**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA - A.D. 2023**

**CORAM: TORKORNOO (MRS.) CJ (PRESIDING)**

**PWAMANG JSC**

**OWUSU (MS.) JSC**

**ACKAH-YENSU (MS.) JSC**

**ASIEDU JSC**

**CIVIL APPEAL**

**NO. J4/72/2021**

**5TH JULY, 2023**

THE REPUBLIC

VS

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| 1. NEW JUABEN DISTRICT ASSEMBLY KOFORIDUA | RESPONDENT |
| 2. THE REGISTERED TRUSTEES OF INTERNATIONAL CENTRAL GOSPEL CHURCH, KOFORIDUA | 2ND RESPONDENT/APPELLANT/ RESPONDENT |

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| EX PARTE: THE REGISTERED TRUSTEE OF CATHOLIC CHURCH DIOCESE OF KOFORIDUA THE BISHOP'S OFFICE, SRODAE-KOFORIDUA | APPLICANT/RESPONDENT/ APPELLANT |

## JUDGMENT

**PWAMANG JSC:-**

My Lords, this appeal emanates from an application for Judicial Review filed in the High Court, Koforidua on 1st October, 2015 by the applicant/respondent/appellant (the applicant) against the New Juaben District Assembly. However, the applicant added the Trustees of the International Central Gospel Church of Koforidua as 2nd respondent. It is a highly unusual practice in our jurisdiction to make a private legal entity a respondent to an application for Judicial Review of an administrative action which action was not taken by that private legal entity. Where any person stands to be affected by the outcome of an application for Judicial Review, either of an administrative action or of a decision of a lower court or adjudicatory body, that party is stated in the originating motion as an interested party, which is the term used in **Order 55** of the **High Court (Civil Procedure) Rules, 2004 (C.I.47)** that deals with applications for Judicial Review. We shall address that matter in more detail *in fra,* but for the consistency of the proceedings in this appeal, we shall in this judgment refer to the interested party as 2nd respondent.

The facts of the case are that, by a building permit dated 15th May, 2015 the 1st respondent granted authorisation to the 2nd respondent/appellant/respondent (2nd respondent) to build a church on a plot of land it acquired at Koforidua in an area originally zoned for residential development. Adjoining the plot was an existing church of the applicant built some years back, called Saint Bakhita Roman Catholic Church, from which they had been worshipping. The applicant states that it came to their knowledge that in order to grant the building permit to the 2nd respondent to build its church, the 1st respondent re-zoned the planned use of the plot in question from residential to

church, but that the 1st respondent ought to have given them prior notice to enable them raise any objection to the re-zoning which was not done.

The applicant also gives several reasons that make it unreasonable for the 1st respondent to have permitted the building of a church on the land. They say that the size of the land is too small for a church building with parking space for the cars of members who attend service there. The result would be that when people attend service they would park cars on the solders of the access road which also connects to the hospital and ought to be kept free always for use by speeding ambulances. The applicant also stated that a second church in the area in addition to his own would increase the noise pollution in the neighbourhood beyond acceptable levels.

On these facts deposed to in an affidavit in support of his motion for Judicial Review, the applicant prayed for the following reliefs from the court;

**a. A declaration that the layout and purpose for which the plot in dispute is zoned is for residential user nor church user**

**b. Mandatory injunction to restrain the 2nd respondent from building a church at the said plot contrary to the original user on the lease whose residual interest has been assigned to the 2nd respondent**

**c. Prohibition to prohibit the 2nd respondent and their workmen from developing the plot into a church**

**d. Mandamus to compel the 1st respondent to withdraw the permit granted to the 2nd respondent to build a church on the said plot**

**e. A declaration that the International Central Gospel Church has no interest in or own Plot No. 57 Sector 2 Block N**

The application was brought under Order 55 of C.I.47 and in line with the requirements of Rule 4(2) of the Order the applicant stated the grounds on which it sought the reliefs as follows;

(i) Failure by the 1st respondent to give notice to the applicant and other neighbours before changing the user of the land in question,
(ii) Wedsnesbury Unreasonableness,
(iii) Illigality
(iv) Unfairness on the part of the 1st respondent, and
(v) The 1st respondent acted ultra vires its powers

The applicant filed a statement of case in which he argued the grounds in support of its application.

