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

KULENDI JSC

CIVIL MOTION

NO. J5/87/2023

24TH JANUARY, 2023

THE REPUBLIC

VRS

HIGH COURT (CRIMINAL DIVISION), ACCRA

EXPARTE: STEPHEN KWABENA OPUNI …….. APPLICANT

AND

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

RULING

DOTSE JSC:-

On the 24th day of January 2023, this Court, by a unanimous decision, dismissed an application at the instance of the Applicant herein, wherein he sought the following reliefs:-

- Certiorari directed at the High Court, (Criminal Division 1) Accra, presided over by Honyenuga JSC, sitting as an additional High Court Judge to bring into this court for the purpose of being quashed, the ruling of the Judge on the 14th day of November 2022 in case No. CR/158/2018 intitutled ***Republic v Stephen Kwabena Opuni and 2 others*** and
- For an order of perpetual injunction to restrain the presiding Judge Honyenuga JSC from continuing with the case No. CR/158/2018 intitutled ***Republic v Stephen Kwabena Opuni and 2 Others*** at the High Court, Criminal Division.

This Court in its orders dated 24th January 2023 dismissed the application referred to supra and stated as follows:-

> "We have considered all the processes filed by all the parties as well as their viva voce submissions this afternoon. We are however of the considered opinion that, this court in its decision in the case, ***Republic v Fast Track High Court, Accra, Ex-parte Daniel [2003-2004] SCGLR 364*** interpreted the relevant and operating provisions in Articles 139 (1) (c) and 145 (4) of the Constitution 1992 and these are so clear that it admits of no controversy whatsoever. Under the circumstances we hereby unanimously dismiss the applications for Certiorari and Perpetual Injunction."

Full reasons for our decision will be filed in the Registry of this Court on or by close of day on 10th February 2023."

We now proceed to give our reasons for the decision rendered on the 24th of January 2023 as follows:-

As stated supra, the Applicant herein through his learned Counsel Samuel Codjoe filed the instant application seeking the twin reliefs of Certiorari to quash the ruling delivered by Honyenuga JSC dated the 14th day of November 2022 pursuant to Article 132 of the Constitution 1992 and secondly for an order of perpetual injunction to restrain the Judge from continuing with case No. CR/158/2018 intitutled ***Republic v Stephen Kwabena Opuni, Seidu Agongo and Agricult Ghana Limited*** at the High Court.

GROUNDS FOR THE APPLICATION

Certiorari

1. That the learned trial Judge committed a grievous error of law apparent on the face of the record and acted without jurisdiction when he continued to sit on *Suit No. CR/158/2018* intitutled as stated supra on the 11th and 17th October, 2022, 7th, 14th and 24th November 2022 respectively and on the 5th of December 2022 in breach of article 145 (2) (a) of the 1992 Constitution which requires a Judge of the Supreme Court to retire upon attaining the age of seventy (70) years.
2. That the learned trial Judge committed a grievous error of law apparent on the face of the record and in breach of the rules of natural justice by acting as a Judge in his own case when he heard and dismissed Applicant's application on the 14th day of November 2022 seeking reliefs including an order of perpetual injunction against the Judges' continuous hearing of Suit No.CR/158/2018 intitutled as listed supra.

3. That the same Judge committed a grievous error of law apparent on the face of the record when, in breach of article 129 (3) of the Constitution 1992, in his ruling dated 14th November 2022, he expressly refused to follow the binding decision in ***Republic v High Court, Ex-parte Agbesi Awusu (No.2) [2003-2004] 2 SCGLR 907*** together with the unreported decision of this court dated 26th October 2021 in review motion ***No.J7/20/21 Republic v High Court, (Criminal Division) Ex-parte Stephen Kwabena Opuni.***
4. The learned Judge committed grievous error on the face of the record when in spite of the rival meanings placed on articles 139 (1) (c) and 145 (4) by both the prosecution and the 1st Accused, he proceeded to interpret same in his ruling of the 14th day of November 2022, and upheld the Prosecution's interpretation that by these said articles the Chief Justice was right in granting an extension to his tenure, an act which is a clear breach of article 130 (2) of the Constitution 1992.

The ground for the perpetual injunction is that:-

(1) The learned trial Judge's position as an additional High Court Judge became vacant when he attained the age of Seventy (70) years as provided for in article 145 (2) (a) and he should be restrained by an order of perpetual injunction from sitting as a Judge in case No. CR/158/2018 the suit referred to supra.

BASIS OF THE APPLICATION

The Applicant herein, Stephen Kwabena Opuni deposed to and swore a 29 paragraph affidavit in support of the motion for the said twin reliefs of Certiorari and perpetual injunction. In addition, the Applicant exhibited a plethora of exhibits to establish the bonafides of the said application. Learned counsel for the Applicant Samuel Codjoe, also filed a comprehensive 42 page statement of case in support of this application.

The 2nd and 3rd Interested Parties, (2nd and 3rd Accused persons) in the criminal trial, through their learned Counsel Emmanuel Kumadey, supported the case of the Applicant herein and did not file any independent processes of their own.

Learned counsel for the 1st Respondent and 1st Interested Party, Mrs. Keelson, Chief State Attorney filed a 22 paragraph affidavit deposed to by one Francis Kwabena Gedzeah, a Registrar of the High Court , General Jurisdiction, Accra as well as another sworn to by Stella Ohene Appiah, Principal State Attorney for the 1st Interested Party.

In addition, learned Chief State Attorney, Mrs. Evelyn Keelson, Counsel for the 1st Respodent and 1st Interested Party filed a brief but incisive 24 page statement of case detailing why the Application should be dismissed.

Thereafter, learned counsel for the Applicant filed a Reply to the statement of case of the 1st Interested party and 1st Respondent with leave of the court.

REFERENCE AND RELIANCE ON SPECIFIC CONSTITUTIONAL PROVISIONS

Since reference had been made to the following constitutional provisions, we deem it expedient that they be set out in extenso for our attention and interpretation.

"Article 129 (3) of the Constitution 1992

129. General Jurisdiction of the Supreme Court

(3) 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.

Article 139 (1) (c) of the Constitution 1992

139. Composition of the High Court and qualification of its Justices

(1) The High Court shall consist of

(c) such other Justices of the Superior Court of Judicature as the Chief Justice may, by writing signed by him, required to sit as High Court Justices for any period.

Article 145 (2) (a) & (4) of the Constitution 1992

145. Retirement and resignation of Justices of the Superior Court and Chairman of Regional Tribunals

(2) A Justice of the 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;

(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 the 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."**

SUBSTANCE OF THE APPLICANT'S CASE

Briefly put, it is the case of the Applicant that, having attained the age of seventy (70) years, which is the compulsory retirement age for Supreme Court Judges, the learned trial Judge, Honyenuga JSC is disabled from continuing to preside over ***case No. CR/158/2018 intitutled Republic v Stephen Kwabena Opuni*** without an express extension of the six months as provided in article 145 (2) (a) and (4) of the Constitution by the appointing authority, the President of the Republic of Ghana. The applicant contended

further that, the said Judge ceased to be a Supreme Court Judge after attaining the age of seventy (70) years.

Learned Counsel for the Applicant also contended that, pursuant to Article 145 (4) of the Constitution, it is only the President who can grant the Judge an extension. However, the Prosecution contended on the other hand that from a combined reading of the provisions of Article 139 (1) (c) and 145 (4) of the Constitution 1992, it is the Chief Justice who is the proper person to grant this extension.

The Applicant further contended that, on the 7th day of November 2022, he caused an application to be filed at the registry of the court for Honyenuga JSC, to cease hearing the case principally because he had attained the statutory retirement age of seventy (70) years as provided in Article 145 (2) (a) of the Constitution 1992. This application was on the 14th day of November 2022 dismissed by the learned trial Judge Honyenuga JSC.

