IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2012

CORAM: AKUFFO (MS) JSC (PRESIDING)
ANSAH JSC
ADINYIRA (MRS) JSC
DOTSE JSC
BONNIE JSC

CIVIL MOTION
No. J8/92/2011

15TH FEBRUARY,2012

THE REPUBLIC

VRS

1. **NII ADAMAH THOMPSON**
2. **HUMPHREY NII TEIKO ARYEE**
3. **ASAFOATSE CHRISTOPHER NETTEY**
4. **NII TETTEH ANKAMAH II**
5. **OFFEI DODOO**
6. **NII ANUM TETTEH**
7. **OTSIAME ALIMO**
8. **ATAA P.OKOE ARYEE**
9. **NAA AYIKAILE NADOBEN I**
10. **JOHN ARYEETEY ARYEE**
11. **PERCY OKOE ADDAY**

EX-PARTE NII TETTEH AHINAKWAH II
SUBSTITUTED BY FRANCIS NII AYIKAI
BY ORDER OF THE COURT OF APPEAL
DATED 25/3/2009

R U L I N G

DOTSE,J.S.C.

In their application, filed on the 2nd day of September 2011 the applicants herein seek the following reliefs:

i. Leave to file additional grounds of appeal,

ii. Leave for extension of time to file amended statement of case and

iii. Leave to adduce fresh evidence

BACKGROUND FACTS

The application herein has its genesis in an action which commenced in the Judicial Committee of the Greater Accra Regional House of Chiefs. In that action judgment was delivered on the 17th day of February 2003, in favour of the respondent herein which inter alia, ordered the Applicants herein to handover stool regalia of the Gbese Stool to the Respondents.

Following the failure and or refusal of the applicants herein to comply with the orders of the Judicial Committee of the Greater Accra Regional House of Chiefs to deliver the stool regalia, the respondent herein, took steps to have them committed for contempt of court.

The High Court, Accra presided over by Dzakpasu J accordingly convicted the Applicants herein of contempt. An appeal lodged by the Applicants against their conviction for contempt to the Court of Appeal was by a unanimous decision of the court dismissed on the 19th November 2009.

Aggrieved by the decision of the Court of Appeal, the Applicants on the 1st of December 2009 filed an appeal against the said decision.

The instant application should therefore be understood as one seeking to add the additional grounds of appeal to those already filed, seek leave for extension of time to amend the statement of case to reflect the additional grounds of appeal and leave to adduce fresh evidence.

We will now deal separately with each of the reliefs being applied for:

1. LEAVE TO FILE ADDITIONAL GROUNDS OF APPEAL

In arguing this application, learned Counsel for the Applicants, Nii Akwei Bruce Thompson stated that there is a jurisdictional issue which is germane to the substance of the suit being commenced before the Judicial Committee of the Greater Accra Regional House of Chiefs and not before the Judicial Committee of the Ga Traditional Council.

The two additional grounds of appeal that Applicants seek leave to add to the original grounds have been stated as follows:

(16) The whole judgment of the Judicial Committee of the Greater Accra Regional House of Chiefs sought to be enforced by contempt proceedings were a nullity and so absolutely unenforceable,

(17) The Greater Accra Regional House of Chiefs had no jurisdiction to hear the matter in exercise of its original jurisdiction.

Responding to the arguments for the filing of additional grounds of appeal, learned counsel for the Respondents, Mr. William Adumua-Bossman argued that being a jurisdictional issue, there is no need for it to be raised specifically for it to be considered by the court.

Learned Counsel for the Respondents', after some brief exchanges with the court agreed that no harm would be caused if the grounds of appeal on jurisdiction are specifically added.

