

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT
OF JUSTICE, FINANCIAL & ECONOMIC CRIME DIVISION 2, HELD
IN ACCRA ON TUESDAY, THE 26TH DAY OF MAY BEFORE HER
LADYSHIP JUSTICE AFIA SERWAH ASARE-BOTWE (MRS.)

CONSOLIDATED SUITS

SUIT NO: MSFT /0022/2020

KROLL ASSOCIATED U.K. LIMITED
NEXUS PALACE
25 FARRINGTON STREET
LONDON, EC4 4B

APPELLANT/APPLICANT

VRS.


THE AUDITOR-GENERAL -----RESPONDENT/RESPONDENT
AUDIT SERVICE
ACCRA

- AND -

SUIT NO. CM/MISC/0315/2020

1. YAW OSAFO MARFO
OFFICE OF THE PRESIDENT ANNEX
RIDGE, ACCRA

2. MICHAEL AYENSU
MINISTRY OF FINANCE
MINISTRIES-ACCRA

CERTIFIED TRUE COPY
 29/10/2020
REGISTRAR
HIGH COURT
FINANCE & ECONOMIC CRIME COURT,
LAW COURT COMPLEX - ACCRA

APPELLANTS

**3. ABRAHAM KOFI TAWIAH
MINISTRY OF FINANCE
MINISTRIES-ACCRA**

**4. EVA ASSELBA MENDS
MINISTRY OF FINANCE
MINISTRIES-ACCRA**

**5. PATRICK NOMO
MINISTRY OF FINANCE
MINISTRIES-ACCRA**

VRS.

**THE AUDITOR-GENERAL ----- RESPONDENT
GHANA AUDIT SERVICE
ACCRA**

=====
PARTIES: 2ND APPLICANT IN CM/MISC/0315/2020 PRESENT

**PROF. EDWARD DUAH-AGYEMAN REPRESENTS
THE APPLICANT**

2ND APPLICANT PRESENT

OTHER PARTIES ABSENT

**COUNSEL: MR. CHARLES ZWENNES FOR KROLL ASSOCIATES
PRESENT**

**MR. YAW OPPONG FOR OSAFO MARFO & ORS
PRESENT**

**MR. KAISER FOR THE RESPONDENT PRESENT
WITH MR. AGBOTAME**

RULING

This is a Ruling on two appeals brought for and on behalf of Kroll Associates UK Limited, the Appellant in **Suit No. MSFT/011/2020** and Yaw Osafo Marfo and Others, the Appellants in Suit No: **SUIT NO. CM/MISC/0315/2020.**

By order of this Court dated the 19th of May, 2020, this Court with the agreement of the parties, and pursuant to Order 31 rule 2 of the High Court Civil (Procedure Rules) 2004, (C.I.47) consolidated both appeals.

The said rule states;

Consolidation of proceedings

2. Where two or more causes or matters are pending in the same Court and it appears to the Court

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it considers just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until the determination of any other of them.

THE FACTS

The antecedents of this case as evidenced Notice of Appeal and other applications are that on the 20th of December, 2019, the Appellants in Suit No. **MSFT/011/2020** (hereafter simply referred to as “Kroll”), being aggrieved with the Disallowance and Surcharge made on them in respect of Certificate No. 2017/2018/MDA1 for the payment of an amount of Five Million Five Hundred and Ten thousand Three Hundred and Fifty-Three Cedis and Seventy-Three Pesewas (GH¢5,510,353.73) by the Respondent (hereafter referred to as “the Auditor-General”, following an audit on the accounts of the Ministry of Finance for the period 1st July 2017 to 31st December 2018, caused an Appeal to be lodged on the following grounds;

GROUND OF APPEAL IN RESPECT OF KROLL

1. The Respondent came to a wrong finding of facts when he concluded, in the absence of proof before him of performance, that the contract had not been performed.
2. The Respondent acted in breach of the rules of natural justice and violated the Appellant’s right to be heard on the fact that the contract had indeed been performed.
3. The Respondent wrongly found the payment to have been made contrary to law, despite the fact that it was made efficiently in exchange for value-for-money service duly and properly rendered by the Appellant as a contractor for services.
4. The findings of the Respondent were not properly so called, as same were made *ultra vires* and in contravention of Articles 187(2), (5) & (6) of the Constitution 1992.

5. The Appellant relies on the presumption of regularity pertaining to the Government's adherence to all the internal processes and Government procedures in the engagement of the supplier services under the contract. Further, the Respondent erred by a misapplication of article 181 of the 1992 Constitution.