It is the contention of the Applicant that, the position of the learned Judge, Honyenuga JSC, as an additional Judge of the High Court had become vacant by the effluxion of time upon attaining the age of seventy years which is the compulsory retirement age for Supreme Court Judges. The Applicant further contended that, any extension of the tenure of the learned trial Judge by the Chief Justice to continue to sit as an additional High Court Judge is unconstitutional as same is in breach of Article 145 (2) (a) of the Constitution 1992. It is therefore the contention of the Applicant that it is only the President, the appointing authority, who can extend a Judge's tenure by the six (6) months, for the Judge to continue to sit and not the Chief Justice. The learned trial Judge dismissed the said objection.

WHAT WERE THE REASONS FOR THIS OBJECTION?

According to learned counsel for the Applicant, the basis of this objection was primarily that, the preliminary objection that was taken against Honyenuga JSC was to prevent him from continuing with the hearing of the case and also to prevail upon him to vacate the orders he had previously made assuming jurisdiction in the trial of the case.

It was also the contention of the Applicant that the learned trial Judge will be in breach of the rules of natural justice to wit: the *"nemo judex in causa sua"* principle in that, he will be a Judge in his own cause, if he proceeded to hear the application fixed before the court on 14th November 2022.

Learned counsel for the Applicant referred to and relied on Article 129 (3) of the Constitution 1992 and also the case of ***Republic v High Court, Denu; Ex-parte Agbesi Awusu II (No.2) [2003-2004] 2 SCGLR 907*** contending that when a motion is filed seeking the recusal of a Judge from hearing a suit, that Judge should not hear the application.

We have taken into consideration the contents of the affidavit filed by the applicant in support of this application.

Upon reception of arguments in this case, learned counsel for the Applicant Samuel Codjoe reiterated the following issues:-

- That the fact that the learned trial Judge breached the rules of natural justice by hearing the motion which sought to injunct him has been supported in paragraph 11 of the 1st Respondent's affidavit sworn to by Francis Gedzeah referred to supra.

The said paragraph 11 provides as follows:-

> **"Save that the trial Judge erred when he sat on the motion filed on 7th day** of November 2022 which also sought a perpetual injunction to restrain him from continuing with the hearing of the case, paragraph 19 of the affidavit is admitted."

In order to really understand the said deposition, it is necessary to refer to paragraph 19 of the applicant's affidavit in support which was referred to supra.

> 19. "That I have been advised by Counsel and verily believe same to be true that this court, in its recent decision in the unreported judgment dated the 26th day of October 2021 in review motion **No. J7/20/2021** ***Republic v High Court, Criminal Division 1, Ex-parte Stephen Kwabena Opuni*** **held that under article 129 (3), it is obligatory and mandatory that all courts other than itself (Supreme Court) follow its decisions. The trial Judge therefore erred when he sat on the motion filed on the 7th day of November 2022 which also sought a perpetual injunction to restrain him from continuing with the hearing of the case."**

The deposition contain in paragraph 11 cited supra does not admit of any controversy. What it means is that, save for the assertion that, the learned trial Judge did err when he sat on the motion filed on the 7th of November 2022, the remaining averments about the effect of the decision in the review motion referred to are admitted. That is all about this deposition in paragraph 11, and nothing more.

SUBSTANCE OF THE CASE PUT UP BY THE 1ST INTERESTED PARTY

The substance of the case of the 1st Respondent and 1st Interested Party as distilled from the processes filed can be said to be the following:-

1. That it is the Chief Justice and not the President, who has the power to extend the tenure of a superior Court Judge for the period of six (6) months stipulated in Article 145 (4) of the Constitution 1992. Learned Chief State Attorney, Mrs. Evelyn Keelson, for the 1st Interested Party argued and prayed the Court to dismiss the

Applicant's submission that it is the President and not the Chief Justice who is the person authorized to extend the period or grant the six months extension to the learned trial Judge. She demonstrated this by referring to the Supreme Court case of the ***Republic v The Fast Track Court, Accra, Ex-parte Daniel, [2003-2004] SCGLR 364*** where the court spoke with unanimity by stating as follows in bringing clarity to that contention.

"Because Afreh JSC, the learned trial Judge in the case had passed the age of 65 years, the prescribed maximum for High Court Judges and as such he cannot sit as an additional High Court Judge pursuant to Article 139 (1) (c) of the Constitution. Secondly that once the learned trial Judge in the Ex-parte Daniel case had attained the compulsory retiring age of 70 years for Supreme Court Judges, he could not sit in any court except for a six-month period to complete cases cases which had commenced before him pursuant to Article 145 (2) of the Constitution 1992 ."

2. The 1st Respondent also denied that the decisions of the learned trial Judge, constituted error of law on his part and that he had usurped the role and powers of this Supreme Court in interpreting a constitutional provision. This is because, according to learned Chief State Attorney, as stated above, Articles 145 and 139 (1) (c) of the constitution had been interpreted in decisions of this Court which made the said provisions very clear, unambiguous and devoid of any controversy whatsoever.
3. She further submitted that the learned trial Judge did not breach the *"nemo judex in causa sua"* principle of natural justice, because the learned trial Judge acted within the remit of his powers and did not do so in a *"cause or matter"* in which he had an interest. Indeed, learned Chief State Attorney, Mrs. Evelyn Keelson, submitted that, the facts of the case in ***Republic v High Court, Accra Ex-parte Agbesi Awusu II (No 2) Nyonyo Agboada Sri III) Interested Party 2 SCGLR 907*** are completely distinguishable from the facts of this instant application.

4. The 1st Respondent per the affidavit of Francis Gedzeah referred and gave ample credence to a carefully planned strategy by the Applicant to stultify and prevent the learned trial Judge from continuing with the hearing and possible conclusion of the trial. This specie of conduct lies in the many applications which have been filed by the Applicant, some of which have been referred to as follows:-

- On 16th November 2022, the Applicant filed a motion on Notice to set aside the orders of the trial court dated 14th November 2022, an order for stay of proceedings of the case and a referral of Articles 139 (1) (c) and 145 (4) of the Constitution, 1992 to the Supreme Court for interpretation pursuant to Article 130 (2) of the Constitution and the inherent jurisdiction of the court.
- Following the dismissal of the said application by the learned trial Judge on the grounds that the said two provisions of the Constitution had earlier been interpreted by the Supreme Court, the **Applicant filed an appeal to the Court of Appeal as well as application for Stay of proceedings which are all pending.**
- **That it is an undeniable fact that the Applicant herein has filed numerous applications all aimed at removing the trial Judge and stopping him from hearing the case and completing same.** The 1st Interested Party therefore concluded that, the orders made by the learned trial Judge were not in error and do not constitute a basis for the supervisory intervention of this court and added that, these specie of conduct are calculated to further delay the trial and prayed this Court to dismiss the application.