On service, the 1st and the 2nd respondents each filed affidavits in opposition and statements of case in answer. In sum, they disputed the contention of the applicant that the 1st respondent was required by any law to notify the applicant and other neighbours before amending the zoning of the plot from residential use to use as a church. They also challenged the claim of the applicant that it was an irrational and unreasonable decision for the 1st respondent to amend the planned layout of the area to enable the 2nd respondent to build a church on the land. The 2nd respondent stated that they acquired the land from the Lands Commission, which is the authority to make grants of land at that area, specifically for building a church so the 1st respondent did no wrong in granting their application for re-zoning. They contended that the land is large enough for building a church and that if it was alright for the applicant to have a church in a residential area then they could also operate a church there.

As part of the hearing of the application, the High Court, on the request of the applicant, caused an official of the 1st respondent to tender the approved layout of the area in

question and he was cross-examined by Counsel for the applicant. The testimony of the 1st respondent's official confirmed that the plot in issue was indeed zoned for residential development but it was the 2nd respondent who applied to the District Planning Authority for it to re-zone the plot for use as church. It was also established that the 1st respondent changed the user without notifying the applicant and other adjoining occupiers.

The High Court in its judgment dated 21st July, 2016 upheld the case of the applicant and granted all the reliefs it prayed for. The 2nd respondent appealed against the decision of the High Court but the 1st respondent did not appeal. In the Court of Appeal, the 2nd respondent raised, for the first time, objection to the procedure by which the applicant sought relief in court in this matter. It argued that the facts on which the action was brought were contentious so the applicant ought to have come by a writ of summons and not by application for Judicial Review. The 2nd respondent further argued that the High Court erred in granting the applicant its relief (e) to the effect that because no vesting assent had been executed in respect of the plot, the 2nd respondent had no interest in the land. The Court of Appeal allowed the appeal in its entirety and dismissed the applicant's motion for Judicial Review. The applicant being obviously aggrieved by the judgment of the Court of Appeal has appealed to the Supreme Court on the following grounds;

i. That the judgment is against the weight of the evidence
ii. That the court lacked jurisdiction in determining that part of the case which exclusively related to the 1st respondent which did not appeal
iii. That the court erred in law by failing to give the Applicant/Appellant the opportunity to contest the case in so far as it affected the 1st Respondent which did not appeal but the court determined and dismissed it.

The complaint by the applicant that as the 1st respondent did not appeal against the decision of the High Court the Court of Appeal had no jurisdiction to reverse the orders

that were directed at the 1st respondent is not valid in law. The relief for Mandamus for the withdrawal of the 2nd respondent's permit directly affected the 2nd respondent and that relief was the substantive relief in this case on which the other reliefs could stand. The 2nd respondent was entitled to appeal for the reversal of that order that affected them and if that order was reversed all the other reliefs were ancillary to it and would automatically be swept away. In this appeal, the applicant's burden is first of all to convince us that the Court of Appeal erred in setting aside the order of Mandamus the High Court granted for the building permit to be revoked. We are therefore going to consider all the grounds of appeal together and to answer the question whether the Court of Appeal erred in setting aside the reliefs granted by the High Court in favour of the applicant.

My Lords, this case is about a subject of considerable public interest in our current circumstances as a nation where buildings are put up without regard to approved spatial plans leading to floods and other environmental hazards. It is common knowledge that some of the haphazard building is done with the connivance of officials of the planning authorities whose statutory duty it is to ensure orderly physical development and when they decide to turn a blind eye to illegal development, persons who stand to suffer the adverse effects of unlawful buildings, some in water courses and road reservations, at times feel helpless. However, one of the means available for checking the rampant illegal building menace when reports to the planning authorities yield no results is the remedies under the Judicial Review jurisdiction of the High Court. This case is therefore an example of what active citizens can do to compel the District Planning Authorities to discharge their statutory duties to the general public by ensuring that approved spatial plans are not side-stepped and buildings allowed in wrong places. Instead of throwing their hands up in the air and giving it to God in typical Ghanaian fashion, those who stand to be directly affected by illegal buildings may activate the machinery of the courts

and pray for corrective orders through Judicial Review of the action or inaction of the relevant planning authority as is regularly done in other democracies.

The above observations notwithstanding, a party who initiates action by way of Judicial Review must comply with the requirements of that procedure and the applicant in this particular case could have presented its case in a better manner. To begin with, while the applicant was perfectly right in bringing an application for Judicial Review in the circumstances of this case, it erred in making the International Central Gospel Church a 2nd respondent. The remedies under Judicial Review are public law remedies that are concerned with the discharge of public duties by mostly public bodies and occasionally, public duties carried out by private entities. See **Republic v High Court Kumasi; ex parte Mobil Oil (Gh) Ltd (Hagan-Interested Party)[2005-2006] SCGLR 312**.