We are accordingly of the view that since the issue of jurisdiction is basic to the commencement of any suit before any adjudicating court or tribunal, it has to be considered at anytime of the trial or appellate process. This means that, this issue of jurisdiction can be raised by the parties or counsel at anytime of the trial or on appeal even for the first time. The authorities are quite certain on this issue. See case of ***Republic v Adansi Traditional Council ex-parte Nana Akyie II & Anr [1974] 2 GLR 126 holden 2*** where the C.A held as follows:

> *"A plea as to the jurisdiction of an inferior court or tribunal could be taken and heard at any time even if the point was not raised in the court below if it appeared to an appellate court that an order against which an appeal had been brought had been made without jurisdiction and it would never be too late to admit and give effect to the plea that the order was a nullity. Chief Kwame Asante v Chief Tawia [1949] W.N. 40, P.C applied."*

See also ***Attorney-General v Faroe Atlantic Co. Ltd. [2005-2006] SCGLR 271.***

It is therefore the view of this court that, this issue of jurisdiction, even though could have been raised as a legal point, or raised suo motu by the court, once the Applicants, who are the appellants to this court have raised the issue it ought to be considered and dealt with once and for all.

Besides, it has to be noted that this is the final court of the land and has appellate jurisdiction as well in chieftaincy matters. This court accordingly grants leave to the Applicants to file the two

additional grounds of appeal stated supra to their original grounds of appeal.

ii. LEAVE TO AMEND STATEMENT OF CASE

By parity of reasoning, once leave had been granted the Applicants to add two (2) new additional grounds, it follows that new arguments must be made to incorporate these additional grounds in the statement of case.

Besides, the new additional grounds raise entirely new issues, i.e. on jurisdiction. It is therefore clear that the applicants will need to amend their statement of case to reflect the new grounds of appeal for which leave has been granted them to file. Reference is made to rule 15 (11) of the Supreme Court Rules 1996 C.I. 16 which states as follows:

> ***"Despite anything to the contrary contained in these Rules, a party to a civil appeal may at any time before judgment apply to the Court to amend a part of the statement of case or in answer of that party and the Court may, having regard to the interests of justice and to a proper determination of the issue between the parties allow the amendment on the appropriate terms."***

It is therefore clear from the above rule that, this court has the power and the discretion to allow a party to amend the statement of case when the justice of the case demands or requires it.

We are therefore of the considered view that, whenever an appellate court, grants leave to an appellant or cross-appellant to file additional grounds and those grounds demand that fresh arguments be made to support and incorporate the said grounds to enable the court deal with the appeal holistically, the court should grant leave to enable the statement of case if already filed to be amended to reflect the new status of the appeal in order to do

justice in the case as is captured in rule 15 (11) of the Supreme Court Rules (C.I. 16).

We will accordingly grant this relief as well. Leave is hereby granted the applicants to file an amended statement of case to reflect only the two new grounds of appeal.

iii. LEAVE TO ADDUCE FRESH EVIDENCE

It is provided by rule 76 (1) & (2) of the Supreme Court Rules, 1996, C.I. 16 as follows:-

> *76 (1) " A party to an appeal before the court shall not be entitled to adduce new evidence in support of his original action unless the court,* ***in the interest of justice, allows or requires new evidence relevant to the issue*** *before the court to be adduced.*
>
> *(2) No such evidence shall be allowed unless the court is satisfied that* ***with due diligence or enquiry*** *the evidence could not have been and was not available to the party at the hearing of the original action to which it relates.*

The above constitute the rules which regulate the circumstances under which this court may permit the adduction of fresh evidence in a matter before it.

Before we proceed any further, it is important to put in proper perspective what this new evidence is or ought to be.

Our understanding of new evidence is that, it is such fresh evidence that is an addition to what is already on record. Being an appeal, the evidence on record must have commenced before any of the lower courts in this case, the High Court. This court is therefore bound by the records presented before it from the lower courts inclusive of the statements of case i.e. the arguments of the parties and or their counsel based on the record as they have it certified

before the lower courts. The parties or their Counsel therefore must base their arguments on this record.

It has been time tested practice that, in an appeal, the parties and the court are bound by the record and no one is permitted to manufacture evidence or refer to any evidence that cannot be supported by reference to evidence on record.

Taking the provisions of rule 76 (1) and (2) of C.I. 16 as a guide, it means therefore that, this court can only allow a party to adduce fresh evidence under any of the following circumstances.

a. The Court must be satisfied that the said evidence could not have been available to the party applying at the first instance after:

   i. due diligence or

   ii. enquiry was made

b. It must be in the interest of justice.

c. It must be relevant to the issue before the court.

