IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA, GHANA – A D. 2026

CORAM: ANGELINA MENSAH HOMIAH, JA (PRESIDING)
DAVID K. A. BOAFO, JA
GEORGE BUADI JA

SUIT NO. H1/244/2022

DATE: 12TH FEBRUARY 2026

ABDUL MALIK KWEKU BAAKO - PLAINTIFF/RESPONDENT

VRS

KENNEDY OHENE AGYAPONG - DEFENDANT/APPELLANT

JUDGMENT

DAVID KWABENA ADADE BOAFO, JA

This is an action involving two very prominent public figures in our nation. It would have sent a very encouraging and positive message to the larger society if the attempt at settling this suit by the parties had been successful. The drive to decongest the courts using Alternative Dispute Resolution would have had an excellent story to share had settlement succeeded. Be that as it may, this court, is enjoined to dispense justice as required by law and it will do so.

BACKGROUND

By a writ of summons issued on the 16th day of October, 2018 at the High Court, the Plaintiff / Respondent (hereinafter called the Respondent) claimed against the Defendant / Appellant (hereinafter called the Appellant) the following reliefs

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a. A declaration that the statements made by the Defendant in both Twi and English Language which is fully transcribed in English indorsed on the writ of summons by way of an attachment and particularised on the attachment with the listed media platforms and publication dates and also repeated in paragraphs 9,10,12,14, 15,16,18,19,20 and 22 of the Statement of Claim are defamatory.

b. An order of the Court directed at the Defendant to publish on three consecutive occasions, on the same platform that he published the defamatory words, an unqualified retraction and an apology, with the same prominence as given to the issuance of the defamatory words.

c. An order of the Court for perpetual injunction restraining the Defendant, his agents, assigns and servants from further publishing any defamatory words against the Plaintiff.

d. General damages of the sum of Twenty-Five million (25,000,000) Ghana Cedis for defamation.

e. Exemplary Damages for malicious conduct of the Defendant in defaming the Plaintiff.

f. Costs including legal fees, and

g. Any other order(s) as this Honourable Court may deem fit.

The Respondent indorsed the writ with the particulars of the defamation as required by Order 57 rule 2 of the High Court (Civil Procedure) Rules, 2004 (C. I. 47).

The basis of the Respondent's claim is that the Appellant had on different occasions, more particularly on the 18th of July, 2018, 25th July, 2018 and 21st August, 2018, caused to be published on Net2 TV, Adom FM, Oman FM and Asempa FM statements that were defamatory. The said publications according to the Appellant were false, malicious and intended to create in the minds of right-thinking members of society that he was dishonest, corrupt, engaged in illegal

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activities, morally reprehensible, opportunistic, not trustworthy and that he engaged in illegal mining popularly referred to as galamsey.

The Respondent states that the words broadcast and published by the Appellant were made recklessly and maliciously with the intention of causing damage and injury to the Respondent's hard-earned reputation, and the utterances of the Appellant have been reproduced on the websites of media houses and blog sites which are accessible to persons across the world. The Respondent says the said publications have damaged his media career and exposed him to ridicule and denigrated him. He also claimed that to have suffered distress as his envied reputation has been reduced and has been brought into dishonour, contempt and reproach.

The Appellant entered appearance to the writ of summons and filed a defence to the Respondent's claim on the 29th of November 2018. In his defence, the Appellant denies that his comments were malicious and defamatory. He says his words are factually true and justified. They were not intended to defame the Respondent or denigrate him. The Appellant says that the issues he raised on galamsey are a major public concern and of a public interest matter and his words were true.

The Respondent filed a reply on the 18th day of December 2018 and joined issues with the Appellant. The Respondent contends that the words uttered by the Appellant are not in any way justified.

