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

CORAM: ATUGUBA, JSC (PRESIDING)
DATE-BAH, JSC
ANSAH, JSC
BONNIE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
J/5 / 23/ 2009
16TH NOVEMBER 2011

THE REPUBLIC

VRS

CIRCUIT COURT 'B' ACCRA
EMMANUEL KOMIETTEH ADAMS
(SUBSTITUTED BY NII OTSIATA IV) - - - RESPONDENTS

EX PARTE:

1. **MADAM REBECCA KOMELEY ADAMS - - - APPELLANTS**
2. **SARAH KOMEKAI ADAMS**
3. **IBRAHIM NII OGBAMEY ADAMS**

J U D G M E N T

ATUGUBA, J.S.C:

I have had the advantage of reading beforehand the able judgment of my brother Dr. Date-Bah JSC. I agree that Ashong-Yakubu, J. was wrong in quashing the judgment, the subject matter of the application for certiorari on the ground that the conveyance of title did not have the requisite Ministerial concurrence in breach of the Administration of Lands Act (Act 123). A court cannot give a

judgment contrary to statute. However, for my part I cannot see such an error on the face of the record. I know of no law which states that the concurrence of the Minister when obtained must be stated on the face of the conveyance. Indeed it is trite law that such concurrence need not be contemporaneous with the grant but can validly and subsequently be obtained after the execution of the conveyance. It may well be that such concurrence was not obtained before or at the time of the Circuit Court's judgment in this case. However such error, if there be, has not been carried on the face of the record in this case. If that error therefore exists it must be a latent error and certiorari does not lie for latent errors.

As regards whether the common law principle that certiorari normally would not lie if there is a pending appeal has been overtaken by the provision of the 1992 Constitution relating to the supervisory jurisdiction of this court, I do not think that principle has been necessarily so overtaken. The supervisory jurisdiction of this court is derived from the common law which formulated it as a prerogative process. See *Darawi & Sons v. Dako* (1961) 1 GLR 72 S.C. and *Republic v. High Court, Accra; Ex parte CHRAJ (Addo Interested Party)* (2003-2004) SCGLR 312 at 326. *Certiorari* is certainly among the remedies open to an applicant under the court's supervisory jurisdiction. Thus, article 161, the relevant interpretation provision, provides as follows:

"161. Interpretation

"supervisory jurisdiction" includes jurisdiction to issue writs or orders in the nature of habeas corpus, *certiorari*, *mandamus*, prohibition and *quo warranto*."

The nature of the jurisdiction to issue these remedies has not been stated in the Constitution. But there is some law within the Constitution which spells out that jurisdiction. That law is the existing law under article 11 of the Constitution which is the law that spells out the common law nature of those remedies. It

follows that the common law nature of those remedies has been adopted by article 132 which provides thus:

"**132. Supervisory jurisdiction of the Supreme Court**

The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may, in the exercise of that supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power."

It is for such reasons that this court was able to hold in *Ackah v. Adjei-Acheampong* (2005-2006) SCGLR 1 that the pre-existing common law power of contempt under article 126(2) of the Constitution can be accessed by individuals and cannot be overtaken by the prosecutorial powers of the Attorney-General under article 188 of the Constitution. There is judicial anxiety that if certiorari lies side by side with an existing appeal there is the danger that the decision on certiorari will avail nothing if the same order has been confirmed on appeal. Also, if an applicant for certiorari can get the reliefs he is seeking from a pending appeal (which is ready to be heard) it is, if anything an abuse of the process in the nature of *lis alibi pendens* to convoke the supervisory relief. It must be remembered that the prerogative origin of the prerogative orders of certiorari, mandamus etc holds that it is a specialised residual jurisdiction and therefore has some peculiarities which the ordinary remedies of the courts do not entail. The reality however is that in practice the courts in recent times have liberalised the resort to these remedies to such an extent that prejudice hardly

arises from the incidence of appeal and certiorari or other remedies being pursued contemporaneously.

However, for the reasons aforegiven I would also dismiss the appeal.