In our mind, even before the court considers whether it is in the interest of justice and or relevant for the new evidence to be adduced, the more fundamental and critical issue to consider is whether the evidence could not have been available to the party applying after due diligence or enquiry of same had been made.

This principle was well addressed by Scrutton L.J. in ***Nash v Rochford Rural District Council [1917] 1 KB 384*** at 393 where he stated thus:

> *"The principle which I have to apply is, I think, the principle stated by Lord Chelmsford in the case of* ***Shedden v Patrick (1869) LR I HL SC 470 at 545*** *in these words: "It is an*

invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, ***no opportunity for producing that evidence ought to be given by the granting (of) a new trial****. That is the principle which was acted upon by this court in the first application in the case of* ***HMS Hawke [28 Times LR 319]*** *I take the reason of it to be that* ***in the interests of the state, litigation should come to an end at some time or other and if you are to allow parties who have been beaten in a case to come to court and say "Now let us have another try; we have found some more evidence, you will never finish litigation, and you will give great scope to the concoction of evidence".***

We also take note of the reference by learned Counsel for the Respondent, Mr. William Adumua-Bossman to the well established rules in circumstances such as the instant one laid down by Denning LJ in the case of ***Nash v Marshall [1954] I WRL 1489 at 1491 CA or 1954 3 A.E.R 745 at 748 CA*** as follows:

"First it must be shown that the evidence could not have been obtained with reasonable diligence for us at the trial."

Secondly, the evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive.

Thirdly, the evidence must be such as is presumably to be believed or in other words it must be apparently credible, though it need not be incontrovertible."

The Supreme Court was called upon to make such a determination in the case of **Poku v Poku [2007-2008] SCGLR 996** when it

considered rule 26 (1) & (2) of the Court of Appeal Rules, 1997 (C.I. 19) which are in pari materia to rule 76 of (C. I. 16) already referred to supra.

The Supreme Court held on the core issues raised in the appeal by a majority decision of 4-1 as follows:

> *"On construction, the adduction of fresh or new evidence in the interest of justice" as provided in rule 26 (1) of the Court of Appeal Rules, 1997 (C.I. 19) was clearly delimited by the factors delineated in rule 26 (2).* ***Consequently, in an application to lead fresh or new evidence before the Court of Appeal, the first criterion, which an applicant ought to establish, was whether the evidence sought to be adduced, was neither in the possession of the applicant nor obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was given by the lower court. It was only when that first hurdle had been surmounted, that the court should proceed to determine the other pertinent question of whether or not the intended evidence would have a positive effect on the outcome. If the first criterion was not met, no useful purpose would be served by examining the other factors".***

What is deducible from this ***Poku v Poku*** case referred to supra, is that, the rule on adduction of new evidence exists to assist an applicant who has exhibited signs that he has made really strenuous and genuine efforts at getting this evidence but has met obstacles or that the evidence was not available to the party at the material time.

The rule on adduction of new evidence is therefore not one which is of general application to a party who desires same. The court is mandated under the rules, to be satisfied that the criteria set out above are met before it can be considered.

Now, what is the evidence that the Applicants want to adduce in this case as new evidence?

The evidence which the Applicants are seeking to introduce as new evidence is made up of the following.

i. EXHIBIT B

Hearts News, a sports paper of one of the leading football teams in Ghana and based in Accra of Tuesday 1st May, 2007 with the picture of one Nii Ayi Bonte II, under the caption *"Hail the new Gbese Mantse, Nii Ayi Bonte II – Tommy, New Gbese Mantse"*

ii. EXHIBIT C

The second is the Daily Graphic of Friday 8th June 2007 – which also contains a picture of one Nii Tetteh Ahinakwa II, described as Regent of Gbese, beating divine drums to signify the lifting of the ban on noise making.

iii. Exhibits D and E, are photographs of events that took place and reputed to be those of Nii Ayi Bonte II and his elders beating the drums to signify the lifting of the ban on noise making on 12/6/2008 at the forecourt of the Gbese Palace, and of some youth reputed to be Gbese Youth, conveying drums to an event.

iv. By far, exhibit F is the most authentic record of the fact that on the 27th day of April 2007, those reputed to be kingmakers of Gbese, installed a new Chief of Gbese and accordingly informed the Minister of Chieftaincy Affairs and other stakeholders.