At the close of pleadings, the following issues were set down by the court for trial;

a. **Whether the publication made by the Defendant on 18th July 2018 and 25th July 2018 about the Plaintiff on Net 2 TV is defamatory?**
b. **Whether the publications made by the Defendant on 24th July 2018 about the Plaintiff on Adom TV is defamatory?**

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c. **Whether the publications made by the Defendant on 24th July 2018 about the Plaintiff on Oman FM is defamatory?**

d. **Whether the publications made by the Defendant on 21st August 2018 about the Plaintiff on Asempa FM is defamatory?**

The parties were ordered by the court to file their witness statements and pretrial checklists. On the 2nd day of April 2019, the High Court conducted case management conference where the lawyers agreed that all the Appellant's evidence relating to Heritage Company be struck down as irrelevant. The record of appeal shows at page 513 that the court struck out paragraphs 6, 7, and 8 of the witness statement of Nana Kwaku Badu alias Nana Asafoatse Badu (DW2). The trial court also struck out paragraphs 9,10,11 and 12 of the Appellant's witness statement.

At the end of the trial, judgment was entered against the Appellant on the 26th of June 2020. It is against this judgment that the Appellant has appealed.

The Appellant filed a notice of appeal on the 6th of July 2020 and set the following as the grounds of appeal;

a. **The judgment was against the weight of evidence as adduced during trial.**

b. **The learned trial judge erred in fact and law when she held that the comments or words attributed to the Defendant were actuated by malice and therefore defamatory.**

The Appellant indicated in his notice of appeal that further grounds of appeal would be filed upon receipt of the judgment and record of proceedings. The Appellant pursuant to leave granted by this court on the 1st of November 2022 filed his additional issues on 2nd November 2022. The additional issues raised by the Appellant are

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1. **That the learned trial court judge erred when she expunged paragraphs 9,10,11 and 12 of Defendant's witness statement at the case management conference stage contrary to section 6(1) of the Evidence Act, 1975 (NRCD 323)**
2. **That the learned trial court judge erred when she expunged paragraphs 6, 7 and 8 at the case management conference stage contrary to section 6(1) of the Evidence Act, 1975 (NRCD 323).**

PRELIMINARY OBJECTIONS

Counsel for the Respondent in his written submissions before this court raised some preliminary procedural objections and same will be addressed by this court. We have noted that Counsel for the Appellant did not file a reply to the Respondent's written submissions and has therefore not put forth any arguments on the objections raised. However, this court is duty bound to deal with the objections in the absence of a response from Counsel for Appellant.

The **first objection** raised by the Respondent is that **the Appellant's grounds b, c and d are defective, incompetent and inadmissible as same fails to give particulars of error of law in accordance with Rule 8 (4) of the Court of Appeal Rules, 1997 (C. I. 19) and same ought to be struck out.**

It is the contention of Counsel for the Respondent that the Appellant failed to give the necessary particulars of the errors in law stated in the grounds of appeal as required by C. I. 19. Counsel for the Respondent argues that the provision in rule 8 (4) of C. I. 19 employs the use of the word ***"shall"*** which word is to be interpreted as mandatory and not permissive as stated in section 42 of the Interpretation Act, 2009 (Act 792) of Ghana.

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Counsel for Respondents cites a series of cases in support of his arguments that the Appellants grounds b, c & d sin against rule 8 (4) of C. I. 19 and same should be struck out.

Rule 8 (4) of C.I. 19 reads as follows:

> **"Where the grounds of an appeal allege misdirection or error in law, particulars of the misdirection or error shall be clearly stated".**

In the Supreme Court case of **Dahabieh v S A Turqui & Bros [2001 – 2002] SCGLR 498**, the Supreme Court held as follows on rule 6 of the Supreme Court Rules 1996, (C. I. 16) which is in pari materia with rule 8 (4) of C. I. 19 thus:

> *"The intention behind rule 6 of the Supreme Court Rules, 1996 (C.I. 16), is to narrow issues on appeal and shorten the hearing by specifying the error made by the lower court or by disclosing whether or not a point at issue had been raised. By that way, both the court and counsel for the respondent would be enabled to concentrate on the relevant parts of the evidence in the record of proceedings and not waste time on irrelevant parts of the evidence.* ***WITH RESPECT TO QUESTIONS OF LAW, IT IS NECESSARY THAT THE RESPONDENT AND HIS LAWYERS KNOW WELL IN ADVANCE WHAT POINTS OF LAW ARE BEING RAISED SO THAT THEY MAY PREPARE THEIR CASE AND MARSHAL THEIR AUTHORITIES****; whilst an indication that the point of law was or was not raised in the court below may help the court resolve the issue faster. In the instant case, ground (1) of the grounds of appeal alleging that judgment is wrong in law is in effect sating that there is an error of law in the judgment.* ***If so, then rule 6 (2) REQUIRES THE APPELLANT TO SPECIFY IN THE GROUND OF APPEAL THAT PARTICULAR COMPLAINT AMOUNTING TO AN ERROR OF LAW.*** *Having failed to do so, ground (1) of the grounds of appeal is inadmissible."* (emphasis mine)

