IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: HENRY KWOFIE JA (PRESIDING)

ANTHONY OPPONG JA

RICHARD ADJEI-FRIMPONG JA

SUIT NO. H1/162/2020

DATE: 9TH FEBRUARY, 2023

THE REPUBLIC

VS.

1. **THE ATTORNEY GENERAL**
2. **LANDS COMMISSION**
3. **BULK OIL STORAGE AND ..... RESPONDENT/RESPONDENT TRANSPORTATION COMPANY (BOST)**

EX-PARTE YAKUBU AWABEGO ..... APPLICANT/APPELLANT

J U D G M E N T

HENRY KWOFIE JA:

This appeal was launched by the applicant/appellant against the ruling of the High Court, Accra delivered on the 12th November, 2021. The trial court in the ruling,

dismissed the applicant/appellants Motion on notice for Judicial Review in the nature of Mandamus under Order 55 of the High Court (Civil Procedure) Rules 2004 (C.I. 47). Dissatisfied with that ruling, the applicant/appellant launched the instant appeal on the 4th of February 2022 on the following grounds:

a. *The judgment is against the weight of affidavit and documentary evidence on record.*

b. *Her Ladyship fundamentally misdirected herself which misdirection, resulted in her erroneously holding that matters in contention can best be decided if the case should be decided on the merits when the suit before her required a decision on the merits*

c. *Her Ladyship fundamentally erred in law in wrongly exercising her discretion not to grant the order of mandamus by relying on the irrelevant consideration that 1st and 3rd respondents disagreed with the compensation assessed by the 2nd respondent (Lands Commission) in respect of the appellant's compulsorily acquired family land.*

d. *Her Ladyship was in manifest error in dismissing the appellant's Judicial Review application on the basis that there existed an alternative remedy.*

e. *The judgment of the High Court was delivered per incuriam the binding decision of the Court of Appeal in the case of* ***Republic vs. Ghana Gas Company ex parte King City Development Company (Unreported)*** *Civil Appeal No. H1/233/2020 dated 25th March 2021.*

The reliefs sought from the Court of Appeal are:

a) An order setting aside the judgment of the High Court delivered on the 12th day of November 2021 in its entirety

b) A declaration that the Government of Ghana is mandated by virtue of section 4(2) of the State Lands Act 1962 (Act 125) to promptly pay the appellant the compensation assessed by the Lands Commission in respect of the land compulsorily acquired under Executive Instrument (E.I.)10

c) *An order of mandamus directed at the Government of Ghana compelling it to immediately pay to the appellant the compensation which has already been assessed by the Lands Commission in respect of the land compulsorily acquired under Executive Instrument (E.I) 10*

d) *Any further or other orders as this honourable Court may deem fit.*

The facts giving rise to this appeal can be summarized as follows:

By a motion on Notice for Judicial Review in the nature of declaration and mandamus under Order 55 of the High Court (Civil Procedure) Rules 2004 (C.I.47) filed on 2nd February 2021, the applicant /appellant claimed the following reliefs:

a) *A declaration that the Government of Ghana is mandated by virtue of Section 4(2) of the State Lands Act, 1962 (Act 125) to promptly pay the applicant the compensation assessed by 2nd respondent in respect of the land compulsorily acquired under Executive Instrument (E.I.)10 for the use and benefit of 3rd respondent*

b) *An order of mandamus directed at the Government of Ghana compelling it to immediately and unconditionally pay to the applicant the compensation assessed by 2nd respondent in respect of the land compulsorily acquired under Executive Instrument (E.I.) 10 for the use and benefit of the 3rd respondent.*

The case of the applicant/appellant (hereinafter called the applicant) who brought the action in a representative capacity as Head of the Awure family of Kalbeo was that his family held a freehold interest in a piece or parcel of land being or lying at Tamale Road, Industrial Area, Bolgatanga and measuring 61.92 acres. It is his case that in 2004, by virtue of an Executive Instrument E.I.10, the Government of the Republic of Ghana compulsorily acquired the said piece or parcel of land. Subsequent to the said compulsory acquisition, the Awure family of Kalbeo represented by its principal members, executed a Memorandum of Understanding (MOU) with the Tindana of

