IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT ACCRA
AD 2015

CORAM: ATUGUBA JSC (PRESIDING)
AKUFFO(MS) JSC
BAFFOE-BONNIE JSC
GBADEGBE JSC
AKOTO-BAMFO (MRS) JSC

CIVIL MOTION
No.: JS/41/2014

21ST JANUARY 2015

THE REPUBLIC

VRS.

HIGH COURT 17, ACCRA

EX PARTE; KWAME EYITI - APPLICANT

AKAN PRINTING PRESS - 1ST INTERESTED PARTY

VICKRAM RAJWANI - 2ND INTERESTED PARTY

RULING

RULING

MAJORITY OPINION

GBADEGBE (JSC):

There is before us a notice of motion praying for an order of judicial review in the nature of certiorari and prohibition on grounds contained in the supporting affidavit of the applicant. The circumstances in which the application has arisen are free from conflict and are as follows. In the course of an action brought to set aside a previous judgment between the parties to these proceedings, the Respondent herein applied by way of a motion in the cause for an order of stay of execution of the judgment in respect of which the action was mounted. It appears that on 06 May 2014 when the said application came on for hearing, learned counsel for the Respondent (Applicant therein) being absent without cause, the application was struck out for want of prosecution as borne out by exhibit APP1. On a subsequent date, 21 May 2014, the learned trial judge, notwithstanding an objection from counsel for the Applicant, received an explanation from counsel for the Applicant in regard to his absence from court and recalled his prior order of 06 May 2014 by which he had struck out the application for stay and directed that the application for stay of execution be argued on the merits. The proceedings of 21 May 2014 resulting in the order recalling the previous order that struck out the application for stay of execution is evidenced by exhibit APP2.

In arguing the application before us, learned counsel for the Applicant contended that, having had the application struck out on 06 May 2014, the court acted without jurisdiction when it received an explanation from counsel at the Bar and restored the application to the list. Our understanding of the argument pressed on us by counsel for the

Applicant is that, as the High Court is a court of record, following the order previously made striking out the application, the learned trial judge should not have received an oral explanation from the Respondent and then recalled his order without an application to relist same. The Applicant's complaint thus appears to raise the question whether before the matter was called, the Applicant would have had any reasonable notice that, at the hearing of the substantive matter, a motion in the cause that was previously struck out with costs might be restored to the list. So stated, the Applicant's complaint speaks to the absence of due process requirement which, if established, affects jurisdiction.

On the other side of the fence, so to say, the Respondent, while admitting that the application was struck out previously, said his client was present in court on that day but he had to go to another court to adjourn a case as the presiding judge was in chambers conducting other proceedings. He added that no sooner had the application been struck out than he turned up in court. In his opinion, if the attention of the learned trial judge had been drawn to the fact that counsel for the Applicant had earlier on come to the court, he would not have proceeded to strike out the application on 06 May 2014.

Although the applicant also seeks from us an order of prohibition directed at the learned trial judge, neither in the affidavit in support of the application herein nor in the statement of case was any reference made to the second limb of the application. The result is that he is deemed to have abandoned that relief. This delivery therefore, is limited to the prayer of the Applicant for judicial review in the nature of certiorari only.

We have examined the processes before us on which the instant application turns and have had regard to the arguments presented to us by learned counsel in the matter. We have come to the conclusion that as the application for stay was previously struck out, it could only have

been restored to the list by an application based on grounds contained in a solemn deposition by the Respondent herein. In our view, it was wrong for the learned trial judge to allow counsel for the Respondent herein to utter from the Bar matters that required proof in a case that was being contested and on the basis of such utterance reverse his earlier decision, particularly when the facts on which his decision was based were contrary to the record of proceedings for that date. In this regard, we do not think that even if on 21 May 2014 counsel for the Applicant herein had not objected to the relistment of the application, it would have had the effect of conferring jurisdiction on the court as in point of fact there was no such pending application on the docket. The learned trial judge in our opinion ought to have directed the Respondent herein to file an application to relist the motion which was on 06 May 2014 struck out instead of what transpired on 21 May 2014. It is our view that it is reasonable to require that a process which is based on a motion that has been struck out can only be restored to the list through the same formal process.