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In **Zambrama v Segbedzi [1992] 2 GLR 221** the Court held that:

"In his notice of appeal, the plaintiff stated two grounds of appeal, namely:

1 'That the judgment is against the weight of evidence. 2 That the trial judge misdirected himself and gave an erroneous decision.' I must say without any fear of contradiction that ground (2) embodied in the notice of appeal is objectionable and inadmissible as a legitimate ground to be urged in this court. Rule 8 (2) of the Court of Appeal Rules, 1962 (L.I. 218) states: '(2) If the grounds of appeal allege misdirection or error in law, particulars of the misdirection or error shall be clearly stated.' And rule 8 (4) also states: "(4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of the evidence." The implication of these rules is that an appellant, after specifying the part of the judgment or order complained of, must state what he alleged ought to have been found by the trial judge, or what error he had made in point of law. I do not think it meets the requirements of these rules to simply allege "misdirection" on the part of the trial judge. ***THE REQUIREMENT IS THAT THE GROUNDS STATED IN THE NOTICE OF APPEAL MUST CLEARLY AND CONCISELY INDICATE IN WHAT MANNER THE TRIAL JUDGE MISDIRECTED HIMSELF EITHER ON THE LAW OR ON THE FACTS.*** *To state in a notice of appeal that "the trial judge misdirected himself and gave an erroneous decision" without specifying how he misdirected himself is against the rules and renders such a ground of appeal inadmissible. The rationale is that a person who is brought to an appellate forum to maintain or defend a verdict or decision which he has got in his favour shall understand on what ground it is impugned."*

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It is clear from rule 8 (4) of C. I. 47 and the authorities cited supra that a ground of appeal that alleges an error or misdirection of law and fact by the trial court must give particulars of the alleged error or misdirection. It cannot be that a blanket statement is made that there was an error or misdirection of law and fact. The Dahabieh and Zambrama cases cited supra give the rationale for the requirement of particularising allegations of misdirection and error of law and fact.

In the Dahabieh case, Adzoe JSC (as he then was) said this *"...with respect to questions of law, it is necessary that the respondent and his lawyers know well in advance what points of law are being raised so that they may prepare their case and marshal their authorities..."*

Particularising allegations of error of law and facts is therefore necessary to put the other party to the appeal and the court itself on notice to make for effective adjudication of the appeal. No party is to be taken by surprise during litigation. The learned jurist further stated *"... rule 6 (2) requires the appellant to specify in the ground of appeal that particular complaint amounting to an error of law..."*

In the Zambrama case, Kpegah J.A (as he then was) stated as follows *"...the requirement is that the grounds stated in the notice of appeal must clearly and concisely indicate in what manner the trial judge misdirected himself either on the law or on the facts..."*

The ground of appeal must therefore specify the error of law within the ground of appeal. To this court's mind, when a court or a lawyer looks at a ground of appeal, they should be able to specifically identify the error of law or fact the Appellant is alleging without having to go fishing for the alleged error. This is the principle that governs grounds of appeal which allege a misdirection or error of law or fact.

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Ground (b) - The learned trial judge erred in fact and law when she held that the comments or words attributed to the Defendant were actuated by malice and therefore defamatory.

The Appellant in this ground alleges that the trial Judge erred in fact and in law, but when the principle espoused in the cases cited supra is applied to this ground, one struggles to see any particulars which demonstrate the error of law or fact the Appellant alleges. Accordingly, this ground falls foul of rule 8 (4) and same is struck out as defective and inadmissible.