On the facts here, the main grievance of the applicant is about the change of the approved zoning of the plot in question from residential to church and the grant of the building permit to International Central Gospel Church. It was the New Juaben District Assembly that effected the change and granted the permit so it is those actions of the Assembly that the applicant is inviting the Court to review on the basis of settled legal grounds which the applicant stated in its affidavit. By the practice of our Courts and Order 55 of C.I.47, International Central Gospel Church ought to have been joined to the action as an interested party since it stood to be affected by the review of the actions of the Assembly. It was therefore wrong procedure to state the International Central Gospel Church as a 2nd respondent and the High Court ought to have ordered the applicant to amend the title of the case before proceeding to hear it. That would also have placed the case in the proper legal perspective and guided the approach of the Judge in the proper legal analysis of the issues arising in the case.

If the court had correctly identified the rightful positions of the parties in this case, it would have become plain to the Court that the prayers for reliefs directed against the

interested party (2nd respondent) were most inappropriate. The relief (e) that sought for a declaration concerning the interest the 2nd respondent had in the land was irregular. The applicant did not alleged that it had a legal or equitable interest in that land so clearly it had no locus standing to sue in respect of the interest the 2nd respondent claimed in the land and that relief ought to have been dismissed *in limine.* Similarly, the relief of mandatory injunction against the 2nd respondent was misconceived because injunctions can only be granted against a private entity in respect of land where the applicant for the injunction proves that she has a legal or equitable interest in the land he was seeking to protect but that is not the case of the applicant here. See: **Day v Brownriggs (1876) 10 Ch 294, CA.** Same with the prayer for an order of prohibition which can only be prayed for against a court or public body to stop the body from performing a function it has no authority to do or has authority but is performing it in an unlawful manner. In the circumstances, the Court of Appeal were right to strike out these reliefs and to consider the case on the basis of only the reliefs targeted at the Assembly in reliefs (a) and (d) which were for a declaration and an order of Mandamus.

But, the declaration sought was needless because there was no dispute about the original zoning of the plot in issue being for residential development. The question was whether the 1st respondent acted properly in granting the re-zoning application of the 2nd respondent and the permit for that matter. Then, having regard to the grounds that were urged by the applicant in support of the application, even the prayer for order of Mandamus, which was the substantive relief that the applicant prayed for, was not sustainable. It is trite learning that there are four preconditions that must exist before a party can apply for an order of Mandamus as stated in **Republic (No.2) v National House of Chiefs; Ex parte Akrofa Krukoko II (Enimil VI Interested Party)(No.2) [2010] SCGLR 134** at page 178 where Supreme Court stated them as follows;

*"(a) that there was a duty imposed by the statute upon which he relied, (b) that the duty was of a public nature, (c) that there was a right in the applicant to enforce the performance of the duty and (d) there had been a demand and a refusal to perform that public duty enjoined by statute."*

The applicant's prayer for Mandamus is to order the 1st respondent to withdraw the permit it granted to the 2nd respondent. However, no where in the depositions in the affidavit in support was any enactment referred to which placed the 1st respondent under a statutory duty in the circumstances of this case to withdraw the permit it granted to the 2nd respondent. Secondly, it was not stated in the affidavit that the applicant before filing its case in the High Court made a demand on the 1st respondent to withdraw the permit but it refused. Thus, from the word go, that relief was bound to fail. The permit was granted only because the plot was re-zoned from residential to church use so unless the re-zoning was reversed, there was no basis for expecting the 1st respondent to withdraw the building permit.

It is unfortunate that the applicant undermined its own case by failing to focus on the grounds for Judicial Review of administrative action mattered most in this case. The strong point of the applicant was that before the 1st respondent could change the approved planned zoning of the plot in question from residential to church, it was required to notify the adjoining occupiers and given them a hearing since they stood to be affected by the amendment. This ground alludes to procedural impropriety or fairness and reasonable expectations of adjoining occupiers of the land which user was to be changed and this is a well settled ground for Judicial Review of administrative action. Procedural impropriety or fairness as a ground for Judicial Review of administrative action in our jurisdiction continues to be stated as the common law Natural Justice rule of a right to a hearing, but the content of that rule, when it has to do with governmental action, differs from where it is concerned with judicial proceedings. See; **Republic v**

**SSNIT; Ex parte Ernest Thompson & Ors, CA J4/51/2021 unreported Judgment of the Supreme Court dated 15/6/2022 (Concurring Judgment of Pwamang, JSC).**

The grounds of irrationality and unreasonableness of granting a permit for a church to be built next to the applicant's church was going to be very difficult to establish since the applicant was a church in the same area that originally was zoned for residential development. Then the ground of ultra vires could not stand because there can be no debate about the authority of the 1st respondent to re-zone plots after a plan for an area has been approved. In fact, it would appear that the applicant itself was a beneficiary of the exercise of that power of re-zoning by the 1st respondent.

