IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, AD. 2016

CORAM: DOTSE, JSC. [PRESIDING]
YEBOAH, JSC.
GBADEGBE, JSC.
BAMFO, JSC.
PWAMANG, JSC.

CIVIL APPEAL
NO: J4/56/2016

28TH JULY, 2016

THE REPUBLIC

VRS

KUMASI TRADITIONAL COUNCIL	**-**	**RESPONDENT/RESPONDENT**
EX-PARTE; EBUSUAPANIN AFRAM OWUSU	**-**	**APPLICANT/APPELLANT RESPONDENT**
NANA MENSAH BONSU	**-**	**INTERESTED PARTY APPELLANT**

RULING

PWAMANG, JSC.

The facts giving rise to this interlocutory appeal are not in dispute. On 18th May 2015 the High Court, Kumasi dismissed an application for Judicial Review file by applicant/appellant/respondent/respondent, hereafter to be referred to as "applicant". Being dissatisfied, he filed an appeal to the Court of Appeal. On 5th October, 2015 applicant was served with Form 6 that is the notice of transmission of the record of appeal to the Court of Appeal. Applicant failed to file his

written submissions within 21 days as required by the rules. Nonetheless, on 18th November, 2015 the Court of Appeal heard an application filed by applicant for leave to amend his Notice of Appeal. The interested party/respondent/applicant/appellant, hereafter to be referred to as "respondent", did not oppose the application so the Court of Appeal granted it and gave applicant up to 26th November, 2015 to file the pursuant Amended Notice of Appeal. Thereafter applicant filed his written submission on 15th December, 2015.

When the respondent was served with the written submission he objected to it and filed a motion in the Court of Appeal praying for it to be struck out on the ground that it was filed after 21 days of the service of Form 6 on applicant. That application was heard and dismissed by the Court of Appeal on 27th January, 2016. The court of appeal in its ruling agreed with respondent that the written submission was filed out of time but decided that it would nevertheless exercise its discretion to waive the non-compliance and admit the written submission. It is against that ruling of the Court of Appeal dated 27th January, 2016 that this interlocutory appeal has been brought to this court.

It is trite learning that an appeal is by way of rehearing, which means an appellate court is required to peruse the whole record of appeal and form its own opinion as to whether the findings and conclusions of the court below were justified having regard to the evidence and the applicable law.

At page 12 of his statement of case filed in this court, the respondent stated as follows;

> "Even though the court of appeal exercised its discretion, the discretion, with the utmost respect was wrongly exercised. The exercise was not in accordance with law. In exercising its discretion in favour of the applicant, the court of appeal ought to have had consideration for rule 20 (1) and (2) of C.I.19. The decision of the Court of Appeal to

> rather reward a party who has flagrantly violated express provisions without any apology whatsoever."

Respondent's lawyer based his arguments on Sub-Rule 2 of Rule 20 as it was stated in the Court of Appeal Rules, 1997 (C.I.19). But Rule 20 (1) and (2) have been amended by the Court of Appeal (Amendment) Rules 1999, (C.I. 25) which removed the automatic striking out of appeals upon failure to file written submission within 21 days. C.I.25 gives the court a discretion, if the appellant fails to file written submission within 21 days, whether to strike out or not.

Therefore this charge against the exercise of discretion by the Court of Appeal is misconceived. The court exercised its discretion on the basis of evidence that was placed before it. Applicant's lawyer in arguing against the motion to strike out at the Court of Appeal applied to the court to exercise its discretion and waive the non-compliance by reason of matters deposed to at Paragraphs 7 of his affidavit in opposition to the motion.

Paragraph 7 is as follows;

> "7. Consequently, as I am now advised and verily belief , the interested Party's motion for striking out my written submission is based on the sole ground that it was filed one day late (after a short period of my Counsel's intervening indisposition as aforesaid), and without showing anything at all on the merits against my written submission which has raised several crucial issues of capacity, res judicata, breach of the constitution by wrongful assumption of legislative power and breach of the High Court rule as to discovery as against the Respondent Kumasi Traditional Council and the Interested Party jointly and severally, to say nothing of the breach of the rules of natural justice on the part of the learned judge."

So it is on the basis of the above matters that the court of appeal exercised its discretion, which respondent has conceded, it had in the matter. Where a court has a discretion to exercise in any

matter, it is required to exercise it judicially and unless it is shown that it did not act judicially, an appellate court will not interfere with its decision. In **Crentsil v Crentsil [1962] 2 GLR 171**, at page 175 the Supreme Court held as follows with regard to appeals against the exercise of discretion;

> *'In Blunt v. Blunt where the judgment of the House of Lords on appeal from the Court of Appeal was delivered by Viscount Simon, L.C. it was held that:*
>
> > *"An appeal against the exercise of the court's discretion can only succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact, in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matter into account; but the appeal is not from the discretion of the court to the discretion of the appellate tribunal."'*

We are in no doubt that the Court of Appeal exercised its discretion judicially as there was adequate material upon which it acted. Respondent says the court ought to have taken into account the provisions of Rule 20 (1) and (2) of C.I. 19 in exercising its discretion. But his whole application at the Court of Appeal was premised on that rule and it is the non-compliance with Rule 20 (1) that the court waived. It is thus ridiculous for respondent to say the court did not take into account the very rule he relied on. That argument may only be because lawyer for respondent based his case on the repealed Sub-Rule 2 of Rule 20 of C.I. 19.

We find no merit in the appeal and we dismiss same.

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO-BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

COUNSEL:

KWAKU YEBOAH APPIAH FOR THE INTERESTED PARTY APPELLANT

HUMPHREY MODZAKA FOR THE APPELLANT/RESPONDENT