ISSUES RAISED IN THIS CASE

Having apprized ourselves in detail with all the processes filed by the parties and their submissions before us, we are of the opinion that, this case can be decided upon a resolution of the issues which we formulate as follows:-

1. Whether or not the learned trial Judge Honyenuga JSC acted without jurisdiction when he continued to sit and adjudicate on Suit No. CR/158/2018 intitutled ***Republic v Stephen Kwabena Opuni, Seidu Agongo & Agricult Ghana Limited*** on 11th , 17th October, 2022, 7th , 14th , and 24th November 2002 and 5th December 2022 respectively and if this is in breach of article 145 (2) (a) of the Constitution 1992.
2. Whether or not the learned trial Judge Honyenuga JSC acted in breach of article 129 (3) of the Constitution 1992 when he refused to follow the decisions in ***Republic v High Court, Ex parte Agbesi Awusu II (No.2) [2003-2004] and the unreported judgment of the Supreme Court in review motion Number J7/20/2021 Republic v High Court, Criminal Division 1 Ex parte Stephen Kwabena Opuni dated 26th day of October 2021.***
3. Whether or not the learned trial Judge committed an error of law patent on the face of the record when in the face of rival meanings placed on Articles 139 (1) (c) and 145 (4) by the parties, i.e. that it is the President and not the Chief Justice who is the proper person to exercise those powers, he nonetheless proceeded to interprete same by upholding the prosecution's interpretation over and in preference to that of the 1st Accused and that, this is in clear breach of article 130 (2) of the Constitution. In other words, whether the learned trial Judge's extension of 6 months was validly obtained.
4. Whether or not the learned trial Judge's position as an additional High Court Judge became vacant when he attained seventy (70) years as provided for in article 145 (2) (a) of the Constitution and he should be perpetually restrained from sitting as a Judge and in particular on case ***No. CR/158/2018 – Republic v Stephen Kwabena Opuni, Seidu Agongo & Agricult Ghana Ltd.***

We are of the considered view that a detailed analysis and consideration of the decisions in the ***Ex-parte Daniel and Ex-parte Agbesi Awusu cases*** supra, will help us determine this case with remarkable ease.

WHAT THEN ARE THE FACTS IN THE EX-PARTE DANIEL AND EX-PARTE AGBESI AWUSU CASES?

Due to the reliance of both parties in the Ex-parte Daniel and Agbesi Awusu cases, we will in our analysis and determination of the issues germane in this application, set out in *extenso* the facts and the decisions of the Court in the above two cases relied upon by the parties. This is to enable us point out the distinguishing facts in the said cases and, when necessary, bring out the differences in the facts in the present case or draw linkages when it is appropriate to do so.

EX-PARTE DANIEL

Relevant Facts

The applicant, (Daniel) was a party in a civil suit entitled ***Speedline Stevedoring Co. Ltd. v S M Kotei and Another,*** which was pending before the Fast Track High Court, Accra presided over by Mr. Justice Afreh, Justice of the Supreme Court, sitting as an additional Judge of the High Court. The applicant brought an application in the Supreme Court for an order of prohibition against Mr. Justice Afreh to stop him from hearing the pending suit, on the ground that having attained the compulsory retirement age of 65 years prescribed under Article 145 (2) (b) of the Constitution 1992 for High Court Judges, he was not competent to sit in the Fast Track High Court. The applicant also argued that, in

any event, having attained, as at 25th March 2003, the compulsory retirement age of 70 years prescribed under Article 145 (2) (a) of the Constitution for Justices of the Supreme Court, Justice Afreh could not continue to sit as an Additional Judge of the High Court except for a six-month period to enable him complete cases which had been commenced before him pursuant to article 145 (4) of the Constitution.

In support of the second argument, the applicant relied on the fact that, although Justice Afreh had dealt with some interlocutory matters, the proceedings had not actually commenced before him within the intendment of article 145 (4) of the Constitution.

Notwithstanding the fact that, the applicant's application for prohibition was still pending before the Supreme Court, Justice Afreh continued to hear the civil suit in the Fast Track High Court and presided over its proceedings of 5th May 2003. The appellant therefore sought leave in the Supreme Court to amend his original application for prohibition by asking for an order of certiorari to quash the proceedings of 5th May 2003 for want of jurisdiction.

The Applicant, in his affidavit in support, contended that, once the determination of the issue of the competence and jurisdiction of the Fast Track High Court was pending at the Supreme Court, the High Court was obliged under Article 130 (2) of the Constitution to "stay the proceedings". Having failed to do so, the Fast Track High Court acted without or in excess of jurisdiction.

WHAT ARE THE DIFFERENCES AND SIMILARITIES IF ANY BETWEEN THIS CASE AND EX-PARTE DANIEL?

1. Luckily for us, the Applicant herein has not made the bizarre claim that the learned trial Judge here is above 65 years and so should not sit over the case as an additional High Court Judge as was contended in the *Ex-parte* Daniel case.

2. Secondly, the instant case is one in which proceedings are far advanced, the prosecution having closed their case and defence opened, with the seventh defence witness in the box which was not the case in the *Ex-parte* Daniel case.
3. While the Applicant herein contends that the Chief Justice does not have the power to extend the tenure of the trial Judge who has attained the compulsory retirement age of 70 years, the said power and/ or authority of the Chief Justice so to do was *sub-silentio* presumed and validated by this Court in the *Ex-parte Daniel* case and the issue in contention tendered on whether such an extension of tenure by the Chief Justice confers jurisdiction in relation to proceedings that were commenced before the Judge previous to his attaining the retirement age and as well as when proceedings may be said to have commenced.
4. In the *Ex-parte* Daniel case, there was a dispute as to what constituted the meaning of article 145 (4) especially the phrase ***"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." "Emphasis supplied***

Prof. Kludze JSC, who spoke with unanimity on behalf of the Court held in relation to the Court's interpretation of Article 145 (4) of the Constitution on pages 371 to 373 of the report as follows:-

> "The other issue canvassed before us is that, in any event, when Mr. Justice Afreh turned 70 on March 25, 2003, he attained the mandatory retirement age as a Justice of the Supreme Court and, therefore, could not continue as an Additional Judge of the High Court. The reason is that only a Justice of the Superior Court of Judicature can be requested to sit as an Additional Judge of the High Court. **It is conceded that under Article 145(4), Mr. Justice Afreh, after his 70th birthday may, if authorised, remain in office to complete cases pending before him. An affidavit**

from the Judicial Secretary exhibited a letter from His Lordship the Chief Justice, Mr Justice E. K. Wiredu, dated 25th March, 2003, authorising Mr. Justice Afreh to remain in office for a period of six months to enable him deliver judgments in cases before him. See exhibit 2 attached to the affidavit of the Judicial Secretary.

In response, the Applicant argues that the Chief Justice has the authority under Article 145(4) to authorise a Judge who has attained the retirement age to remain in office for further six months, but only for the limited purpose of completing pending cases. Such authority cannot be granted to try fresh cases.

From the above premise, the Applicant seeks an order of Prohibition against Mr. Justice Afreh to stop him from hearing the case intitutled ***Speedline Stevedoring Co. Ltd. v. S. M. Kotei*** and Another, because hearing had not commenced before him prior to his 70th birthday. The Applicant attached Exhibit "A", being the proceedings in that case, in proof that Mr. Justice Afreh did not begin to hear testimony in the case until 27th March, 2003, two days after he had turned 70. The Applicant argues, therefore, that this was not a case the trial of which had commenced before the Judge attaining the compulsory retirement age. If that is true, Mr. Justice Afreh lacked the capacity and therefore, the jurisdiction to try the case as an Additional Judge of the High Court.

The thrust of the Applicant's case is that the trial did not commence before the Judge's 70th birthday on March 25, 2003, because the first witness was not called until March 27. The Applicant quoted a Statement by Mr. Justice Afreh on page 4 of his Exhibit "A", being the proceedings of 14th March, 2003, which can be interpreted, and which he interprets, to mean that trial had not begun and would begin at a future date. **That future date, as Exhibit "A" shows, was March 27th,**

two days after Mr. Justice Afreh's birthday. **For this reason, the Applicant and also the Respondent and Interested Party have expended effort in disputations as to when a trial can be said to have commenced."**

After setting out the facts germane to the case in the Ex-parte Daniel in his rendition, Prof. Kludze JSC then continued as follows:-

"In popular parlance, we often speak of "part-heard" cases. These are usually cases in which the court has received testimony from some of the witnesses. They are said to be part-heard because the trial has not been completed and judgment has not been delivered. It is presumably because of this conception or misconception that all parties have endeavoured to show that the case of ***Speedline Stevedoring Co., Ltd. v. S. M. Kotei*** and Another did not become part-heard until March 27, two days after Mr. Justice Afreh turned 70, when the first witness (P.W. 1) was called to testify. **If the dispensation for retiring Justices was to permit them to complete "part-heard"' cases, we might devote greater attention to the events that have been related with regard to the course of proceedings in that case.**