When parties appear before a court pursuant to a schedule of appointment, the only business that can be carried out on a given date is that which was listed before the court and any other matter that might reasonably be connected there with. This is important for the assurance of procedural integrity and predictability. The question that emerges is, following the order of 06 May 2014 by which the application for stay was struck out and without any notification of a pending application to have it restored to the list, it could not have been in the Applicant's reasonable expectation and indeed that of the learned trial judge that at the hearing of the substantive matter on the subsequent date, an oral application to recall his order of 06 May 2014 would be made, as its hearing was more likely to hold up the progress of the action towards its earlier disposal.

This view of the matter accords with settled practice of the court which requires motions that have been struck out to be restored to the list by formal applications in that behalf. In the course of preparing this delivery, we tried in vain if we could come across any previously decided case in regard to the procedure for restoring applications that have been struck out but there are reported cases involving appeals that were struck out such as **Ashchkar v Karam** [1972] 1 GLR 1 and **Fori v Akrobettoe** [1971] 2 GLR 137, which decided that in such cases an application can only be made to restore the appeals to the list for a trial on the merits. Although the said cases were pronounced upon in regard to appeals, we think we should be guided by the principles which were applied in those cases; and develop by analogy similar principles in regard to applications that are struck out. This approach recognises the potential of an existing precedent case to create a new precedent where, as in this case, the circumstances to which it is subsequently applied are not the same with that of the previous case in which the principle was pronounced upon. In our opinion, this is one of the strengths of the common law tradition in which one of the features is judge made law. It seems to us that, as applications are commenced by a solemn process of depositions supporting them, a relaxation in the practice would undermine the purpose for which affidavits are to serve namely swearing to the truth of the facts grounding applications.

We think that the learned trial judge having done that which falls outside the settled practice of the court can be said to have acted without jurisdiction and rumblings whether in the circumstances there was any miscarriage of justice are of no moment as an application for judicial review in the nature of certiorari concerns itself with due process requirements and not the merits. See: **Republic v Committee of Inquiry into NunguaTraditional Affairs Ex-Parte Odai IV and Others**

[1996-97] SC GLR 401. In her judgment at page 14, Bamford-Addo JSC (as she the n was) observed as follows:

> "*A decision made in breach of the rules of natural justice would be quashed even if made correctly…."*

In any event, we are inclined to the view that when a court acts in a manner not sanctioned by the settled practice of the court, having regard to the adversarial nature of proceedings in our jurisdiction, it is indeed, an instance of miscarriage of justice as the person affected by the order made consequent upon the said non-compliance is deprived of the benefit of having a reasonable opportunity to answer the application mounted against a regularly obtained order of the court. We add that the situation in our courts whereby trial judges conduct themselves in the same manner as that which resulted in the order of 21 May 2014 with which we are concerned in these proceedings is a deviation from the practice of the court, which is intended to foster orderly proceedings, and should not be sanctioned by the highest court in the land. There is also the need for us to ensure that the current unhappy trend in our courts whereby proceedings are conveniently conducted without due regard to the settled practice of the Courts, in a misapplication of the policy of promotion of timely disposal of cases, must be resisted by us in order to ensure compliance with due process requirements.

In the result, the application for certiorari succeeds and the ruling of the High Court, Accra dated 21 May 2014 in suit number B Misc. 493/2013 entitled: **Akan Printing Press and Another v Eric Jeff Owusu and Another** are accordingly brought up into this court and same is hereby quashed.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

DISSENTING OPINION

ATUGUBA JSC:

The applicant per his lawyer, Ray Ayersen moves this court for "an order of certiorari directed to the High Court, Accra, presided over by his Lordship Justice Kenneth A. Okwabi to remove into this hon. Court to be quashed the order or ruling of the Court dated 21st day of May, 2014; and for a further order of prohibition, prohibiting the respondent from hearing Suit No. B. MISC 493/2013 entitled (1) Akan Printing Press (2) Vickram Rajwani v (1) Eric Jeff Owusu Boateng (2) Kwame Eyiti*".*

The crux of the application is that the interested parties obtained a relistment of their motion for stay of execution which had been struck out for want of prosecution and upon an oral application.

It is a well-established practice that a matter that has been struck out can be relisted upon application except if statutorily otherwise provided.

