WRITE-UP

SPECIAL LEAVE TO APPEAL TO THE SUPREME COURT; **SOME THOUGHTS**

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FRIDAY 20TH AUGUST, 2021

DENNIS LAW
A legal material portal

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Introduction

In ordinary parlance, leave implies praying to the court to grant permission to file an appeal. This looks very simple and what does failure to seek 'permission' to file an appeal cause the litigant? One may argue that just failing to seek 'permission' should not deprive the litigant of access to justice. As Kpegah JSC (as he then was) held in *Ekwan v Pianim (No.1)*[1] said; "For it is the duty of the court to keep the door to the shrine of justice wide open rather than close it"

Did the *dictum* of the learned judge mean that even if the litigant breaches a constitutional provision or statute he should still be given the field day to access justice? The author does not think so. The courts, especially the Supreme Court, is the watchdog of the constitution and breaches of its provision without any checks will lead to chaos in the whole edifice of our judicial and legal jurisprudence. Date-Bah JSC (as he then was) admonished judges of breaches of statute in the case of **Republic v High Court (FTD) Accra; Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties) [2009] SCGLR 390,** the Supreme Court, per Date-Bah JSC held:

"The learned Judge acted in obvious excess of his jurisdiction. No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament. But this was the effect of the order granted by the learned judge. The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders."

The question is if an Act of Parliament cannot be breached how can a Constitution which is the fundamental law of the land be breached? This paper is to inform readers that special leave to appeal to the Supreme Court and Court of Appeal in filing appeals are not procedural rules but are conferred by the constitution and statute. This therefore means that a slip cannot be countenanced and it will render an appeal filed otiose. The author is of the view that the aim of special leave to appeal is for the apex court to check litigants from filing frivolous appeals and avoid unnecessary delays. An applicant invoking the Supreme Court's jurisdiction to seek special leave to appeal must canvass good reasons why he should succeed. As opined by Atuguba JSC in

1 [1996-97] SCGLR 117 at p. 118

In *Kotey v Koletey* infra the learned judge said (at page 445 said:

"although an application for normal leave must show some merits in the intended appeal, an application for special leave must do more than that, it must also give good and convincing reasons why the application is special."

The question is, what is the effect of not seeking special leave to file an appeal to the Supreme Court as stated in Article 131(2) of the Constitution 1992? Does it go to the root of the matter? I will answer this question by referring to the case of *Sarkwa and Another v Ahunaku*[2] , where the Supreme Court held:

"where the rules prescribe for special leave before an appeal can be lodged, unless the special leave to appeal is granted, no appeal can be filed and if an appeal purports to have been filed against a judgment without special leave, the court should not have jurisdiction to entertain it."

Article 131(1) of the Constitution, 1992 and section 4 of the Courts Act, 1993 (Act 459), make provisions as to how appeals shall lie from judgments of the Court of Appeal to the Supreme Court. For ease of reference I will quote *extenso* the provision under article 131(1) and (2) of the Constitution 1992 as follows:

"131 Appellate jurisdiction of the Supreme Court

(1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court

(a) As of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction; or

(b) With leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest.

(2) Notwithstanding clause (1) of this article, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or

2 [1966] GLR 244 SC

matter, civil or criminal, and may grant leave accordingly."

From this provision it can be deduced that the framers of the Constitution, 1992 have provided three different ways to lodge an appeal to the Supreme Court. These are appeal as of right, appeal with leave of the Court of Appeal and special leave to appeal obtained from the Supreme Court. For the purposes of this article I will confine myself to special leave to appeal to the Supreme Court.

Special leave to appeal to the Supreme Court

Special leave to appeal to the Supreme Court can be triggered under Article 131(2) of the Constitution 1992 and it states as follows:

"Notwithstanding clause (1) of this article, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant leave accordingly."

This provision therefore means that the mandate of granting leave to the Supreme Court does not lie solely with the Court of Appeal. In *Dolphyne v Speedline Stevedoring Co. Ltd and Another*[3] , the Supreme Court held that the word "notwithstanding" meant that without being affected by the provisions of clause (1) of Article 131 of the Constitution 1992, the Supreme Court may entertain an application for special leave to appeal.