The constitutional dispensation (as stated in article 145 (4) of the Constitution) however, does not concern "part-heard" cases. **In terms of Article 145(4) of the Constitution, a retiring Justice may be permitted to remain in office for a further period of six months "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." It does not speak of "part-heard" or "part-tried" cases. The word "trial" and its cognate forms is a terminology of choice fastened upon by the Applicant. It does not appear in Article 145(4) of the Constitution. Its use obfuscates the analysis and establishes nothing as a matter of law."**

The learned and distinguished jurist, Kludze JSC, continued his delivery in the following terms:-

> In our opinion, the operative words are "**proceedings that were commenced**" **before the Judge previous to his attainment of the retiring age. In our judgment, the word "proceedings," if it be a term of art, encompasses any material progress in the adjudicatory process before the Judge or Court. It may not be part-heard in the sense of taking partial testimony. If the Judge or Court is seized of the matter and has made rulings or determinations or given directives, whether these be interlocutory or not, we would conclude that proceedings have commenced before that Judge or that Court within the intendment of Article 145(4).** That may not be sufficient to constitute "proceedings" in other aspects of the law, depending on the language that we are to construe or apply. Under Article 145(4), however, the word used **is "proceedings" commenced before a Judge. The word is plain and admits of no ambiguity.** We will, therefore, not embark upon any exhaustive enquiry to ascertain its meaning." Emphasis

The Supreme Court has by the above authoritative statements brought clarity to the actual intendment and meaning of Article 145 (4), and this is clear and unambiguous.

We observe that, the Supreme Court as far back as 2003-2004, had the presence of mind and the premonition to **comment on the conduct of counsel in that case which created the impression that it was intentionally delaying the pace of the case to prevent Justice Afreh from continuing and completing the case.** Twenty (20) years down the line, it appears that those in charge of administration of justice have not found any antidote to this inimical and dangerous phenomenon which has instead gained deep roots. It is however gratifying to observe that, the Supreme Court has dealt with this phenomenon by the directions given to compel parties to adopt proceedings in civil cases.

The comments of the Supreme Court were expressed on pages 373-374 in these hallowed words as follows:-

> "In the case of *Speedline Stevedoring Co., Ltd. v. S. M. Kotei* and Another, the exhibit A, tendered in that case by the Applicant, convinces us that the Judge, Mr. Justice Afreh, was seized of the matter and the proceedings had commenced before him prior to March 27, 2003, when he took evidence from the first witness. For instance, on 14th March, 2003, Mr. Justice Afreh had made an order for discoveries. He listened to and dismissed a preliminary objection by one of the parties, for which he gave reasons later. Other matters were dealt with. **Our impression, which may be wrong, is that it was Counsel for the Applicant whose conduct contributed in no small measure in the delay in taking evidence**. As appears from the Applicant's Exhibit "A," his Counsel did not seem to have even an address for the service of process which was returned when sent to a Hotel. **Whether or not these antics were intended to slow down the proceedings, in anticipation of the retirement of Mr Justice Afreh, it certainly did have at least that partial result. It seems to us that in the circumstances the strictures against the progress of the case are not in the best taste."**

From the above rendition of the Supreme Court, it bears emphasis that, if this Court and the Administrators of the Criminal Justice system are not to become laughing stock, then swift reforms in the criminal justice system must be put in place to ensure that, proceedings taken before a Judge who has retired or not available to continue the trial in the case are adopted and put before another Court and judge to be continued. There should be no need to start such cases de novo in criminal cases because it is gratifying to observe that, this Court has already dealt with this phenomenon by the directives given

to compel parties adopt proceedings in civil cases. See case of ***Awudome (Tsito) Stool v Peki Stool [2009] SCGLR 681.***

In the case of ***Awudome (Tsito) Stool v Peki Stool supra***, the court stated as follows:-

> "The established rule is that when a case is transferred from one High Court to another, the parties have the option to adopt the proceedings or to have the trial started de novo. This is the common law rule which has been adopted and practiced for many years in our courts. That was indeed the procedure adopted in ***Boama v Okyere [1967] GLR 548 and Coleshill v Manchester Corporation [1928] I KB 766***, the only cases cited by the parties in this appeal."

The Supreme Court did not mention its application to the criminal cases. There is also no specific legal provision on whether part heard trials must start de novo or be adopted by the new Judge. The practice for now is that, in criminal trials, the practice is to start trials *de novo.*

Perhaps the time has come for this problem to be reviewed. This is because, if as a country we are to make some progress in the prosecution of criminal cases, especially corruption related cases pursuant to the Article 19 provisions of the Constitution 1992, then the bold step has to be taken to introduce sweeping reforms in this part of our criminal justice. We therefore appeal to the Chief Justice to urgently consider reforms in this part of our criminal justice.

The Supreme Court, in the *Ex-parte* Daniel case also dealt with the argument that every Court before whom rival interpretations of constitutional provisions are raised is obliged to refer same to the constitutional court pursuant to Article 130 (2) of the Constitution for interpretation. See pages 374 to 375 of the report.

"After the motion for prohibition had been filed, the Applicant sought leave to amend by asking for an Order of Certiorari to quash the proceedings of 5th May, 2003, of the said Fast Track High Court presided over by Mr. Justice Afreh. The Applicant refers us to Article 130(2) of the Constitution to buttress his claim. By virtue of Article 132 of the Constitution read in conjunction with Article 161, the Supreme Court has the supervisory jurisdiction to quash the proceedings of the High Court, which includes the Fast Track Court.

The gravamen of the claim, as we understand it, **is that once the determination of the issue of competence and jurisdiction of the Fast Track High Court was pending at the Supreme Court, the Fast Track High Court, in obedience to the mandate of Article 130(2) is obliged to "stay the proceedings." Having not stayed the proceedings, the Fast Track High Court, as the argument presumably goes, was acting without or in excess of jurisdiction**. That would be a basis for jurisdiction in the Supreme Court to quash the proceedings in the Fast Track High Court of 5th May, 2003, since prior to that date the Applicant had filed a Motion in the Supreme Court.

That is a misconception based upon a misreading of Article 130(2) of the Constitution. The Article only provides that where a Court other than the Supreme Court is confronted by a genuine issue of ***"matters relating to the enforcement and interpretation of this Constitution ... that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination."*** (The emphasis is ours). That is not the factual, legal or procedural situation presented by this case. The Fast Track High Court did not consider that a question of enforcement or interpretation arose which had to be determined by the Supreme Court. The presiding Judge was apparently prepared to proceed with the case, and a dissatisfied party would have a right to appeal in respect of that

issue. Therefore, the Fast Track Court did not refer the question to the Supreme Court. It was the Applicant who invoked the jurisdiction of the Supreme Court by way of Motion to interpret the relevant provisions of the Constitution. **That being the case, the Fast Track High Court is not obligated by the constitutional provision in Article 130(2) to stay its proceedings."** Emphasis supplied

It is important to note that the Supreme Court was very clear that it is only in cases where the court is of the view that a **genuine** issue relating to enforcement or interpretation of the Constitution had arisen that a referral under article 130 (2) of the Constitution and a stay of proceedings will be mandatory. Otherwise, learned trial Judges in the courts from the District courts to the Court of Appeal would be reduced to robots, dancing to the tune of learned counsel who have agenda to delay trials of cases before the trial courts. The Court continued as follows:-

"A Motion for other relief, in this case an order of prohibition, **does not automatically operate to stay proceedings in the Court whose proceedings are being challenged**. It is only when the trial Court refers the question of law to the Supreme Court that the Constitution enjoins it to stay its proceedings until the matter is determined by the Supreme Court. **A Motion for an order of prohibition does not come within the ambit of Article 130(2); and the Fast Track High Court is perfectly within the law to continue with its proceedings until and unless there is an order from a higher court**. That being our view, we consider that the application for certiorari to quash the proceedings of the 5th May, 2003, in the Fast Track High Court is wholly misconceived. The amendment ought not to have been brought. Article 130(2) under which the Applicant purports to invoke our jurisdiction is clear and does not require much effort to understand. It does not relate to the present case. We would dismiss the amended claim also as being without any merit." Emphasis

Having quoted at length from this *Ex-parte* Daniel case, we deem it prudent to sound a note of caution to all practitioners of the law that it is necessary and obligatory for them to thoroughly read reported cases before seeking to rely on them as their authorities.

