IN THE SUPREME COURT OF JUDICATURE
IN THE SUPREME COURT JUSTICE
ACCRA-GHANA

CORAM: DR. DATE-BAH, JSC (PRESIDING)
OWUSU (MS), JSC
DOTSE, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC

CIVIL MOTION

NO: J5/31/2011

28TH JUNE, 2011

THE REPUBLIC

VRS

THE HIGH COURT, ACCRA

EX-PARTE: DR. ERNEST ASIEDU OSAFO ……. APPLICANT

ALEX ABOAGYE …….. INTERESTED PARTY

RULING

GBADEGBE, JSC:

We have before us a notice of motion at the instance of the Applicant that seeks to invoke our supervisory jurisdiction under Article 132 of the 1992 Constitution for an

order of Certiorari quashing the ruling of the High Court Accra dated 29th March 2011 in Suit Number BFA.81/2007, by which the body of the Applicant was committed to prison for contempt of court. In the body of the motion paper originating the application herein, the prayer sought was for an order of extension of time within which to apply for certiorari in respect of rulings dated 29 March 201, 13 April 2011 and 21 April 2011. When the matter came up for hearing, learned counsel for the applicant's attention having been drawn to the time frame spelt out in rule 62 of the Supreme Court Rules, CI 16 in relation to such applications, he abandoned his invitation to us that sought extension of time and proceeded with leave of the court to move the application substantively but limited only to the delivery of 29th March 2011. Following this, the parties through their counsel submitted oral arguments to us on the application that concerns the order of the High Court Accra, by which the applicant was condemned into prison for a period of twelve months.

In the course of his ruling in the matter, the learned trial judge of the High Court made a positive finding against the applicant herein as follows:

> "**I find the conduct of the Respondent by not complying with the 26th January order as amounting to contempt of court. I also find the conduct to be deliberate and willful for the reasons stated earlier in this Ruling and further for the fact that the application was first placed before the court on 11 August, 2009, and before me in particular on 23 November 2010.The 1st defendant/respondent since 23 November, 2010, has had a series of adjournment to his benefit to resolve the matter out of court but has failed to do so."**

Pausing here, we observe that what is before us in the application herein is unrelated to the merits of the contempt application, as the complaint on which the processes on which the matter herein are based is concerned only with inquiring into whether or not the learned trial judge of the High Court, whose pronouncement has just been referred to above, acted within jurisdiction. In the body of the motion paper, the applicant founded his challenge to the jurisdiction of the High Court on the fact that the matter was initially before a judge other than the judge who conducted the contempt proceedings and that the absence of a transfer order from the Chief Justice before the matter was placed before the learned trial judge who ordered his incarceration, the proceedings suffered from the absence of jurisdiction. From the explanation offered in support of the said ground, it was quite clear to us that the issue of jurisdiction on

which it turned was a not well founded, but, noting that the matter touched the right of a citizen to be confined by an order of court and in particular the provisions of Article 14 of the 1992 Constitution that guarantees the right to personal liberty, we enabled the application to be proceeded with. Reference is made to the constitutional provision contained in Article 14(1) as follows:

> **"Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following circumstances and in accordance with procedure permitted by law-**
>
> > **(b) in execution of an order of a court punishing him for contempt of court."**

In allowing the applicant to proceed with the application, we offered him the opportunity to have the benefit of the elaborate provisions on fundamental human rights as enshrined in the 1992 Constitution that enjoins us in Article 12 to give meaning and content to the said rights by enforcing their observance. It repays to make a reference to clause 1 of Article 12 that is expressed as follows:

> **"The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and the Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution."**

This being the position, we think it is competent for us to examine the circumstances surrounding the making of the ruling of 29 March 2011 to find out whether the order made against him was in the words of Article 14 of the Constitution **"in accordance with procedure permitted by law.**" The order ,from the processes filed by the parties before us was based on the refusal by the applicant to comply with orders of the High Court that were made previously on the 26 of January 2009 by a court constituted by a judge other than the one who delivered the ruling, the subject matter of this application. In his judgment, the minutes of which are in evidence before us in these proceedings as exhibit EAO 2, the learned trial judge of the High Court made the following orders.

> "**BY COURT: - Application is granted as prayed. Judgment is hereby entered against the defendants in favour of the plaintiffs' in respect of reliefs (1), (111) and (v). ……"**

The said exhibit has inscribed on it in bold letters **"JUDGMENT IN DEFAULT OF DEFENCE."**

It appears that the said judgment was entered by the court under Order 13 rule 6(2) of the High Court (Civil Procedure Rules), 2004, CI 47. A careful examination of the orders made by the High Court, Accra reveals that while relief (1) was substantive, the other reliefs were ancillary to it. The question that comes up is whether in making the said order the court acted in accordance with due process. Since the substantive order made is a declaration, by the settled practice of the courts, such orders to be good must be made only after hearing all the parties to the action or at least offering them an opportunity to be heard. In the case of METZGER v DEPARTMENT OF HEALTH & SOCIAL SECURITY [1977] 3 All ER 444, MEGARRY VC at 451, made the following pronouncement:

> **"The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument, not merely after admission by the parties. There are no declarations without argument; that is quite plain."**

Similarly, the learned authors in **Volume 37 of Halsbury's Laws of England** make the following statement at page 191, paragraph 252:

> "A **declaratory judgment or order should be final, in the sense of finally determining the rights of the parties, but should not be granted in the course of interlocutory proceedings or by way of an interim declaration"**

See also: WELLESTEINER v MOIR [1974] 3 ALL ER 217 at 251.