(SGD) W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

DR. DATE-BAH JSC:

This case presents, for authoritative clarification, some interesting legal issues relating to judicial review of lower courts by the High Court. The material facts of the case were briefly as follows: a son brought action against his mother and sisters over land situated near Accra, claiming damages for trespass and a perpetual injunction restraining the defendants from interfering with the land in dispute. He succeeded and on 24th September 2003 the Circuit Court in Accra gave judgment in his favour. The defendants then applied to the High Court for leave to apply for an order of *certiorari* under the old High Court Rules (that is, the High Court (Civil Procedure) Rules, 1954 (LN 140A). Leave was granted and their application for *certiorari* was granted by the High Court presided over by Her Lordship Ashong-Yakubu J. The learned High Court judge held in her ruling that the trial Circuit Court had based its judgment primarily on a legal document of title which was defective since it purported to dispose of Stool land but did not have the prior concurrence of the Minister, in breach of the Administration of Lands Act (Act 123). She therefore set aside the document of title as void and, along with it, the judgment of the Circuit Court and all the proceedings before that court. The plaintiff appealed to the Court of Appeal

against her order granting *certiorari* and the appeal was allowed. It is against this judgment of the Court of Appeal that his siblings have brought this appeal. (Their mother, the first appellant, has in the meantime died.) The appellants filed no less than 21 grounds of appeal and 6 further grounds, most of which were argumentative and prolix. They also filed a Statement of Case. In reply, the respondent did not file any Statement of Case. In my view, it is unnecessary to set out these grounds *seriatim* and deal with them. Rather, I will address the two main relevant legal issues which arise from them below.

The first of the issues mentioned above relates to the preconditions for the exercise by the High Court of its supervisory jurisdiction. In *Republic v High Court Accra, Ex Parte CHRAJ* [2003-2004] SCGLR 312, this court examined extensively the preconditions for the exercise of its supervisory jurisdiction. However, it then left open the preconditions for the exercise by the High Court of its supervisory jurisdiction over lower courts. It did, however, note (at p. 339) that:

> "From the discussion earlier in this Ruling, it must be evident that we believe there to be a sound policy reason for keeping narrow the category of errors by the superior courts that can be made subject to judicial review. We consider, therefore, that the post-*Anisminic* cases in England dealing with inferior courts and tribunals and administrative authorities should be treated with caution with regard to their relevance to judicial review of the decisions of the superior courts in Ghana. We are strengthened in this view by a similar reluctance of the High Court of Australia to follow *Anisminic* in relation to the judicial review of courts, as opposed to administrative tribunals."

The facts of this case raise directly for decision whether the sound policy reason for keeping narrow the category of errors by the superior courts that can be made subject to judicial review necessitate that judicial review by the High Court over the lower courts should be similarly limited. The view of the High Court of Australia on this issue is that inferior courts should be given a treatment similar to what this Supreme Court has formulated for the superior courts in the *Ex Parte CHRAJ* case. In a passage that was approved by this Supreme Court in the *Ex Parte CHRAJ* case, the High Court of Australia (comprising Brennan, Deane, Toohey, Gaudron and McHugh JJ) said in *Craig v The State of South Australia* (1995) 184 CLR 149:

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> "It was submitted on behalf of the respondent State of South Australia that an inferior court commits jurisdictional error whenever it addresses the wrong issue or asks itself the wrong question. Particular reliance was placed, in support of that submission, upon the well-known passage of Lord Reid's speech in *Anisminic Limited v Foreign Compensation Commission:*
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> (the court then quotes the well-known passage of Lord Reid's speech and continues as follows)
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> …
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> In *Anisminic,* the respondent Commission was an administrative tribunal. Read in context, the above comments should, in our view, be understood as not intended to refer to a court of law. That was recognized by Lord Diplock in *In Re Racal Communications* and affirmed by the English Divisional Court in *R v Surrey Coroner; Ex parte Campbell* [1982] QB 661 at 675. It is true that Lord Reid's comments were subsequently suggested by Lord Diplock (*O'Reilly v Mackman* [1983] 2 AC 237 at 278) and held by the Divisional Court (*R. v Greater Manchester Coroner Ex parte Tal* [1985] QB 67 at 81-83*)* to be also applicable to an inferior court

