IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA - A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)
PWAMANG, JSC
DORDZIE (MRS.), JSC
PROF. MENSA-BONSU (MRS.), JSC
KULENDI, JSC

CIVIL MOTION
NO. J5/35/2021

26TH MAY, 2021

REPUBLIC

VRS

THE HIGH COURT, SEKONDI ……. RESPONDENT

EX PARTE:

NANA BRAFO DADZIE II ……. APPLICANT

1. EBUSUAPANYIN S. K. OBENG
2. SHAMA TRADITIONAL COUNCIL — INTERESTED PARTIES
3. NANA ATTA KAKRA I
4. NANA WURAPA II

RULING

KULENDI JSC:-

Introduction:

This is an application for an order of certiorari directed at the High Court 2, Sekondi to remove into this court for the purpose of being quashed, all proceedings in respect of Suit No.: E12/103/18 titled: EBUSUAPANYIN S.K OBENG vrs. SHAMA TRADITIONAL COUNCIL & 2

OTHERS, and a further order of prohibition against the said High Court from continuing to hear the matter.

Before we proceed to consider the contentions in this application, we wish to observe that the parties described by the Applicant on the face of the motion as 2nd, 3rd, 4th and 5th Respondents ought to have been referred to as the 1st, 2nd, 3rd and 4th Interested Parties respectively. This error was correctly avoided by counsel for the Interested Parties and we will follow the correct description of the Interested Parties as such.

APPLICANT'S CASE:

It is the case of the Applicant that a chieftaincy matter entitled **Ebusuapanyin Kwamina Ackon (Suing For and On Behalf of the Shama Gate of the Ebiradze Family of Shama) Vrs S.K. Obeng (Ebusuapanyin of the Ebiradze Family of Dompoase)** was initiated on the 16th of August, 2013 by Ebusuapanyin Kwamina Ackon at the Sharma Traditional Council against Ebusuapanyin S.K. Obeng, the 1st Interested Party herein. In the said suit, Ebusuapanyin Kwamina Ackon sought the following reliefs from the Shama Traditional Council:

i. A declaration that it was the turn of the Shama gate to nominate a candidate to occupy the stool of Konfeiku and
ii. An order of perpetual injunction to restrain the Defendant, his agents, assigns and family members from nominating, electing, confining and installing anyone to mount the Konfeiku stool.

Pursuant to this, the Shama Traditional Council (the 2nd Interested Party herein) constituted a three-member Judicial Committee comprising the Applicant as Chairman of the Panel and the 3rd and 4th Interested Parties as Members to hear and determine the chieftaincy matter.

It is the Applicant's case that on the 4th of July 2017, he read the judgment of the Judicial Committee in open "court" to the parties, dismissing the case of Ebusuapanyin Kwamina Ackon and entering judgment in favour of the 1st Interested Party. Counsel for both parties then agreed on cost of GHS 2,000.

According to the Applicant, after judgment was given and cost pronounced, the Committee dispersed. The Applicant claims that he subsequently discovered that the Registrar of the 2nd Interested Party had convened a meeting of the losing party (Ebusuapanyin Kwamina Ackon) and his supporters and read to them another judgment which he referred to as the 'majority judgment' in which Ebuaupanyin Kwamina Ackon was pronounced the victorious party.

Aggrieved by this purported "majority judgment" which had the effect of overriding the judgment read in his favour by the Applicant, the 1st Interested Party instituted **Suit No: E12/103/18** at the High Court, Sekondi entitled **Ebusuapanyin S.K. Obeng v Shama Traditional Council and 3 Others.** In this suit, 1st Interested Party claimed for : ***"A declaration that the purported Judgment of the Shama Traditional Council signed by the 2nd and 3rd Defendants in the case titled Ebusuapanyin Kwamina Ackon vrs Ebusuapanyin S.K. Obeng dated 4th July 2017 is null and void as same was procured by fraud."***

It is in respect of these proceedings in the Respondent High Court, Sekondi that the Applicant is seeking an order of certiorari to remove into this Court for the purpose of being quashed for nullity and a further order prohibiting the Respondent from continuing the proceedings.

The case of the Applicant is that under the **CHIEFTAINCY (PROCEEDINGS AND FUNCTIONS) (TRADITIONAL COUNCILS) REGULATIONS, 1972 (LI 798), Regulation 13(2),** a member of judicial committee of a traditional council shall not be liable in any action or suit in respect of any matter or thing done by him in the performance of his functions under the regulations. Consequently, the Applicant contends that he and the 3rd and 4th Interested Parties being members of the Judicial Committee of the 2nd Interested Party cannot be held liable in the pending action before the Respondent High Court, Sekondi.

