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

CORAM: BROBBEY, J.S.C. (PRESIDING)
DATE-BAH, J.S.C.
ADINYIRA, J.S.C.
DOTSE, J.S.C.
ANIN YEBOAH, J.S.C.

CIVIL APPEAL
NO. J4/19/2008
11TH MARCH, 2009

M. N. OCANSEY .. PLAINTIFF/RESPONDENT/RESPONDENT

VRS.

1. **MADAM GRACE TEYE & 6 ORS } DEFENDANTS**
2. **TEMA DEVELOPMENT CORPORATION } 1ST CO-DEFENDANT**
3. **DOKU AGBEYEVU } 2ND CO-DEFENDANT/ APPELLANT/APPLICANT**

J U D G M E N T

ANIN YEBOAH, J.S.C:-

This is an appeal against the striking out of an appeal and failure to relist same by the Court of appeal. The facts which appear to be simple are that the appellant was a Co-defendant in a case which was heard before the High Court, Tema. The judgment in the case was delivered on 11/10/2001 and the appellant who felt aggrieved by the judgment filed an appeal on the 2/11/2001.

As enjoined by procedural rules of the court, the appellant and the respondent herein were invited by the registrar of the High Court to settle records for the appeal. The parties herein did not appear before the registrar of the Tema High Court on 21st of January 2005 to settle the records by themselves. The solicitor for the respondent, however, wrote a letter to the registrar and listed the documents

and evidence which he wanted to constitute the record for the purposes of the appeal. The appellant's solicitor sent a law clerk in the person of Benjamin Addey Tettey to represent the solicitor for the appellant. He also requested that all the processes so far filed and the entire record and evidence be compiled to form the record for the appeal. The Registrar then proceeded to list the conditions of appeal which is reproduced for a fuller record:

Registrar Conditions:

1. The Appellants to deposit the sum of ¢500,000.00 towards the preparation of the records.
2. To deposit the sum of Two million Cedis (¢2,000,000.00) into court towards costs on appeal or in lieu of payment enter into bond for the costs in like sum with one surety.
3. Appellants are to pay the bills of binding the record of appeal after typing and photocopying of the relevant documents
4. The above conditions to be fulfilled with one month from today.

J.N. NYAGBLODZRO
HIGH COURT REGISTRAR

The record shows clearly that on 26/01/05 the appellant indeed paid the deposit of ¢500,000.00 in compliance with the first condition set out above. He, however, did not satisfy the condition set out in paragraph 3 thereof. It however, turned out that the appellant later went to the Registrar to demand his deposit on instructions of his solicitor. It is not clear whether the other condition set out in paragraph 2 thereof was fulfilled. On 27.10.2005, counsel for the Respondent wrote to the trial court registrar demanding to know whether indeed the appellant had on instructions of his solicitor withdrawn the deposit he paid as part of the fulfillment of the conditions of appeal.

Counsel for the respondent herein in the said letter threatened to report the conduct of the solicitor for the respondent to the Chief Justice for causing the withdrawal of

the deposit. The reply to the letter from the registrar of the Tema High Court dated the 1/11/2005, however stated that the appellant had not withdrawn the ¢500,000.00 deposit he had paid but had withdrawn an amount of ¢150,000.00 which he paid as part – payment for the preparation of the binding and photocopying which the registrar had fixed at ¢600.00. No further payment was made and the registrar of the trial court on 8/11/05 issued a Certificate of Non-Compliance and addressed same to the Court of Appeal for striking out of the appeal.

On 4/4/2006, the Certificate of Non-Compliance was listed before the Court of Appeal for striking out. Both the appellant and his counsel, Mr. J.O.Amui were present in court. The Court of Appeal, basing itself obviously on the Certificate of Non- Compliance struck out the appeal with cost of ¢2,000,000.000. On 3/7/07, the appellant and his solicitor appeared before the Court of Appeal this time to relist the appeal which was struck out on 4/4/2006. The Court of Appeal found no merit in the application for relistment and proceeded to accordingly dismiss same. The refusal of the Court of Appeal to relist the appeal has culminated in this appeal to this court. Before this court, learned counsel has filed two grounds of appeal which were argued together in the statement of case filed pursuant to the appeal.

