IN THE SUPERIOR COURT OF JUDICATURE
THE SUPREME COURT
ACCRA, GHANA.

CORAM: BROBBEY, J.S.C. (PRESIDING)
ANSAH, J.S.C
ADINYIRA , J.S.C.
DOTSE, J.S.C
ANIN YEBOAH, J.S.C

CIVIL MOTION
NO. J5/41/2008
11TH FEBRUARY, 2009

THE REPUBLIC

VRS

THE HIGH COURT, KOFORIDUA

EX-PARTE:

WILLIAM ANSA-OTU ... 1ST APPLICANT

MAD. ADWOA KWAFOA ... 2ND APPLICANT

BOTH OF ABURI AKUAPEM

KOANS BUILDING SOLUTIONS LIMITED ... INTERESTED PARTY

R U L I N G

ANSAH, J.S.C. :

The applicants herein applied to this court, pursuant to article 132 of the 1992 Constitution, for an order of *certiorari* directed at the High Court, Koforidua presided over by Anyimiah J, to quash a ruling by the said court dated 12 June 2008 in Suit No E149/2008 intituled *Koans Building Solutions Ltd* v *William*

Ansah-Otu & Another. The ground for the application was that: "There was an error of law apparent on the face of the record."

According to the supporting affidavit, the first applicant deposed that he had negotiated with the plaintiff-company, Koans Solutions Ltd (hereinafter called the interested party), through its managing director on behalf of the other applicant, for the hire or purchase of a farmland at Okotokrom-Asuboi. The interested party paid ¢60 million old cedis (Gh¢6,000.00) and a second payment of Gh¢700 (seven million old cedis) for the preparation of a site plan. The interested party was put in possession of the land and started cultivating corn on part of it. Before then, the applicants had cultivated some economic crops like palm trees, cassava and plantain on part of the land. It was agreed that if by 31 December 2005, the interested party failed to complete the applicants' uncompleted family house situated at another place at Aburi, the applicants reserved unto themselves the right to terminate the agreement. When the interested party failed to complete the building within the period agreed upon, the applicants abrogated the agreement. By then, the interested party had harvested the cash crops cultivated on the land and had nothing left there. However, the first applicant offered to reimburse him of the sum of Gh¢1,000.

Later the interested party sued the applicants for specific performance of the contract and prayed for an order of interlocutory injunction. On 12 June 2008, the High Court (per Anyimiah J) gave its ruling, granting the application exhibited as exhibit WKA 119. It was the case of the applicants that there was an error of law apparent on the face of WKA 119 for it was not warranted by the rules of court.

The ground of the application in a nutshell was that the rule of court which governed the order of interlocutory injunction gave the court the discretion not only to grant the order sought but also to attach conditions to it. Where the application was opposed, then the rule had the effect of fettering the discretion of the court as provided in rule 1(1) of Order 25 of the High Court (Civil Procedure) Rules, 2004 (CI 47), by imposing a precondition for the exercise rule 9(1) and (2) of the same Order 25 of CI 47.

For the sake of clarity, I would set out *in extenso* the said Order 25, rr 1(1) and 9(1) and (2) which respectively state as follows:

> "1(1) The Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just or convenient to do so, and the order may be made either unconditionally or upon such terms as the Court considers just."
>
> 9(1) Where an application is made under rules 1 and 2 of this Order the Court shall, if the application is opposed, require, before making an order, that the applicant shall give an undertaking to the person opposing the application to pay any damages that person may suffer as a result of the grant of the application if it turns out in the end that the applicant was not entitled to the order.

(2) The giving of an undertaking required under sub-rule (1) shall be a precondition to the making of any order under rules 1 and 2 of this Order."

The applicants have submitted before us that they opposed the application in the court below (as per their exhibit WKA 117. Consequently, by the mandatory terms of Order 25, r 9(1) and (2) (supra) the court, before making the grant, should have ordered the interested party to give an undertaking to the applicants to pay damages if it turned out that the interested party was not entitled to the granting of the order sought. The failure by the court to comply with the mandatory terms in Order 25, r 9(1) and (2) constituted an error apparent on the face of the record, entitling the applicants to have the offending ruling to be brought up to this court for same to be quashed.

Counsel for the interested party treated this court to an excursus to rules 1(1) and 9(1) and (2) of Order 25 referred to above. Counsel's submission was that Order 25, r 1(1) did not contain any fetters to the power of the courts to grant an injunction; it was only Order 25, r 9(1) and (2) which did by introducing the word 'shall' in its wording. Counsel prayed this courts to give a liberal and purposive meaning to the word "shall" to mean "may" and thereby remove the fetters on the rule and hence the contradiction in the two clauses of the same rule. In the view of counsel, when that was done, the conflict in the rule would be removed and they will become congruous in meaning to each other.

I think there ought to be symmetry in the meaning of the two rules, namely, rules 1(1) and 9(1) and (2) of Order 25 on the same subject of injunction. I believe the submissions by counsel for the interested party is deserving of consideration. I would endorse his call to adopt a broad and liberal purposive approach in interpreting the rules in the manner advocated by him. Either "shall" in rule 9(1) and (2) is amended and substituted for by "may" by the law makers, or the courts interpret and apply the rule as such. I must make myself clear I am saying all this out of deference to counsel's submission which may not be decisive of the application before us.