Grounds (c) & (d)

(c) That the learned trial court judge erred when she expunged paragraphs 9, 10, 11 and 12 of Defendant's witness statement at the case management conference stage contrary to section 6 (1) of the Evidence Act, 1975 (NRCD 323)

(d) That the learned trial court judge erred when she expunged paragraphs 6, 7 and 8 at the case management conference stage contrary to section 6 (1) of the Evidence Act, 1975 (NRCD 323)

This court will consider both grounds together as they are similar in nature and effect.

In **Living Faith World Outreach Ministry v Registrar General, George Adjeman & Ors (J4/49/2021, dated 17th May 2023)** the Supreme Court speaking through Asiedu JSC stated inter alia

"The above provisions require that in preparing his grounds of appeal, an Appellant shall give particulars of any misdirection or error in law if he alleges any such misdirection or error against the judgment he appeals against before this court. It is not every allegation of misdirection or error that requires particulars thereof to be given. It is allegations of misdirection of law

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and allegations of error in law that requires particulars to be provided. Hence, where the allegation of misdirection or error does not specifically state that it was made in respect of law, there is no such stringent requirement of particulars to be given before that ground of appeal could be entertained for hearing or arguments. In so doing, the Appellant is cautioned to avoid arguments and narratives in his general grounds of appeal."

The Supreme Court in this case distinguishes a mere statement of an error or misdirection from a statement of an error or misdirection of law or fact. Where the ground of appeal merely states that there is an error or misdirection without qualifying it as an error or misdirection of law or fact there is no stringent requirement to particularise same. A look at grounds c & d shows that the Appellant does not specifically state that the error was made in respect of law or fact and therefore is not required to particularise same. This court finds no merit in Respondent's prayer to have grounds c & d struck out under rule 8 (4) of C. I. 19.

In any case this court takes cognisance of the fact that in practice when a party is said to particularise its alleged error or misdirection, it is usually placed under a sub heading within the particular ground of appeal. This is the form most practitioners use but where this form is not used but the particulars of the alleged error or misdirection can be gleaned from the ground of appeal the lack of a coherent or organised drafting or presentation will not take the said ground out of rule 8 (4) of C. I. 19 for which the ground must be struck out.

A look at grounds c & d of the Appellant shows clearly that the Appellant has alleged an error of law and the error of law is that the trial court went contrary to section 6 (1) of the Evidence Act, 1975 (NRCD 323). How else would the Appellant have particularised this? It would have been a repetition of the ground under a sub-heading either in the same words or in words which would carry the

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same meaning and have the same effect on any person who reads. This Court does not see how else the Appellant would have particularised grounds c & d.

This court is clear in its mind and believes any lawyer who reads grounds c & d would be clear, in what error the Appellant is complaining of. It will pose no surprise to opposing Counsel or the court. Grounds c & d puts the court and opposing Counsel on notice as to what Appellant seeks to argue on and opposing Counsel can adequately marshal his tools to respond appropriately.

Particulars, as this court understands it, is for a party to provide detailed or specific information regarding the error being alleged and this should be gathered from the ground of appeal even if it is not set out in a form that is easily identifiable.

The **second objection** by the Respondent is that the additional grounds c and d amount to an interlocutory appeal for which the time limits prescribed by the rules have lapsed and so it should be struck out for lack of jurisdiction.

Counsel for the Respondent contends that the trial court's decision to strike out the paragraphs in the Appellant's witness statement and that of his witness was made on the 2nd day of April 2019 and the said decision was interlocutory and not final as it did not dispose of the suit. And since it was interlocutory the time limit for filing an appeal was 21 days with no option to extend time therefore grounds c and d have been raised out of time so this court lacks jurisdiction to hear same.

Counsel for the Respondent also argues that an appeal is a creature of statute so an appellant must satisfy all the requirements contained within the statute conferring the right to appeal including adhering to timelines. Counsel cites the cases of **XL Insurance Switzerland Co. & Ors v Gemini Maritime Services & Ghana Ports and Harbours Authority [2012] 1 SCGLR 658** And **Amadu Oppong v Yakubu Manu [2021] DLCA 10009** in support of his arguments.

