IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE JSC (PRESIDING)

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

TORKORNOO (MRS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

ACKAH-YENSU (MS.) JSC

CIVIL MOTION

NO. J7/07/2023

22ND FEBRUARY, 2023

THE REPUBLIC …….. RESPONDENT

VRS

HIGH COURT (CRIMINAL DIVISION), ACCRA

EXPARTE: STEPHEN KWABENA OPUNI …….. APPLICANT/APPLICANT

AND

ATTORNEY-GENERAL
SEIDU AGONGO ……. **INTERESTED PARTIES**
AGRICULT GHANA LTD.

RULING

TORKORNOO (MRS.) JSC:- Article 133 of the 1992 Constitution provides the jurisdiction of the Supreme Court to review its decisions. It reads in

Power of Supreme Court to Review its Decisions

(1) *The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court*

(2) *The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven justices of the Supreme Court*

Rule 54 of the **Supreme Court Rules 1996 C. I. 16** provides the extremely limited circumstances under which the Court may review its decisions

54. **Grounds for Review**

The Court may review any decision made or given by it on any of the following grounds –

a. *Exceptional circumstances which have resulted in miscarriage of justice;*
b. *Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given*

Background

This is an application to review a decision of the ordinary bench of this Court dated 24th January 2023. The applicant before us is defending himself in a criminal trial in the high court before a Supreme Court judge sitting as an additional High Court judge. He applied for an order of perpetual injunction to restrain the judge from continuing to preside over the criminal trial on the grounds that (a) the learned judge had reached the compulsory retirement age of 70 years pursuant to **article 145 (2) (a)** of the 1992 Constitution, and so had ceased to be a judge and (b) that any extension to his tenure to continue sitting as an

additional High Court judge by the Chief justice is unconstitutional and in breach of **article 145 (2) (a)**. He also sought an order setting aside certain orders of the court.

Article 145 (2) (a) reads:

2. *A justice of a Superior court or a Chairman of a Regional Tribunal shall vacate his office –*
a. *In the case of a Justice of the Supreme Court or the Court of Appeal, on attaining the age of seventy years;*

The records supporting this application settle the position that the learned judge had been requested by the Honorable Chief Justice to continue in office for the purpose of completing proceedings that had been commenced before him prior to attaining the retirement age, including the trial of the applicant pursuant to **Article 144 (11)**

Article 144 (11) reads:

Notwithstanding the expiration of the period of his appointment or the revocation of his appointment under clause (9) of this article, a person appointed under clause (9) of this article may thereafter continue to act for a period not exceeding six months, to enable him to deliver judgment or do any other thing in relation to proceedings that were commenced before him previous to the expiration or revocation

On 14th November 2022, the learned judge, after dismissing a preliminary objection seeking to stop him from hearing the application filed in his court, dismissed the application on the premise that it was not sustainable on a clear reading of **article 139 (1) (c)** read conjunctively with **article 145 (4).** It was the view of the learned judge that the submissions made by applicant counsel to the effect that since it is the President of the Republic who appoints Superior Court judges, it is the President who must exercise the mandate in **article 145 (4)** to grant an extension of time of not more than six months to a retired judge to complete proceedings before him, was erroneous.

Article 145 (4) reads:

4. *Notwithstanding that he has attained the age at which he is required by this article to vacate his office, a person holding office as a Justice of a Superior Court or Chairman of a Regional Tribunal may continue in office for a period not exceeding six months after attaining that age, as may be necessary to enable him to deliver judgment or do any other thing in relation to proceedings that were commenced before him previous to his attaining that age*

Application to the Supreme Court

The applicant thereafter brought an application to the Supreme Court for certiorari to quash the ruling of 14th November 2022. He urged that the trial judge acted without jurisdiction on account of sitting to hear proceedings including delivering the impugned ruling after he had attained the age of 70 years. Further, in the proceedings before the trial judge, rival meanings had been placed on **articles 139 (1) (c) and 145 (4)** by the prosecution and the applicant. Applicant urged that the trial judge acted without jurisdiction when in spite of the rival meanings, the trial judge failed to refer the contradictory positions to the Supreme Court to interpret and enforce the true meaning of the relevant constitutional positions.

