IN THE SUPERIOR COURTS OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

HELD IN CAPE COAST ON 14TH OCTOBER, 2022

BEFORE HIS LORDSHIP JUSTICE EMMANUEL A. LODOH

SUIT NO: E10/04/2022

REPUBLIC

VRS.

CAPE COAST METROPOLITAN ASSEMBLY **RESPONDENT**

HEAD OFFICE

17 JOHNSON ROAD

CAPE COAST

EXPARTE: JACKSON MENSAH

SUING PER HIS LAWFUL ATTORNEY

SAMUEL M. CODJOE

UNNUMBERED HOUSE

OFF THE MAIN CAPE COAST-KAKUMDO ROAD

OPPOSITE THE NEW CATHOLIC SCHOOL AND WINNERS CHURCH

CAPE COAST

INTERESTED PARTIES:

THE OWNER (1)

BLOCK FACTORY

OPPOSITE UNNUMBERED HOUSE

OFF THE MAIN CAPE COAST-KAKUMDO ROAD

OPPOSITE THE NEW CATHOLIC SCHOOL AND WINNERS CHURCH

CAPE COAST

THE OWNER (2)

FITTING SHOP

OPPOSITE UNNUMBERED HOUSE

OFF THE MAIN CAPE COAST-KAKUMDO ROAD

OPPOSITE THE NEW CATHOLIC SCHOOL AND WINNERS CHURCH

RULING ON APPLICATION FOR JUDICIAL REVIEW

(ORDER 55 RULE 1(a) of HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C.I. 47)

Counsel for and on behalf of the Applicant, took out this process against the Respondent seeking an order of Mandamus to compel the Respondent to abate the nuisance caused by the "unauthorised development and activities of the owners of the block factory and fitting (mechanic) shop which are sited underneath high-tension cables as well as the unauthorised parking of vehicles in front of Applicant's House".

The Respondent upon service of the process duly filed an Affidavit in response to the motion on 17th June, 2022. The record will further show that, per an Affidavit of Service deposed to by Benard K.B. Acheampong, a bailiff attached to the EMS Court Process Service, on 20th May, 2022, the Owner of the Fitting shop, disclosed as Mr. Adoko was

served with the application. Similarly, the record will show that on 24th June, 2022, the said bailiff served the application on the Owner of the Block Factory, whose name is recorded as Mr. Richard Albright.

On 4th July, 2022, Mr. Roland A.K. Hamilton, Esq. attended court and announced himself as representing the two interested parties even though he had not filed any processes to formalise his representation in court. Be that as it may, the court advised counsel to regularise his appearance before the court. Regrettably, as at the time of writing this ruling, Mr. Roland A.K. Hamilton, esq. has failed to regularise his alleged representation of the two interested parties. Consequently, since it is expedient in the interest of justice, fairness and security, that litigation cannot be kept in abeyance and must end, and since the court in such circumstances cannot compel a party to respond to an action, I will proceed to determine this matter on the basis of the processes filed.

Case of the Applicant

The factual basis for which the Applicant seeks the court to compel the Respondent, with the consequential impact of such orders, when granted, on the economy of the interested parties is succinctly captured in paragraphs 4, 5, 6, and 7 of their affidavit in support.

The evidence of the Applicant is essentially that he has put up a building in the area of contention, for which he had been granted a building permit. However the Respondent has allowed the 1st and 2nd interested parties who have no building or business operation permit to "erect unauthorised structures and operate a fitting (mechanic) shop and block factory", and same has become an going nuisance for which the Applicant is suffering. The Applicant then goes into specifics as follows:

5. That 1st and 2nd interested parties have set up the block factory and a fitting (mechanic) shop directly under the high-tension electricity lines which is opposite Applicant's house. To state that the operation of the block factory and the fitting (mechanic) shop directly under the high-tension electricity cables constitute a fire hazard and poses series risk to life, health and property is to state the obvious. Attached hereto as Exhibit A series are pictures of the activities of 1st and 2nd Interested Parties.
6. That the block factory constructed by 1st Interested party is directly opposite Applicant's house and is situated directly under high tension electricity cables. The operation of a block factory under the high-tension cables does not only pose a serious risk to life and property, but also the trucks which come to 1st interested party's block factory park haphazardly on the frontage of Applicant's house.
7. That the fitting (mechanic) shop operated by 2nd Interested Party is situated directly under the high-tension cables does not only pose a serious risk to life and property but is also a source of nuisance. The patrons of 2nd Interested party's fitting (mechanic) shop park their cars on the frontage of Applicant's house and generate excessive noise throughout the day.