Learned counsel for the appellant has urged on this court that as the appellant had subsequent to the striking out complied with the conditions and the record of proceedings was ready at the time of the relistment, the court of appeal was in error in refusing to relist this appeal. It was therefore submitted that the appeal be allowed and the same restored to the list for determination on the merits.

It must be pointed out that all appeals are statutorily conferred on the courts exercising appellate jurisdiction. Under every rule governing appeals, the trial courts and courts where appeals emanate impose conditions on any appellant to be fulfilled before the appeals are listed for hearing. As this appeal was before the Court of Appeal, the appellant was duty bound to fulfill the conditions of appeal imposed on

him by the High Court, Tema. This is clearly in compliance with section 11(7) of the Courts Act, Act 459 of 1993 which states as follows:

> "(7) The Court of Appeal shall not entertain any appeal unless the appellant has fulfilled all the conditions prescribed in that behalf by the Rules of Court"

It has not been argued that at the time the striking out was done the appellant had fulfilled all the conditions of appeal and therefore was irregularly visited with striking out. The record shows that he was present with his counsel and raised no objection whatsoever before his appeal was struck out.

In my opinion, if the appellant after the striking out was anxious to have his appeal heard he could only do so by satisfying the Courts of Appeal Rules , Rule 18(3) of 1997 CI 19. The discretion to restore an appeal to the list is vested in the Appellate Court which struck out the appeal. If the discretion was fairly exercised after taking all the circumstances of the case into consideration this appellate court should not substitute its own discretion for the Court of Appeal. It was held in the case of **ADJOWEI V YIADOM II & ORS [1970]** CC 51 that "where there has been a failure to comply with the conditions of the appeal imposed by a lower court, the Court of Appeal by virtue of LI 210 r 19(1) has a discretion either to dismiss the appeal or to make such order as would advance the course of justice. Even where the appeal has been actually dismissed the Court of Appeal can still restore it upon terms as it thinks fit by virtue of LI 218 r 19(3)."

In my opinion, Rule 18(3) of the current Court of Appeal rules is substantially the same as the Rule 19(3) of LI 218 which was repealed by CI 19 of 1997.

In this appeal, there is no material before this court that the discretion imposed on the Court of Appeal by Rule 18(3) was not fairly exercised which would have amounted to failure to do justice. The evidence rather disclosed before their lordships that it took the appellant almost thirteen months after the striking out to make any attempt to have the appeal restored. He also did not offer any convincing explanation in his affidavit to raise any reasonable excuse in his favour. Even though the Constitution 1992 and the Courts Act of 1993 confers statutory right on

the appellant to appeal as of right, his statutory rights to appeal is regulated by the rules of court out of which the conditions were imposed on him to fulfill. If on the facts an appellant has failed to comply with the rules regulating the appeal, irrespective of the statutory rights conferred on the appellant by the Constitution and the Courts Act, and notwithstanding the merits of the appeal, an appellate court will not proceed to hear the appeal. Francois JA (as he then was) expressed similar views in **KARLETSE – PANIN V NURO** [1979] GLR CA at 209 as follows:

> "Numerous decisions have settled conclusively that the merits notwithstanding, if an appellant fails to avail himself of a statutory dispensation to appeal within the time limited or abide by rules regulating the appeal he would be forever barred from re-litigating his cause"

The learned judge continued in his judgment at the same page to conclude on this point as follows:

> "In such an event, the court is not called upon to view the hardships that might flow in consequence. It may be said that the court's judicial vision is circumscribed by statutory blinkers"

Even though the appellant may on the merits have a case, statutory provisions regulating appeals in this country, though subsidiary in nature when flouted or ignored can in appropriate cases deny a litigant his inherent right to exercise his constitutional right of appeal.

In my opinion, the conduct of the appellant was such that the Court of Appeal was right in refusing to restore his appeal to the list for the hearing of her appeal on the merits. I will therefore dismiss this appeal.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

I agree

S.A BROBBEY
(JUSTICE OF THE SUPREME COURT)

I agree

DR. DATE-BAH
(JUSTICE OF THE SUPREME COURT)

I agree

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

I agree

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

COUNSEL:

J. O. AMUI FOR THE 2ND CO-DEFENDANT APPELLANT.
T. A. NELSON COFIE FOR THE RESPONDENT.