IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: AKUFFO (MS), CJ (PRESIDING)
ATUGUBA, JSC
ANSAH, JSC
ADINYIRA (MRS), JSC
DOTSE, JSC
YEBOAH, JSC
BENIN, JSC

REVIEW MOTION
NO. J7/15/2017

14TH MARCH, 2018

STANDARD BANK OFFSHORE
TRUST COMPANY LIMITED

47- 49 LA MOTTE STREET
ST. HELIER, JERSEY
CHANNEL ISLANDS JE4 4X4

(SUING ON BEHALF OF CERTAIN
INVESTORS IN PROMISSORY NOTES

1. SYPHYNX CAPITAL MARKETS PCC INVESTORS &
2. TRICON TRADE MANAGEMENT LIMITED

SUBSTITUTED BY

DOMINION CORPORATE TRUSTEES
LIMITED ..... PLAINTIFF/RESPONDENT/RESPONDENT/APPLICANT

ESPLANADE, ST HELIER
JERSEY JEI OBD

VRS

1. NATIONAL INVESTMENT BANK
LIMITED ..... 1ST DEFENDANT/APPELLANT/APPELLANT/RESPONDENT

37 KWAME NKRUMAH AVENUE

2. ELAND INTERNATIONAL GHANA
LIMITED ..... 2ND DEFENDANT

39/40 SOULA LOOP
NORTH LABONE (SHC), ACCRA

3. DANIEL CHARLES GYIMAH - 3RD DEFENDANT

ACCRA

RULING

DOTSE, JSC:-

This is a Ruling premised upon an application at the instance of the Plaintiffs/Respondents/Respondents/Applicants, hereafter referred to as the Applicants praying for a review of the unanimous judgment of the ordinary bench of this Court delivered on the 21st day of June, 2017 which allowed an appeal filed by the 1st Defendants/Appellants/Appellants/Respondents hereafter referred to as the Respondents.

The application for review was supported by a 52 paragraphed affidavit, sworn to by Mr. Kwame Pianim, who described himself as the legal representative of the Applicants herein.

The Respondents herein vehemently opposed this application for review and in this respect a forty paragraphed affidavit in opposition was sworn to by Robertson Kpatsa Esq., who described himself as Head of Legal Department of the Respondent Bank.

GROUNDS OF THE REVIEW APPLICATION

This application for review has been brought on the following grounds:

i. The Judgment of the ordinary bench of the Supreme Court delivered on 21st June, 2017 was given per incuriam relevant case law and statute law.

ii. The ordinary bench of the Supreme Court misapplied the facts and the ratio decidendi in the case of ***Naos Holdings v Ghana Commercial Bank [2005-2006] SCGLR 407*** and wrongfully declined to exercise their power to amend the Applicant's writ, thereby occasioning a gross miscarriage of justice; and

iii. The demands of justice make the exercise of the court's review jurisdiction extremely necessary to avoid irremediable harm to the Applicant.

ARGUMENTS OF COUNSEL

Even though learned counsel for the parties have all relied on their affidavits and statements of case filed, they were all given some time to expatiate on these processes and grounds by oral submissions in court as follows:-

BY COUNSEL FOR APPLICANTS

Learned counsel for the Applicants, Nene Amegatcher in his submission argued as follows:-

1. That, the ordinary bench of this Court in it's judgment held that the Applicant, having failed to name the foreign beneficiaries and their resident addresses

on behalf of whom the action had been mounted were in breach of Order 2, r. 4 (2) of the High Court, (Civil Procedure) Rules, 2004 (C.I. 47) and therefore lacked capacity to even commence the action.

Learned counsel however argued that, under Order 4 r 13 of C. I. 47 (already referred to supra), the Applicants were entitled to sue as *"a trustee"* without the need to join the beneficiaries of the trust or estate and accordingly, there was no need to also endorse the names of and addresses of such persons.

Learned counsel also referred to the Court, a long line of cases decided by this court in respect of which this court applied order 81 rules (1) and (2) of C.I. 47 to rectify non compliance with the rules of court.

