FRIDAY LEGAL CORNER

JUSTICE ALEXANDER OSEI TUTU & LADY PEARL OSEI TUTU

WHAT YOU WILL FIND

In the **Adomako Anane** case which dragged for 40 years, the Supreme Court departed from the common law rule on adoption of proceedings.

Debate Corner

Is the non-adoption of proceedings in a part-heard case a jurisdictional issue or just an irregularity which borders on procedure and practice?

Historical Fun Corner

"*A rose by any other name would smell as sweet*."

- Do you know that the author of the above quote was a bad speller and often spelt his own name incorrectly?
- Do you know that the author died on his birthday - 23rd April?
- Do you know that his father's profession was a beer taster?
- If you want to know who this author is, go to Psalm 46 of the King James Bible and put the 46th word from the top [in v. 3] and the bottom [in v. 9] respectively together
- Do you know that when the KJV was first written in 1611, the author was 46 years old?

Funeral Invitation

Justice Osei Tutu respectfully invites all his numerous readers, fans, friends and sympathizers to the burial service and funeral of his late mother, Mrs Comfort Adu at the Emmaus Presby Church, Konongo on Saturday, 9th November 2024.

VOL. 7, 2024 EDITION

To Adopt or Not to Adopt in Civil Cases: The New Judge's Dilemma

Introduction

All too soon, the legal vacation has ended paving way for another busy legal year, in tandem with the tradition of our vocation. More often than not, the commencement of every legal year is characterized by the transfer of judges and judicial staff to new courts. The 2024 legal year, presumably, will not defy the order. There are also newly recruited or elevated judges who will be assuming office in various courts across the country.

Not unnaturally, the transferred or newly posted judge would be confronted with part heard cases. Proceedings may either have to be adopted or trials be started afresh (*de novo)*. In proceeding on either path, directions from the courts have come in handy, but sometimes, not without some difficulty. What is so much an issue that appears to distress transferred or newly posted judges has principally got to do with the adoption of proceedings of the previous judge (s) and the legal effect of the failure to adopt same.

In this article, the writer discusses how transferred and newly posted judges have handled civil cases that are part heard cases, raising pertinent issues that, as of necessity, impinge on the effective administration of justice and impede predictability and certainty in the application of the rules and practices.

How part-heard cases were dealt with by newly posted or transferred judges

For several decades, the courts were unwavering in the procedure to adopt in respect of part heard cases when a transferred or newly-posted judge takes over a court. Annan J espoused the common law principle[1] in **Boama v. Okyere,**[2] that where a new judge inherits a part heard case, the trial must be commenced *de novo* unless the parties agree to adopt the prior proceedings.

What was intriguing in the practice was that where the parties were many and only one kicked against the adoption of the proceedings, the court had no option than to start the

[1] See Coleshill v. Manchester Corporation [1928] 1 K.B. 776.
[2] Boama v. Okyere [1967] GLR 548.

trial *de novo*. Barbara Ackah-Yensu JA (as she then was) surmises in **Emmanuel Palmas Abankwa v. Emmanuel Duah Barning**[3] thus:

> "*The practice has been that the decision as to whether or not to adopt proceedings or to start de novo, lies with the parties and not the judge. If one of the parties or both decide not to adopt the proceedings, then the matter will have to start de novo and then the evidence on record will be expunged.*"

Just as the Attorney General's power to enter a *nolle prosequi* in criminal cases cannot be a subject of judicial inquiry or review,[4] so the party who objected to the adoption of the proceedings in a part-heard case could not be compelled by the court to offer justifiable reasons for objecting. The consequence was that some parties took advantage of the procedual constraints to deliberately frustrate the expeditious determination of the case, especially where they realized that the witnesses of their adversaries had passed on after testifying or were unavailable to reappear in court to adduce evidence at the trial. It was not as if judges were ignorant or unaware of the boundless inconvenience and miscarriage of justice the practice visited on some of the parties, but they were destitute in the face of a long-established practice, because they had firmly assured litigants that an established practice of the court is one of the three-pronged indices of dispensing justice.

In **Harlley v. Ejura Farms (Ghana) Ltd,**[5] Taylor J. (as he then was) said:

> "*In these courts we dispense justice in accordance with three and only three yardsticks: statute law, case law and the well-known practice of the courts*".