What must be noted is that, facts of a decided case must always be taken into consideration whenever a reliance is to be made on that case. Secondly, the principle of law decided in the said case must be seen on the face of it to be applicable to the circumstances of the case to which it has been referred to for application.

Quite too often, we find learned counsel making references and relying on the doctrine of stare decisis in cases without any corresponding resemblance and application to the case in point. We are of the view that it is dangerous for learned Counsel to take guidance from the headnotes only and not read the actual law report. Headnotes of cases are the Editors understanding of the principles involved. It is therefore imperative for lawyers, jurists and researchers to be cautious about taking their entire learning from only the Headnotes of cases, without more.

This is why we deem it appropriate to quote some portions of the learned trial Judge's rendition of the facts and decided cases and the law applicable in the trial High Court.

For example, contrary to the contention of learned counsel for the Applicant that the learned trial Judge did not consider the merits of the application made to him pursuant to Article 130 (2) of the Constitution 1992, the learned trial Judge (Honyenuga JSC) did what was needful and required of him.

For example the learned Judge stated thus:-

> *"In the instant case a perusal of the application filed together with the 1st accused's submission raised* ***no real or genuine issues for referral to the Supreme Court for interpretation. As a result, I held that Articles 139 (1) (c) and 145 (4) of the Constitution 1992 authorised the Chief Justice to extend the time for me to sit as***

an additional High Court Judge for a limited time to enable me complete the hearing of this case which was before me prior to my retiring date. In this respect, I only applied the two Constitutional provisions and did not purport to interpret the constitution. I must state that the court never breached Article 130 (2) of the Constitution."

Elsewhere, the learned trial Judge also adequately addressed the substance of this application to our satisfaction. This is how the issue was addressed.

"The main submission of counsel for 1st accused is that by virtue of Article 145 (4) of the Constitution, it is only the President and not the Chief Justice who has power to extend my tenure. He further submitted that, the Chief Justice is not the appointing authority so he could not grant an extension to my tenure. He stated that the issue has not been determined by the Supreme Court. The issue is whether the 1st accused's application raises any issue of constitutional interpretation. ***It is my humble view that counsel's submission is untenable and raises no issue for interpretation by the Supreme Court****. The Supreme Court determined or pronounced on the interpretation of Articles 139 (1) (c) and 145 (4) of the Constitution which is binding on all lower courts including this court.* ***The Republic v Fast Track High Court, Accra Ex-parte Daniel [2003-2004] SCGLR 364*** *rightly cited by learned Chief State Attorney."*

The learned trial Judge Honyenuga JSC then proceeded to quote and rely on the said case.

REPUBLIC V HIGH COURT, DENU; EXPARTE AGBESI AWUSU II (NO 2) (NYONYO AGBOADA (SRI III) INTERESTED PARTY [2003-2004] SCGLR AT 907

What are the relevant facts in this case?

Since so much attention and reliance has been given the above case by the parties, some decent attempt is hereby made to set out in *extenso* the facts of the case. This will therefore bring out the salient facts, such that at the end of the day, it will be made manifest whether or not the wholesale automatic application of the principles enunciated in that case as urged upon this court by learned counsel for the Applicant Samuel Codjoe is tenable.

Facts of the case per Bamford Addo JSC on page 912 of the report

The brief facts of this case are that the applicant *(who is Torgbi Agbesi Awusu II)* filed a suit in the High Court, Denu entitled *Torgbi Agbesi II Awadada of Anlo and Two Others v Francis Nyonyo Agboada and R Akatti*, claiming certain reliefs among which was for a **declaration that the first plaintiff is the Acting President of the Anlo Traditional Council in the absence of an Awoamefia and an order of perpetual injunction in the nature of quo warranto against the first defendant restraining him from purporting to be the Acting President of the Anlo Traditional Council and masquerading as a chief under the stool name of Torgbi Sri III.** While the case was pending before the Denu High Court, the Applicant therein filed a motion before Justice Woanyah, requesting him to disqualify himself from sitting on the case on grounds of real likelihood of bias. The applicant alleged that the **said Judge is liable for misconduct by a series of acts, pronouncements and utterances which, according to him, have given rise to the apprehension that the judge was biased against him; and, that consequently, he should decline jurisdiction in the case. The High Court Judge dismissed the application in his judgment of 28th July 2003. Dissatisfied the applicant applied to this court for certiorari to quash that decision on grounds of bias or real likelihood of bias.**

The facts relied on by the applicant were that on 27 June 2003, Justice Woanyah accepted an invitation believed to have been sent at the instigation of the applicant's opponent, Torgbi Sri III, to attend a meeting at Keta to discuss matters relating to the same controversy pending before the High Court as to who was the proper person to

act as the Acting President of the Anlo Traditional Council in the absence of the Awoamefia. The said invitation in paragraph (2) thereof stated that: *"Highlight of the programme will be the recognition and acceptance of the regent to the Awoamefia by the council"*. This item on the invitation should have put the judge on his guard since he knew that, that issue was the same issue pending before him.

Another matter relied on by the Applicant therein was that after the Keta meeting, Justice Woanyah met with Mr. Vorkeh, the District Chief Executive (outside court) and discussed the very same issues to be determined between the parties to the suit. He was said to have expressed adverse views about the chances of success of the applicant's case since his name was not listed in the Register of Chiefs. After this meeting, Mr. Vorkeh sent a report of their discussions to the Volta Regional Minister in a report dated 29th June 2003.

The Applicant therein also relied on the hostile attitude shown by the judge to the applicant and his counsel. **These facts are evidence in the rulings of Justice Woanyah, especially the ruling dated 28th July 2003 to prove the real likelihood of bias on the part of the judge.** Justice Woanyah did not file an affidavit in opposition, challenging the said facts but in his said ruling, he narrated facts concerning his side of the case which materially supported the applicant's case on the facts with a few insignificant differences. He did not, however, make findings of fact but dismissed the allegation of bias against him. As discussed in the earlier ruling of the court involving the same parties, as in the instant case, just delivered today, ie in CM No 61/2003 reported as ***Republic v High Court, Denu; Ex parte Agbesi Awusu II (No1) (Nyonyo Agboada (Sri III) Interested party) [2003-2004] SCGLR 864*** ante, even though the judge cannot give evidence in his own cause, **his revelations of fact in his said ruling could amount to admission under section 119 of the Evidence Decree, 1975 (NRCD 323), or the court can take judicial notice of those facts contained in his ruling under section 9 (2) (b) of the said Decree."**

The rendition of the facts as set out supra in this Ex-parte Agbesi Awusu case are dramatically different from the conduct of the learned trial Judge in the instant case.

It must also be noted that, we have combed all the exhibits attached to the instant application and we have not found any conduct exhibited by Honyenuga JSC which is repulsive, repugnant or contrary to settled judicial conduct.