Tindonsobligo to enable it claim compensation in respect of the compulsorily acquired land. By virtue of the said MOU, any compensation paid in respect of the compulsorily acquired land was to be shared in the ratio of 60% to 40% between the Tindana of Tindonsobligo and Awure family of Kalbeo respectively. The applicant further stated that in the case of **Yakubu Awabego (suing on behalf of the Awure family of Kalbeo) vs. Tindana Agongo Akubayela (Civil Appeal N. J4/6/2016)** the Supreme Court held that both the Awure family of Kalbeo and the Tindana of Tindonsobligo were bound by the MOU they executed. Thus, the total compensation paid in respect of the land compulsorily acquired was to be shared in the ratio of 60% to 40% between the Tindana and the Awure family Pursuant to this, the 2nd Respondent (the Lands Commission) assessed the compensation payable to the Awure family in respect of the 52.204 acres of the compulsorily acquired land at an amount of One Million and Seventy-Three Thousand, Nine Hundred and Fifty Eight Ghana Cedis Forty pesewas (GH¢1, 073, 958.40) representing 40% of the total compensation payable in respect of 52.204 acres of the compulsorily acquired land. Consequently by letter dated 16th June 2020 the 2nd Respondent (the Lands Commission) directed the Managing Director of the 3rd respondent, Bulk Oil Storage and Transportation Co. (BOST) who were the beneficiaries of the compulsory acquired land, to make the following payments:

a) *An amount of One Million and Seventy – Three Thousand, Nine Hundred and Fifty Eight Ghana Cedis (GH¢1,073 958 .40) to the family.*
b) *An amount of One Hundred and Seven Thousand Three Hundred and Ninety five Ghana Cedis, Eighty Four Pesewas (GH¢107,395.84) to Atuguba & Associates, Legal Practitioners.*
c) *An amount of One Hundred and Seven Thousand Three Hundred and Ninety Five Ghana Cedis Eighty Four Pesewas (GH¢107, 398.84) to Prestige Property Consulting.*

The 3rd respondent failed to pay the said assessed compensation hence the application for an order of mandamus to compel it to pay the stated sums.

The 1st and 3rd respondents opposed the application and in its affidavit in opposition, the 3rd respondent admitted that the applicant family was entitled to prompt payment for the piece of land in which they had an interest and which was compulsorily acquired for the use and benefit of the 3rd respondent. The 3rd respondent case however is that they paid compensation for 9.72 acres of that portion of the land over which there were title deeds and that compensation for the rest of the land remained outstanding as there were no title deeds covering that portion of the land. They further attributed the non-payment of the outstanding compensation to litigation between the applicant family and the Tindana over their respective share of the compensation payable. Their case further was that where due to a dispute between the beneficiaries, compensation was not paid, the money for the payment of such compensation was to be lodged in an interest yielding escrow account pending the determination of the dispute whereupon the beneficiary will recover the compensation with the accrued interest. The 3rd respondent contended that were the money for the payment of the compensation for the remainder of the land compulsorily acquired put in an interest yielding escrow account from 2006, the amount due would be an estimated sum of Two Hundred and five Thousand, one Hundred and Seventy Nine Ghana Cedis, Ninety Nine Pesewas (GH¢205,179.99) and not Three Million Sixty Three Million Thousand seven Hundred and Eighty Two Ghana Cedis (GH¢3, 060, 782.00) as claimed by the applicant. The 3rd respondent contended that applicant's claim lay in the estimated amount of GH¢205,179.99. The 3rd respondent further stated that it did not lodge the money for the payment of the outstanding compensation in such an escrow account as same was not communicated to them. They also denied the involvement of Atuguba and Associates and Prestige Property Consulting in the acquisition of the land.