The applicant further deposed that notwithstanding his notice to the respondent about the activities of the interested parties, and a demand to the Respondent as the supervising entity and interested parties to abate the nuisance, the respondent and the interested parties have failed to act. The Applicant duly exhibited the said communication to the Respondent and the interested parties as Exhibit "B" series.

Case of the Respondent

The Respondent in Affidavit in response did not deny the material factual basis of the activities that triggered the Applicant's action. They however denied prior knowledge of the activities of the interested parties by reason of Exhibit "B" because they claim

they cannot confirm receipt of the said letter. The Respondent however claims that following the service of this suit, they commissioned an enquiry into the activities of the interested parties for which a report (Exhibit "1") was issued. The Respondent concludes in paragraph 7 and 8 of their Affidavit in Response as follows:

7. That in further response, Respondent says that to the extent that the Applicant is alleging that the Interested parties are operating without permit, the Respondent is currently acting on the complaint. However, the Applicant has every right to pursue a case of nuisance against the interested parties if he so wishes.
8. That in response to paragraph 14 and 15 of the affidavit in support, I say that whilst the Applicant has the right to seek the remedy of judicial review by way of mandamus, the Respondent is already dealing with the alleged authorised activities of the Interest Parties and would not require any court order before doing so.

From a synthesis of the affidavits, the undisputed facts are that the interested parties are carrying on business within the vicinity of the Applicants property. Further per the Respondents Exhibit 1, the claims of the Applicant that the interested parties were unlawfully carrying out business and the effect of such activities on Applicant is confirmed at page 2 of the Respondent's report under the subject observations as follows:

3.0 Observations

1. The block factory and fitting (mechanic) shops owners do not have Building permit from the Metropolitan Assembly.
2. We observed that the land was given to them by one of the families from Esuekyir, Cape Coast
3. Unauthorised parking of vehicles in front of the complainant's house.

4. The block factory and fitting (mechanic) shops were sited underneath high-tension cables and operates in front of the complainant's house.
5. The block factory and fitting (mechanic) shops operate within the road reservation. The Jukwa Road is a Regional road with a road reservation of 200ft.

I further find from the evidence that the Respondent is public body. This is so because from their official website ("https://ccma.gov.gh/about ccma) it is stated as follows:

"The Metropolitan Assembly (CCMA) was established initially as a municipal Assembly by L.I. 1373 in 1987 and after twenty years of existence elevated to Metropolitan status by L.I. 1927 in February, 2007."

I further hold that the Respondents have a duty to discharge the functions contained in the Land Use and Spatial Planning Act, 2016 (Act 925). I finally find that the Respondent has jurisdiction over the subject matter area.

Moving on the first question for the court to determine is whether or not the Applicant can seek an order to compel the Respondent (a public body) to perform its statutory duty and secondly whether or not the process of judicial review is the appropriate tool or remedy.

In response to this question I will quote in agreement, extensively from the decision of my senior brother Justice Samuel K.A. Asiedu, J (as he then was) in the case of **THE REPUBLIC vs. GA SOUTH MUNICIPAL ASSEMBLY (NOW WEIJA/GBAWE MUNICIPAL ASSEMBLY) THE MUNICIPAL CHIEF EXECUTIVE (GA SOUTH MUNICIPAL ASSEMBLY) (RESPONDENTS) GBAWE KWATEI FAMILY EX PARTE**

BEN N. A. ARYEETEY (APPLICANT) reported by Dennislaw® with citation number **[2019]DLHC7739**. The learned judge stated in this case as follows:

"Order 55 rule 1 of the High Court (Civil Procedure) Rules, 2004, CI.47 permits an applicant to apply to the High Court for judicial review and to seek the prerogative writ of mandamus against a respondent. In Republic v. Chief Accountant, District Treasury, Kumasi; Ex parte Badu [1971] 2 G.L.R. 285 the court held that"

> *An order of mandamus lies against public officials in the performance of their public or quasi-public legal duty, to require them to carry out their duty. The order is not meant to review or control what such officials have done or what they do, but to compel them to act . . . The order will only issue if the duty required to be performed can be legally done.*

In Republic v Court of Appeal; Ex parte Lands Commission (Vanderpuye Orgle Estates Ltd, Interested Party) [1999-2000] 1 GLR 75, the court pointed out at page 98 that:

> *A mandamus is simply "an order requiring an act to be done." It may issue to enforce a right against public officers and other statutory authorities derived by the citizen from a statutory legal duty or the common law. Its purpose was succinctly set down in an old English case, R v Baker (1762) 3 Burr 1265 at 1267 by Lord Mansfield, a Chief Justice of England as:*
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> *"A mandamus is prerogative writ, to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the Court. The original nature of the writ, and the occasions it should be used. It was introduced, to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. . It has been liberally interposed for the benefit of the subject and advancement of justice. . . . If there be a right, and no other specific remedy this should not be denied."*

Thus, an order for mandamus may issue against a public officer, a statutory authority or person who has a public duty to perform under the common law to do any act so warranted but who refuses or neglects to do that act or perform that duty. It includes the correction of such acts or duty wrongly performed. The order neither grants victory to the person applying nor is it the result of litigation.

In view of the above findings, the court is of the view that the 1 and 2 respondents have a statutory duty to supervise developments in its area of authority which includes the McCarthy area and particularly the area in contention in the instant matter"

From the above text, I hold that the Applicant is well within his rights to bring the instant application against the Respondents. However this is subject to the question whether or not a formal demand to perform its duty had earlier been made to the Respondent and refused.

Demand and Refusal

The Supreme Court case of **Republic (No. 2) v National House of Chiefs; Ex Parte Akrofakrukoko II (Enimil VI Interested Party (No.2) 2010 SCGLR 134** dealt with the circumstances surrounding such demand and refusal. It was stated in holding 4 of the Report as follows:

"(4) As a general rule the order for mandamus would not be granted unless the party complained of had known what it was required to do, so that he had the means of considering whether or not he should comply; and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desired to enforce and a refusal to perform it could not be applicable in all possible cases, and would not apply where a person had by inadvertence omitted to do some act he was under a duty to do, and where the time within which he could do it had passed. Ordinarily, time within which to apply for mandamus should begin to run only after a

demand to perform duty had been met with refusal. Where the demand made for the performance of the duty had been found to be premature, mandamus would not lie. And the mere fact of non-compliance with a duty would be sufficient ground for the award of mandamus, where the applicant had been substantially prejudiced by the respondent's procrastination. On the facts of the instant case, the appellant had more than satisfied the demand and refusal criteria to maintain an application for mandamus. Indeed, the conduct of the respondent in delaying to comply with the demand of the appellant and failing to give a direct answer on the demand, was tantamount to a refusal"

So what evidence did the Applicant lead in proof that a demand had been made on the Respondent. According to the Applicant they wrote a letter dated 15th November, 2021 to the Metropolitan Chief Executive bringing to their attention the activities of the interested parties and demanding that they perform their statutory duties. They duly exhibited the said communication as Exhibit "B". This was denied by the Respondent in paragraph 5 of their affidavit in response as follows:

5. That in response to paragraph 11 of the Affidavit in support, I say that whilst the Respondent cannot confirm receipt of the said Exhibit B as there is no record to such effect, upon the service of the instant suit, the Respondent has caused its offices to proceed to the area complained of and to prepare a report for the necessary action which report is ready and the issue is currently being addressed. Please see Exhibit "1".