I think that this application has been brought per incuriam of the several decisions of this court upholding substantial justice over and above procedural niceties. Indeed in **Hanna Assi (No.2) v Ghana Refrigeration and Household Products Ltd (No. 2)** [2007-2008] SCGLR 161 (with the

concurrence of Sophia Akuffo, Georgina Wood and Aninakwah JJSC), I stated at 29 thus:

"The courts have indeed gone to extraordinary lengths to uphold the substance against the form. In the remarkable case of *Bugden v Ministry of Defence* [1972] 1 ALL ER 1, CA an application was made to the Master for the issue of a concurrent writ. This was granted. But the Master, perceiving that the writ was approaching expiry, suo motu extended its validity. Under the relevant rule Order 6, r 8 (2) of the English Rules of the Supreme Court that could be done upon application to the court. On appeal the court led by Lord Denning MR (Stephenson LJ concurring) held that the absence of application was a mere irregularity and that there were good grounds upon which the Master had acted, on the merits.

Similarly in *Real Estate Developers Ltd v Fosua* [1984-86] 2 GLR 334, CA it was stated per holding (1) of the head note as follows:-

"(1)on the facts, the trial judge was right in making the order of consolidation. Even if the consolidation was ordered without regard to proper procedure in that there was no written application by way of motion or summons, the answer was to be found in Order 70 of the High Court (Civil Procedure) Rules, 1954 (LN 140A), ie the rule dealing with the effect of non-compliance. In any event, counsel had been unable to show how prejudiced or damnified the defendant company was by the consolidation. Daws v Daily Sketch & Sunday Graphic Ltd. [1960] 1 ALL ER 397, CA cited". (The emphasis is mine)

In view of this judicial trend I doubt whether the court which decided (per Sowah JA (as he then was) the case of *Michelletti Polla Ltd v Crabbe* [1976] 1 GLR 108, CA would today have nullified a judgment on the grounds that application for the same was oral and not by motion."

Similarly in **Halle & Sonns SA v Bank of Ghana & Warm Weather Enterprise Ltd**. [2011] SCGLR 378 it is stated in the headnote as follows:

" (2) *It was not possible for an honest litigant in the courts in Ghana to be defeated by any mere technicality, any slip and any mistaken step in litigation in view of rule 79 of the Supreme Court Rules, 1996 (CI 16); rule 63 of the Court of Appeal Rules, 1997 (CI 19), and Order 81 of the High Court (Civil Procedure Rules, 2004 (C I 47)*. Consequently, in the instant case, the notice of appeal filed by the defendants, pursuant to the leave for extension

of time granted by the Court of Appeal was proper and the Court of Appeal had jurisdiction to entertain the appeal. Dictum of Lord Denning MR in *Harkness v Bell's Asbestos & Engineering Ltd*. [1967] 2 QB 729 at 735-736, CA cited.

Per curiam. We must allow flexibility in the rules of procedure to enable courts to make such orders as it considers just or necessary for doing justice to the case. We therefore agree with Prof. Ocran JSC that we must totally reject what his Lordship referred to in the case of Gihoc Refrigeration & Household Products v Hanna Assi [2005-2006] SCGLR 458 at 492 as "technicism... as a judicial approach to case resolution." In our opinion, rule 63 of the Court of Appeal Rules, 1997 (CI 19), gives the Court of Appeal the flexibility in resolving such technicalities in the event of a breach or non-compliance with any rules of procedures.

Per curiam. Our Courts have now come so far that any wrong step taken in legal proceedings should not have the effect of nullifying the judgment or proceedings, except in those cases where the court has no jurisdiction. A court has discretion in such matters to waive or set aside the proceedings depending on the circumstances of each case: see Order 79 of the Supreme Court Rules, 1996 (CI 16); Order 63 of the Court of Appeal Rules, 1997 (CI 19) and Order 81 of the High Court (Civil Procedure) Rules, 2004 (CI 47)." *(The emphasis is mine).*

Mr. Ayersen also complains that the trial Judge dealt with the motion without having first relisted it. Again this is formalism. In **Royal Exchange Assurance v Brew** [1971] 1 GLR 371 C.A the court was faced with a situation in which without expressly vacating a prior interlocutory judgment the trial court allowed an intervener, Kofi Mensah to fight the case on its merits and deny vicarious liability. Consequently, Apaloo J.A (his brethren concurring) held at 375 thus

"It is this fact that led the learned judge to hold that *the interlocutory judgment must have been vacated by necessary implication*. In my opinion this is a reasonable view to take of the matter." *(The emphasis is mine)*

In this case upon the oral application for relistment, the record of proceedings (App.2) states as follows:

"Counsel:- Geofrey H. Quist for Plaintiff

Ray Ayerson for defendant

On the 6th May 2014 the motion for stay was struck out. Counsel for the applicant is in court today and has explained that on the day that the motion was struck out he was in Court but left for another Court. His clients were present when the motion was struck out Counsel therefore submits that the court must use it discretion to relist the motion."