In 2005, Anin Yeboah J.A. (as he then was), speaking for the Court of Appeal in **Ebusuapanyin Kwesi Appiah (Substituted by Opanyin Kofi Essibu) v. Ebusuapanyin Kwesi Ackon,**[6] had cause to worry about the practice where parties had the prerogative to determine whether proceedings in a case should be adopted or the trial be started *de novo*. Despite his deep-seated reservation, he lamentably conceded thus:

---

[3] Emmanuel Palmas Abankwa v. Emmanuel Duah Barning, Civil Appeal Suit No. H1/13/14, 19 April, 2014, CA, Unreported.
[4] See the case of Republic v. Abrokwah [1989-90] 1 GLR 385.
[5] Harlley v. Ejura Farms (Ghana) Ltd. [1977] 2 GLR 179 at 214.
[6] Ebusuapanyin Kwesi Appiah (substituted by Opanyin Koffi Essibu) v. Ebusuapanyin Kwesi Ackon, Civil Appeal No. 111/208/2005, Unreported.

"*Even though the non-adoption of evidence may cause hardship and injustice to one party, until the law is changed by statute or a decided case, the parties have to exercise their discretion to consent to the proceedings being adopted before trial can proceed from where it stopped.*"

In line with the above sentiments, the learned author, His Lordship Brobbey, in his invaluable book, **Practice and Procedure in the Trial Courts and Tribunals of Ghana,**[7] canvassed several reasons why the state of the law was unreasonable and advocated for a change in the rule by either a legislation or case law.

In 2009, an opportunity presented itself in the case of **Awudome (Tsito) Stool v Peki Stool**[8] for the Supreme Court to make that long-clamoured incursion into the law, but it swerved everyone by renewing its loyalty to the old common law practice when it held at page 689 thus:

"*The established rule is that when a case is transferred from one High Court to another, the parties have the option to adopt the proceedings or to have the trial started de novo. This is a common law rule which has been adopted and practiced for many years in the courts of Ghana*."

The Lordships ended their decision at page 691 in these terms:

"The policy in the High Court (Civil Procedure) Rules, 2004 (C.I. 47), that trials should be expedited is no ground for side stepping well-established procedure in the Court."

Undeniably, the decision left many a legal commentator disenchanted, and it came as no surprise when the distinguished Bimpong Buta of blessed memory extensively dedicated some pages of his editorial comment on the report to demand an amendment in the law.

[7] See Volume 1, page 494, paragraph 1175-1176.
[8] Awudome (Tsito) Stool v. Peki Stool [2009] SCGLR 681.

A Departure from the Old Practice

In 2014, the stage was set for a legal revolution in the case of **AdomakoAnane v. Nana Owusu Agyeman (Substituted by Nana Banahene) & 7 Others.**[9] The facts are that Roger Korsah J. heard the entire evidence in the trial, but he could not deliver his judgment before he was transferred to another station. When S.S. Okunnor J. took over the case, he proceeded to deliver judgment without first adopting the proceedings of his predecessor.

The Court of Appeal set aside the judgment on the sole ground that the proceedings before Roger Korsah J. were not adopted by S.S. Okunnor J. before proceeding. The Appellate Court then remitted the case to the High Court for retrial. The parties who 'were visibly tired' for the case that spanned over two scores[10] in the courts, agreed to make a written submission on points of law, with the hope that it would be able to effectually dispose of the matter. While the trial High Court judge, Debrah J, reasoned with the parties, he also tasted the fruit of forgetfulness like his previous colleague and failed to adopt the proceedings before delivering his judgment on the legal submission.

On appeal, the Court of Appeal found the non-adoption of the proceedings as a procedural technicality which should not prevent them from determining the appeal on its merits. Since an appeal is said to be by way of rehearing, their Lordships took into consideration the entire record of appeal as settled below to dispose of the appeal. Incidentally, they also failed to formally adopt the proceedings.