The relief being sought is solely to for the Disallowance and Surcharge imposed by the Auditor-General be set aside.

Still on the antecedents of this case, it is worth mentioning that the Appellants in Suit No. **CM/MISC/0315/2020** (hereafter referred to as "Mr. Osafo Marfo and others"), also being dissatisfied with the Notice of Specification and Certification Of Disallowance And/Or Surcharge made by the Auditor-General dated the 22nd day of October, 2019 also caused an appeal to be lodged against same on the following grounds;

GROUND OF APPEAL OF MR. OSAFO MARFO AND OTHERS

1. The determination by the Auditor-General that, the payment of the sum of GH¢4,869,421. 87 was without approval from Parliament and the Public Procurement Authority (PPA) and thus offends Article 181 of the Constitution 1992 and the Public Procurement Act, violated the appellants' right to a hearing and as same did not form part of either the Audit Observations issued to the Ministry of Finance under section 29 of the Audit Service Act, 2000 (Act 584), or the Final Report of the Auditor-General laid before Parliament pursuant to article 187(5) of the Constitution, 1992.
2. The findings violated the 1st appellant's right to a fair hearing as the Auditor-General, in contravention of section 29 of Act 584 and

articles 23 and 296 of the Constitution, failed to serve 1st appellant with any audit observations containing any breaches by him before proceeding to issue the notice of intention to disallow /surcharge.

3. The Auditor-General acted unreasonably, capriciously and maliciously towards all the appellants, in blatant violation of his duty as a public officer, when he refused to inspect and study the evidence of work done by Kroll Associates UK Limited, as requested by the 1st appellant in his response to the notice of intention to disallow/surcharge, before proceeding to serve the notice of disallowance and surcharge.
4. The Auditor-General committed a grave and fundamental error of law in purporting to investigate and make findings of breaches of the procurement law by the appellants when he had no such authority at law.

It is on the basis of these appeals that two interlocutory applications were filed by the appellants in both cases.

The first application was brought by Mr. Osafo Maafo and Others praying for an order committing the Auditor-General for contempt of court. It was the case of the Applicants that in accordance with Order 54A Rules 5(1) and (2) of C.I 47 pursuant amendment by C.I.102, the refusal of the Respondent to file the legally mandated documents within the stipulated time amounts to contempt of court.

This Court per a Ruling dated the 12th day of May, 2020, held that the Auditor-General, Mr. Domelevo, was in contempt of Court within the meaning of the Rules, and cautioned and discharged him.

Further, this Court had to determine an Application for Special Directions brought by Kroll filed on the 18th of February, 2020.

Per Exhibit 2 attached to the affidavit in support of the application for special directions, it was “proposed for information in the following categories of sensitivity to be treated by the Court hearing the appeal in the following manner;

1. That the application and the hearing the appeal be heard in chambers;
2. Informative Reports if Kroll already serving ongoing prosecutions to be reported to the Auditor-General upon evaluation by the Judge;
3. Informative Reports of Kroll which are ongoing to be reported on to the Judge only, with background and general areas of investigation as well as hours rendered covered by the fee paid;
4. Informative Reports and investigations on prospective recoveries on high asset targets to be reported to the Judge only in limited terms without liberty to report to the Auditor-General on the grounds of National Security.
5. Informative Reports and investigations on highly confidential national security matters undertaken in addition to the Cocobod matter.”

The document gave further particulars of evidence in the control of the Ministry of National Security (and by extension the

Appellant/Applicant) which will not be elucidated at this time for the reason that the matter was referred to the appropriate quarter and dealt with.

(Emphases mine)

On the 25th of May, 2020, this court determined that in the circumstances, the matter of the status of the documents to be examined and determined whether or not they are prejudicial to national security is referred to the Supreme Court, which has the exclusive jurisdiction to do so.

The Court has since been notified by the Registrar of the Supreme Court per a letter dated 11th August, 2020 that the matter has been disposed of by the Apex Court.

The holding of the Court was:

“Having informed the Court that the special confidential documents, which necessitated the Learned Trial Judge to make a reference to this Court have been inspected by a team from the Audit Service, representing the Acting Auditor-General and found same to be satisfactory, this Court is of the view that the reference to the Supreme Court is moot and the reference is accordingly struck out.”

(Emphasis mine)

The Respondent has since then caused to be filed a supplementary affidavit verifying their satisfaction with the process.

ON CONSOLIDATED MATTERS GENERALLY

The law and practice are well settled with regard to consolidated actions that the individual identities of the consolidated suits must be maintained throughout the proceedings.