The High Court (Civil Procedure) Rules, 2004 (C I 47) must be studied for the effect of non-compliance with the rules of court. It is provided by rules 1(2) and (2) of Order 81 of CI 47 that:

"1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall ... be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings , or any document, judgment or order in it.

(2) The Court may, on the grounds that there has been such a failure as stated in sub-rule (1), and on such terms as to costs or otherwise as it considers just

> (*a*) set aside either wholly or in part the proceedings in which the failure occurred, and any step taken in those proceedings or any document judgment or order therein; or
> (*b*) exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just."

And as further stated by rule 2(2) of Order 81 of CI 47, the party affected by the non-compliance with the rules of court, may apply to the trial court to set aside the proceedings for irregularity, provided an application was made timeously and without taking any fresh step in the matter after knowledge of the irregularity. Indeed, the provisions in Order 81 of the High Court (Civil Procedure) Rules, 2004 (CI 47), are not new in our rules of court procedure for they had existed as Order 70 under the High Court (Civil Procedure) Rules, 1954 (LN 140A). Both rules provide in clear terms that non-compliance with the rules do not render the proceedings null and void but is a mere irregularity, a voidable but not a void act which may be set aside on terms.

The applicants have submitted that the error in question went to as far as destroying the jurisdiction the court originally had in the matter and as same was apparent on the face of the record, made it amenable to be quashed by an order of *certiorari*. This calls for a statement of the law on the scope of the order of *certiorari* which this court is empowered by law to issue under article 132 of the 1992 Constitution. In connection herewith, I can do no better than to quote what Dr Date-Bah JSC masterfully stated in his didactic judgment in *Republic* v *High Court, Accra; Ex parte Commission on Human Rights and Administrative Justice (Addo Interested Party)* [2003-2004) 1 SCGLR 312. After an exhaustive review of authorities local and abroad on the subject, his Lordship said (at pages 345-346 of the Report) that:

> "The restatement of the law may be summarised as follows: where the High Court (or for that matter the Court of Appeal) makes a non-jurisdictional error of law which is not patent on the face of the record…, the venue for redress open to an aggrieved party is an appeal, not judicial review. In this regard, the error of law made by the High Court or the Court of Appeal is not to be regarded as taking the judge outside the court's jurisdiction, unless the court has acted ultra vires the Constitution or an express statutory restriction validly imposed on it."

It was also held in *Okofo Estates Ltd* v *Modern Signs Ltd* [1996-97] SCGLR 224 (as stated in holding (4) of the headnote) that:

> "(4) Even though the trial High Court judge had jurisdiction to hear the application — being an application under Order 25, r 4 — he had committed an error of law apparent on the face of the record by taking

> into account extrinsic evidence. He fell beyond the bounds of his jurisdiction and the ruling would therefore be set aside. Dicta of Lord Reid in *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147 at 171 and of Charles Hayfron-Benjamin JSC in *Republic* v *High Court, Accra; Ex parte Eastwood*, Supreme Court, 20 June 1995 cited."

In his opinion in *Okofo Estates* (supra), Aikins JSC said (as stated in the headnote at page 226) that:

> "certiorari would lie to quash the decision of a court on the ground of error of law on the face of the record if such error went to jurisdiction, or was so obvious as to make the decision a nullity."

In the case of *Republic* v *High Court; Ex parte Eastwood* [1995-96] 1 GLR 689 at 698, SC Hayfron-Benjamin JSC said that:

> "If therefore there is an error of law appearing on the face of the record of a superior court which warrants intervention by this court by the exercise of our supervisory jurisdiction, it must be such an error as goes to the wrong assumption of jurisdiction or the error is so obvious as to make the decision a nullity."

As earlier stated, the error complained of in the instant case, was not as to the wrong assumption of jurisdiction, it being a case of the granting of an order of injunction manifestly within the jurisdiction of the court; the error complained of was non-compliance with the mandatory rules of court in not ensuring that the party who succeeded in obtaining the order in his favour in the teeth of opposition by the losing side, was made to give an undertaking to pay damages in the event of losing the suit. I would maintain that the trial judge erred in not complying with the mandatory terms of rule 9(1) and (2) of Order 25 of CI 47, which error of law was also apparent on the face of the record. Beyond that, the error did not go to the jurisdiction of the court in the sense that it did not emanate from a wrongful assumption of jurisdiction or in violation of a constitutional provision; nor was it a nullity by any standard. It was a mere irregularity curable under Order 81 of the new High Court (Civil Procedure) Rules, 1997 (CI 47): see *Republic* v *Akyem Abuakwa Traditional Council; Ex parte Sakyiraa II* [1977]2 GLR 115 and the cases cited therein.