We think that the purpose of the insistence that the courts make declarations only after hearing the parties is sufficiently retained in Order 13 rule 6 (1) and (2) of the High Court Rules, CI 47 by the requirement that in actions to which the claim that resulted in the judgment in which the declaratory judgment was granted (actions not specifically provided for), the court shall give such judgment as the plaintiff may be entitled by his

statement of claim. In our view, the rule that authorizes the court to enter judgment in default of pleadings in the cases to which Order 13 rule 6 (1) and(2) apply by the words in which it is expressed make it subject to among others the practice of the court as is contained in previous determinations and practice books as regulating the exercise by the court of its power to grant default judgments in respect of specific reliefs. The said rules read as follows:

(1) **" Where the plaintiff makes against a defendant a claim of a description not mentioned in rules 1to 4 against a defendant, and the defendant fails to file a defendant fails to file a defence to the claim, the plaintiff may after the expiration of the period fixed by these Rules for filing a defence , apply to the court for judgment**

(2) **On the hearing of the application the court shall give such judgment as the plaintiff appears entitled to by the statement of claim of the plaintiff."**

From the references made in respect of declaratory judgments in the course of this delivery, we think that since declarations belong to a particular class or type of relief that may be allowed by a court in favour of a party, the use of the words " such judgment as the plaintiff appears entitled to……", means that in making such orders the judge before whom the application is placed should take into account matters , such as for example the practice of the court that regulates the exercise of the power conferred on him. In the instant case, we think that before making a declaratory order, the court should receive evidence from the parties in the matter as appears from the statements alluded to which we accept as correct expositions on the practice of the court in such matters. The insistence on hearing the parties, in our thinking enables the judge who is invited to make the order to hear them before making pronouncements that are good and not limited to only the parties to the dispute. This requirement in our view is satisfied when the judge ensures that the parties to the dispute particularly the one against its pronouncement is sought is served to appear before the court. From Exhibit EAO2, there is no indication that the defendants were served and the learned trial judge appeared not to have received any evidence before acceding to the declaratory relief. The said lapse on the part of the court is an instance of breach of the fundamental right of hearing and deprives the court of jurisdiction in the matter.

Therefore by not hearing the defendant- the applicant herein or not satisfying himself that he was given an opportunity to be heard before making the order against him renders the order amenable to the supervisory jurisdiction of the court. In the case of THE REPUBLIC v THE HIGH COURT, ACCRA; EX PARTE SALLOUM & ORS, an unreported judgment of this court in Suit No. J5/4/2011 delivered on 16 March 2011, ANIN YEBOAH JSC delivering the majority opinion of the court, said:

> "The **courts in Ghana and elsewhere seriously frown upon breaches of the *audi alteram partem* rule to the extent that no matter the merits of the case, its denial is seen as a basic fundamental error which should nullify proceedings made pursuant to the denial.**
>
> **.. It is our opinion that as this court has in several cases held that a breach of the rules of natural justice renders proceedings a nullity, we will declare that the applicants have sufficiently made a case to warrant our supervisory intervention"**

In the instant case the High Court had committed an error so fundamental that has the effect of vitiating its decision of 26 January 2009. The consequence of a denial of the fundamental right of hearing is so well settled and free from conflict of judicial opinion that we do not desire to refer to a collection of cases in affirmation of the rule that in all cases of proven default the judgment that is entered by the court is so fundamentally flawed as to be quashed by certiorari. So fundamental is the right of hearing that when there is a breach notwithstanding the clear provisions of Order 81 of CI 47, which has brought into being a new regime of non-compliance with the rules of procedure, proceedings that suffer from its breach cannot be rectified by courts. When this occurs, we think that the court has no discretion in the matter but to make an accession to the relief of certiorari. See: THE REPUBLIC v THE COURT OF APPEAL & OR EX PARTE GHANA CHARTERED INSTITUTE OF BANKERS, Suit No. J5/21/2011 an unreported judgment of this court delivered on 22 June 2011.

For the above reasons, since the contempt proceedings that resulted in the decision of 29 March 2011 is based on the flawed decision of 26 January 2009, it is as it were affected by the fundamental defect that is the basis of the jurisdiction that the learned trial judge of the High Court, Accra purported to exercise and accordingly in line with settled judicial opinion in such cases, we have no discretion in the matter but to grant the application in terms of the prayer before us. The result is that the application succeeds.

[SGD] **N. S. GBADEGBE**

JUSTICE OF THE SUPREME COURT

[SGD] DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

[SGD] R. C. OWUSU (MS.)
JUSTICE OF THE SUPREME COURT

[SGD] J. DOTSE
JUSTICE OF THE SUPREME COURT

[SGD] P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

COUNSELS:

CHARLES BENTUM FOR THE APPELLANT.

GEORGE AMPIAH-BONNIE FOR THE RESPONDENT.