However, it must be noted that, based on the facts stated in the Ex-parte Agbesi Awusu case supra, the Supreme Court unanimously allowed the application for Certiorari in the following terms:-

Held unanimously allowing the application for an order of certiorari

(1) "Where bias or real likelihood of bias has been satisfactorily established against a trial judge, both certiorari and prohibition would automatically lie to quash his judgment or prevent the biased judge from hearing a case in the supreme interest of justice so as not to bring the administration of justice into disrepute. Further, it was a principle of law that justice must not only be done but must be seen to have been manifestly done. On the evidence of the instant case, real likelihood of bias has been proved by the applicant. He could not trust the impartiality of the trial judge who was alleged to have aligned himself with the opposing party, prejudged the issue pending before him, even before hearing the evidence of the other side in the trial, and showing gross personal animosity and hostility towards the applicant and his lawyer. Besides, the respondent trial Judge had sat as a judge in his own case. ***Republic v Constitutional Committee Chairman; Ex parte Barimah II [1968] GLR 1050; Republic v Owusu-Addo; Ex parte Agyemang, High Court, Kumasi, 24 October 1969; digested in (1970) CC 10, unreported; Attorney-General v Sallah (1970) G & G 487; Adzaku v Galenku [1974] 1 GLR 198; Bilson v Apaloo [1981] GLR 15, SC and In re Effiduase Stool Affairs (No. 1); Republic v***

Numapau, President of the National House of Chiefs; Ex parte Ameyaw II [1998-99] SCGLR 427 at 443-444, 448 and 449-450; R v Handley (1921) 61 DLR 656 and R v Sussex Justices; Ex parte McCharthy [1924] 1 KB 256 at 259 cited."

Per Bamford-Addo JSC: "[T]he charge of bias against the trial High Court Judge could be properly raised before this court, since a Judge is not permitted to be a judge in his own cause, such a decision would be against the rules of natural justice and a nullity…**The strict application of the rules of natural justice prevents and discourages judges who have proprietary, hostile or any other interest from sitting in judgment over such cases."**

Per Atuguba JSC: "It is well known that certiorari is a discretionary remedy and therefore it does not necessarily follow that when the technical grounds upon which certiorari lies are established, it will pro tanto be granted…

I was therefore inclined to refuse the remedy of certiorari in this case…. **However, since the violation of the rules of natural justice by the trial Judge is so flagrant in this case, certiorari ought prima facie to be granted.** Even so it is further well-established that the remedy of certiorari is a residual one to be held in reserve for exceptional circumstances. ***R v Grimsby Borough Quarter Sessions; Ex parte Fuller [1956] 1 QB 36 at 41 and R v Inland Revenue Commissioners; Ex parte Opman International UK [1986] 1 ALL ER 328 at 330*** cited."

Per Wood JSC (as she then was): **In this court, the allegation against the judge were not only grave but to a full extent called into question his integrity or credibility as an impartial adjudicator.** More importantly, the matters which were raised in the motion on notice were obviously being disputed by him. This is plainly manifest from the ruling complained of.

It contains copious evidence of these disputed facts having been resolved by the judge himself. It matters very little that the motion was virtually, as it were, thrust on him by the applicant. **He was still a judge in his own cause when in spite of the obvious, he nevertheless went ahead to hear the motion**. He should have instantly and automatically and without any prodding from any quarter, declined jurisdiction for the simple reason that if he nevertheless went ahead and sat on the matter, he would be breaking a fundamental and most cherished rule of natural justice-the nemo judex in causa sua rule.

Per Date-Bah JSC: "An allegation of bias or real likelihood of bias is not one of error of law and thus does not really come within the ambit of the restatement set out in ***[Ex parte CHRAJ [2003-2004] SCGLR 312 at 345-346].*** Bias or real likelihood of bias remains a valid ground for the exercise of courts' supervisory jurisdiction…whenever bias or real likelihood of bias affects a judgment or ruling, it should be set aside, irrespective of whether an appeal is available in respect of it or even if it has been delivered by the highest court in the land…Bias or real likelihood of bias is thus a ground for the invocation of certiorari independent of the ground of error on the face of the record or excess of jurisdiction.

The supervisory jurisdiction of this court will be exercised to ensure that no superior court judge decided a case where there is bias on his part…If there is bias or real likelihood of bias, then irrespective of the quality of the decision given certiorari will lie to quash the decision. ***R v Bowstreet Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No2) [2000] 1 AC 117, HL*** **cited.**

From the general condemnation by the distinguished Judges of the conduct of the learned trial Judge in the Ex-parte Agbesi Awusu case supra, especially the description of Wood JSC, (as she then was) that ***"the allegations against the Judge were not only grave but to***

a full extent called into question his integrity or credibility as an impartial adjudicator." one is at a loss as to why the said case is relied upon by applicant.

In the instant case, there is nothing near the specie of conduct narrated by the distinguished Judges referred to supra. In order to put matters in their correct perspective, which will not leave anyone in doubt about the unmeritorious nature of the instant application, we deem it expedient to refer to the deep reasoning of Wood JSC (as she then was) from pages 917-921 of the report, explaining the basis of their decision.

Per Wood JSC (as she then was) at page 917 of the Report

"I intend to determine this application in the light of the ground (4) which, in essence, **alleges that the Judge was biased in the determination of or that he failed to address the issues raised in the application before him. In other words, he failed to exercise his jurisdiction by absolutely failing to determine the matter before him and thus confirming the worst fears of the applicant.**

What constitutes judicial bias has been firmly and nearly set out and clearly explained by this court in a fair number of well-known cases notably ***Attorney-General v Sallah, Court of Appeal, 17th April 1970; (1970) G & G 487 and Bilson v Apaloo [1981] GLR 15, SC.*** The honourable justices in the Bilson case concluded (as stated in the headnote at page 16) that:

> "(i) the rule of natural justice (nemo judex in causa sua) also known as the rule against judicial bias arose in two ways: (i) **where the adjudicator was disqualified because he had direct or financial or proprietary interest in the subject-matter of the suit; and (ii) there was a real likelihood that the adjudicator would be biased in favour of one of the parties**. There were, however, three situations where the presence of any one of the disqualifying elements under the rule would

not render the adjudicator incompetent to sit: (a) it was always open to the parties, on their being apprised of the disqualifying elements **to waive their right to object to the adjudicator sitting in the particular case; (b) an enactment might permit an adjudicator to sit or might save the adjudication from invalidity; and (c) an adjudicator who might be otherwise disqualified would be nevertheless eligible and indeed obliged to sit if there was no other competent tribunal or if the quorum would not be formed without him**. The policy reason underlying that exception was necessity; in other words, the common law considered it expedient that justice should be dispensed by a "disqualified" judge than that there should be a failure of justice or that the machinery of justice should grind to a halt in a particular case." Emphasis

Continuing her reasoning, Wood JSC (as she then was) delivered herself thus:-

"Similar views were expressed by my learned brother Kpegah JSC in his opinion delivered on 18th March 1998 in the case of ***In re Effiduase Stool Affairs (No.1): Republic v Numapau, President of the National House of Chiefs: Ex parte Ameyaw II (No.1) [1998-99] SCGLR 427.*** His opinion also on the doctrine of necessity is that when a judge is otherwise disqualified, he may be required to sit *"if there is no competent tribunal to deal with the matter or no quorum can be formed without him"*. The doctrine is, under such circumstances, applied to avoid a failure of justice.

In the Effiduase Stool Affairs (No 1) case, my brother Atuguba JSC expressed an opinion which I would like to adopt in toto to inform my decision that the applicant is well and truly entitled to the order of certiorari. This firm principle, which should never be compromised by any adjudicator under any circumstances, save and except as provided under the rule in the *Bilson case*, is that (as stated by Atuguba JSC at pp 449-450):

> "Where objections are based on facts which are not only in dispute but flagrantly indicate a real likelihood of bias on the part of the objected adjudicator, it will be an unnecessary risk and a travesty of justice to say that such adjudicator can nonetheless sit and rule on the objection against him. That scenario ipsa loquitur clamours for a reconstitution of the panel concerned."