See cases of ***Hydrafoam Estates (Gh) Limited v Owusu (per Lawful Attorney) Okine and others [2013-2014] 2 SCGLR 1117 and Ghana Ports and Harbours Authority v Issoufou [1991] 1 GLR 500***, just to mention a few.

In further argument, learned counsel for the Applicants contended that, this Review bench should apply Order 81 r (1) and (2) and rectify the non compliance in order to achieve substantial justice in this case.

It was the contention of learned counsel that, not having raised this issue of capacity in the High Court and the Court of Appeal, it was wrong for the Respondents to have raised this issue of capacity in the Supreme Court to which they did not have the opportunity to really respond.

In this respect, learned counsel argued that, in the capital market it is difficult to disclose all the beneficiaries who may be about 500, 500,000 or 1,000,000 and even more. It is because of this difficulty that normally Trustees are appointed to mount such cases as is provided under Order 4 r. 13 of C.I. 47.

Learned counsel contended further that, the issues of non compliance and lack of capacity are two different matters that deserve separate and distinct considerations. In this respect, learned counsel concluded this aspect of his submissions that, on the basis of the maxim *"generalia specialibus non derogat"* Order 2 r. 4 (2) is incompatible with Order 4 r. 13 (1) which allows Trustees to dispense with the endorsement of the resident status and addresses of the persons on behalf of whom the trustee has sued.

It is the view of learned counsel that order 4 r. 13 which is a specific provision dealing with beneficial interest in trust property or an estate, takes precedence over order 2 r. 4 (2) which is a more general provision dealing with plaintiffs who sue in a representative capacity.

2. In respect of arguments on the second ground of this review application, learned counsel argued that the ordinary bench relied very heavily on this court's decision in the case of **Naos Holdings Inc. v Ghana Commercial Bank [2005-2006] SCGLR 407** which according to the Applicants is distinguishable from the instant review application.

Learned counsel argued that, the ordinary bench should have applied Order 81 of C. I. 47 as was used by the Supreme Court in the case of ***Owusu Domena v Amoah [2015-2016] 1 SCGLR 790.***

3. Finally, in respect of the third ground of this review application, learned counsel argued that this review bench must ensure that substantial justice is seen to be done. This is because if the ordinary bench decision is allowed to stand, it will amount to substantial miscarriage of justice as the cause of action arose in 2009 and the Applicants would be deemed to be statute barred.

It was further contended that, the amount involved is huge, in excess of USD60 million and still counting. Learned counsel therefore prayed the Court to grant the review application.

BY COUNSEL FOR RESPONDENTS

COMPETENCE OF THE REVIEW APPLICATION

Learned counsel for the Respondents, Benson Nutsukpui argued that, the application has not passed the threshold of a review application and therefore urged the court not to consider the merits of the application. This is because all the matters raised by the Applicants for the review of the decision of the ordinary bench had been exhaustively dealt with by the judgment of the court.

In that respect, learned counsel for the Respondent argued that the instant application is nothing more than the Applicants attempting a second bite of the cherry which is tantamount to unsuccessful litigants turning this review jurisdiction into a forum to re-argue their case.

Learned counsel also argued that no exceptional circumstances have been shown to exist in this case and the reveiw application must therefore be dismissed. Counsel

referred to the unanimous decision of this court in the case of ***Okudzeto Ablakwa (No.3) and Another v Attorney-General & Obetsebi Lamptey (No.3) [2013-2014] 1 SCGLR 16.***

On the merits of the case, the arguments of substance of learned counsel for the Respondents will briefly be summed up thus:-

1. Counsel argued that there is no contradiction between Order 4 rule 13 (1) and Order 2 rule 4 (2) for the maxim *"generalia specialibus non derogat"* to apply in the first place as it does not arise at all. According to learned counsel, order 4 r 13 (1) is rather the general provision referring to Trustees whilst order 2 r 4 (2) makes specific reference which is applicable in terms to Trustees who sue on behalf of persons not resident in the jurisdiction. Learned counsel contended that, non compliance with requirements of Order 2 r. 4 (2) cannot therefore be waived.