The Applicant in paragraph 10 of their Affidavit in Support further stated that the Respondent duly received the said Exhibit "B". Unfortunately, they failed to put before the court documentary or physical evidence to satisfy the court that the Respondent did receive the said communication. Indeed I find from the record that the applicant simply

tendered his lawyer's copy as Exhibit "B". So the question therefore is whether simply tendering a communication addressed to another, constitute sufficient evidence to ground the basis for an inference that the letter was indeed transmitted and received by the recipient. My considered view is that such a conclusion cannot be supported in law. I am of the respectful view that in the minimum the Applicant must led evidence on some overt acts of the respondent in proof of their claim that the addressee or any officer of the Respondent had been served Exhibit "B". Did he post, fax or hand deliver the letter? Did he lead evidence on the mode of transmission? These pieces of documentary evidence were not put before this court. It is unfortunate that the Applicant did not anticipate the importance of retaining delivery receipts.

Be that as it may, as indicated earlier, as a consequence of the denial of the receipt of the letter by the Respondent, another method of proof is put before the court overt acts of the Respondent which will be deemed to constitute proof of delivery and receipt.

The Applicant's attorney in his affidavit in support stated that in the said Exhibit "B" they duly notified the Respondent about their intention to commence an action against them in compliance with section 210 of the Local Governance Act, 2016. A reading of the last paragraph of page 1 of Exhibit "B" states as follows:

"Please note that we have further instructions to commence action for mandamus to compel you to perform your statutory functions if you fail, refuse and or neglect to stop these unlawful developments".

Section 210 of Act 936 provides as follow:

210. (1) A suit shall not be commenced against a District Assembly until at least one month after a written notice of intention to commence the suit has been

served on the District Assembly by the intending plaintiff or an agent of the plaintiff.

(2) The notice shall state the cause of action, the names and place of abode of the intending plaintiff and the relief which the plaintiff claims.

(3) An action shall not lie against a District Assembly unless the action is commenced within twelve months after the act, neglect or default complained of, or in the case of continuing damage or injury, within twelve months after the date of cessation.

The above text of the law is couched in mandatory terms. This section simply means that no action can be taken against the Assembly without a written notice intention served on them. I also observed during the trial that no objection was raised regarding whether or not the Applicant had complied with section 210 of Act 936. This to my mind creates a presumption that the Respondent are aware that the Applicant has complied with the statutory notices. Now since the said statutory notice per the evidence of the Applicant was domiciled in Exhibit "B", I hold the view that the presumption that they received the letter (Exhibit "B") will operate against them, unless they can show that the said notice was contained in another document other than Exhibit "B" or the pre-condition had not complied with. Unfortunately, the Respondent failed to disclose responses to this in their affidavit, I therefore find that they were served with Exhibit "B".

Failure to Act

The evidence of the Respondent is that they only acted after they were served with the action, which was filed on 11th May, 2022 and served on Mr. Simon Godar, the Metro Coordinating Director on 3rd June, 2022. This definitely means that they had had sufficient time to respond to Exhibit "B" before the suit was filed. Exhibit "B" is dated 15th November, 2021. In line with the **Republic (No. 2) v National House of Chiefs; Ex**

Parte Akrofakrukoko II (Enimil VI Interested Party (No.2) (supra), I find that their delay in taking action within a reasonable time is akin to a refusal to act.

Conclusion

In conclusion, I am satisfied that the Applicant has put before this court evidence to support his application. Fortunately, the respondent per their affidavit in support have begun taking proactive steps to address the complaint of the Applicant. This to my mind means that they only require limited time to complete the process. Accordingly, the application for mandamus to compel the Respondent to perform their statutory duty by abating the activities of the interested parties is hereby granted as prayed. The Respondent is further ordered to remove the interested parties from within the vicinity of the Applicant's property within thirty (30) days today. Cost of Five thousand Ghana Cedis (GHC5,000.00) against the Respondent.

(SGD)

Emmanuel Atsu Lodoh, J

(Justice of the High Court)

Lawyers

Aaron Gyaban-Mensah Esq. for the Applicant

Daniel Arthur, Esq. Counsel for the Respondent