Earlier on in the same *Effiduase Stool Affairs (No 1)* case, Atuguba JSC at 448 also said:-

> "Where grave charges of bias are raised against a judge…such as were involved in the Sallah case…which require a factual resolution, it should be open to the complaining party to apply to the court or the Chief Justice that the panel be reconstituted to exclude the judge or judges concerned from sitting to determine such objections. In such a situation, the judge concerned will have to resolve issues of credibility of witnesses on matters that touch and concern him in such a personal particular that the judge concerned, though not a party in the formal sense to the issues for determination, is in all reality *particeps litis* and ought not to sit and determine the said issues. Right-minded men will, in such circumstance, feel that there is a real likelihood of bias on the part of the judge if he sits to determine the said issues."

In this court, the allegation against the judge were not only grave but to a full extent called into question his integrity or credibility as an impartial adjudicator. More importantly, the matters which were raised in the motion on notice were obviously being disputed by him. This is plainly manifest from the ruling complained of. It contains copious evidence of these disputed facts having been resolved by the judge himself. It matters very little that the motion was virtually, as it were thrust on him by the applicant. **He was still a judge in his own cause when in spite of the obvious, he nevertheless went ahead to hear the motion**.

He should **have instantly and automatically and without any prodding from any quarter, declined jurisdiction for the simple reason that if he nevertheless went ahead and sat on the matter, he would be breaking a fundamental and most cherished rule of natural justice- the nemo judex in causa sua rule."**

Our distinguished former Chief Justice Wood JSC continued thus:-

> "In this regard, I would once again rely on the thinking of my learned honourable brother Acquah JSC (as he then was, now the Chief Justice) in the *Effiduase Stool Affairs (No 1)* case. He stated at pages 443-444 as follows:-
>
> **It can certainly not be laid down as a general proposition that whenever an objection is raised against a judge either sitting alone or on a panel of judges, the judge in question should take part or not take part in the determination of the objection…But if the objector had filed a formal motion supported by affidavit at that court…(**as in the instant case), a different consideration would apply. The judge cannot hear that motion against him. He has to bring the application to the notice of the Chief Justice for same to be put before another judge. The reason is obvious. The motion is against him personally, and whether he swears an affidavit in opposition or not, he cannot be a judge and an opposer at the same time in the same application. This is the precious quality of justice epitomised in the maxim nemo judex in causa sua." Emphasis supplied

The former Chief Justice, then Wood JSC concluded her delivery thus:-

> "In the instant case, the failure of Justice Woanyah to relieve himself from hearing the motion led to a serious failure of justice and lured him from committing such grave errors that one cannot but say the applicant's fears were real and justified. So he failed to rule on the very issue of bias brought before him and rather proceeded to deal with matters which he has not even in that motion been called

upon to determine. This evidently again led to a flagrant breach of the audi alteram partem rule for he ruled against the applicant without first giving him a hearing. What did he do? Although the motion by the applicant was limited to the disqualification question, the respondent trial judge proceeded suo motu and without hearing the applicant to determine whether the court was, in any event, clothed with jurisdiction to determine the claim instituted by the applicant in Suit No CS 25/2003. He ruled that it was a chieftaincy matter and so dismissed the writ in limine. The correctness or otherwise of that ruling is wholly, for our purposes, irrelevant; and we, on the peculiar facts of this case, should not be misled into raising that issue for consideration. The substance of the application meant that applicant did not want him to be the adjudicator of even that issue should it come up for determination. The worse point is that it did not even arise in the instant application before him."

GENERAL COMMENTS

From the above rendition of the Supreme Court in the *Ex-parte* Agbesi Awusu Case, it is clear that, for the allegation that the 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.

For example, in the ***Effiduase Stool Affairs (No.1) Republic v Numapau, President of the National House of Chiefs, Ex-parte Ameyaw II [1998-99] SCGLR 427 at 443-444, 448 and 449-450 where at 448*** it was said of the particular Judge therein that he was in all ***"reality a particepis litis and ought not to sit and determine the said issues brought against him."*** Emphasis

In the instant case we are of the considered view that the allegation against Honyenuga JSC is ill founded. An inference that the main reason for the said allegation is to prevent the learned Judge from progressing to a completion of the hearing of the case is irresistible. We seriously condemn such tactics employed by the Applicant and his Counsel in this case.

It must therefore be noted that, the facts of the ***In Re Effiduase Stool Affairs supra and Ex-parte Agbesi Awusu case*** and indeed all the other cases from which the principle of the *"nemo judex in causa sua"* have been distilled are dramatically different in scope, degree, substance and content from the instant case.

We will accordingly refuse to follow the said principle because we have not found it useful and necessary to do so.

We also find that a lot of attention has been given the concurring opinion of Dotse JSC in the decision of this court in the Review Motion No. J7/20/2021, dated 26th October 2021, intitutled, ***Republic v Court (Criminal Division 1) Accra, Ex-parte Stephen Kwabena Opuni***, Attorney-General, Applicant. Out of abundance of caution, and to stop the needless interpretation being forced down our understanding, it is considered prudent to quote in extenso what was stated in the said concurring opinion

> "I have read the erudite rendition of my able and respected sister Gertrude Torkornoo (Mrs) JSC and I agree with her analysis, reasoning and conclusions that the review application be granted.
>
> Article 129 (3) of the Constitution 1992, has raised to a constitutional level, the doctrine of stare decisis. This Article reads as follows:-
>
> **"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." Emphasis

We must also bear in mind at this stage that, our brother Honyenuga JSC who presided over the suit at the High Court, did so as an additional Judge of the High Court. This therefore meant that he was exercising the jurisdiction conferred on the High Court as by law established.

This therefore meant that, at all material times, when there is an authority on a subject matter from the Supreme Court, all courts lower than that court are bound to follow that decision of the Supreme Court. The case of ***Ekow Russel v Republic [2017-2020] SCGLR 469,*** **which was relied upon by the learned High Court Judge was actually a binding authority upon him. There was no way he could have departed from it.**

The majority decision of the ordinary bench which has now been reviewed, in their quest to arrive at their decision had to depart from the decision of the Supreme Court in the said *Ekow Russel v Republic case* supra. Quite an enormous task indeed." Emphasis

A careful reading of the above makes it quite clear that apart from restating and re-emphasizing an age old constitutional provision on the doctrine of *stare decisis* the above concurring decision has been taken out of context and its meaning and effect wrongly inferred and applied. We hope this will set the records straight.

We will accordingly proceed on the basis of the renditions in the cases of ***Ex-parte Daniel and Agbesi Awusu II*** to answer the issues raised supra in this case.

DETERMINATION OF ISSUES IDENTIFIED IN THIS CASE

ISSUE ONE

Whether or not the learned trial Judge Honyenuga JSC acted without jurisdiction when he continued to sit and adjudicate on Suit No. CR/158/2018 intitutled *Republic v Stephen Kwabena Opuni, Seidu Agongo & Agricult Ghana Limited* on 11th , 17th October, 2022, 7th 14th and 24th November 2002 and 5th December 2022 respectively and if this is in breach of article 145 (2) (a) of the Constitution 1992.

It is not in doubt that Honyenuga JSC attained 70 years on the 4th day of September 2022 and by that, pursuant to Article 145 (2) (a) of the Constitution 1992 he is expected to vacate his office.

However, the said Article 145 (2) (a) does not stand in insolation. This is because, this provision is to be read together with the provisions in Article 145 (4) by which a superior Court Judge, which Honyenuga JSC is, is allowed to continue in office under some conditions. These conditions are that, such a Judge may be permitted to continue in office for periods not exceeding six (6) months as may be necessary **to enable him deliver judgment or do any other thing in relation to proceedings that were commenced before him previous to his attaining that age.**

In this case, we have to look for the following features:-

1. That Honyenuga JSC has reached the compulsory retirement age of 70 years as at 11th , 17th , October 2022, 7th , 14th and 24th November 2022, and 5th December 2022 respectively when he adjudicated in the said case is not in doubt.
2. What is also not in doubt is that the learned trial Judge had been granted the six (6) months extension provided in Article 145 (4) of the constitution 1992 by the Chief Justice.
3. It is also an undeniable fact, that by the computation of time, the dates of the impugned sittings mentioned supra all took place within the six month extension period granted him by the Chief Justice.