On a further appeal, the Supreme Court commended the Court of Appeal for the step taken in determining the appeal based on the entire record. The Apex Court in its unanimous decision stripped the parties of their power to decide how a part-heard case should proceed and vested same in the hands of the new judge, stressing thus:

> "*We would therefore state the law as follows:*
>
> *In civil proceedings, the ultimate question of whether or not evidence already adduced before a previous judge be adopted should not rest on the parties'*

[9] Adomako Anane v. Nana Owusu Agyeman (Substituted by Nana Banahene) & 7 Others [2013-2014] SCGLR 241.
[10] A Score is a period of twenty years.

consent. It should exclusively be at the discretion of the new judge who takes over the partly-heard case".

The courts have since been applying the restatement of the law by the Apex Court; often recounting its unenviable historical past and gladly celebrating the ingenuity of Wood C.J. in charting the new path.

In **Juliana Antwi Agyei (Mrs) v. Madam Adwoa Manu and Others,**[11]Appau J. (as he then was) failed to adopt the proceedings of Kpentey J, when he took over from him in a part heard case and delivered judgment. Guided by the Apex Court's new direction in Adomako Anane case, His Lordship Ayebi JA could confidently recapitulate the law thus:

"*Therefore, the failure or omission to adopt the previous proceedings heard by Kpentey J, is nothing more than an omission to comply with an established rule of practice. On that score we, are in agreement with the submission of the respondent that the failure or omission to adopt previous proceedings is an irregularity which should not automatically invalidate or render null and void the judgment thereon."*

In **Charles Lawrence v. Ahmed Danawi,**[12] Baffoe Bonnie J.S.C. cheerfully described the reasoning of Wood C.J. for the Apex Court's departure from the old rule as 'very illuminating'.

Is the Adoption of Proceedings in a Part-Heard Case still relevant?

In **Elizabeth Abbew Jackson v. Esther Anderson,**[13] the Defendant urged the Court of Appeal, by way of a preliminary objection to the hearing of the appeal, to set aside the entire trial because Duose J. (as he then was) omitted to adopt the part heard proceedings by Kanyoke and Batu JJ, when he took over the court. According to him, the procedural infraction goes to the root of the case to render the entire trial a nullity.

[11] Juliana Antwi Agyei (Mrs) v. Adwoa Manu & Others, Civil Appeal No. H/18/2017, 24 October 2017, CA, Unreported.
[12] Charles Lawrence v. Ahmed Danawi, Civil App. No. J4/63/2014, 28 November 2014, S.C., Unreported.
[13] Elizabeth Abbew Jackson v. Esther Anderson, Civil App. No. H1/227/2007, 27 June 2018, CA, Unreported.

In discountenancing the Defendant's argument, His Lordship L.L. Mensah said:

> *"... the position taken by the Defendant's counsel in this instant appeal that the partly-heard case taken over by Duose J was not adopted and or declared to be tried de novo is no longer good law. Same has been consigned between the pages of Agyeman (substituted by) Banahene & Others v. Anane (2013-2014) 1 SCGLR 241*."

Was the Court of Appeal insinuating that the adoption of proceedings in a part-heard matter or a determination that the case be tried *de novo* is no longer necessary by virtue of the decision in the Adomako Anane case *supra*? It may be observed that even in the Adomako Anane case where the practice of adoption of proceedings in a part-heard case was reviewed, the Apex Court did not shoot it down entirely, but vested the power in the judge. Her Ladyship the Chief Justice, despite affirming the decision of the Court of Appeal, signified that their Lordships at the Court of Appeal should have adopted the proceedings before rehearing the appeal.[14]

In the recent case of **The Republic v. The High Court, Kumasi Ex Parte Attorney-General, Minister of Roads and Transportation,**[15] the Supreme Court affirmatively espoused the need for the adoption of proceedings by a transferred judge in a part heard case thus:

> *"... when a judge is transferred to a new court and meets a part head case, he is constrained from assuming jurisdiction over that part heard case unless the first step of adopting the proceedings is taken by the judge. See the decision in Awudome (Tsito) Stool v. Peki Stool [2009] SCGLR 681."*

While there is no good reason to disagree with their Lordships' position, it is somehow doubtful whether the adoption of proceedings could be said to be a jurisdictional matter and not merely a procedural or an established practice. For if it is jurisdictional, then it was surprising that the courts have in recent times been treating the failure or omission to adopt part-heard cases as a mere irregularity and not a fatality. This is because, an issue