Circumstances under which the Supreme Court will grant special leave

Article 131(b) of the Constitution 1992 states that a party who intends to appeal against the decision of the Court of Appeal in any cause or matter where the case was commenced in a court lower than the High Court or a Regional Tribunal must first seek leave of the Court of Appeal. The Court of Appeal will only grant the leave if it is satisfied that the case involves substantial question of law or is in the public interest. In the case of *Dolphyne (No.2) v Speedline Stevedoring Co. Ltd*[4] the court laid down the requirements under Article 131(2) of the Constitution 1992 and later re-echoed same in *Kotey v Korletey*[5] , as follows:

i. That there was a prima facie error on the face of the record;

ii. That a general principle of law had arisen for the first time; and

iii. That a decision by the Supreme Court on the point sought to be appealed

3 [1995-96] 1 GLR 532, SC
4 [1996-97] SCGLR 373
5 [2000] SCGLR 417

against would be advantageous to the public

In a recent Supreme Court case of *Appiah-Nkyi v Nuamah*[6] , the Supreme Court per Pwamang JSC also stated the grounds under which the Supreme Court will grant special leave to appeal as follows:

"one of the grounds on which this court will grant special leave to appeal in exercise of its jurisdiction conferred by Article 131(2) of the Constitution 1992 is where there is a prima facie error of law on the face of the record as I have found in this case. Another ground is where a decision on a point of law will inure to the benefit of the general public as I have pointed out above."

Also in *Gyimah v Abrokwa*[7] , the Supreme Court speaking through R.C Owusu JSC stated the circumstances under which the Supreme Court will grant special leave as:

The Supreme Court would affirm the principle to be applied as guides on which the court might determine whether or not to grant special leave to appeal, namely:

(a) Where there had been prima facie error on the face of the record; or

(b) A general principle of law had arisen for the first time; or

(c) A decision by the Supreme Court on the point sought to be appealed against would be advantageous to the public.

Whether there is any time frame for an application for special leave from the Court of Appeal to the Supreme Court

In the *Gyima* case *supra,* the errors which the applicant could have addressed in an application for ordinary leave to appeal; were not prima facie errors on the face of the record for which reason the court must exercise its discretion to grant special leave. Besides, in an attempt to prevail on the court to grant the application for special leave sought for, the applicant had sworn to an affidavit in which he had deposed to deliberate falsehood, namely, that at the time of obtaining a copy of the Court of Appeal judgment, time for filing an application for leave to appeal had run out. The averment was a deliberate falsehood to put the reason for the delay at the doorstep of the Court of Appeal in order to sway the Supreme Court in the exercise of its discretion in favour of the applicant.[8]

6 [2017] 112 GMJ 140 SC
7 [2011] 1 SCGLR 406
8 See Dolphyne(No.2) v Speedline Co. Ltd [1996-97] SCGLR 373; Ansah v Atsem [2001-2002] SCGLR 906 at 910

The court held further thus:

"……there was no time frame within which to bring an application for special leave to appeal to the Supreme Court from the judgment of the Court of Appeal. However, the application must be brought timeously.[9]

In other words, if the Court of Appeal delivers a judgment in a case commenced in the District or Circuit Court, an appeal shall lie in the Supreme Court only upon leave from the Court of Appeal. Per Rule 7(1) of the Supreme Court Rules, CI 16, an application for leave to appeal under paragraph (b) of clause (1) of Article 131 of the Constitution 1992 shall be by motion on notice and shall be filed in the registry of the Court of Appeal within fourteen days of the date of the decision against which leave of appeal is sought. Under Rule 7(2) of CI 16, an application for special leave to appeal under clause (2) of Article 131 of the Constitution 1992 shall be by motion on notice and filed in the Supreme Court within fourteen days of the refusal of the court below to grant leave to appeal.