CASE OF THE 2nd, 3rd and 4th INTERESTED PARTIES

In response, the 2nd, 3rd and 4th Interested Parties seem to agree with the Applicant that the said Regulations 13(2) of L.I 798 grants they and the Applicant immunity from liability in respect

of their functions as members of the Judicial Committee of the 2nd Interested Party. However, they are opposed to the grant of the reliefs of certiorari and prohibition in favour of the Applicant because they would rather have the allegations of fraud in the suit pending before the Respondent High Court, Sekondi determined in order to "for the truth to come out because the Applicant is going about tarnishing our image when in fact he is the one who has brought the administration of justice into disrepute."

Like the Applicant, 2nd, 3rd and 4th Interested Parties allege that indeed there was an action brought before the Shama Traditional Council by one Ebusuapanyin Kwamina Ackon. The panel of the Judicial Committee of the Shama Traditional Council comprised the Applicant and the 3rd and 4th Interested Parties. They further aver that during a pre-judgment conference with the Registrar of the 2nd Interested Party, the Applicant and the 3rd and 4th Interested Parties resolved the dispute differently. While the Applicant decided the case in favour of the 1st Interested Party, the 3rd and 4th Interested Parties decided the matter in favour of Ebusuapanyin Kwamina Ackon. That when the panel sat on the 4th of July 2017, the Applicant was asked to read both the majority and minority judgments. However, the Applicant read only his minority judgement and failed or refused to read, during the open hearing, the majority judgment given by 3rd and 4th Interested Parties in favour of Ebusuapanyin Kwamina Ackon. They contend that the Applicant by reading his minority judgment alone, intimated to those present in the court that judgment had unanimously been given in favour of the 1st Interested Party. It is their case that it took the intervention of the Registrar of the 2nd Interested Party, together with the 3rd and 4th Interested Parties to correct the misrepresentation by the Applicant. They claim that the 3rd and 4th Interested Parties interjected and indicated, during the open hearing, that the judgment read by the Applicant was a minority decision and not the judgment of the majority. That the Applicant then proceeded to walk out of the hearing and the Registrar of the 2nd Interested Party went on to give a gist of the majority judgement and announced that a full text of the judgment was available for collection. The majority is said to have found in favour of Ebusuapanyin Kwamina Ackon and ordered a perpetual injunction against the 1st Interested Party, his agents, assigns and family members from nominating, electing, confining and installing anyone to mount the Konfeiku stool.

It is relevant to note that after the institution of the Suit in the High Court, Sekondi by the 1st Interested Party, the 1st Interested Party together with the Applicant went ahead to install a chief for the disputed Konfeiku Stool. They were subsequently cited by Ebusuananyin Ackon for contempt and convicted by the High Court, Sekondi in a ruling dated 7th November, 2019. The gravamen of the contempt application was firstly their disobedience of the order of injunction contained in the majority judgment of the Judicial Committee and secondly, their interference with the subject matter of the proceedings before the High Court, Sekondi seeking to declare the said majority judgment null and void for fraud.

PRELIMINARY

Rule 62 of C.I 16 provides as follows:

> "Rule 62—Time Limit.
>
> An application to invoke the supervisory jurisdiction of the Court shall be filed within 90 days of the date when the grounds for the application first arose unless the time is extended by the Court. [As substituted by Supreme Court (Amendment) Rules, 1999 (CI 24), (c)]."

By rule 62 (supra), the Applicant ought to have brought the instant application seeking to invoke our supervisory jurisdiction within ninety days of the date when the grounds of the application first arose. The proceedings in the High Court that the Applicant seeks to quash by certiorari was commenced by a writ of summons issued on 8th November, 2018 whilst the instant application was filed on 2nd March, 2021. The Applicant, in his bid to evade the consequences of Rule 62 has contended in his statement of case that his attention "***has just been drawn to the on-going case before the High Court****…"*

Although the Applicant says his attention was just drawn to the pendency of the High Court Suit which he seeks orders of certiorari and prohibition, the evidence on record suggests the contrary. Exhibit JSA 2, which is the ruling of the High Court dated 7th November, 2019, convicting the Applicant (therein the 3rd Respondent) for contempt of court shows that at the very least, the Applicant has been aware of the proceedings in the High Court before 7th November, 2019, the

date Applicant was convicted for contempt and his actions declared as undermining the authority of the High Court in its effectual determination of the very suit he now seeks to quash.