See: **AGBOADO v. FIANKOR [1996-96] 1 GLR 278 @ 281(CA)**. In that case, it was held that although an important incidence of consolidating cases was to enable the hearing to be facilitated and expedited, another equally important incidence of consolidation was that a separate judgment had to be delivered in each suit.

Thus, the individual identity of each of the consolidated suits had to be maintained throughout the proceedings up to execution. Hence pleadings filed subsequent to consolidation had to clearly specify in which of the consolidated suits it was being filed.

Accordingly, since in the instant case, after the five suits had been consolidated the trial circuit court proceeded as though there was only a plaintiff against a defendant with the same reliefs and the same defences and thus only one judgment was given, the trial following the order of consolidation was unsatisfactory.

Further, it has been held in **YAW ATUAHENE & ANOR v. BOTANTIM & ANOR (UNREPORTED) (Suit No. H1/20/2005) dated 13th July, 2005**, that where a single judgment is preferred to separate judgments, there is a duty on the trial judge to give reasons for arriving at the same or different conclusions in respect of the consolidated suits to reflect the distinct characters of each case.

In this case, it is proposed that the reasons for the conclusions arrived at in dealing with the appeal be discussed together since the

circumstances of both cases are inextricably intertwined, after which the Judgments or Findings will be set out in separate paragraphs.

**AFIA SERWAH ASARE-BOTWE (MRS.)
(JUSTICE OF THE HIGH COURT)**

ON APPEALS GENERALLY

The duty of this court in regard to the instant appeal was clearly stated in the case of **BAKANA LTD. v. OSEI [2014] 77 G.M.J 76 (CA).**

The court held that since an appeal is by way of rehearing, it is for the Appellate court to comprehensively review the whole case by analyzing the entire record of appeal, taking into account the testimonies and all documentary evidence adduced at the trial before arriving at a decision, so as to satisfy itself that on a preponderance of probabilities, the judgement of the trial court or tribunal is reasonably or amply supported by the evidence on record.

See also: NORTEY (NO.2) v. AFRICAN INSTITUTE OF JOURNALISM AND COMMUNICATION & OTHERS (NO.2) [2013-2014] 1 SCGLR 703

In the circumstances, the grounds of appeal will be assessed or evaluated in the light of the entire evidence before the Court and a determination made as to whether the conclusion of the Auditor General was meritorious.

As stated supra, some of the rounds of appeal will be dealt with together since they are interlinked. From the grounds filed, those relating to the performance of the work of Kroll and the Approval by the Appellants in Osafo Marfo and others are related and will be dealt with together. Another set of grounds of appeal to be dealt with together will be those relating to alleged breaches of the rules of natural justice.

In the circumstances, the grounds will be dealt with viz;

- a) On the performance or otherwise of the contract culminating in the payment of the sum of GH¢4,869,421. 87, being **Grounds 1, 3 and 5** of the Notice of Appeal filed by Kroll and Ground 3 of the Appeal filed by Osafo Marfo and Others;
- b) On matters pertaining to alleged breaches of the rules of natural justice, being Grounds 2 and 4 of the Notice of Appeal filed on behalf of Kroll and Grounds 1, 2 3 and 4 of the Notice of Appeal filed by Osafo Marfo and others.

ON THE MATTERS PERTAINING TO WHETHER OR NOT ANY SERVICE WAS RENDERED BY KROLL

The relevant grounds of appeal are;

ON KROLL'S APPEAL

Ground one:

The Respondent came to a wrong finding of fact when he concluded, in the absence of proof before him of performance, that the contract had not been performed.

Ground three:

The Respondent wrongly found the payment to have been made contrary to law, despite the fact that it was made efficiently in exchange for value-for-money service duly and properly rendered by the Appellant as a contractor for services.

Ground five:

The Appellant relies on the presumption of regularity pertaining to the Government's adherence to all the internal processes and Government

procedures in the engagement of the supplier services under the contract. Further, the Respondent erred by a misapplication of article 181 of the 1992 Constitution.

ON THE APPEAL BY OSAFO MARFO AND OTHERS:

Ground three

The Auditor-General acted **unreasonably, capriciously and maliciously towards all the appellants, in blatant violation of his duty as a public officer, when he refused to inspect and study the evidence of work done by Kroll Associates UK Limited**, as requested by the 1st appellant in his response to the notice of intention to disallow/surcharge, before proceeding to serve the notice of disallowance and surcharge.