Again, a party intending to appeal against the decision of the Court of Appeal in a repeat application must first seek leave of the Supreme Court before filing the appeal. An applicant in a repeat application for stay of execution who is dissatisfied with the decision of the Court of Appeal and intends to appeal to the Supreme Court, needs to obtain the special leave of the Supreme Court before filing the appeal against the decision. In the case *Owusu & Others v Addo & Others* [10]the Supreme Court examined same issue and the Court through her eminent Wood CJ said:

"We had in the past glossed over a critical legal gateway that all appellants must first satisfy and assume jurisdiction without questioning the competence of appeals filed which have not fulfilled this important pre-condition which we are about to discuss. We did so in the case of *Djokoto & Amissah v BBC Industrials Co. (Ghana) Ltd & City Express Bus Services*[11] which shares commonality with the instant appeal, in terms particularly of the relief sought and the procedure adopted. We overlooked this essential legal requirement and proceeded to clothe ourselves with jurisdiction and determined the appeal on the merits, implying such appeals against decisions of the Court of Appeal is, unquestionably as of right. As a court, which per Article 129(3) of the Constitution 1992 is not bound by its previous decisions on questions of law, and may, for just reasons depart from same, we

9 Allen v Sir Alfred Macalphine & Sons Ltd. [1968] All ER 547.
10 [2015-2016] 2 SCGLR 1479
11 [2011] 2SCGLR 825

would on this occasion jettison our previous decision given *per incuriam* and state the law correctly as follows:

"The right to appeal to this court in respect of an order of the Court of Appeal, dismissing a repeat application for stay of execution, is not an automatic right but one carefully circumscribed by Article 131(2) of the Constitution 1992 and section 4(2) of the Courts Act, 1993 (Act 459). It is a right exercisable by special leave, as the appellants counsel honourably conceded when at a further hearing, we invited him to address us on whether the right to appeal is a right or subject to the grant of this court's special leave as pertinently provided under section 4(2) of Act 459."

Some cases where appeals emanated from court lower than the High Court.

In *Brown v National Labour Commission & Anor.*[12] , the facts were that the appellant, a chief clerk in the Ahantaman Rural Bank Ltd, the respondent herein, had his position terminated by the respondent for gross misconduct after disciplinary enquiry was held to investigate his conduct. Dissatisfied with the decision of the management of the respondent bank, he petitioned the National Labour Commission (NLC) for redress. On 20th September 2017, the NLC found that the respondent had unfairly terminated the appointed of the appellant and awarded compensation of three month's salary devoid of tax. The appellant, still dissatisfied, appealed to the Court of Appeal. The actual date for the filing of the appeal was not evident from the record but the hint from the notice of appeal indicated that it was prepared on 9th October 2017 and the appeal could only have been filed after that date. The appellant added the NLC as a party in the appeal, as the first respondent. The Court of Appeal dismissed the appeal on two technical grounds: (i) the only jurisdiction conferred on the Court of Appeal by section 134 of the Labour Act, 2003 (Act 651) against the decision of the NLC was in respect of decisions made in cases of unfair labour practices but not in respect of unfair termination as in the instant case, and (ii) even if the appeal was properly before the Court of Appeal, there was evidence that the appeal was filed nineteen days after the decision rendered by the NLC instead of the fourteen days stipulated by law. The appellant further appealed from the decision to the Supreme Court on the grounds that the judges misconstrued section 63(4) of Act 651 to be the same as section 127, 133 and 134 on unfair labour practices; and secondly, that the judges erred in law when they held that the Court of Appeal had no jurisdiction over

12 [2018-2019] 1 GLR 592

decisions against the NLC in respect of unfair termination matters. At the hearing, the court under rule 6(7) and (8) of the Supreme Court Rules, 1996 (CI 16) ordered parties to address the relevance of Article 131(1) and (2) of the Constitution 1992.

Decision of the Supreme Court

Amegatcher JSC held;

"Under Article 131(1) (a) of the Constitution 1992 a party could file an appeal as of right from the Court of Appeal to the Supreme Court if he could satisfy that: (a) the appeal was in respect of a civil or criminal cause or matter; (ii) the appeal has been brought to the Court of Appeal from the judgment of the High Court or a Regional Tribunal; and (iii) the High Court was exercising its original jurisdiction. The current appeal did not emanate from the High Court to the Court of Appeal in the exercise of the High Court's original jurisdiction. Consequently, an appeal could not be filed as of right as the appellant purported to do. If the lawmaker had intended to equate adjudicatory bodies like the NLC to the High Court in the exercise of its functions for an appeal to lie as of right to the Court of Appeal and then to the Supreme Court, it would have expressly stated so. In the absence of any such clear provision, the NLC could not be deemed to be a High Court for its decision to lie as of right from the Court of Appeal to the Supreme Court."