4. Apart from the above, we must necessarily look at the provisions of Article 139 (1) of the Constitution 1992 because that has a direct connection with those Superior Court Justices qualified to be appointed to sit as High Court Judges.

It reads thus:-

Article 139 (1)

"139. Composition of the High Court and qualification of its Justices

(1) The High Court shall consist of

(a) The Chief Justice

(b) Not less than twenty Justices of the High Court; and

(c) such other Justices of the Superior Court of Judicature as the Chief Justice may, by writing signed by him, request to sit as High Court Justices for any period." Emphasis

It is therefore apparent and clear from the reading of this Article 139 (1) (a) (b) and (c) in conjunction with Articles 145 (2) (a) and (4) of the Constitution that the following qualifications exist for High Court Judges appointed or designated as such under the Constitution;

i. The category of persons appointed as High Court Judges;
ii. Superior Court Justices, i.e. Court of Appeal and Supreme Court Judges who may be designated in writing to sit as High Court Judges;
iii. Honyenuga JSC was first designated in writing signed by the then Chief Justice to sit as a High Court Judge when he was in the Court of Appeal;
iv. Following his elevation to the Supreme Court, the Chief Justice again designated him to continue sitting as a High Court Judge in the case and

v. On his attainment of the retirement age as a Justice of the Supreme Court the Chief Justice duly exercised the power of extension as warranted by the Constitution granting the learned Judge the permission to continue as a Justice of the Supreme Court and for that matter a Justice of the High Court for the purpose of delivering any judgments or doing any other act or thing in relation to proceedings that were commenced before him previous to his attaining that age.

The Supreme Court in the *Ex-parte* Daniel case supra, per Prof. Kludze JSC at page 369-370 of the report stated authoritatively as follows:-

> "The provision in article **139 (1) (c) empowers the Chief Justice to request in writing signed by him, a Justice of the Supreme Court of judicature to sit in the High Court for any period. The only requirement of this constitutional provision is that the person so requested must be a justice of the Superior court**. In this context, it means that the person requested by the Chief Justice must be a Justice of the Court of Appeal or of the Supreme Court." Emphasis

We are therefore of the considered view that, 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) of the Constitution 1992.

Therefore upon a true and proper application of this provisions to the circumstances of this case, we find that the learned trial Judge, Honyenuga JSC, was properly mandated, constituted and acting within jurisdiction when he sat on this case on the date above mentioned. The compliant of the Applicant is thus rejected and the said issue one resolved in favour of the 1st Respondent and the 1st Interested Party.

ISSUE TWO

Whether or not the learned trial Judge Honyenuga JSC acted in breach of article 129 (3) of the Constitution 1992 when he refused to follow the decisions in *Republic v High*

Court, Ex parte Agbesi Awusu II (No.2) [2003-2004] and the unreported judgment of the Supreme Court in review motion Number J7/20/2021 Republic v High Court, Criminal Division 1 Ex parte Stephen Kwabena Opuni dated 26th day of October 2021.

From our analysis of the judgments in the cases ***of Ex-parte Agbesi Awusu and Ex-parte Stephen Kwabena Opuni*** – Review motion supra, it is crystal clear that Honyenuga JSC did not breach Article 129 (3) of the Constitution 1992 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 relied upon.

ISSUE THREE

Whether or not the learned trial Judge committed an error of law patent on the face of the record when in the face of rival meanings placed on articles 139 (1) (c) and 145 (4) by the parties i.e. that it is the President and not the Chief Justice who is the proper person to exercise those powers, he nonetheless proceeded to interpret same by upholding the prosecution's interpretation over and in preference to that of the 1st Accused and that, this is in clear breach of article 130 (2) of the Constitution. In other words, whether the learned trial Judge's extension of six (6) months was validly obtained.

We fail to see how there could be any rival meanings in the cases referred to the learned trial Judge. This is because, as we have pointed out, there is only one apparent meaning and that was the path taken by the Supreme Court in the Ex-parte Agbesi Awusu, supra, and Ex-parte Daniel supra as well as the review motion in the Ex-parte Stephen Opuni cases supra. Indeed, by our analysis and decision herein, there was absolutely no need for the learned trial Judge to refer to the Supreme Court pursuant to Article 130 (2). To have acceded to that request, would have meant the learned trial Judge had yielded to

the unsupportable tactics exhibited against the Judge by Counsel and Applicant throughout the hearing of the case.

The only legitimate position was that which was undertaken by the learned trial Judge in this case. Issue three is therefore also similarly resolved against the Applicant.

ISSUE FOUR

Whether or not the learned trial Judge's position as an additional High Court Judge became vacant when he attained seventy (70) years as provided for in article 145 (2) (a) of the Constitution and should be perpetually restrained from sitting as a Judge and in particular on case *No. CR/158/2018 – Republic v Stephen Kwabena Opuni, Seidu Agongo & Agricult Ghana Ltd.*

As a matter of fact, issue four has already been dealt with supra in issue one. But out of the abundance of caution, we refer again to the decision in the Ex-parte Daniel case supra and urge that the position of the learned trial Judge, Honyenuga JSC did not become vacant as an additional High Court Judge, upon attaining the compulsory retirement age of seventy (70) years. Article 145 (2) (a) should be read in conjunction with article 145 (4). If that is done, the clear meaning of the decision in Ex-parte Daniel is apparent. That is why the learned trial Judge applied it.

We want to comment briefly on the argument that, it is the President and not the Chief Justice, who has the right or power to extend the time of the learned trial Judge by the period of six (6) months as stipulated in Article 145 (4) of the Constitution 1992. The reason for this argument is that, it is the President who is the appointing authority. We reject this argument and we refuse to detain ourselves on it for any length of time. The words in Article 145 (4) are clear and precise.

They do not deal with the appointment of judges but the extension of time for a judge to complete matters that the judge was working on prior to the retirement age. Article 125 (4) states unequivocally as follows:-

> *"The Chief Justice shall, subject to this Constitution, be the Head of the Judiciary and shall be responsible for the administration and supervision of the Judiciary."*

Since this provision admits of no ambiguity, we hold that, it is the Chief Justice and not the President, who is the Administrative head of the Judiciary, and therefore entitled to exercise the powers in Articles 139 (1) (c) and 145 (4).

CLOSING STATEMENTS

On the whole, we are of the considered view that there is no substance in the Applicant's application to have the decision of the learned trial Judge dated 14th November 2022 quashed by Certiorari and also perpetually restrain him from continuing with Case No. CR/158/2018 intitutled ***Republic v Stephen Kwabena Opuni and 2 Others***, at the Criminal Division of the High Court.

The application is therefore dismissed.

V. J. M DOTSE

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

E. Y. KULENDI

(JUSTICE OF THE SUPREME COURT)

COUNSEL

SAMUEL CUDJOE ESQ. WITH HIM JOHNSON HORMESINU ESQ., TONY NYARKO ACHEAMPONG ESQ., ZENAB ABDUL AZIZ ESQ. AND JOSHU BODWURO ESQ. FOR THE APPLICANT.

EVELYN KEELSON (CHIEF STATE ATTORNEY) WITH HER SEFAKOR BATSE (PRINCIPAL STATE ATTORNEY) AND EMMA MESSIPA (ASSISTANT STATE ATTORNEY) FOR THE 1ST INTERESTED PARTY.

EMMANUEL KUMADEY ESQ. WITH HIM CHRISTABEL AKWELE GABOR ESQ. FOR THE 2ND AND 3RD INTERESTED PARTIES.