Per the record before the Court, and all the parties agree to this, (especially per the Reply of the Respondent) the fact is that the Respondent audited the accounts of the Ministry of Finance for the period July 1, 2018 to December 31, 2018. Subsequent to the Audit, the Respondent issued an Audit Observation Memoranda dated the 21st of January, 2019 in which the Respondent required the Ministry of Finance to respond to the to the said observations. In essence, it was required for the Ministry to explain or justify the service provided prior to the payment of the contract sum of about one million US dollars (US\$1,000,000).

The response received essentially was that the relevant documents to corroborate the justification for the spending were available for audit review and further that a team outside the Ministry of Finance was carrying out the assignment and that they were ready to share the relevant information.

In order to endure that the payment was properly authenticated, the Respondent “urged the Ministry to provide us with copy of the report

[sic] detailing the assets recovered and acceptance of report thereon.” The Respondent issued a Notice of Intention to Disallow/Surcharge dated 24th September, 2019.

Eventually, in the ensuing exchanges, the Senior Minister, Hon. Yaw Osafo-Maafa (as his name is spelt therein) (the 1st Appellant in in Suit No. **CM/MISC/0315/2020**, wrote Exhibit AG 12 (also attached as Exhibit D to the Appeal) a letter dated 8th October, 2019 which concluded inter alia thus;

*“The work of Kroll Associates under the agreement include asset tracing and asset searching.....which will be produced in Court as evidence for the prosecution and are therefore considered as privileged and confidential information and reports. **They are, however, available at the office of the Senior Minister for your inspection.....***

*.....**They will be available after the investigations for your inspection and study.”***

The Respondent upon receiving this and other correspondences rather opted to issue a notice of specification and certification of disallowance and/or surcharge against the Appellants in the consolidated matters before the Court without taking up the offer or opportunity to inspect the documents. No reason was given for the refusal, and nothing else was heard from the Respondent, other than the issuance of the notice that has culminated in these appeals.

Eventually however, when the matter was referred to the Supreme Court, not only did the Respondent’s office now agree to inspect the documents, they also expressed satisfaction with the work done.

The affidavit in support of the verified documents filed on the 21st of October, 2020 states inter alia that;

3. ***That on 2nd July 2020 upon the instructions of the acting Auditor-General a team of officers from the Audit Service led by Mr. Winful went to the Senior Minister's office to inspect the report Kroll Associates U.K. Limited submitted to the government of Ghana.***
4. ***That we inspected a number of memos dating from April, 2019 to October, 2019***
5. ***That after the inspection, we were satisfied with the work done.***
6. ***That this deposition is only in relation to the work done.***

Clearly, both appeals relate to the surcharge and/or disallowance issued on the basis on no work having been done by Kroll Associates. It is clear then, that had the Respondent not been hasty, and had the Respondent's office taken up the offer to inspect the documents which would be made available for inspection, the whole issue of whether or not work had been done would have been resolved without this convoluted and tortuous legal battle.

Eventually, the Respondent has declared that "***we were satisfied with the work done***".

That has apparently settled the matter before the court regarding the issue of whether or not the work was done which merited the payment of the subject matter of disallowance and surcharge.

I therefore hold, upholding grounds one (1), three (3) and five (5) of the Kroll Appeal (Suit No. MSFT/0011/2020) that the Respondent erred by issuing the disallowance and/or surcharge against the Appellant (Kroll Associates) without recourse to the inspection of the documents corroborating the work done.

I shall now deal with the ground of appeal on matters pertaining to alleged breaches of the rules of natural justice, being **Grounds 2 and 4 of the Notice of Appeal filed on behalf of Kroll** and **Grounds 1, 2 and 4 of the Notice of Appeal filed by Osafo Marfo and others.**

Grounds 2 and 4 of the Notice of Appeal filed by Kroll state:

Ground two:

The Respondent acted in breach of the rules of natural justice and violated the Appellant's right to be heard on the fact that the contract had indeed been performed.

Ground 4:

The findings of the Respondent were not properly so called, as same were made *ultra vires* and in contravention of Articles 187(2), (5) & (6) of the Constitution 1992.

Additionally, there are the grounds 1, 2 and 4 filed by Mr. Osafo Marfo and Others as set out below;

GROUND OF APPEAL OF MR. OSAFO MARFO AND OTHERS

1. The determination by the Auditor-General that, the payment of the sum of GH¢4,869,421.87 was without approval from Parliament and the Public Procurement Authority (PPA) and thus offends Article 181 of the Constitution 1992 and the Public Procurement Act, **violated the appellants' right to a hearing** and as same did not form part of either the Audit Observations issued to the Ministry of Finance under section 29 of the Audit Service Act, 2000 (Act 584), or the Final Report of the AuditorGeneral laid before Parliament pursuant to article 187(5) of the Constitution, 1992.