2. Secondly, learned Counsel for Respondents argued that, the decision of this court in the NAOS case actually turned on the conclusion of the court that the writ was void for failure to state the residence of the Plaintiff and that the ordinary bench did not misapply the facts and ratio decidendi in the Naos case.

3. Finally, learned counsel for the Respondents argued that the decision of the ordinary bench has not occasioned any miscarriage of justice. Counsel also contended that the relationships between the investors and Sphynx Capital

Markets PCC and Iroko Securities are not governed by Ghanaian Law and the Ghana Statute of Limitations is irrelevant to the determination of a cause of action under English law. Counsel therefore concluded that any bonafide holder for value of the promissory notes issued by Eland International Ghana Limited has always had the opportunity to institute an action on its own and not dependent on the Plaintiff's action.

Responding to the arguments that the arguments on order 2 r. 4 (2) was raised in this court for the first time, learned counsel stated that the Applicants could have called in aid Rule 76 of the Supreme Court Rules, C. I. 16 which allows this court under some conditions e.g. interest of justice and the special circumstances of the case to permit the adduction of evidence in this court. That not having been done, learned counsel prayed that the application for review lacks substance and must be dismissed.

COMPETENCE OF THIS REVIEW APPLICATION

In the case of ***Arthur (No.2) v Arthur (No.2) [2013-2014] 1 SCGLR 569 at 579 – 580***, this court in a unanimous decision in a review application, after evaluating the scope of review applications generally pursuant to Rules 54 and 55 of the Supreme Court Rules, 1996 C. I. 16, and considering the effect and application of the following cases, laid down a road map that must be complied with to ensure a successful review application.

Some of the cases referred to were,

i. ***Mechanical Lloyd Assembly Plant Limited v Nartey [1987-88] 2 GLR 598 at 664***

ii. ***Quartey v Central Services Co. Limited [1996-97] SCGLR 398***

iii. ***Bisi v Kwayie [1987-88] 2 GLR 295, SC***

iv. ***Koglex (GH) Limited v Attieh [2001-2002] SCGLR 947***

v. ***Internal Revenue Service v Chapel Hill Limited [2010] SCGLR 827 at 850, especially at 852 – 853, just to mention a few.***

This is what the court laid down in the Arthur (No.2) v Arthur (No.2) case supra.

"We are therefore constrained to send a note of caution to all those who apply for the review jurisdiction of this court in respect of rule 54 (a) of C. I. 16 to be mindful of the following which we set out as a road map. It is neither an exhaustive list nor one that is cast in iron such that it cannot be varied depending upon the circumstances of each case.

i. *In the first place, it must be established that the review application was filed within the time lines specified in rule 55 of C. I. 16.*

ii. ***That there exists exceptional circumstances to warrant a consideration of the application.***

iii. ***That these exceptional circumstances have led to some fundamental or basic error in the judgment of the ordinary bench.***

iv. That these have resulted into miscarriage of justice (it could be gross miscarriage or miscarriage of justice simpliciter).

v. The review process should not be turned into another avenue as a further appeal against the decision of the ordinary bench.

vi. The review process should not be used as a forum for unsuccessful litigants to re-argue their case

It is only when the above conditions have been met to the satisfaction of the Court that the review panel should seriously consider the merits of the application." Emphasis

1. There is unanimity that the decision of the ordinary bench was rendered on 21st June 2017. There is also no doubt that this review application was filed in the Registry of this Court on 20th July 2017, thereby complying with Rule 55 of the Supreme Court Rules, C. I. 16 which provides that an application for review shall be filed in the Registry of the court not later than one month from the date of the decision sought to be reviewed. The first requirement in the road map in the Arthur (No.2) case supra has therefore been complied with. We will deal with the requirements in (ii) to (iv) set out in ***Arthur (No.2)*** supra together as a common principle.