> with the result that the distinction between jurisdictional error and error within jurisdiction has been effectively abolished in England (*Pearlman v Harrow School* [1979] QB 56 at 69; *O'Reilly v Mackman* [1983] 2 AC 237 at 278. But cf *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363.) That distinction has not, however, been discarded in this country (See, in particular, *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 141, 149, 165; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372. And see also *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 93-95; *Hockey v Yelland* (1984) 157 CLR 124 at 130; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-377) and, for the reasons which follow, we consider that Lord Reid's comments should not be accepted here as an authoritative statement of what constitutes jurisdictional error by an inferior court for the purposes of certiorari. In that regard, it is important to bear in mind a critical distinction which exists between administrative tribunals and courts of law."

I am in agreement with the High Court of Australia that a distinction needs to be made between administrative tribunals and courts of law, even if they are lower courts. An error of law *simpliciter* should not be a ground for the exercise of the supervisory jurisdiction of the High Court, if the error has been made by a court. However, there is a policy justification for tighter supervision over the decisions of officials and administrative tribunals. An error of law by an administrative tribunal or official may well justify the exercise of the High Court's supervisory jurisdiction over them. The distinction is justified because of the presumption that judges and magistrates should know the law ("the law is

in their bosom"), whilst lay officials or members of administrative tribunals are not presumed to know the law. There is therefore need for closer oversight by the High Court over the latter. The primary avenue of redress for an error of law *simpliciter* by a judge or magistrate should be an appeal.

It is for this reason that I would uphold Appau JA's view that the learned High Court judge was in error in quashing the Circuit Court judgment solely on the ground that it had relied on an indenture that had been executed by a Stool without ministerial concurrence. He said (at p. 113 of the Record):

> "It must be noted that certiorari is a discretionary remedy that is resorted to, to correct a clear error of law on the face of the judgment or ruling of a lower court or tribunal, or an error that amounts to lack of jurisdiction in the court so as to make its decision a nullity, or further still where the rules of natural justice have been clearly breached. There is therefore a clear distinction between certiorari and appeal. Where therefore, a court of competent jurisdiction acts within its jurisdiction and gave all the parties the opportunity to be heard in the course of its deliberations but nevertheless arrives at an erroneous decision, such a decision whether founded on law or fact, can only be corrected on appeal but not by a quashing order."

This is a correct statement of the law, but I would like to build on it and go further to unify the statement of the law in relation to the High Court's supervisory jurisdiction over other courts with the law that has been authoritatively stated in relation to the Supreme Court, when it is exercising its supervisory jurisdiction over the superior courts. In *Republic v High Court*

(Commercial Division) Ex Parte The Trust Bank (Ampomah Photo Lab and 3 ors, Interested Parties) [2009] SCGLR 164, the current law applicable to the Supreme Court was summarized as follows (at p.169-171):

> "The current law on when the prerogative writs will be available from the Supreme Court to supervise the superior courts in respect of their errors of law was restated and then fine-tuned in the *Republic v High Court Accra, Ex Parte CHRAJ* [2003-2004] SCGLR 1 and *Republic v Court of Appeal, Ex Parte Tsatsu Tsikata* [2005-2006] SCGLR 612, respectively. In my view, the combined effect of these two authorities results in a statement of the law which is desirable and should be re-affirmed. This Court should endeavour not to backslide into excessive supervisory intervention over the High Court in relation to its errors of law. Appeals are better suited for resolving errors of law. In the *Ex Parte CHRAJ* case, this Court, speaking through me, sought to reset the clock on this aspect of the law (as stated at pages 345-346) as follows:
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> "The Ruling of this Court in this case, it is hoped, provides a response to the above invitation to restate the law on this matter. 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 (within the meaning already discussed), the avenue for redress open to an aggrieved party is an appeal, not judicial review. In this regard, an 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. To the extent that this restatement of the law is inconsistent with any previous decision of this Supreme Court, this Court should be regarded as departing from its previous decision or decisions concerned, pursuant to

Article 129(3) of the 1992 Constitution. Any previous decisions of other courts inconsistent with this restatement are overruled."