On the basis of the affidavit evidence, we find that the Applicant's instant application has been filed in breach rule 62 of C.I 16.

However, in view of the fact that the Applicant's instant application is hinged on a contention that the High Court, Sekondi is acting in breach of statute and for that matter engaged in a nullity, we shall consider the merits of the application since this Court has repeatedly held that in cases of nullity, time does not run.

GROUNDS

The grounds of the application as set out by the Applicant are as follows:

1. "That under the CHIEFTAINCY (PROCEEDINGS AND FUNCTIONS) (TRADITIONAL COUNCILS) REGULATIONS, 1972, L.I. 798 Regulation 13(2) a member of any judicial committee of a Traditional Council shall not be liable to any action or suit in respect of any matter or thing done by him in the performance of his functions under these regulations.

2. That the 4th and 5th Interested Parties/Respondents being members of the Judicial Committee of the 2nd Interested Party shall not be liable to the pending action involving them before the Respondent under L.I. 798 Regulation 13(2)"

THE LAW & ITS APPLICATION

Generally, this Court's supervisory jurisdiction can be invoked on three legal grounds: excess or want of jurisdiction; breach of the principles of natural justice; and clear errors of law apparent on the face of the record.

The above trio grounds have been elaborated in a number of judicial decisions of this court. Dotse JSC in the case of Republic v High Court, Kumasi: Ex-parte Bank of Ghana & Ors (Gyamfi & Others – Interested Parties) [2013-14] 1SCGLR 477 postulates the grounds of certiorari thus: "It is well settled that certiorari was not concerned with the merits of the decision; ***it was rather discretionary remedy which would be granted on grounds of excess or want of jurisdiction and or some beach of rules of natural justice; or to correct a clear error of law apparent on the face of the record."***

The gravamen of the Applicant's application for orders of certiorari and prohibition is premised on the following contention urged in the Statement of Case filed by the Applicant. At page 1 of the Statement of Case, the Applicant says that:

> "In the exercise of its jurisdiction, the 4th and 5th Respondents have been named as the 2nd and 3rd Defendants which means they are required to mount their defenses while examination of the evidence will involve the input of the Applicant herein, though not a party to the action."

It is worthy to point out that the Applicant is not a party to the proceedings in the High Court for which he seeks an order of certiorari and prohibition. Albeit in an inelegant manner of expression, we understand the Applicant to contend that he is immune from liability and therefore neither himself nor any other member of the Judicial Committee can be liable in "any action or suit in respect of any matter or thing done by them" in the performance of their functions under law. This is articulated in paragraph 10 of the Applicant's affidavit in support of this Application as follows:

> "10. That joined to the suit as 2nd and 3rd Defendants therein are two members of the Judicial Committee which tried the case and i the chairman and a member of the judicial committee, neither of them nor my goodself can be liable to any action or suit in respect of any matter or thing done by them or me in the performance of our functions under the law."

In our view, what the Applicant obviously fails to appreciate is that statutory exemption from civil or criminal personal liability in the performance of a statutory function does not and cannot amount to an immunity from being investigated by a court of competent jurisdiction in respect of an allegation of fraud or unlawful conduct in the performance of such statutory functions. To

conclude otherwise will be an affront to the law itself, good conscience and public morality. This is more so in society governed by the rule of law and due process.

Further, any such statutory exemptions cannot ordinarily or necessarily, as a general rule, preclude a person so exempt from testifying in judicial proceedings before a court of competent jurisdiction in respect of matters arising from and/or related to the performance of such statutory functions.

In any case, even in the appropriate circumstances, regulation 13 (2) of LI 798 should not avail the Applicant since on his own showing, he is not a party to the proceedings before the High Court, Sekondi.

For the avoidance of doubt, the said Regulation 13(2) of LI 798 states as follows:

> "A member of any judicial committee of a Traditional Council shall not be liable to any action or suit in respect of any matter or thing done by him in the performance of his functions under these regulations."

Regulation 13(2) is in *pari materia* with section 33(5) of the Chieftaincy Act 2008 (Act 759), its parent statute which provides as follows:

> "A member of any Judicial Committee appointed under this Act or the lawyer of a judicial Committee is not liable to an action or suit in respect of a matter or thing done by the member or the lawyer in the performance of functions under these Act."

Clearly, the functions of a member of a Judicial Committee contemplated under both Act 759 and L.I. 798 cannot be properly construed to include the commission of acts of fraud or some other criminal act.

Given our finding that the Applicant is not a party to the Suit before the High Court, Sekondi in respect of which he is seeking orders of *certiorari* and prohibition, the Application is untenable, unjustifiable and must fail *in limine,* for this reason alone.