[14] See Juliana Antwi Agyei (Mrs) v. Adwoa Manu & Others, Civil Appeal No. H/18/2017, 24 October 2017, CA, Unreported.
[15] The Republic v. The High Court, Kumasi, Ex parte Attorney-General, Minister of Roads and Transportation, No. J5/05/2023, 24 January 2023, S.C. Unreported.

of jurisdiction, as is generally known, goes to the root of a case[16] and cannot be waived. Even confounding was the court's reliance on the case of **Awudome (Tsito) v. Peki Stool** *supra* which their Lordships had since 2014 departed from in the **Adomako Anane** case. It is important to emphasize that since the Court made the point in passing, it could conveniently be rounded up, and rightly so, dispatched to the compartment of *obiter dicta.*

Do the Parties have any Role to play in the Adoption of Proceedings in Partly Heard Cases?

Suffice to say, the parties' power to determine whether a part heard case should be adopted or tried *de novo* has been taken away from them and given to the new judge. The argument from any quarter that the parties no longer have any role to play in the process of determining the adoption of a part-heard case appears to be sound.

Nevertheless, we firmly believe that in practice, the parties still have a role to play in the process. We must not lose sight of the fact that prior to the adoption by the judge, the proceedings are often typed for the parties and their lawyers (who were present during the adduction of evidence before the previous judge) to verify and be satisfied that the record is a true reflection of the evidence tendered, so that if it is deficient, steps could be taken to rectify the anomaly. Where the new or transferred judge hastily adopts the proceedings and they turn out to be inadequate or not decipherable, it may be difficult to fill in the gaps or correct the errors.

Adoption of proceedings – Is there an Alternate Terminology?

It may appear that where a transferred or new judge in a court decides to continue with a part-heard case, he must first adopt proceedings. No other phrase has emerged in the pages of the law reports for such a course. Where a judge declares that he has examined the prior proceedings and indicates his acceptance or approval of same, without using the magical phrase 'adoption of the proceedings'; if he/she goes ahead to fix a date for the continuation of the trial, it will be unfair to consider it as an invalid adoption in this era of

[16] See the cases of Republic v. High Court, Kumasi, Ex Parte Abubakari (No. 3) [2000] SCGLR 45, 50 & Edusei (No. 2) v. A.G. [1997-98] 1 SCGLR 753, 757.

the courts' resolve to dispense substantial justice other than arid technicalities. According to William Shakespeare,[17] "*a rose by any other name would smell as good.*"[18]

Conclusion

The practice had been that when a transferred or new judge takes over a part-heard case, the parties decided whether to adopt the prior proceedings or to start the whole trial afresh. That practice became entrenched in Ghanaian jurisprudence until 2014 when the Supreme Court altered it, by allowing the judge to decide the fate of the evidence already adduced. An omission to adopt proceedings has since been treated as an irregularity that does not nullify the proceedings.

As simple as its formulation may seem, the law on adoption of proceedings in a part-heard matter, in practice, has sometimes been nothing but obscure. While the decisions of some courts tend to suggest that adoption of proceedings of a part-heard matter is a thing of the past, others consider it *sine qua non* to the assumption of jurisdiction by the new judge in the case. It is thus a matter of paramount importance that the status of the law on adoption of proceedings in a part-heard case is clearly laid out. It needs stressing the point that trial judges who take over part-heard cases must either adopt proceedings before continuing with the trial or start the trial *de novo* where the circumstances of the case so warrant.

Finally, for appellate courts, if they find that proceedings in a part-heard case were not formally adopted by the new judge before proceeding with the trial, they must not be quick to nullify the trial. In appropriate cases, they can waive the wrong practice by treating the failure or omission to adopt the prior proceedings as an irregularity, especially where the parties fully participated in the proceedings and ought not to be allowed to resile from the very proceedings they had actively participated.

[17] Shakespeare has been described by Wikipedia as the greater writer in the English language and the world's pre-eminent dramatist, yet he was a bad speller who spelt his own name wrongly on more than eighty times. He was baptized on April 26, 1564 at Holy Trinity Church with the name "Shakspere".
[18] This is an adage by William Shakespeare in Romeo and Juliet.