Counsel for the appellant argued ground (d) and (e) of the appeal together. In his written submissions, the appellant relied on the cases of **Djin vs. Musa Baako (2007-2008) SCGLR 686, Tuakwa vs. Bosom (2001-2002) SCGLR 61 and Agyenin Boateng vs. Ofori & Yeboah (2010) SCGLR 861** relating to the duty cast on an appellant who appeals on the ground that the judgment is against the weight of evidence and submitted that the trial judge failed in her duty to make up her mind one way or the other on the primary facts and to state her findings and then proceed to apply the law. He submitted that a careful reading of the judgment shows that the trial judge simply regurgitated the affidavit evidence led by the parties without evaluating them. He added that although the trial judge failed in her duty to make primary findings of fact with regard to the issues in controversy, this honourable court is well within its remit to draw its own conclusions on both the facts and the law.

Ground (D): *Her Ladyship was in manifest error in dismissing the appellant's judicial review application on the basis that there exist an alternative remedy*

Ground (E): *The judgment of the High Court was delivered per incuriam the binding decision of the Court of Appeal in the case of* ***Republic vs. Ghana Gas Company; ex parte King City Development Co****. (Unreported Civil Appeal No. H1/233/2020 dated 25th March 2021)*

Counsel submitted that although the trial judge held that there was an alternative remedy to judicial review, she failed to specify the alternative remedy the appellant should have resorted to. Counsel further argued that the decision of the trial judge that the court is

incapable of granting the application for judicial review in the nature of mandamus because there is an alternative remedy was also delivered per incuriam the binding decision of the Court of Appeal in the case of **Republic vs. Ghana Gas Company ex parte King City Development Co**. (Unreported), Civil Appeal No. H1/233/2020 dated 25th March 2021 wherein the Court of Appeal held that where compensation has been assessed for a compulsorily acquired land but the assessed compensation had not been paid, the applicant may seek an order of mandamus to compel the payment of the assessed compensation. Counsel submitted that the said decision of the Court of Appeal in **ex parte King City Development** (supra) was a question of law which was binding on the trial High Court judge pursuant to Article 136 (5) of the 1992 Constitution which provides thus:

> *"subject to clause (3) of Article 129 of this Constitution, the Court of Appeal shall be bound by its own previous decisions and all courts lower than the Court of Appeal shall follow the decisions of the Court of Appeal on questions of law"*

With respect to the appellant's contention that the trial judge failed to specify the alternative remedy the appellant should have resorted to, it suffices to say that that charge against the trial judge is unjustified. In the recent Court of Appeal case Suit No.H1/05/2015 intituled **Republic vs. The Administrator of Stool Lands and others; ex parte Emmanuel Narh Amade & Anor,** the respondents claimed to be entitled to a portion of mining royalties accruing from mining activities in the Yongwa Forest Reserve which is on their stool land. They applied for an order of mandamus to compel the appellant to pay the royalties to them which the High Court, Koforidua, granted.

On appeal, the Court of Appeal in their unreported judgment stated in a unanimous judgment authored by Justice Dennis Adjei JA dated 11th March 2015 set aside the order of mandamus, reasoning that mandamus is ill-suited as a remedy in private Civil Law claims. In the case of the **Republic vs. Ghana National Gas Company Ltd ex parte King City Development Company (Lands Commission – Interested Party/Respondent)** Suit No. J4/61/2021 (Unreported judgment of the Supreme Court dated 15th December 2021) the Supreme Court held in reversing the decision of the Court of Appeal stated as follows per Pwamang JSC:

> *"We are therefore on policy grounds, very reluctant to extend the remedy of mandamus to the area of the state's liabilities when the existing remedies have not been found to be inadequate. It is our considered opinion that, in compensation claims for the states compulsory acquisition of land, the appropriate procedure ought to be under Order 2 rule 2 of C.I. 47 in order that the claim can be thoroughly investigated before payment is ordered by a court"*

With regard to ground (e) of the appeal where the appellant contends that the decision of the trial High Court was given per incuriam the binding decision of the Court of Appeal in the case of **The Republic vs. Ghana Gas Company Ltd ex parte King City Development Company** (supra), it is worth pointing out that the said Court of Appeal decision which forms the bedrock of the appellant's argument has itself been reversed on appeal by the Supreme Court in its decision dated 15th December 2021 which decision I propose to discuss in detail when dealing with the appellant's other grounds of appeal. The Court of Appeal decision having been reversed cannot give any solace to the appellant. Grounds (d) and (e) of the appeal fail and are dismissed.