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Counsel for the Respondent contends that the Appellant went to sleep and is now seeking to apply a Supreme Court decision retrospectively and Counsel added that Appellants grounds c and d are nothing but a subterfuge by the Appellant to appeal against an interlocutory order made by the High Court under the pretext of appealing against the final decision of the trial High Court.

To rule on this objection the Court would have to consider the grounds of appeal that have engendered this objection. They are reproduced hereunder:

That the learned trial court judge erred when she expunged paragraphs 9, 10, 11 and 12 of Defendant's witness statement at the case management conference stage contrary to section 6 (1) of the Evidence Act, 1975 (NRCD 323) and that the learned trial court judge erred when she expunged paragraphs 6,7 and 8 of the case management conference stage contrary to section 6(1) of the Evidence Act, 1975 (NRCD 323)

The grounds of appeal as couched by the Appellant seek to raise issue with the trial court expunging certain paragraphs from the Appellant's witness statement and that of the Appellant's witness (DW1) at the case management conference stage of the trial.

Section 6 of the Evidence Act, 1975 (N.R.C.D. 323) is entitled "Objections to evidence" and it states as follows:

1. **In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered.**
2. **An objection to the admissibility of evidence shall be recorded and ruled upon by the Court as a matter of course.**
3. **Where a document is produced and tendered in evidence and rejected by the Court, it shall be marked by the Court as having been tendered and rejected.**

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The import of subsection 1 of section 6 of NRCD 323 is clear and unambiguous. Any objection to the admissibility of evidence shall only be done at the time of it being offered or tendered. The rationale for this rule of evidence has been set out in the recent cases of **Republic v High Court Commercial Division, Ex parte Kwabena Duffour, Attorney-General & 8 Ors (2021 JELR 107279)** and **Republic v High Court (General Jurisdiction 10) Ex parte Adu Boahene & Another (Civil Motion No. J5/5/2026 delivered on 29th October 2025).**

In the ex parte Duffour case, the application before the Supreme Court was essentially seeking to find out at what stage of a trial, is the trial court by law empowered to admit or reject documents into evidence in proceedings before it. The Supreme Court said that the application before it raised very crucial issues bordering on the right of the applicant to a fair trial as guaranteed by article 19 of the Constitution, therefore the procedural glitch will be waived by the Court and the substance of the matter dealt with. The Supreme Court speaking through Amadu Tanko JSC confirmed the import of section 6 of NRCD 323 and held that objections to admissibility were to be taken at the time of offering the evidence and not at the case management conference stage. Tanko JSC stated:

> *"The statutory provisions on objections to evidence says in very certain terms and with clarity that in "an action" (regardless of whether it is a civil or criminal) "and at every stage of the action (including case management) an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered". This without fear of contradiction whatsoever means that the only time an objection can be taken to the admissibility of evidence is at the time (not before, or after, or in between)" when the evidence is being offered."*

In the ex parte Adu Boahene case, Dennis Adjei JSC had this to say

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"The right to a fair trial is to ensure that all individuals have access to a fair and public hearing by a court of competent jurisdiction established by law. The General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (ICCPR) is relevant. Ghana ratified the ICCPR ON 7th September 2000, guaranteeing fair trial principles by giving it a broader interpretation to ensure that no accused person suffers injustice from the time of arrest until the final appeal is filed and disposed of. A fair trial cannot be guaranteed where an accused person's request for disclosure has to be determined at the pretrial stage by the judge alone, where no objection can be raised for a determination to be made. The Evidence Act makes provision for an objection to be raised and determined on the relevance and admissibility of evidence, and the practice direction shall occasion a serious miscarriage of justice where it permits judges and magistrates to determine admissibility at the pre-trial stage without the right to be heard on it. Under such circumstances, the accused person cannot be presumed innocent, as his right to a fair trial is denied."