Consequently, we do not intend to spend valuable time discussing all the grounds stated by the applicant in detail but will focus on the grounds of procedural impropriety and illegality alleged to have been committed by the 1st respondent in re-zoning the use of the plot in question without notifying the adjoining occupants and hearing any objections by them. Where in a case it is established that an administrative decision was taken without observing the rightful procedure, the High Court is empowered to issue an order of certiorari and quashed the decision, and that is why in this case the applicant ought to have prayed for an order of certiorari to quash the re-zoning and then the building permit instead of the reliefs it stated in its affidavit.

We have read closely the judgment of the Court of Appeal but it regrettably avoided the crucial issue in this case, which is whether the 1st respondent acted rightly and within the law by changing the user of the land without giving a hearing to the occupiers adjoining the land who stood to be affected by the change. From the evidence on record, the 1st respondent did not make any effort to notify the neighbours and the community in which the land lies about the application by the 2nd respondent for the re-zoning of the use of the land. Re-zoning from residential to church definitely was bound to have an effect on the adjoining occupiers and the community and they were entitled to be notified

so that if they had any objections, the planning authority would take that into account before deciding whether to re-zone or not to re-zone. Those who acquired lands and built houses in the area because it was zoned for residential development would be deemed to have had a reasonable expectation that their surroundings would not be changed without notice to them.

As at 2015 when it appears the 1st respondent decided to change the approved planning scheme of the area, the legislation that governed spatial planning in Ghana was the **Town and Country Planning Ordinance of 1945 (CAP 84)**. That legislation was only repealed by the **Land Use and Spatial Planning Act, 2016 (Act 925).** Under CAP 84, when a planning scheme was developed for a locality it was required to be published for the information of members of the locality and they were entitled to make representations which were to be taken into account before the scheme was approved for implementation. **Section 12 of CAP 84** provided as follows;

**12. Deposit of scheme and notice of deposit**

**(1) When a scheme is framed it shall be deposited in a place that the Minister shall decide.**

**(2) Notice of the deposit and of the period in which a person may inspect and make representations respecting the scheme shall be published by the Minister in the Gazette and two local daily newspapers.**

**(3) A person may within two months of the date of the notice of the deposit, inspect and make representations to the Minister respecting the scheme, and on the expiration of that period the Minister shall take the recommendations into consideration.**

Amendment to the scheme was by necessary implication to go through the same publication and two months notice to enable persons interested to inspect the proposed amendment and make representation to the Minister through the Planning Committee of

the area. The changes to the approved plan could not be approved and implemented without going through the procedure set out under section 12 of CAP 84. The new Act has gone a step further under section 93 of Act 925 to explicitly provide as follows;

**Application for change of use or request for re-zoning**

**93. (1) Where a person seeks to change the zoning of the whole or part of a piece of land, that person shall apply in writing to the District Spatial Planning Committee of the district to which the change relates in the form prescribed in the zoning regulations and planning standards.**

**(2) The request for re-zoning or change of use of land shall be accompanied with a report prepared by a professional planner.**

**(3) A District Spatial Planning Committee shall not grant a request for change of the existing zoning or land use unless the request is intended to make the zoning of the land comply with the structure plan or zoning scheme or local plan.**

**(4) Without limiting subsection (3), the change of use or re-zoning of a public space shall be subjected to approval by Parliament.**

**(5) Where the request for change is for a purpose other than compliance and there is evidence that**

**(a) a special circumstance has arisen that necessitates the change requested;**

**(b) a notice of the special circumstance has been brought to the attention of the community in which the land affected by the request is located and an objection has not been raised by that community; and**

**(c) details of the special circumstance have been made available at the Public Data Room for a period of at least twenty-one days after the request, the District Spatial Planning Committee shall grant the request.**

**(6) Where an application for re-zoning relates to a change of use and the address of the owners of land abutting the land to which the application relates are not known, the District Planning Officer shall**

**(a) require the applicant concerned to**

**(i) give notice in the manner prescribed by Regulations**

**to the owners of land abutting the land to which the application relates;**

**(ii) advertise the application in the manner prescribed by the Regulations; and**

**(iii) post the notice in the immediate vicinity of the land concerned subject to Regulations made under this Act;**

**(b) where an objection against the application is received, submit the objection to the applicant for comment and the comment shall be submitted to the District Assembly through the District Spatial Planning Committee within fourteen days;**