The applicant also sought from this Court, an order of prohibition and perpetual injunction to restrain the learned judge from continuing to preside over the trial on the ground that on the basis of the decision of this Court in **Republic v High Court, Ex Parte Agbesi Awusu 11 (No 2) (Nyonyo Agboada (SRI 111) Interested Party) 2003-2004] 2 SCGLR 907**, the learned judge was bound in law to have referred an application requiring him to restrain himself from presiding over the criminal trial to the Chief Justice for that application to be heard by a different judge. According to the applicant, the hearing of an application seeking recusal of a judge by the same judge amounted to a violation of the natural justice rule of nemo judex in causa sua.

The Supreme Court's decision of 24th January 2023

On 24th January 2023 this Court dismissed the application for certiorari and prohibition and rendered a 40 page reasoned ruling setting out why both the application for certiorari and prohibition could not be acceded to.

The Court identified four issues raised by the application before it. The first was whether the trial judge acted without jurisdiction and in breach of **article 145 (2) (a**) of the 1992 Constitution when he continued to preside over the trials after he attained the retirement age.

On this issue, the ordinary bench of this Court pointed out that contrary to assertions of counsel for the applicant, **article 145 (2)** and **article 145 (4)** had been interpreted and applied by this court approximately twenty years ago in **Republic v Fast Track High Court, Accra Ex Parte Daniel [2003-2004] SCGLR 364**.

In **Ex parte Daniel,** this Court had inter alia, determined that a Court of Appeal or Supreme Court judge who reached the compulsory retirement age of 70 was not precluded from presiding over a High Court case as an additional High Court judge during a six month extension of his tenure by operation of **article 145 (4)**. Second, in situations where the Chief Justice has directed a superior court judge to preside over a suit in the capacity of additional High Court judge, he does so pursuant to **article 139 (1) (c)** which empowers the Chief Justice in writing signed by him to request any Superior Court Justice to sit as a High Court judge. This Court ruled that the '*the Supreme Court has already spoken very loud with unanimity and clarity on the relevant constitutional provisions in articles 139 (1) (a) (b) (c), 145 (2) (a) and (4)*'

Upon a true and proper application of these provisions to the circumstances of the case therefore, the trial judge was properly mandated and acting within jurisdiction when he presided over the criminal trial after his retirement date.

The second issue settled by the ordinary bench was whether the trial judge acted in breach of **article 129 (3)** by refusing to follow the decision in **Ex parte Agbesi Awusu 11** in hearing the application to restrain him from continuing the criminal trial.

Article 129 (3) reads:

The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law

To determine the applicability of the legal tenets in **Ex parte Agbesi Awusu 11**, to the case submitted to the trial judge, the decision sought to be reviewed drew out the core parameters of the facts and determinations in **Ex parte Agbesi Awusu 11**, and other cases that dealt with the law on when a Judge ought to recuse himself from hearing a case seeking to prohibit them from presiding over proceedings filed before him. The decision noted that the facts that led to the decision in **Ex Parte Agbesi Awusu 11** '*are dramatically different from the conduct of the learned trial judge in the instant case*'.

Inter alia, it was noted in the decision of the ordinary bench that unlike the complaints that culminated in the 14th November 2022 ruling, the allegations against the judge in **Ex Parte Agbesi Awusu 11** were '*grave and called into question his integrity or credibility as an impartial adjudicator and he was personally disputing the matters raised in the motion*'.

In the same vein in **In re Effiduase Stool Affairs (No 1) Republic v Numapau, President of the National House of Chiefs: Ex Parte Ameyaw 11 (No 1) [1998-199] SCGLR 427**, Atuguba JSC had noted that where grave charges of bias are raised against a judge which require factual resolution, and the judge concerned has to resolve issues of credibility of witnesses on matters that touch and concern him in such personal particulars, the judge is in reality a party to the litigation (particeps litis) and ought not to sit and determine the said issues.

It was the conclusion of the ordinary bench in the impugned decision that from an examination of the standing decisions resulting in the determinations in **Ex Parte Agbesi Awusu 11,** '*for the allegation that a judge was sitting in his own cause, thereby breaching the 'nemo judex in causa sua' principle of natural justice to succeed, the ingredients of the allegation must be proved and established. The mere fact that an application has been made and filed against a Judge, however disingenuous, baseless and mischievous it might be does not automatically mean that the said Judge is to refer the application to the Chief Justice for determination before he can continue to sit on the case*'. The court concluded that '*it is crystal clear that the judge (in the 14th November 2022 ruling) did not breach article 129 (3) of the Constitution by refusing to follow binding authority. On the contrary, the learned trial judge applied himself within the remit and proper understanding of the two cases cited to him*.'