The Court also speaking through Adjei- Frimpong JSC in the same ex parte Adu Boahene case stated as follows

"From my reading of the provisions of section 51(1) & (2) and section 6 of the Evidence Act therefore, the determination of the relevancy of a material belongs to the trial proper and not pre-trial. For it is at the trial when evidence is being offered that the court can properly determine the relevancy of a particular material and hence its admissibility. At this stage, witnesses mount the box, the materials are tendered by or through them, both sides are offered the opportunity of being heard before a determination is made. Any proposition that relevancy and admissibility of a material can be determined at pre-trial case management conference will be per incuriam in sections 6

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and 51 of the Evidence Act. It will be contrary to law and therefore impermissible"

The Supreme Court in the case of **Republic v High Court (Commercial Division) Accra; ex parte Electoral Commission (Nduom Interested Party) [2015 - 2016] 2 SCGLR 1091** held as follows:

".... It is trite law that the supervisory jurisdiction of the Supreme Court under Article 132 is not limited to the issuance of conventional prerogative writs but also the issuance of orders and such directions as will ensure prevalence of justice, equity, and fairness. Consequently, pursuant to section 5 of the Courts Act, 1993 (Act 459), we direct any objections that a witness statement contains any inadmissible evidence or other objectionable material during case management conference shall be heard and determined after the witness has produced the said witness statement at the trial in accordance with section 6 (1) of the Evidence Act 1975 (NRCD 323)."

It is clear from the authorities that the rationale for evidence to be objected to at the time it is being tendered rather than before is to ensure a fair trial for the parties to the trial be it in a civil or criminal matter.

In accordance with the rules of natural justice a party is to be given the opportunity to be heard, and this is fundamental to any system of justice. The absence of the opportunity of a fair hearing occasions a miscarriage of justice. Can a party be denied justice by a procedural requirement when there is a breach of the party's fundamental right to a fair hearing? This Court thinks not. The whole purpose of our judicial system is to do justice as between parties and not to sanction a miscarriage of justice. I will liken this to the raising of the issue of capacity which can be raised at any stage of the proceedings and even on appeal. An issue that goes against the fundamental rights of a party cannot be said to be

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interlocutory for which the jurisdiction of this court ought to be ousted. It is in our opinion a matter that can and should be raised in the substantive appeal.

It is important to draw attention at this stage to **S.61 of N.R.C.D. 323** and **S.62 (1) of the Courts Act 1993 (Act 459)**

S.62(1) of Act 459

Subject to any enactment or rule of law to the contrary, a court shall require any witness to be examined on oath.

S.61 of N.R.C.D. 323

Subject to an enactment or a rule of law to the contrary, a witness before testifying shall take an oath or affirmation that the witness will testify truthfully and a statement made by a witness without the oath or affirmation shall not be considered as evidence.

The above stated sections require the administering of an oath prior to a witness testifying. S.61 of N.R.C.D. 323 states unequivocally that a statement made by a witness without the oath or affirmation is no evidence. A witness statement at the case management conference stage is therefore no evidence and cannot be subject to the test of admissibility and relevance as was done in this suit.

In the suit before us, both parties admit that at the case management conference stage, the trial court excluded evidence on Heritage Company as agreed to by both Counsel in the matter and certain paragraphs in the witness statements of the Appellant and DW2. This is in clear breach of the provisions of section 6 of NRCD 323 notwithstanding the fact that both lawyers agreed for these paragraphs to be expunged at the case management stage. The agreement does not cure the breach. The net effect of this is that a party is denied the opportunity to be heard on an aspect of his case even before the case is heard in terms of a trial. Where the evidence is objected to at the time of it being offered or tendered and a court

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rules on it, it becomes a part of the trial record which when it goes before an appellate court, the court in rehearing the matter as required under our laws, would have the benefit of analysing and assessing the basis for the admission or rejection of the particular piece of evidence in reaching its final decision and doing justice as between the parties. However, where the objections and the expunging take place at the case management conference stage this important part of the trial process is lost to the record and that in this court's mind would occasion a miscarriage of justice.