2. In order to adequately deal with the resolution of the above requirements and others, we have to turn to the judgment of the ordinary bench for guidance. Our respected brother, Benin JSC, through whom the entire ordinary bench

spoke with unanimity considered the appeal on the basis of what was described as a ***"technical but profound legal objection to the entire proceedings on ground on non compliance with the provisions of order 2 Rule 4 (2) of the High Court (Civil Procedure) Rules, 2004 C. I. 47 and urged the court to dismiss the action.*** *Indeed they were challenging the capacity of both the original and the substituted Plaintiff, per paragraph 4.0 of the Statement of case." Emphasis*

The ordinary bench then dealt at length with the said order 2 Rule 4(2) of C. I. 47. It was in the course of their analysis of the said rule and it's application that the decision of this court per Sohpia Akuffo JSC (as she then was) in the case of ***NAOS Holding PSC v Ghana Commercial Bank [2005-2006] SCGLR 407*** was relied upon. The court then proceeded to state the Respondent's herein, therein Appellants arguments in respect of this NAOS case as being on all fours with the instant case. The Court then stated thus:-

"That case" a reference to the NAOS case, "like the instant, involved the issuance of promissory notes which has been guaranteed by the defendant bank. *"The Plaintiff sued in its capacity as the holder in due course of the promissory notes. The defendant entered conditional appearance and applied to have the writ dismissed on this relevant ground that the existence of the Plaintiff as a foreign entity was not disclosed and so too was its address not provided in the endorsement. This court affirmed the decision of the courts below that had upheld the application to dismiss the writ."*

The ordinary bench then proceeded to set out the arguments of the Appellants therein, herein Respondents which are as follows:-

1. That the writ of the Applicants herein, therein Respondents did not disclose the fact that the Plaintiff is suing on behalf of foreign based persons.

ii. Secondly, that the foreign residential address of the investors or companies the Plaintiff represents has not been disclosed on the writ.

iii. Finally, that the persons on whose behalf the Plaintiff issued the writ were not disclosed or identified with specificity."

The court then proceeded with diligence by setting out in detail the various metamorphosis that the Plaintiff's (Applicants herein) writ had undergone since the issuance of the writ.

The Applicant's writ commenced with the description of the Plaintiffs as ***suing on behalf of certain Investors.*** The certain investors were not disclosed, but an amendment of the writ which was granted by the High Court on 21st June 2010 led to the amendment which introduced the expression ***"on behalf of certain investors in promissory notes"*** which ***introduced Sphynx Capital markets PCC Investors and also Tricon Trade Management Limited as the investors on whose behalf the writ was issued by the Plaintiff."***

The ordinary bench proceeded to analyse further the amended pleadings which gave a different picture altogether. For example, paragraph 13 of the amended statement of claim reads thus:

"On the 23rd day of May 2007, ***Edland International Ghana Limited, through Iroko Securities Limited of London, United Kingdom discounted the said promissory notes to investors of Sphynx Capital Market PCC, a Mauritian incorporated entity and others" emphasis***

What this means is that, Sphynx are not the Investors per se and that there are others besides, Sphynx. The ordinary bench proceeded further to introduce another dimension in paragraph 18 of the Statement of Claim. The Applicants herein, therein Respondents argued in response to the said analysis and claims of the Respondents herein that the Writ was in breach of Order 2 r. 4 (2) of C. I. 47 as follows. This is how the ordinary bench captured these arguments.

"In response to the issue that they did not state the address of Syhynx and Tricon on the writ, the Respondent counsel in paragraph 24 of their statement of case stated that the address of Sphynx was to be found in exhibit C which was tendered at the trial. Yet they concede that the address of Tricon was not disclosed anywhere. But they stated that ***"for purposes of serving court processes SBOTCJ and it's replacement, Dominion Corporate Trustees Limited were always available.*** *This point can quickly be disposed of in the sense that the rule does not require the address for service of the plaintiff;* ***what is required is rather the address of the foreigner on whose behalf the Plaintiff has sued.*** *And there are good reasons why this requirement is in place." Emphasis*

Throughout this review hearing the Applicants have been re-arguing the same points they made before the ordinary bench contrary to the settled practice of this court.