The third issue identified in the decision we are being asked to review was whether the trial judge committed an error of law patent on the face of the record when in the alleged face of rival meanings placed on **articles 139 (1) (c)** and **145 (4)** by the parties, he proceeded to uphold the submission of the prosecution that there was no ambiguity on the face of the provisions as to their meaning.

The ordinary bench failed to see how there could be any rival meanings in the provisions referred to. It determined that '*there was absolutely no need for the learned trial judge to refer to the Supreme Court pursuant to article 130 (2)'*

On the issue of whether it is the President and not the Chief Justice who has the power or right to extend the time of the learned trial judge under **article 145 (4),** the evaluation of the ordinary bench was that '*the power and/or authority of the Chief Justice to do so was sub-silentio presumed and validated by this Court in the Ex parte Daniel case*.' This is because the issues in contention in that case included inter alia, whether such an extension of tenure by the Chief Justice confers jurisdiction in relation to proceedings that were

commenced before the Judge previous to attaining the retirement age. The answer to this issue in the **Ex Parte Daniel** was positive.

The decision under review refused to detain itself with the alleged ambiguity of meaning regarding who was the proper person to authorize the extension of time to a retiring judge to complete proceedings before him, because the words in **article 145 (4)** are clear and precise. They concluded by holding that it is the Chief Justice and not the President, who is the administrative head of the Judiciary, who is entitled to exercise the powers in **articles 139 (1) (c)** and **145 (4).**

The present application

Notwithstanding the clarity and cogency of this decision of 24th January 2023, the applicant has presented an application for review of the ruling and his application is grounded on **Rule 54 (a) of CI 16**. It is therefore to be appreciated that the applicant will show the exceptional circumstances that should invoke the empanelling of seven judges pursuant to **article 133** for the purpose of sitting and overturning the determinations made on 24th January 2023.

Citing **Agyei & Ano v Fori & Others [1999-2000] 2 GLR 426**, **Quartey v Central Services Co ltd [1996-1997] SC GLR 398**, and **Koglex v Field [1999-2000] 2 SCGLR 437**, counsel for the applicant agrees that the firm jurisprudence on the consideration behind the grant of a review of this Court's decisions requires that the reviewing bench focuses only on the decision before them because the alleged exceptional circumstance must be a fundamental or basic error inadvertently committed by the court and must be apparent on the face of the decision.

So what are the alleged inadvertent, fundamental and basic errors that have led to miscarriage of justice that applicant is urging as grounds for the current application for review?

First, that because, by the provisions of **article 144(2**) and **article 145 (4)** of the 1992 Constitution, it is the President who has the sole authority to appoint a Supreme Court judge, it is the President who has the implied power **article 297 (a)** and **(c)** to extend the tenure of office of the trial judge under **145(4)** of the 1992 Constitution.

Further, in *Ex parte Daniel cited supra,* this Court did not and was not called upon to determine whether it is the President and not the Chief Justice who has the power to extend the tenure of a superior court judge whose tenure has come to an end upon attaining the constitutional retirement age. Counsel for applicant however submits that this Court in ***Ex parte Daniel*** interpreted **Articles 139(1)(c) and 145(4)** of the 1992 Constitution with regard to the two issues which were before it in that case. These issues were whether a superior court judge of either the Court of Appeal or Supreme Court over the age of 65 (sixty-five) years could sit as an additional High Court judge under **article 139(1)(c)** and whether under **Article 145(4),** a judge of the superior court who has retired and had been given an extension could only hear part heard cases. To these issues, this Court had held that under **article 139(1) (c),** a superior court judge over 65 (sixty-five) years could be requested to sit as an additional High Court judge and further held that under **article 145(4),** a judge who has been given an extension of tenure for six months could hear any form of proceedings that had begun before him and not only part heard case.

To this end, **Ex-parte Daniel** did not require this Court to decide whether under **articles 139(1)(c)** and **145(4)** it is either the Chief Justice or the President who had the power to extend the tenure of superior court judges including Supreme Court judges. This is more so when the Chief Justice is not the appointing authority for superior court judges, but the President under Article 144 of the 1992 Constitution.