In the *the Ex Parte Tsatsu Tsikata* case, Wood JSC, as she then was, said (at p. 619 of the Report):

> "The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then, that the error(s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. The error of law must be one on which the decision depends. A minor, trifling, inconsequential or unimportant error, or for that matter an error which does not go to the core or root of the decision complained of; or stated differently, on which the decision does not turn, would not attract the court's supervisory jurisdiction."

The combined effect of these two authorities, it seems to me, is that even where a High Court makes a non-jurisdictional error which is patent on the face of the record, it will not be a ground for the exercise of the supervisory jurisdiction of this court unless the error is fundamental. Only fundamental non-jurisdictional error can found the exercise of this court's supervisory jurisdiction. "

Accordingly, in relation to the High Court's supervisory jurisdiction also, even an error patent on the face of the record cannot found the invocation of that

jurisdiction of the court unless it is fundamental, substantial, material, grave or so serious as to go to the root of the matter. In sum, in addition to jurisdictional errors, only a fundamental non-jurisdictional error of law can be the basis for the exercise of the High Court's supervisory jurisdiction. *A fortiori*, an error of law not patent on the face of the record cannot found the High Court's intervention by way of its supervisory jurisdiction, where such jurisdiction is exercised in relation to a court. This position of the Ghanaian law is to be contrasted with English law where the modern position is as set out by Lord Denning MR in *Pearlman v Governors of Harrow School* [1979] QB 56, at p. 70, where he stated that:

> "No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction."

This statement of law, in the Ghanaian context, applies only to public bodies and officials, as distinct from courts. Lord Denning justified his statement of the law thus (at p. 70):

> "The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant. But also so to secure that all courts and tribunals, when faced with the same points of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in which court it is heard. The way to to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends."

Whilst I agree with the redoubtable Lord Denning in relation to inferior tribunals and public bodies and officials, I beg to differ, in the Ghanaian context, with respect to inferior (or lower) courts. The avenue of redress for

their errors of law *simpliciter* should be an appeal which is provided for in the Courts Act 1993.

This clarification of the law on the scope of the High Court's supervisory jurisdiction should be enough to dispose of this appeal. The appeal should be dismissed since the error of law on which the learned High Court judge based her order of *certiorari* is not sufficiently fundamental, substantial, material, grave or serious to go to the root of the judgment of the Circuit Court. Nevertheless, a second point that was addressed by Appau JA in his judgment in the Court below deserves discussion in the interest of making the position of the law clear.

The second issue which presents itself for clarification in this case is that relating to whether an aggrieved party from the court below can resort to both judicial review and an appeal at the same time. On this issue, Yaw Appau JA, in delivering the judgment of the Court of Appeal, stated (at p. 114 of the Record) that:

> "Again, the authorities are legion that Certiorari, which is a discretionary remedy would not be granted in favour of an applicant who had already lodged an appeal to a court against the impugned decision while the appeal was pending. See the Supreme Court case of **REPUBLIC V HIGH COURT, ACCRA, EX PARTE ARYEETEY (ANKRAH INTERESTED PARTY) [2003-2004] SCGLR 398 @ 401.**"

However, subsequent to the delivery of Appau JA's opinion, the Supreme Court has held that the fact that an aggrieved party has an appeal pending is no bar to that party applying for *certiorari* in respect of the same matter. It so held in *Republic v High Court, Cape Coast; Ex parte Ghana Cocoa Board (Nana Kwaku Apotoi III; Interested Party)* [2009] SCGLR 603. In the lead judgment

with which other members of the Court agreed, I cast doubt on the authority of the *Ex Parte Aryeetey* case *(supra)* and said (at pp. 612-14):