From this decision it can be argued that there is an obligation placed on the appellant who appeals a decision that originated from the decision of an inferior body or a court or tribunal lower than a High Court, to seek leave of the Court of Appeal before filing an appeal to the Supreme Court, is a statutory as well as a constitutional one. If an appellant fails to seek leave prior to filing an appeal to the Supreme Court where leave is required, the appeal shall be a nullity.

However, in *National Labour Commission v First Atlantic Bank*[13] the appeal originated from the ruling of the High Court and not from a court lower than the High Court and Court of Appeal.

Kulendi JSC distinguished it from the *Brown* case *supra* and held thus:

"In ordinary parlance, leave implies praying to the court to grant permission to file appeal. The issue for determination boils down to this: does a further appeal to the Supreme Court from the Court of Appeal with respect to a matter emanating from the labour commission

13 Civil Appeal No. J4/62/2019

require leave of the Court or is it an appeal as of right?

The answer is in Article 131(1) (b) of the Constitution 1992. Leave of the Court of Appeal arises in circumstances where a civil or criminal cause or matter started in a court lower than the High Court and Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest. The decisions of the NLC in this matter is a civil matter and, therefore, satisfies the first precondition. Since our opinion above is conclusive that the NLC is not a High Court, but an adjudicatory body lower that the High Court, the second requirement would have been satisfied."

The Court further held that in the *Brown* case *supra* that the appellant therein appealed from the decision of the NLC to the Court of Appeal. It was therefore the decision of the National Labour Commission which was under attack on appeal. In the instant case however, the appeal originated from the ruling of the High Court and it is the decision of the High Court that was on appeal and not that of the Respondent Commission. Consequently, the argument that this appeal originates from a cause or matter commenced in a court lower than the High Court is untenable and fails.

The cases above touches on Article 131(1) (a) and 131 (1) (b) of the Constitution 1992 and section 4(1) (a) or (b) of Act 459.

Finally in *General Legal Council v Kodua*[14] , the court per Appau JSC opined that the instant case does not fall under Article 131(1) (a) or 131 (1) (b) of the Constitution 1992 and section 4(1) (a) or (b) of Act 459 but under Article 131(2) and held thus:

"….the fact is that the application did not emanate from a case that originated from the High Court or regional tribunal for which the applicants needed leave of the court or regional tribunal for which the applicant could appeal as of right as provided under article 131 (1) (a); neither did it emanate from a case that originated from a court lower than the High Court or regional tribunal, for which the applicants needed leave of the Court of Appeal first as provided under article 131 (1) (b) is therefore inapplicable. The application is an off-shoot of a case that originated from the second applicant as provided under section 18 of the Legal Profession Act, 1960 (Act 32). Being a case that did not fall under either of Article 131(1) (a) or 131 (b) of the Constitution

14 [2016-2017] 1 GLR 545 SC

1992 or section 4(1) (a) or (b) of Act 459, the only means by which the applicants could reach this court on an appeal is by recourse to Article 131 (2) of the Constitution 1992, section 4(2) of Act 459 and rule 7(4) of CI 16… The application before the court was therefore made within jurisdiction."

Conclusion

I will conclude this article by saying that leave of the court especially as provided in Article 131(1) (a) and 131 (1) (b) of the Constitution 1992 and section 4(1) (a) or (b) of Act 459 is constitutional as well as a statutory provision which cannot be ignored and taken lightly if the litigant wishes to succeed in appealing a decision under the said constitutional provision supra. Appeals are conferred by statute and no one has an inherent right of appeal.[15] Failure to comply with rules of appeals goes to the root of the matter and therefore the court would not be seised with jurisdiction to hear the matter. In *Sandema-Nab v Asangalisa and Others*[16] , it was held thus:

"Now it must be appreciated that an appeal is a creature of statute and therefore no one has an inherent right to it. Where a statute does not provide for right of appeal, no court has jurisdiction to confer that right in a dispute determined under that statute. Similarly, where a right of appeal is conferred as of right or with leave or with special leave, the right is to be exercised within the four corners of that statute and the relevant procedural regulations, as a court will not have jurisdiction to grant deviations outside the parameters of that statute."

15 Nye v Nye [1967] GLR 76 CA
16 [1996-97] SCGLR 302