Applicant claims that he is advised that '*when the 1992 Constitution provided in Article 145(4) that notwithstanding that a judge had attained the age of 70(seventy) years, such a judge may continue to hold office for a period not exceeding 6(six) months to enable him deliver judgment, it could only mean that such a judge's appointment can only be extended by the person who appointed the judge namely, the President and no other person*'.

He therefore urged that this Court by its ruling of the 24th January, 2023 disabled itself and reneged on its constitutional duty of interpreting **articles 139(1) (c) and 145(4)** of the Constitution and to determine the issue of whether it is the Chief Justice and not the President who has the power to extend the tenure of judges under **article 145 (4)** of the 1992 Constitution. That this is a clear breach of the duty placed on this Court to interpret and enforce the Constitution under **article 130(1) (a)** of the 1992 Constitution, and it is this error that constitutes exceptional circumstances resulting in a miscarriage of justice. Again, this court committed a fundamental error by refusing to quash the 14th November 2022 ruling of the trial judge that upheld a rival meaning placed on **article 145 (4)** by the prosecution, instead of referring the contrary positions submitted by the parties to the Supreme Court for interpretation and enforcement of the contested constitutional provisions.

A further ground for this application for review is that '*the ordinary bench of this court committed a grievous error of law which error constitutes an exceptional circumstance which has resulted in miscarriage of justice when it did not rule that the trial judge committed a breach of the rules of natural justice and more specifically the nemo judex in causa sua rule. This is because the trial judge personally sat and dismissed the application which amongst others, sought to injunct him from continuing with the hearing of the case on the basis that he had attained the constitutional retirement age of 70(seventy) years*'.

Applicant claims that he is advised that '*the decision of the ordinary bench of this court is against the constitutional provision of stare decisis which requires that all lower courts are bound by the decision of this court. This court held in Republic v. High Court, Ex parte Agbesi Awusu II (No. 2) [2003-2004] 2 SCGLR 907 that as soon as a motion is filed seeking the recusal of a judge from hearing a case in which he is personally being challenged, he is bound to recuse himself from hearing the particular motion and should necessarily refer same to the Chief Justice for same to be assigned to another judge*'.

He therefore opined that it was a fundamental and basic error for the the ordinary bench not to hold the trial judge as bound to apply the principles settled in the **Ex Parte Agbesi Awusu II** decision, which decision required the trial judge not to hear the motion seeking a perpetual injunction against him personally.

Counsel for applicant in his Statement of Case went on to cite the decision of this Court in **Republic v High Court (Criminal Division 1) Ex Parte Stephen Kwabena Opuni, Attorney General (Interested Party) Civil Motion No J7/20/2021** and submitted that in that ruling, this Court had grounded its review of an earlier 3-2 majority decision on the position that it is mandatory and binding pursuant to **article 129 (3)** for a lower court not to depart from decisions of the Supreme Court. Thus if the trial judge had failed in the 14th November 2022 decision to abide by the directions of **Ex Parte Agbesi Awusu 11**, it was an error apparent on the face of the 24th January 2023 ruling for this Court to uphold that high court decision.

He also cited other cases including **Republic v High Court, (Human Right Division) Accra; Ex Parte Swayne (Amoabeng Interested Party) [2015-2016] 2 SCGLR 1130** and **Republic v Cape Coast District Magistrate Grade 11 ; Ex Parte Amoo [1979] GLR 150** on the position that certiorari must lie to quash decisions given in breach of the principles of

natural justice. Thus in dismissing the application for certiorari, the ordinary bench had committed a grievous error which is an exceptional circumstance because it had upheld an unconstitutional act by the trial judge.

Consideration of the application for review

We will not expend effort on setting out the opposing positions of the Attorney General as an Interested Party, because it is easy to see that not one of these alleged grounds for the current application pretend to introduce anything new beyond the grounds for the original application for certiorari and prohibition that was dismissed.

We have read with close attention the reasons submitted for the review of the 24th January 2023 and are satisfied that they do not meet the required parameters for the invocation of the Supreme Court's jurisdiction to review its decisions. **Rule 54 (a) of CI 16** requires that an application for review must be premised only on exceptional circumstances that have occasioned miscarriage of justice.