I now propose to deal with the appellants 2 outstanding grounds of appeal viz b and c.

Ground (b)	*Her Ladyship fundamentally misdirected herself which misdirection resulted in her erroneously holding that the matters in contention can best be decided if the case should be decided on the merits when the suit before her required a decision on the merits.*
Ground (c)	*her Ladyship fundamentally erred in law in wrongly exercising her discretion not to grant the order of mandamus by relying on the irrelevant consideration that the 1st and 3rd respondents disagreed with the compensation assessed by the 2nd respondent (Lands Commission) in respect of appellants compulsorily acquired land.*

The appellant contended that the trial judge's decision that the matter in contention in the said case are matters that can best be decided if the case should be heard on the merits is bewildering as although the suit was commenced by an originating notice of Motion, it still required her to make a decision on the merits. The appellant referred to the case of **Owusu Mensah And Another vs. National Board for Professional and Technical Examination (NAPTEX) and others** (Unreported) Civil Appeal No. J4/57/2017 dated 9th May 2018 S.C. and submitted that if the trial judge was of the view that the matters in controversy could not be resolved solely on the basis of the affidavit and documentary evidence on record, the proper procedure was for her to have ordered the taking of oral evidence or even order the filing of pleadings. The appellant further submitted that the Government has a duty under Section 4(2) of the State Lands Act, 1962 (Act 125) and Article 20(2) (a) of the 1992 Constitution to

promptly pay the appellant the compensation assessed by the 2nd respondent (The Lands Commission) in respect of the land compulsorily acquired under Executive Instrument (EI) 10. He added that the combined effect of Section 4(2) of Act 125 and Article 20(2) of the 1992 Constitution is that where the 2nd respondent (Lands Commission) assesses the compensation payable to a landowner whose land has been compulsorily acquired, the Government is mandated to pay the assessed compensation promptly.

The originating Notice of Motion which has culminated in this appeal was for an order of mandamus directed at the Government of Ghana compelling it to mandatorily and unconditionally pay to the appellant, the compensation assessed by the 2nd respondent in respect of the land compulsorily acquired under Executive Instrument (EI) 10 for the use and benefit of the 3rd respondent, Bulk Oil Storage and Transportation Ltd. (BOST). In the case of **Republic (No. 2) vs. National House of Chiefs; Ex Parte Akrofa Krukoko II (Enimil VI Interested Party) (No. 2) (2010) SCGLR 134 at pages 177 to 178,** the Supreme Court adopted the following statement of Annan J (as he then was) on the conditions precedent for mandamus:

> *"This issue was addressed by Annan J (as he then was) in the case of* ***Republic vs. Chieftaincy Secretariat; Ex Parte Adansi Traditional Council (1968) GLR 736*** *where an apt summary of the law and the grounds upon which a party may seek the redress for mandamus were stated by the Court. The Court (as stated in holding (1) of*

the headnote held thus:

> *"An order of mandamus would lie to compel performance of the duty at the instance of a person aggrieved by the refusal to perform that duty unless another remedy was indicated by the statute. But before a court would make such an order of mandamus, the applicant must satisfy four main conditions, namely:*
>
> *a) That there was a duty imposed by the statute upon which he relied,*
>
> *b) That the duty was of a public nature*
>
> *c) That there was a right in the applicant to enforce the performance of the duty and*
>
> *d) There had been a demand and a refusal to perform that public duty enjoined by statute"*

Also in the case of **Republic vs. High Court, Koforidua; Ex Parte Affum (Deceased) substituted by Akomeah Frimpong Manso IV (2012) 1 SCGLR** it was held that:

> *"mandamus is a discretionary remedy. A court may exercise its discretion to deny the grant, even more so when it is found that there was good reason behind the refusal to act on the part of whichever public body that had the duty to act"*

From the four (4) main conditions set out in the cases of **ex parte, Adansi Traditional Council (supra) and ex parte Krukoko II** supra, the sine qua non for an order of mandamus is the existence of a statutory duty imposed on the person or body against whom the order of mandamus is sought and there must equally be a right in the person applying for the mandamus to enforce the performance of that statutory duty.