Objection: The review of the Court's decision would delay proceedings.The order was clear.

By Court: Applicant is given the opportunity to argue on the grounds of natural justice. The delay complained of would had to any injustice.

Before the court is motion for Stay of execution of the judgment of the Circuit Court dated 28th day of May.

Counsel moves in terms of motion paper, and supporting affidavit. Counsel relies on all the depositions in support of the applications."

Counsel Ray Ayerson also addressed the court on the motion for stay of execution. It is quite clear that mutatis mutandis the trial Judge in this case did impliedly relist the motion for stay of execution for argument and counsel on both sides addressed the court in extenso before the court ruled on it.

In this case the applicant never objected to the irregularity of the oral application to relist the motion for stay of execution but was heard on the merits throughout the proceedings to which this application relates.

Had the applicant attempted to impeach the proceedings under Order 81 r. 2 of the High Court (Civil Procedure) Rules , 2004 CI 47 he would have failed because that rule inter alia requires that "**the party applying has not taken any further steps after knowledge of the irregularity".** Here the applicant took full further steps in arguing the proceedings on their merits, see **Ofori v Donkor** [1976] 1 GLR 275.

He cannot be allowed to succeed by a side door of this court. In **Republic v High Court, Koforidua; Ex parte Ansah-Otu & Another (Koans Building Solutions Ltd – Interested Party)** [2009] SCGLR 141 this court unanimously held in holding (3) of the headnote thus:

"An order of certiorari being a discretionary remedy, *the conduct of the applicant would also be considered in deciding to grant or refuse the*

application. Under Order 81, r 2 (1) and (2) of CI 47, a party affected by the non-compliance of the rules of court might apply to the trial court to set aside the proceedings for irregularity, provided an application was made timeously and without taking any fresh step in the matter after knowledge of the irregularity. *Where an applicant took fresh steps after knowledge of the irregularity, his chances of succeeding on his application, would be minimized. In the instant case, the applicants had earlier applied to the trial High Court for a review of the injunction order sought to be quashed. By taking recourse to that fresh step, they imperiled their chances of success in their application for certiorari*. **Republic v Akyem Abuakwa Traditional Council; Ex parte Sakyiraa II** [1972] 2 GLR 115 cited." *(The emphasis is mine).*

I would say that there is no error of law on the face of the record of these proceedings, properly so called. It has been held over and over again by this court that the errors of law that would earn certiorari from this court are those that are serious, fundamental or so grave that they nullify the decision in question. For my part, however, since nullity evinces the idea of lack or excess of jurisdiction but certiorari is not limited to such situations, I would add that where the error of law renders the decision obviously wrong, certiorari also lies. Obviously where the error, if any is healed, recalled or negated by some other considerations of the law, such as Order 81 r 2 of CI 47 it would be a truncated view of the relevant applicable law to apply parts of it and ignore other competing parts of it in a certiorari application, even though one does not deal with the merits of such an application. Order 19 r. 1 which requires applications to be by motion is subservient to Order 81.

It is even noticeable, though the interested parties do not take the point, that even though their counsel was absent when the motion for stay was called the interested parties were present.

Therefore it was non pars judicis to peremptorily strike out their motion for alleged non prosecution. There is nothing on the record to indicate that the interested parties were asked of their stance in view of the absence of their counsel. Therefore the trial Judge lacked jurisdiction to summarily strike out their motion. Consequently, even if to some minds he was in error in relisting the motion on an oral appicaition his course of action is sustainable under the principle of **Mosi v Bagyina** [1963] 1 GLR 337 in vacating his earlier order and dealing with the motion on its merits and it matters not that he professed to be acting on the practice of relisting a struck out process. For a superior

court can even suo motu vacate a void order no matter the method by which it came to its notice.

Applying the foregoing principles I hold that no error of law has been shown on the face of the record. And in any case since certiorari is a discretionary remedy, the conduct of the applicant, approbating and reprobating the proceedings and the absence of any miscarriage of justice or prejudice to the applicant; this application fails and is dismissed.

I regret that I cannot agree with the decision of my brethren to the contrary.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

COUNSEL

RAY AYERSEN ESQ. FOR THE APPLICANT.

GEOFFREY H. QUIST FOR THE 1ST AND 2ND INTERESTED PARTIES.