The ordinary bench then considered the other arguments of the Applicants herein, therein Respondents that the said defect in the writ can be cured by the court and relied on some decisions of this court, notably, ***Opoku (No. 2) v Axes Co. Ltd (No.2) [2012] SCGLR 1214*** and the case of ***Nana Yaw Owusu & Others v Hydrafoam Estates Limited*** referred to supra. See also the cases of ***Republic v High Court, Ex-parte Allgate Co. Limited (Amalgamated Bank Ltd-Interested Party) [2007-2008] SCGLR 1041, Halle & Sons v Bank of Ghana & Anr [2011] 1 SCGLR 378 at 384*** *and finally* ***Obeng v Assemblies of God, Church Ghana [2010] SCGLR 300 at 324, just to mention a few.***

It must be noted that, we have taken pains to refer to some of the cases referred to and relied upon by the Applicants to illustrate in this ruling that the ordinary bench indeed considered in detail all the arguments made by the Applicants in response to the incisive arguments of the Respondents before the ordinary bench. We note also that the ordinary bench considered the possibility of allowing the Applicants to amend the writ to supply the address of SPHYNX and TRICON. **The court however declined that option because the rule is that, the identity of these entities as well as their addresses must be in place before the issuance of the writ of summons**. They concluded that the writ cannot be amended after it had been issued to comply with requirements.

It is interesting to observe and note that the ordinary bench was very emphatic on the scope of the rule in the NAOS and the other cases as well. On the NAOS case, the court was emphatic as follows:

"In the NAOS case, the argument that the Plaintiff's address had been disclosed in the Power of Attorney did not find favour with the court. The authority of NAOS Holding is clear that if the writ is issued without satisfying the requirements imposed by the rule, it is void. The court cannot grant an amendment to cure that which is void." Emphasis

The court also discussed all the cases relied upon, and either distinguished it's application or clearly stated its non applicability to the principles of law involved. This court has been very consistent in its desire in not turning our review jurisdiction into a forum for unsuccessful litigants embarking upon an appeal.

Similarly, this court seriously frowns upon litigants who fail to find favour with the exposition of the law by the ordinary bench in forcing to have their way by embarking upon review as in this case.

Considering the road map set out in Arthur (No. 2) supra, and taking into consideration our detailed analysis of the judgment of the ordinary bench we want to reiterate for the purposes of emphasis the dictum of Adade JSC (of blessed memory) in the case of ***Mechanical Lloyd Assembly Plant Ltd. v Nartey,*** (supra)

"The review jurisdiction is not intended as a try on by a party losing an appeal; ***neither is it meant to be resorted to as an emotional reaction to an unfavourable judgment****"* emphasis

The ordinary bench took pains to address all the procedural issues that arose from it's application of Order 2 r 4 (2) and Order 4 r. 13 and applied the rules correctly in our view. It is pointless to re-argue the same points here. By the combined import of all the requirements stated in (Arthur No. 2) supra, and other principles for review, this type of practice in turning reviews into appeals etc. is not allowed, and is indeed frowned upon by the practice of this court.

Before we conclude this matter, we wish to refer to the unanimous decision of this court in **Okudzeto Ablakwa (No.3) and Another v Attorney-General & Obetsebi Lamptey (No. 3)** supra, where the court held as follows:-

> **"Indeed, the applicants based their case for review primarily on inviting this Court to depart from its previous decision in *Nii Kpobi Tettey Tsuru III (No.2) case.* In our view, a review application will usually not be the right context in which to exercise the power of the Supreme Court to depart from its own previous decision. This is so particularly when the applicant in question has not previously invited the Court, during the argument before it prior to the judgment sought to be reviewed, to depart from its earlier binding decision. In short, in our considered view, the applicants have not made a sufficient case for this court to enter into a full review of this case on its merits. This is because they have not established an essential element in the legal concept of "exceptional circumstances which have resulted in miscarriage of justice" as interpreted in the case law. That essential element is proof of a fundamental error of**

law by the Supreme Court. Rule 54 of the Supreme Court Rules, 1996 (CI 16) requires reliance on either exceptional circumstances or discovery of new and important matter or evidence." Emphasis

From the ratio of the decided cases of this court on review, it is immaterial if the applicant for a review considers the decision of the ordinary court to be wrong in law or has an emotional reaction to it, as in this case the magnitude of the amounts involved or the shutting of the door to Applicants because of effluxion of time in instituting a fresh action. These are not factors that a review bench normally takes into consideration save exceptional circumstances or failure to prove fundamental error.