The question or issue of whether the payment of compensation for land compulsorily acquired by government is a statutory duty imposed under Act 125, the State Lands Act 1962, and whether in compensation claims for the state's compulsory acquisition of land, the appropriate procedure is the initiation of an application for an order of mandamus has engaged the attention of the highest court of the land. In the recent case of **Republic vs. Ghana National Gas Company; Ex parte King's Development Company** (Lands Commission Interested party) unreported suit No. J4/61/2021 dated 15th December 2021, the Supreme Court had occasion to comprehensively deal with those 2 issues. By an affidavit in support of its application for mandamus, the applicant, King City Development Company, deposed that its land in the Western Region was compulsorily acquired under the State Lands Act, 1962 (Act 125) by Executive Instrument No. 47 made on 12th June, 2014 by the Minister for Lands and Natural Resources to be used for laying a gas pipeline from the facility of the respondent at Atuabo. The applicants case was that the compensation payable to it under Act 125 had been assessed by the Lands Commission to be GH¢69,388,642.47 and that the Lands Commission had instructed the respondent to pay as it is the agency for whose benefit the land was compulsorily acquired. The respondent had refused to pay the assessed compensation hence the application for an order of mandamus to compel it to pay the stated sum to it or into an interest yielding escrow account. The applicant alleged in paragraph 33 of its affidavit in support, that the respondent owes a constitutional and statutory duty to pay the assessed compensation under provisions of Act 125 and the State Land Regulations, 1962 (L.I.230). On being served, the respondent opposed the application and in its affidavit in opposition raised two main points; (1) it is not a department or agency of the Government of Ghana but a limited liability company incorporated under the Companies Act 1963 (Act 179) so it is not amenable to the writ of mandamus (2) There is no duty imposed on it by any law to pay compensation to the applicant for the land acquired by the Government of Ghana.

The High Court, (Commercial Division) Accra, granted the application for an order of mandamus and ordered the appellant Ghana Gas Company Ltd., to pay to the respondent, the assessed compensation for the said compulsory acquisition in the sum of GH¢69,388,642.47. The appellant appealed against the decision of the High Court to the Court of Appeal, Accra, which affirmed the decision of the High Court and held as follows:

> *"it cannot be in dispute that the 1st respondent's right to the assessed compensation is a fundamental human right. The denial or refusal to pay the assessed compensation to the 1st respondent thus constitutes a violation of that right and the 1st respondent is entitled to apply for judicial review in the nature of a Writ of Mandamus in its quest for redress under Article 33. It is therefore our considered opinion that the procedure by which the 1st respondent sought relief in the trial court is cognizable in law"*

The appellant further appealed against the decision of the Court of Appeal to the Supreme Court.

The Supreme Court in resolving the issue of whether the payment of compensation that has been assessed by the Lands Commission is a public duty held as follows per Pwamang J.S.C:

> *"In this case, the applicant was not able to point out from Act 125 and L.I. 230 any provision that imposes a duty for the compensation that has been assessed by Lands Commission to be paid to a person whose land is compulsorily acquired. The duty that Act 125 imposes on the Lands*

Commission is clear, and it is to cause the compensation payable to be assessed. Section 4(2) of Act 125 is as follows:

2) The Lands Commission shall upon receipt of claim for compensation under subsection (1) cause to be assessed the payment of fair and adequate compensation by the government for the land acquired to the owner.