> "It is no answer to this want of jurisdiction to argue, as does the interested party's counsel, that *certiorari* is a discretionary remedy and that because the applicant has filed an appeal against Ayimeh J.'s refusal to set aside the garnishee order, this court should dismiss the application. The right to appeal from the High Court to the Court of Appeal and the right to apply for the exercise of the supervisory jurisdiction of this Court are both constitutional rights and I see nothing in the constitutional governing provisions of these rights that makes them mutually exclusive. In particular, the supervisory jurisdiction is conferred as follows in article 132:
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> > "The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may, in the exercise of that supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power."
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> The exercise of this jurisdiction is not expressly made subject to an applicant not having previously lodged an appeal in respect of the same matter. So long as the separate requirements of an appeal and of an application for the exercise of the supervisory jurisdiction of this court are complied with, a party should be able to avail himself or herself with either avenue of redress at the same time. If there are any previous cases decided by this court which have held otherwise, I think that this court should depart from them, pursuant to article 129(3) of the 1992 Constitution. Counsel for the interested party cited a case which he claims supports his position.

This is *Republic v High Court, Accra: Ex parte Aryeetey (Ankrah Interested Party).* [2003-2004] SCGLR 398. Upon close scrutiny, this case does not assert that there is rule which prevents an appellant from at the same time applying for relief pursuant to the supervisory jurisdiction of this court. What the court there asserted is a practice which, in my humble view, is not necessarily conducive to justice. This is what Kpegah JSC, delivering the judgment of the Supreme Court in that case, said (at p. 410 of the Report):

> "Needless for us to say that certiorari is a discretional (*sic*) remedy and the conduct of an applicant can disentitle him to the remedy. The circumstances in the instant case, and taking the conduct of the applicant into consideration, we feel obliged to deny him the remedy he seeks. The scales of justice are heavily weighted against him. Moreover, it is not our normal practice in this court to exercise our discretion in favour of an applicant if he has already lodged an appeal to a court against the impugned decision and the appeal is pending."

I certainly consider that we should not follow this practice on the facts of this case. I would make bold and go on to assert further that it is not a desirable practice which should be encouraged. I accept that *certiorari* is a discretionary remedy and agree with Wuaku JSC's view in *Republic v High Court, Accra; Ex parte Pupulampu* [1991] 2 GLR 472 at p. 477 that:

> "Certiorari is never granted if the grant will serve no useful purpose or where no benefit can be derived from it. It is in

> the discretion of the court to grant or to refuse an order of certiorari, and it is not a matter of right: see R v. Newborough (1869) LR 4 QB 585 at 589."

However, I do not consider that on the facts of this case no useful purpose would be served by granting the order. Furthermore, I do not think that the fact alone of the applicant having filed an appeal against the impugned ruling should be an automatic bar to the exercise of our discretion whether or not to grant *certiorari.* Indeed, Wuaku JSC himself in the *Ex parte Pupulampu* case conceded that a party could resort to both an appeal and an application for *certiorari* when he said (at p. 477 of the Report):

> "In my opinion, what the applicant should have done if he had wanted to pursue the matter by praying for an order of certiorari, was to have applied for it at the time he lodged his appeal and then to have the certiorari application stayed until the appeal was heard and disposed of.""

Clearly, I disagree with Appau JA's view that it was an error for the High Court to have considered a *certiorari* application while an appeal was pending before the Court of Appeal against the decision of the Circuit Court complained of. I think that the *Ex parte Cocoa Board* case (*supra)* has overruled the *Ex parte Aryeetey* case (*supra)* and therefore the mere fact of the pendency of an appeal from a decision of a court cannot be a bar to an application for *certiorari* in respect of the same decision. Whether or not the application for *certiorari* succeeds will depend on other factors. This clarification of the law on this second issue will, however, not affect the outcome of this case, since this was not an appropriate case for *certiorari* to lie from the High Court to the Circuit Court for the reasons earlier explained. Accordingly, the appeal is dismissed

and the decision of the Court of Appeal setting aside the ruling of the High Court is affirmed.

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

(SGD) J. ANSAH
(JUSTICE OF THE SUPREME COURT)

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