CONCLUSION

Having considered the entirety of the arguments made by the Applicants for a review of the decision of the ordinary bench dated 21st June 2017 and considering all the processes filed in respect of this review application, we conclude our decision as follows:-

1. The judgment of the ordinary bench of even date was not given per incuriam relevant case law and statute. For purposes of emphasis we reiterate the position that failure to comply with the pre-requisites for the issuance of a writ under order 2 r. 4 (2) renders the writ void and it cannot be amended or waived. Order 4 r. 13 cannot be used to give validity to such a rule of mandatory practice. The maxim *"generalia specialibus non derogat"* does not even arise.

2. The ordinary bench as has been explained supra did not misapply the facts and the ratio in the NAOS decision.

3. The circumstances of this case does not merit the consideration and grant of ground three supra.

For the above reasons, the application for review of the decision of the ordinary bench of this court dated 21st June 2017 fails and is accordingly dismissed.

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

AKUFFO (MS), CJ:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

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

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BENIN, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

ATUGUBA, JSC:-

I have had the advantage of reading beforehand the Ruling of my industrious and able brother Dotse JSC.

After considering this matter in the round I am reluctantly driven to concur in the dismissal of this Review application.

I was at the brink of preferring cautious cowardice to perilous certainty with regard to the decision of this matter when I felt compelled to retreat therefrom.

It is trite learning that the Legislature knows the law and legislates with the existing law in mind. That being so the decision of the ordinary bench in this case in holding the writ in this case void for non disclosure of the addresses of the foreign persons on whose behalf the applicant sued is, with the greatest respect, difficult to support. There has been a long settled Judicial attitude in favour of saving actions and other processes from perdition on account of procedural blunders.

With Rules in *pari materia* with the High Court (Civil Procedure) Rules, 2004 (C.I.47) the consistent path of the courts has been exemplified by principles to the effect, as stated by Mensah Boison J (as he then was) in *Republic v Ga Traditional Council and Another; Ex parte Damanley* (1980) GLR 609 at 622 that "*The courts have always been reluctant to penalize parties for their errors, especially procedural errors, unless they result in injustice to the other party*. In *Republic v. Asokore Traditional Council; Ex parte Tiwaa* [1976] 2 GLR 231, C.A. the court, faced with a similar situation affirmed that principle. At page 238 of the judgment the court relied on a passage in *Cropper v. Smith* (1884) 26 Ch.D. 700 at p. 710 by Bowen L.J. which I respectfully, adopt:

> "it is well established principle that *the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights* . . I know of *no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party*."

In the decision of the ordinary bench emphasis is placed on the fact that the requirements breached in these proceedings precede the filing of a writ.

However one would have thought that all prerequisites to the issue of a writ are matters that precede the filing or issue of the writ. Even with such prerequisites non compliance with them has not been held to be fatal. Thus in *Opata v. Akussie* (1979)GLR 262 Taylor J (as he then was), was confronted with the stark and compelling prerequisites of O.16, r.19 of the then High Court (Civil Procedure) Rules, 1954 (L.N. 140A) as follows:

> "*Before the name of any person shall be used in any action as next friend of any infant* . . . such person shall sign a written authority to the solicitor for that purpose, *and the authority shall be filed in the Registry of the Court in which the cause or matter is proceeding*."