The explanation given by the Applicants for their inability to include all these facts or evidence in their original evidence or depositions before the High Court was that, they filed their affidavit in opposition as well as statement of case on 22nd January 2007 and

14th February 2007 long before these publications and or events took place.

One hurdle that the Applicants must clear in their bid to adduce those fresh pieces of evidence is that, those pieces of evidence could not have been obtained with reasonable diligence at the trial.

If indeed, it is the contention of the Applicants that the Gbese stool paraphernalia which they have been ordered to handover is already in the possession of the Respondents and that they made use of it in the installation of Nii Ayi Bonte II and on other occasions as depicted in Exhibits B, C, D and E, then it behoves on them to satisfy this court that despite the publication in these widely circulating newspapers they were unable after diligent and reasonable effort, to know about the said publications and state of facts.

Besides, we have seen a copy of proceedings dated 4th July, 2007 held before the High Court, Accra, presided over by Dzakpasu J, wherein an application for bail for the Applicants herein, therein Respondents was moved by their Counsel, Nii Akwei Bruce Thompson after their conviction for contempt.

This proceeding is attached and marked as Exhibit A, to an affidavit sworn to by Nii Akwei Bruce Thompson on 4/11/2011.

In those proceedings, coming after the publications referred to as the source material for the new evidence had been published, the Applicants herein never informed the High Court which convicted them for refusing to release the stool paraphernalia that the stool regalia was rather with the Respondents and that they had used them on this and that occasion. Indeed that was a convenient occasion for the Applicants to have raised these issues of the new evidence if they had been diligent. Again in exhibit FNA7, the Applicants herein, therein Respondents at the Court of Appeal, on the 22nd day of December 2009, through their Counsel gave an

undertaking to the Court to comply with the orders of the Judicial Committee of the Greater Accra Regional Tribunal of 17th February 2003. This was the order directing the Applicants to surrender or release the stool of Gbese and other paraphernalia to the Respondent and his elders.

The publications contained in exhibits B & C and the pictures in exhibit D and E really does not absolve the Applicants from compliance with the orders complained of. In any case, it is too late in the day, for the Applicants to contend that the stool regalia they have been ordered to release to the Respondent is rather with them and which they had used on the occasions referred to.

We have also taken into consideration the effect the proposed new evidence will have on the case. To what influence then, would such an evidence as has been depicted in exhibits B, C, D, E and F have on this case where the Applicants have been convicted for contempt for refusing to comply with the orders of the Judicial Committee of the Greater Accra Regional House of Chiefs made on 17th February 2003? All the events took place after their conviction and could not have influenced the Committee in their decision.

The fact that a new Gbese Mantse has been installed by the Respondent and the fact of performance of rituals using cloth and drums which perhaps form part of the stool regalia of the Gbese Stool cannot on their own absolve the Respondents from the allegations which led to their conviction. Those events, if at all they are true, (which have been denied) occurred long after the orders being complained of had been made.

In essence, we are of the view that, the new evidence being sought to be adducted is not in the interest of justice and will also becloud the issues before the court. That is to say, the new evidence apart from not advancing the course of justice in this case is also not relevant to the determination of the issues before this court.

To this end, this court is of the considered view that the Applicants have not satisfied the established criteria based upon the rules of court and decided case law to enable them be granted leave to adduce fresh evidence in this case.

CONCLUSION

Whilst this court grants leave to the Applicants to add two additional grounds of appeal in terms set out supra and also grants them leave to file an amended statement of case to embody or incorporate the said two new grounds of appeal only, the application to adduce new evidence is refused as not having met the established standard required in law.

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

(SGD) S. A. B. AKUFFO (MS.)
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

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

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