However, we cannot fail to evaluate depositions by the 3rd Interested Party for himself and for and on behalf of the 4th Interested Party in paragraphs 11, 12 and 13 of their affidavit in opposition which read as follows:

> "11. That it was subsequent to the 4th July, 2017 that the Applicant brought two judgments signed by him alone and created the impression that the judgment was given on 4th July, 2017. Hereto attached and marked as Exhibit NAK2 and NAK 3 are copies of the two minority judgments.
>
> 12. That thereafter, the 1st Interested Party (described as 2nd Respondent in the title) mounted the action in Exhibit A, praying for the setting aside of the majority judgement Exhibit NAK1 on grounds of fraud.
>
> 13. That I admit the depositions in paragraph 10 of the affidavit in support except that the 4th Interested Party and I have chosen to defend the case for the truth to come out because the Applicant is going about tarnishing our image when in fact he is the one who has brought the administration of justice into disrepute."

In paragraph 11 aforesaid, the 3rd and 4th Interested Parties, understandably, concede the contention of the Applicant that they cannot be liable to any action or suit in respect of any matter or thing done by them in respect of the performance of their functions as members of the Judicial Committee. We have already opined that this contention is tenable to the extent that the conduct in issue does not bother on fraud, criminality or unconstitutionality. Consequently, section 33(5) of Act 759 and Regulation 13(2) of L.I. 798 do not provide an impervious armour to the Applicant and or the 3rd and 4th Interested Parties when the conduct in issue is alleged to be fraudulent, criminal or unconstitutional and moreover is being challenged in a competent judicial and/or even quasi-judicial forum or proceedings.

It is significant to note that Regulations 7(4)(5)(6) of L.I 798 provide as follows:

"Regulation 7—Evidence Etc., before Judicial Committee.

...

(4) A judicial committee shall in every case deliver a written judgment, ruling or opinion giving reasons for arriving at its decision.

(5) Where any member disagrees with the majority decision that member shall also deliver a written judgment, ruling or opinion giving reasons for arriving at his decision.

(6) The Registrar of each Traditional Council shall within one month of a judicial committee delivering judgment, ruling or opinion send a certified true copy of the judgment, ruling or opinion as well as any dissenting opinion to the Attorney-General."

Further, Regulation 15 of LI 798 states that:

> "15. There shall be kept by the Registrar of a Traditional Council a Tribunal Record Book in which shall be recorded in the English language the proceedings of the judicial committee of that Council."

We are of the view that that, read together, the import of the said regulation 7(4)(5)(6) and regulation 15 is that a judgment, ruling or opinion of a judicial committee, properly so called, ought to comply with the following minimum criteria:

I. It must be in writing and must indicate whether it is unanimous or by a majority;
II. It must contain reasons for conclusions arrived at;
III. Where there is a dissent, the dissent must be in writing and must have reasons for the conclusions arrived at;
IV. The judgment, ruling or opinion as well as any dissenting opinion(s) must be read in part or whole at a sitting of the judicial committee;
V. All members of the panel must be present at the sitting at which it is read.
VI. It must be entered in the Tribunal Record Book;
VII. The judgment as well as any dissent, and the Record Book into which it is entered must be signed by all members of the panel of the judicial committee and;
VIII. It must be certified by the Registrar and provided to the parties or their lawyers upon request.

IX. A certified true copy of the judgment, ruling or opinion as well as of any dissenting opinion must be sent to the Attorney General within one month of the delivery of the judgment, ruling or opinion.

The contentions of the parties before the Respondent High Court border on which of the alleged judgments in issue satisfies the requirements enunciated above and for that matter, whether there was impropriety in the nature of fraud, in the manner in which the "majority judgment" came into existence. Needless to say, a resolution of the dispute at hand, ultimately turns on questions that can only be addressed by the production of relevant evidence to the requisite standard of proof to enable the High Court determine which of the judgments in contention complies with regulation 7(4), (5) and (6) as well as regulation 15, and the criteria we have inferred therefrom.

Indeed, several or most of the matters, sought to be urged on us in this application, are matters which more properly belong to the hearing in the High Court. This is because, it is the High Court, which can make a definitive finding on which of the judgements in issue is tainted by fraud and is for that matter null and void. This important preliminary determination has to be made to enable a determination at a secondary level, whether the conduct of any of the members of the 2nd Interested Party's judicial committee in relation to the judgments in contention, was bona fide and within the remit of regulation 13(2) of LI 798 and/or section 33(5) of Act 759 to justify a recourse to these provisions as an impervious armour.