An order of *certiorari* being a discretionary remedy, the conduct of the applicant would also be considered in deciding to grant or refuse the application. Where an applicant takes fresh steps after knowledge of the irregularity, he minimizes his chances of succeeding on his application. Indeed (as earlier stated), Order 81, r 2(2) provides that:

> "No application to set aside any proceedings for irregularity shall be allowed unless it is made within reasonable time and the party applying has not taken any further steps after knowledge of the irregularity."

In the instant case, the applicants had applied to the trial High Court for a review of the injunction order sought to be quashed. Thus, in paragraphs (32) and (33) of the affidavit in support of the instant application, the first applicant stated as follows:

> "(32) That upon our application for a review and appointment of receiver and manager, the High Court made [an order]...
> (33) That I verily believe that the review order is inequitable and unfair as it allows the interested party to join us to harvest crops on our land whose cultivation we undertook without its involvement or contribution."

By taking recourse to that fresh step, the applicants imperilled their instant chances of success in the instant application: see *Republic* v *Akyem Abuakwa Traditional Council* (supra).

For these reasons, the application is dismissed.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH, J.S.C.:

I had the opportunity of reading beforehand the opinion of my learned brother Ansah JSC. I agree with him that the application ought to be dismissed. As we have been called upon to interpret the provisions of the new High Court (Civil Procedure) Rules, 2004 (CI 47), I have decided to briefly state my own opinion in support of the dismissal of the application.

The jurisdiction to grant the interlocutory injunction is exercisable by both the Superior Court of Judicature and the Lower Courts in Ghana. Both the 1992 Constitution and the Courts Act, 1993 (Act 459), have conferred jurisdiction on the courts to grant this equitable relief. It is relief which the common law courts have always granted, in the exercise of their discretion, when the circumstances appear to be just and convenient. It is, however, granted to protect rights and in some cases prevent any injury or damage in accordance with laid down legal principles which have developed as a result of case law over the years.

In my opinion, the rules of court merely regulate the procedure for applying for judicial reliefs. It does not confer the jurisdiction on the courts to grant

injunctions. In my view, Order 25, r 9(1) and (2) of the High Court (Civil Procedure) Rules, 2004 (CI 47), which learned counsel for the applicants has forcefully pressed on this court, is not meant to impose any serious fetters on the discretion of the court in granting an interlocutory injunction, it being a discretionary relief. I think the circumstances of the case must be looked at in considering the grant or refusal of the application for interlocutory injunction.

Even though rule 9(1) and (2) of Order 25 requires of an applicant to give an undertaking, it is procedural and should not be interpreted to limit the jurisdiction imposed on the courts by the 1992 Constitution and the Courts Act, 1993 (Act 459). Undertakings are made upon the grant of interlocutory injunctions in some cases to balance the scales evenly to avoid any loss to the respondent to the application should the applicant in the end fail to make a case. In *Halsbury's Laws of England* (4th ed), Vol 25 at page 454, para 865 the learned authors state the position as follows:

> "**Undertakings**. The court will take care that the order for an injunction is so framed that neither party will be deprived of the benefit he is entitled to, if in the event it turns out that the party in whose favour it was made is in the wrong. For this purpose it *will, if necessary,* impose terms upon the plaintiff as a condition of granting the injunction. He may also be required to undertake to prosecute the action with due diligence or, if the action has reference to the payment of money, to pay the amount in dispute into court." (The emphasis is mine).

It is therefore not the case that in all interlocutory injunction applications before the courts, where rule 9(1) and (2) of Order 25 is applicable, the refusal or failure of the court to make an order for undertaking should nullify the grant of interlocutory injunction. In my opinion, if the courts should consider themselves bound by strict adherence to interpret the word "shall" in rule 9(1) and (2) of Order 25 to be so mandatory so as to nullify the grant of interlocutory injunctions in the absence of any undertaking, the courts would be placing serious utters on their jurisdiction to grant this important and helpful relief. It was through the development of case law in this area of the law that led to new relief like *Mireva injunction* which has come to stay as a useful relief in other jurisdictions. The discretionary powers vested in the courts should not be limited in the manner counsel for the applicants has advocated. The circumstances of each case must inform the judge whether it is necessary or not to make an order of undertaking in any particular case as the discretion is inherent in the court itself. I think the time has come for the Rules of Court Committee established under article 157 of the 1992 Constitution, to examine the insistence on undertaking in interlocutory injunctions as the rule under consideration, ie rule 9(1) and (2) of Order 25 of the High Court (Civil Procedure) Rules, 2004 (CI 47), being a subsidiary legislation, clearly seeks to limit the court's discretion vested in it by the 1992 Constitution and the Courts Act, 1993 (Act 459).

I think the application ought to be refused.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BROBBEY, J.S.C.:-

I have had the benefit of reading beforehand the opinion of my learned brother Ansah JSC. I agree with him and have nothing useful to add.

S. A. BROBBEY
(JUSTICE OF THE SUPREME COURT)

SOPHIA ADINYIRA, J.S.C.:-

I have also had the benefit of reading beforehand, the opinion of my learned brother Ansah JSC. I agree that the application for *certiorari* be dismissed for the reasons given by his Lordship.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

DOTSE, J.S.C.:-

I also agree with the opinion of my learned brother Ansah JSC.

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

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