A close reading of the case law on the exercise of the review jurisdiction of this court will reveal such exceptional circumstances to include situations where this court has made determinations of law premised on a lack of jurisdiction such as will render its decision void, decisions given per incuriam, or decisions that '*demonstrably indicate that the said decision is not legally right*'. See **Ababio v Mensah [1989-90] 1 GLR 573**, **Afranie 11 v Quarcoo and Another [1992] 2 GLR 561**, **Amidu v Attorney General, Waterville Holdings BVI & Woyome (No 2) [2013-2014] 2 SCGLR 606**. Not only must the decision lack foundation in law or legality, the applicant must also show how it has led to miscarriage of justice.

Rival Meanings

From a review of the ruling of 24th January 2023, we are satisfied that even if, before the trial judge, two rival meanings were placed on **article 145 (4)** by the parties, regarding whether it is the President or the Chief Justice who has authority to extend the tenure of a Superior Court judge to complete proceedings before him after reaching the constitutionally mandated retirement age, the ordinary bench settled its opinion on the correctness of the trial judge's opinion when it stated on page 13 of its ruling as quoted earlier, that; '*the power and/or authority of the Chief Justice to do so was sub-silentio presumed and validated by this Court in the Ex parte Daniel case*.'

Having identified this position from the **Ex-parte Daniel** decision, the submissions that the ordinary bench erred in failing to properly distinguish between the issues raised in the Ex-parte Daniel case and the application that was ruled on on 14th January 2023, are at best, vacuous. So is the submission that the ordinary bench failed to interpret and enforce **article 145 (4),** apply **article 297 (a)** and exercise its jurisdiction under **article 130 (1),** because it did not address the issue of whether the power of extension should be exercised by the President or the Chief Justice. The submissions raise no issues for consideration in the light of the above determination of the ordinary bench, and must be dismissed.

Violation of article 129 (3)

The submission that the trial judge failed to apply the edict in **Ex Parte Agbesi Awusu 11** and this was not corrected by the ordinary bench is equally without any force. Indeed Dotse JSC, speaking for the ordinary bench, went to great lengths to distinguish the facts and issues in **Ex Parte Agbesi Awusu 11** vis a vis the current suit and we appreciate this to have been in aid of clarifying whether or not the trial judge had complied with the nemo judex in causa sua rule or violated it. Having done so, and provided direction regarding the distinction between a judge sitting on a proceeding in which he is alleged

to be in (flagrant) dereliction of duty or the judicial oath, as occurred in the **Ex Parte Agbesi Awusu 11** case, and a judge faced with a legal resolution of whether a statutory or constitutional provision applies, we fail to see the source of the current insistence of applicant that the ordinary bench committed a fundamental error requiring the Supreme Court to review its decision under **article 133.**

There also seems to be an insistence on turning a blind eye to the import of the opinion of the majority in the review decision in **Republic v High Court (Criminal Division 1) Ex Parte Stephen Kwabena Opuni, Attorney General (Interested Party) Civil Motion No J7/20/2021** to the extent that applicant is urging that that decision is relatable to the current application.

In **Ex Parte Stephen Kwabena Opuni, Civil Motion No J7/20/2021**, the majority of the ordinary bench had recognized that the trial judge (whose decision had been brought up to the Supreme Court to be quashed), had duly followed the standing decision on the issue before him as established in **Ekow Russel v Republic [2017-2020] SCGLR 469**. The majority opinion appreciated that the trial judge had discharged his constitutionally directed judicial duty by following precedent and through that, applied the relevant principle of law settled by the Supreme Court.

The exceptional exercise undertaken by the majority opinion in the ruling of the ordinary bench was that **Ekow Russel was not properly decided**. And though the application before them had nothing to do with the correctness or wrongness of the decision in **Ekow Russel**, the majority then went on a legal excursus into the **Evidence Act 1975 NRCD 323** to show why **Ekow Russel** was not properly decided, then went on to show how it should have been decided, and in the same opinion, used this new evaluation of how **Ekow Russel** should have been decided to determine that the trial judge had erred in law in

applying the principles in **Ekow Russel**, and through this outcome, determined that his decision should be quashed. Herein lay the fundamental and basic error of the majority opinion that was determined to be an exceptional circumstance meriting the application of the review jurisdiction of this court. Correctly viewed, it is clear that the current submissions have no correlation with the determinations in **Ex parte Opuni Civil Motion No J7/20/2021** and must be dismissed.

The application to review this Court's decision of 24th January 2023 is dismissed in its entirety as being without merit

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

V. J. M DOTSE

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

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