As stated supra, the Respondent seeks to urge on this court that the order of the trial court expunging paragraphs in the Appellant's witness statement, DW2's witness statement, evidence relating to Heritage Company, videos and photographs was an interlocutory order and the Appellant should have appealed same within 21 days in accordance with Rule 9(1) of the Court of Appeal Rules C.I. 19. According to the Respondent, the Appellant having failed to do that, cannot now raise same in the substantive appeal before this court and this attempt is a subterfuge by the Appellant to appeal against the interlocutory order made by the High Court under the pretext of appealing against the final decision of the trial High Court.

Rule 30 of the Court of Appeal Rules 1997 C.I. 19 states as follows

"Interlocutory judgment does not prejudice appeal

An interlocutory judgment or order from which an appeal has not been lodged shall not operate so as to bar or prejudice the Court from giving a decision on the appeal that the Court considers just."

Atuguba JSC (as he then was) in the case of **Geoffrey Christopher Badu-Anim v Henrietta Badu-Anim [1999] DLSC 6408** speaking on Rule 30 of C.I. 19 stated as follows

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"The appeal was decided by the Court of Appeal on the 12th day of June, 1977. At that time the new Court of Appeal Rules, 1997 (C.I. 19) were not in force. They now provide by rule 30 as follows:

"No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving a decision upon the appeal as may seem just."

Similarly, rule 22 of the Supreme Court Rules, 1996 provides as follows:

"22. An interlocutory judgment, decree or order from which there has been no appeal shall not operate to bar or prejudice the Court from giving its own decision upon the appeal as may seem just."

I think this rule is wide enough to cover the present situation.

Be that as it may, the holding by the majority of the Court of Appeal that by reason of the failure of the appellant to appeal expressly against the High Court's ruling which dismissed the preliminary objection to the use of originating procedure, they could not deal with that issue, is in my respectful opinion, per in curiam of the then existing rules, that is to say, the Court of Appeal Rules, 1962 (L.I. 218) which provided in rule 30 thereof as follows:

"30. No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may seem just."

This incorporates and extends the common law view that an interlocutory decision can be attacked in a subsequent appeal against the substantive decision even though a person did not earlier appeal against it within the period limited for interlocutory appeals. See for example R.T. BRISCOE (GHANA) LTD. VS. AMPONSAH (1960) C.C. 100 C.A."

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Adjei JA (as he then was) in the case of **Alhaji Adamu Wala And Nii Awuley Ahiaku IV v Mohammed Waziri [2019] DLCA 7826** also had this to say

"The plaintiffs did not appeal against the ruling by the court. It was an interlocutory decision and the plaintiffs, if they were dissatisfied, should have appealed against it within twenty-one days from the date of the delivery of the ruling.

Rule 9 of the Court of Appeal Rules, 1997 (CI 19) provides that an interlocutory appeal shall not be brought after the expiration of twenty-one days from the date the ruling was delivered. The plaintiffs in this case did not appeal against the ruling and it is not an issue which goes to the root of the matter and, therefore, could have been raised and discussed even on appeal.

In the case in point, the plaintiffs' right to appeal became extinct after the expiration of the prescribed period of twenty-one days. The law is settled that an appellant who fails to avail himself within the time to appeal is perpetually barred from raising same from the fact that an appeal is a creature of statute. We are fortified by the case of ***Karletse Panin v Nuro [1979] GLR 194*** *which reiterates the common law position that an appeal is a creature of statute. Where the right to appeal is not created, you cannot take advantage of same. Furthermore, where the right to appeal is created you must comply with the time specified by the law.*

It is trite law in Ghana that there is no extension of time in interlocutory appeals in civil matters. The plaintiffs, therefore, lost their right of appeal and cannot, therefore, reintroduce the matter on appeal. On the other hand, if the plaintiffs had filed an interlocutory appeal against the ruling, this Court could have heard and determined same provided it was made available to the court. The Supreme Court case of ***Tonado Enterprises v Chou Sen Lin [2007-2008] 1 SCGLR 135*** *is to the effect that any issue which crops up during the hearing of a matter should be raised and addressed by the Court below unless it borders on legalities which*

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can be raised at anytime on appeal. Furthermore, in the case of ***Badu-Anum v Badu-Anum [1998-1999] SCGLR 845*** *the Supreme Court held that failure of a party to appeal expressly against the ruling of the High Court which had dismissed the preliminary objections to the use of originating summons could be entertained on appeal once it borders on legalities.*