There is no ambiguity as to the nature of the duty imposed on the Lands Commission by the Act and the judge of first instance recognizes clearly the absence of any duty imposed by statute on anyone to pay assessed compensation"

Further on the Court stated at page 9 of the judgment

"payment of compensation may not be a straightforward question of enforcement of human right where there are contentions issues bordering on the rightful person entitled to be paid, the correct amount that the particular land ought to be valued for or even whether compensation has not already been paid for the acquisition in question. In those situations, the appropriate procedure to seek redress would be by action commenced by writ of summons under Order 2 rule 2. The trial judge herself stated in her ruling that mandamus, and that goes for all the prerogative writs, is normally seen as a supplementary remedy to be resorted to where there is no alternative effective remedy provided by statute and may be refused in the discretion of the court. But on the matter of claim for compensation, more than adequate effective remedy already exist in the law. No legal impediment has been pointed out to as likely to be experienced by the applicant proceeding under Order 67 or Order 2 Rule 2 of C.I. 47 to warrant the disregard for building judicial precedent which makes the

requirement of a public duty imposed on the respondent mandatory for the invocation of the administrative law remedy of mandamus"

Finally, the Supreme Court put the nail in the coffin of applications for mandamus for the payment of assessed compensation for compulsorily acquired land when it said at page 14, 15 and 16 as follows:

> *"The applicant to all intents and purposes is seeking by its application to have its claim to compensation for its private land compulsorily acquired by the state paid to it. Both the High Court and the Court of appeal were very clear on this, but mandamus is only to be granted where the right the applicant seeks to enforce derives from a statutory or public duty and not for the establishment of liability and enforcement of a private right against a respondent whether a public, quasi public or private entity. We see through this case, an attempt to add the remedy of mandamus to claims for compensation for compulsory acquisition of land by the state ..... We are therefore on policy grounds, very reluctant to extend the remedy of mandamus to this area of the state's liabilities when the existing remedies have not been found to be inadequate. It is our considered opinion that in compensation claims for the state's compulsory acquisition of land, the appropriate procedure ought to be under Order 2 rule 2 of C.I. 47 in order that the claim can be thoroughly investigated before payment is ordered by the court"*

Clearly the Supreme Court by the judgment in the **ex parte King City Development Company** clearly discouraged the use of the remedy of mandamus in cases involving payment of compensation assessed for lands compulsorily acquired by the state.

The proper procedure to be followed in such cases is by the issue of a Writ of Summons under Order 2 Rule 2 of the High Court (Civil Procedure) Rules 2004 (C.I.47) which states as follows:

> *"Subject to any existing enactment to the contrary, all civil proceedings shall be commenced by the filling of a Writ of Summons"*

This will enable all issues in controversy including the issue of how much should be paid for the compulsorily acquired land as arose in this instant case to be determined by viva voce evidence which will be subjected to cross-examination. In any event, there already exist under the law alternative effective remedies provided by statute for the reliefs sought by mandamus. From a careful reading of the Supreme Court judgment in **ex parte King City Development Company**, several principles are deducible therefrom viz:

a) *There already exist effective alternative remedies in respect of claims for the payment of compensation assessed in respect of land compulsorily acquired by government*
b) *A claim for the payment of compensation is not a public duty but a private civil claim*
c) *Mandamus is not an appropriate remedy to resort to in a claim for payment of compensation assessed in respect of land compulsorily acquired by the state*
d) *Where land is compulsorily acquired by the state for the benefit of an entity eg. a state institution or company eg. BOST or Ghana Gas, that entity for whose benefit the land was compulsorily acquired is responsible for the payment of the assessed compensation.*

Grounds (c) and (d) of the appeal fail. For the same reasons, ground (a) also fails. On the whole, the appeal of the appellant fails and is dismissed in its entirety as being without merit. The judgment of the trial court dated 12th November, 2021 is hereby affirmed.

SGD

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JUSTICE HENRY KWOFIE

(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE .....

JUSTICE ANTHONY OPPONG

(JUSTICE OF THE COURT OF APPEAL)

SGD

I ALSO AGREE .....

JUSTICE RICHARD ADJEI-FRIMPONG

(JUSTICE OF THE COURT OF APPEAL)

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