorari and rather pursue an appeal, the wrong move of counsel should not be cited as a reason for not exercising the discretion in favour of appellants. We hold that the trial court in exercising its discretion placed undue weight on the abandoned application for certiorari and his "well-reasoned and considered judgment" and thereby paid little or no regard to the grounds of appeal attached to the application which in our view disclose arguable points of law.

As earlier discussed in this judgment, the guiding principle in an application for extension of time to appeal, is whether the supporting affidavit discloses good and substantial reasons for the application. It is not for the trial judge whose judgment was being assailed, to declare his judgment unimpeachable and thereby refuse the application. To so hold would occasion miscarriage of justice and render Order 9 Rule 5 of no effect.

By giving weight to irrelevant matters, the court reached a wrong conclusion which in our view would work manifest injustice between the parties if allowed to stand; given the arguable grounds of appeal filed. Our decision to interfere with the trial court's exercise of discretion is supported by the decision in **Crentsil v Crentsil (supra)** where the Supreme Court cited with approval the following passage from the judgment of Viscount Simon LC in **Blunt v Blunt [1943] AC 517** at page 518 on what amounts to improper exercise of discretion;

> *"A discretion would be said to be improperly exercised if it was exercised on wrong principles or insufficient material, or did not take into account the balance of convenience or justness or otherwise of a grant or refusal."*

See also the Court of Appeal case of ***Ballmoos vs. Mensah [1984-86] 1 GLR 724*** where the court observed thus;

> "*The Court of Appeal would not interfere with the exercise of the trial court's discretion save in exceptional circumstances. An appeal against the exercise of the court's discretion might succeed on the ground that the discretion was exercised on wrong or inadequate materials if it could 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; but the appeal was not from the discretion of the court to the discretion of the appellate tribunal*."

Having read the judgment of 30th July, 2021 and having given careful consideration to the grounds of appeal and the reasons assigned by appellants for the delay in filing the appeal, we are of the view that the trial court failed to properly take into account the justice of the case and thereby wrongly exercised his discretion. It is our view that appellants have sufficiently established a case for the intervention of this court.

The appeal succeeds and we set aside the ruling of the trial court dated 4th February 2021. Leave is hereby granted to appellants to file the notice of appeal within 14 days of this Ruling.

SGD

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JUSTICE NOVISI ARYENE

(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE .....

JUSTICE ALEX B. POKU-ACHEAMPONG

(JUSTICE OF THE COURT OF APPEL)

SGD

I ALSO AGREE .....

JUSTICE AFIA SERWAH ASARE-BOTWE

(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

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