**(c) request for comment from any person who in the opinion of the Head of the Physical Planning Department of the District Assembly has an interest in the application;**

**(d) submit the application and relevant documents to the District Spatial Planning Committee;**

**(e) give notice to the applicant of the decision of the District Spatial Planning Committee and, where applicable, furnish the applicant with a copy of the conditions imposed by the local authority;**

**(f) give notice to an objector in the manner prescribed by Regulations, of the decision of the District Spatial Planning Committee; and**

**(g) record the re-zoning in accordance with this Act.**

From the above provisions of the law, the Municipal Coordinating Director of New Juaben Municipal Assembly was in error when he stated in paragraph 41 of the 1st respondent's affidavit in opposition that; "under the law in the grant of permit the Committee were not under any obligation to inform or give notice to all persons in the area where the structure is to be erected." The Committee was required by law to notify the persons who stood to be affected of the application to re-zone the land in this case from residential to church as explained above. It would appear that the Coordinating Director and the District Planning Authority had disregarded the CAP 84 for so long that they considered it was no longer in force. It is refreshing that Act 925 has been so detailed on the procedure by which an approved spatial plan may be amended. Since without approval of the re-zoning the Planning Committee could not grant a building permit to the 2nd respondent, they failed to comply with the law in granting the permit. Rather unfortunately, the applicant failed to refer to the relevant enactments as **section 53(2)** of the **Local Government Act, 1993 (Act 462)** and **section 15** of the **Administration of Lands Act, 1962 (Act 123)** that they relied on relate to enforcement of approved plans and not the procedure for changes to an approved plan, which is the issue in this case. The law, it is said, is in the boson of the Judge so the lower courts too had a duty to find the applicable law that governed the facts of this case.

This brings us to the issue whether any remedy may be granted to the applicant in this case since it has been established that the 1st respondent committed a procedural impropriety and disregarded the law by failing to afford the applicant a hearing before re-zoning the plot in question. The applicant prayed for an order of Mandamus but as has been demonstrated above, the conditions precedent for grant of that remedy are non-existent in this case. We have explained that the appropriate remedy the applicant ought to have asked for is an order of Certiorari but they did not pray for that relief.

Nevertheless, in **NTHC Ltd v Antwi [2009] SCGLR 117** the Supreme Court in holding (3) of the Headnote of the report held as follows;

*"Although the Order 63 rule 6 of the repealed High Court Rules referred to in the passage quoted above appears not to have been re-enacted in the High Court (Civil Procedure) Rules 2004 (CI 47), the High Court has an inherent jurisdiction to make such consequential orders as are necessary for doing justice, even if the beneficiary of such order, such as the defendant company in the instant case, had not expressly requested it. The Supreme Court would thus vicariously also have that power."*

Accordingly, we have power to grant an order of Certiorari to quash the re-zoning and the building permit in this case if other principles bearing on the remedy of Certiorari are satisfied. One such principle is that the remedy of Certiorari is discretionary and would not be granted in favour of an applicant who failed to apply timeously for it. See; **Appenteng (Decd) In re Republic v High Court, Accra; Ex parte Appenteng [2010] SCGLR 327.**

At paragraph 27 of the 1st respondent's affidavit in opposition to the application, it stated that the building of the church by the 2nd respondent pursuant to the permit had been completed and that the effect of granting the reliefs claimed by the applicant would be for the church building to be demolished. What this means is that the applicant was tardy in bringing its action. The applicant is next door to the development being questioned and must have noticed the early development operations on the land but did not act at that time. The 2nd respondent must have believed that with the building permit issued by the 1st respondent, it was entitled to build the church and has obviously expended considerable amount of resources on the building which it may not have done if the applicant had acted from the very moment the development commenced. In the circumstances, we are not minded to make an order of Certiorari to quash the re-zoning and the building permit. However, if the re-zoning and permit had been for a building in

a water course or a road reservation, that would have been an irrational decision by the planning authority and then our judgment would certainly have been different.

In conclusion, although our reasons differ in some respects from those of the Court of Appeal, we have arrived at the same conclusion that the applicant is not entitled to the reliefs it claimed in the application for Judicial Review or at all. Consequently, the appeal against the judgment of the Court of Appeal dated 10th June, 2020 fails and is hereby dismissed.

**G. PWAMANG**

**(JUSTICE OF THE SUPREME COURT)**

**G. A. E. SACKEY TORKORNOO (MRS.)**

**(CHIEF JUSTICE)**

**M. OWUSU (MS.)**

**(JUSTICE OF THE SUPREME COURT)**

**B. F. ACKAH-YENSU (MS.)**

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