The common law position was that interlocutory decisions could be attacked in a final appeal even though the person complaining of the decision did not file and interlocutory appeal against it. The above common law position was also discussed in the case of ***R.T Briscoe (Ghana) Ltd. V Amponsah 1969 CC 100. We are of the considered opinion that the issue being complained of was not on legalities which will affect the judgment. However, we state that even where the point raised by the plaintiffs is considered, it cannot affect the judgment rendered by the trial High Court" (emphasis mine)***

In the Court of Appeal case of **Otoo v Dua 1991 2 GLR 247**, Kpegah JA, (as he then was), had this to say

"The right of an appellant aggrieved by an interlocutory decision to raise the issue in a substantive appeal was also recognised in the case of (Maharajah) Mohesur Sing v. Bengal Government (1859) 19 E.R. 316. It was there held that where an appeal laid to the Privy Council, the propriety of any interlocutory proceedings in the course of the suit may be called into question notwithstanding that they were submitted to at the time. I therefore entirely agree with Mr. Adjetey's submission that where a party is aggrieved by an interlocutory decision, he can either immediately proceed to appeal against the

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said decision or sit and raise the issue in the appeal against the final judgment or decision.

The choice, I must however emphasise, is entirely that of the aggrieved party. Where, however, he chooses to appeal against the interlocutory decision, he must, as was pointed out in the case of Anane v. Efriyea (supra), do so "within the time provided."

Rule 30 of C.I.19 and the authorities are clear that a failure by a party not to appeal an interlocutory decision does not bar or preclude the Appellate court from dealing with the said decision in the substantive appeal. Adjei JA in the Wala v Waziri case supra points out that where the interlocutory decision not appealed against affects the judgment of the lower court or borders on legalities that will directly impact on the judgment of the court, the appellate court can attack or deal with any such decisions in the substantive appeal.

As shown earlier in this judgment, this court is of the considered view that the issues raised by grounds c and d are issues that go directly to the Appellant's right to a fair trial which impacts the judgment of the trial court. We find that though the Appellants did not appeal the orders of the court within the stipulated 21 days, this court is not barred from determining and dealing with same in this appeal.

Counsel for the Respondent also contends that the Appellant sought to retrospectively apply the decision of the ex parte Duffuor case because the trial court expunged the said evidence on the 2nd day of April 2019 whilst the decision in the ex parte Duffuor case was delivered on the 10th day of February 2021. We respectfully disagree with Counsel for the Respondent. What Counsel loses sight of is that the law in place is section 6 of the Evidence Act which was passed in 1975 prior to the coming into effect of C. I. 87 (the amendment of the rules of the High Court) which brought into effect the use of witness statements and case management conference.

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The preliminary objection by the Respondent to grounds c and d is hereby dismissed.

CONCLUSION

As Tanko JSC stated in the ex parte Duffuor case, *"as the application before the Supreme Court raised very crucial issues bordering on the right of the applicant to a fair trial as guaranteed by article 19 of the Constitution, therefore the procedural glitch will be waived by the Court and the substance of the matter dealt with"*, it is on this same basis that this court has dealt with the present appeal.

This Court finds that the breach of section 6 of the Evidence Act, 1975 (NRCD 323) by the trial court by striking down evidence relating to Heritage Company as irrelevant, striking out paragraphs 9, 10, 11 and 12 of the Appellant's witness statement and striking out paragraphs 6, 7 and 8 of the Appellant's witness statement at the case management conference stage of the suit is such as to deny the Appellant a fair hearing and occasion a miscarriage of justice. This Court would therefore not go into the merits of the present appeal and hereby orders a retrial.

The appeal succeeds in terms as stated above.

SGD
DAVID KWABENA ADADE BOAFO
(JUSTICE OF THE COURT OF APPEAL)

I AGREE

SGD
ANGELINA MENSAH-HOMIAH
(JUSTICE OF THE COURT OF APPEAL)

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I ALSO AGREE

SGD
GEORGE BUADI
(JUSTICE OF THE COURT OF APPEAL)

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