Otherwise this Court has held in a plethora of cases that a court of law cannot shut its eyes to violations of statute.

The famous dictum of Date Baah JSC (as he then was) in Republic vs. High Court (Fast Track Division); Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties) (2009) SCGLR 390, wherein he said: "**No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament … The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders**", would have been of moment if the circumstances of this case were appropriate. However, the case of the Applicant even with the

aid of the 3rd and 4th Interested Parties is a far cry from situations that would warrant the intervention of this Court to invoke the cloak of statutory immunity.

Even if the plaint of the Applicant were to fall within circumstances that will amount to a breach of a statutory immunity from liability in suit, we are of the view that this would have amounted to a misjoinder and as such cannot be held to invalidate the entire proceedings before the High Court, Sekondi to warrant a recourse to certiorari and prohibition. [See: **Jonah v. Duodu Kumi [2003-2004] SCGLR 50; Dwamena Vrs Otoo and Others Civil Motion No.: J4/47/2018 judgment dated 12 June 2019 and Asante v Scanship Ghana Limited Suit No.: J4/15/2013 judgment dated 15 January 2014 among others.]**

We are strengthened in our considered opinion that even if the Applicant, as well as the 3rd and 4th Interested Parties, had, by virtue of the statutory exemption in Regulation 13(2) of LI 798, been improperly joined to the suit before the High Court, Sekondi, the misjoinder would not invalidate the entire proceedings of the High Court to warrant our supervisory intervention.

Our power to exercise judicial review is derived from Articles 2(1) and 130(1) of the 1992 Constitution and may be exercised in respect of legislative, executive and judicial actions.

In the case of **British Airways v. Attorney-General [1996-1997 SCGLR 547]**, Her Ladyship Bamford-Addo JSC in her opinion observed that the Supreme Court's supervisory jurisdiction should be exercised "in appropriate and deserving cases in the interest of justice." She further remarked that "… whenever in the course of any matter brought before this Court, it is found that there exists in any lower Court any matter which would in the long run result in injustice or in illegality, it is the duty of the Court to at once intervene, and issue orders and directions, with a view to preventing such illegalities or injustice even before they occur."

This means that in all cases where we are called to exercise this awesome jurisdiction, we ought to do so only when it will preempt an illegality, or an injustice with the ultimate effect of protecting the ends of justice. Also see the cases of **Republic v Court of Appeal, ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612, Republic v. High Court, Accra; Ex Parte Industrialization Fund for Developing Countries [2003-2004] 1 SCGLR 312.**

It is obvious from the contentions of the parties, that the matter pending before the High Court, is an enquiry into whether or not fraud, a toxic illegality, was perpetuated to orchestrate the alleged majority judgment authored by the 3rd and 4th Interested Parties. An invitation to intervene to quash proceedings in such an enquiry and prohibit same will be subversive of our duty to use our supervisory powers to prevent illegalities and protect the ends of justice. That is why we have already indicated that we shall decline such an invitation.

In any event, the Applicant's overall conduct in the circumstances of this case is worth commenting on. No person, natural or artificial, is entitled to our supervisory remedies as of right. We have reiterated times without number that the grant of orders of certiorari is a matter of judicial discretion except in relation to nullities. This Court, being a bastion of justice, will not be dribbled into using the very tools meant to aid the administration of justice, to occasion injustice. It is for this reason that the conduct of a party seeking our discretionary remedy must be considered in determining whether or not a compelling case has been made to ground a favourable exercise of our judicial discretion. It is our considered opinion that the conduct of the Applicant is one which is undeserving of a favourable exercise of our discretion. The Applicant and 1st Interested Party were convicted for contempt by the High Court. In convicting the Applicant, the High Court found that the actions of the Applicant also undermined or defied the authority of the High Court by prejudicing the pending High Court case which is the subject matter of this application. What does the Applicant hope to achieve with the instant application before us? By this application, he is seeking to prevent the Respondent High Court from resolving the confusion occasioned by alleged conflicting judgements of the Judicial Committee which the Applicant himself chaired. We do not think the Applicant has been able to demonstrate that the instant application is brought in good faith to avert any injustice or injury to him.

Conclusion

In the circumstances, we will refuse this application as it is wholly incompetent, umeritorious and same is hereby dismissed.

E. Y. KULENDI
(JUSTICE OF THE SUPREME COURT)

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

A. M. A DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

BAFFOUR DWUMAH FOR THE 2ND, 3RD AND 4TH INTERESTED PARTIES.

GUSTAV ADDITINGTON FOR THE APPLICANT.