This provision was clearly breached. But as held in the headnote of that decision "under L.N. 140A, Order 16, r.19 the concern of the court where an action was brought on behalf of an infant plaintiff, was to have an adult able and willing to exercise control of the proceedings on behalf of the infant and if necessary to give security for the costs of the defendant. The status and powers of a next friend made it clear that his consent to *the use of his name was not merely a technical requirement* and a solicitor was under *a duty before he commenced an action to obtain that consent* and take instructions from the next friend and not the infant. *Where, as in the instant case, that consent had not been obtained, the court to jealously safeguard the infant's interest, should have recourse to Order 70, r.1 and should adjourn to enable the written consent to be filed*." (e.s)

Similarly in *Seyire v Amemana* (1971) 2 GLR 32 C.A at 46-47 Azu Crabbe J.A (Amissah and Anin JJ.A concurring) said:

> "In *MacFoy v United Africa Co., Ltd.* [1962] A.C. 152, P.C., the delivery of pleadings in the long vacation *without the leave of the court or judge, as was required under the relevant rule of court, was held to be an irregularity only*, and *not a nullity*, and it was therefore a matter for the discretion of the court whether it should be set aside or not.
>
> In *Cooper v. Cooper [1964]* 1 W.L.R. 1323, it was held that *the failure to obtain the leave of a judge as required by rule 3(2) of the Matrimonial Causes Rules, 1957, resulted in the filing of the petition being an irregularity which the court had jurisdiction to set aside, but not a nullity which was incurable.* In that case *the court granted retrospectively that leave which should have been obtained when the petition was filed so that evidence in support of the petition could be heard*.
>
> It seems clear, therefore, that *in this case failure to obtain the direction of a judge as to the mode of giving the security for costs does not automatically make the payment through the bank a nullity*. It is *still a matter for the discretion of the court* whether it should be set aside or not."

The reasoning in these decisions and similar ones has been steadily followed by this court in countless cases and it will be sheer pedantry to repeat them here.

It would appear that the ordinary bench in its judgment per Benin JSC with characteristic dazzling brilliance laid more emphasis on the letter rather than the purpose or spirit of O.4 r.(2) of C.147. Furthermore O.4 r.2 of C 147 is not outside the curative provisions of O.81 of C147. It is starkly clear from O.81 r.1(1) that "a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, . . . *shall be treated as an irregularity and shall not nullify the proceedings*, any step taken in the proceedings, or any document, judgment or order in it"

Any setting aside of proceedings is a judicial discretionary exercise and not permissible upon application after fresh steps taken, see O.81 rules 1 (2) and 2.
Quite clearly no court has the jurisdiction to nullify proceedings etc for non compliance with any of the Rules under the High Court (Civil Procedure) Rules, 2004 (C.I.47).

This rule has been construed in the manner I have done here by this court in several cases.
The purposive rule of construction of statutes so firmly entrenched in this court, led by Dr. Date-Bah JSC during his distinguished tenure in this court and statutorily reinforced by s.10(4) of the Interpretation Act, 2009 (Act 792) heavily militate against the decision of the ordinary bench in this case.

The purpose of an address of a person is to identify and trace him when necessary and can easily be cured by amendment where it is not endorsed on a writ, without injustice to the other side. But for all this, the Review jurisdiction of this court is not a further appellate one and must not be treated as such.

It is pertinent to stress that the ordinary bench went to the extent of considering high foreign judicial decisions and academic writers to the effect that procedural non compliance relating to the exercise of a party's capacity is part and parcel of that

capacity and invalidates it. However our local O.81 has the final say as far as the procedural aspects of the invocation of capacity is concerned.

Where therefore an application has been brought for Review based on exceptional grounds it is difficult to say that where the very issue involved has been fully argued and exhaustively considered on the same grounds and relevant considerations, statutory or otherwise, as in this case, an error of the ordinary bench can still be considered as exceptional, on the balance of the weight of the decisions of this court which have expounded the Review jurisdiction of this court.

I therefore felt constrained to dismiss this application but in the hope that the decision of the ordinary bench of this court will soon be departed from in subsequent cases.

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

COUNSEL

NENE AMEGATCHER WITH HIM VICTORIA BARTH,JERRY DEI FOR PLAINTIFF/RESPONDENT/RESPONDENT/APPLICANT.

NUTSUKPUI BENSON WITH HIM YAW OPPONG,NUTIFAFA NUTSUKPUI FOR 1ST DEFENDANT/APPELLANT/APPELLANT/RESPONDENT.