2. The findings violated the 1st appellant's **right to a fair hearing** as the Auditor-General, in contravention of section 29 of Act 584 and articles 23 and 296 of the Constitution, failed to serve 1st appellant with any audit observations containing any breaches by him before proceeding to issue the notice of intention to disallow /surcharge.

3. The Auditor-General committed a grave and fundamental error of law in purporting to investigate and make findings of breaches of the procurement law by the appellants when he had no such authority at law.

In the case of **L'AIRE LIQUIDE GHANA LIMITED v. ANIN AND OTHERS [1991] 1 GLR 460**, it was held that whenever people were given power by law to consider facts and to arrive at conclusions affecting the fate of human beings, they were performing a quasijudicial function and if the body violated the rules of natural justice the courts had power to declare the procedure invalid, as well as the conclusions therefrom. In that case, the administrative inquiry violated the two cardinal principles of natural justice, namely a man might not be condemned unheard, and secondly, a man must not be a judge in his own case.

It has been argued that the Auditor-General under section 11(1) the Audit Service Act, 2000 and Article 187 (2) of the 1992 Constitution, has the following mandate;

The public accounts of Ghana and of all public offices, including the courts, the central and local government administrations, of the Universities and public institutions of like nature, of any public

corporation or other body or organization established by an Act of Parliament

Further, it has been argued that it is not intended that the Auditor-General would engage the people with whom the public institutions have dealt. He is rather to engage the public institutions themselves.

In this case however, the Auditor-General had clearly engaged the office of the Senior Minister directly to a point. There is however no clear reason on the record to show why he did not complete the engagement and decided to withdraw his co-operation without consummating the engagement already commenced.

It must be put on record that for any and every person in public office who exercises discretionary power of any sort, under Article 296 of the 1992 Constitution;

a) that discretionary power shall be deemed to imply a duty to be fair and candid;

(b) the exercise of the discretionary power shall not be arbitrary, capricious or biased wither by resentment, prejudice or personal dislike and shall be in accordance with due process of law;

Further, in **AWUNI v. WEST AFRICAN EXAMINATIONS COUNCIL [2003-2004] SCGLR 471**, the Supreme Court dealt with matters **pertaining to what it means** “to act fairly and reasonably” per Kpegah JSC at page 489 of the judgment. He said:

“The phrase ‘to act fairly and reasonably’ in my opinion necessarily imports a duty to observe the common law maxim of audi alterem partem and other principles of natural justice which is very much part of our jurisprudence and are implicit in the constitutional provisions in article 23.

In this case, this Court holds the view that the Respondent, in order to observe due process and to prevent any procedural lapses, ought to have at least communicated his refusal to inspect the documents for stated reasons before going ahead to issue the notices that have given rise to the Appeals before this court.

Without going into any further detail, since by their eventual agreement to inspect the documents the Respondent's office have tacitly acknowledged the error of their ways, I hold that the Respondent failed to abide by the well-known rules of natural justice of giving the Appellants the opportunity to be heard.

I therefore conclude on the respective consolidates cases as follows;

JUDGMENT IN SUIT NO: MSFT /0022/2020

**KROLL ASSOCIATED U.K. LIMITED
NEXUS PALACE
25 FARRINGTON STREET
LONDON, EC4 4B**

APPELLANT/APPLICANT

VRS.

**THE AUDITOR-GENERAL -----RESPONDENT/RESPONDENT
AUDIT SERVICE
ACCRA**

The Appeal is upheld on all grounds.

JUDGMENT IN SUIT NO. CM/MISC/0315/2020

**1. YAW OSAFO MARFO
OFFICE OF THE PRESIDENT ANNEX
RIDGE, ACCRA**

2. MICHAEL AYENSU
MINISTRY OF FINANCE
MINISTRIES-ACCRA

APPELLANTS

3. ABRAHAM KOFI TAWIAH
MINISTRY OF FINANCE
MINISTRIES-ACCRA

4. EVA ASSELBA MENDS MINISTRY
OF FINANCE
MINISTRIES-ACCRA


5. PATRICK NOMO
MINISTRY OF FINANCE
MINISTRIES-ACCRA

VRS.

THE AUDITOR-GENERAL ----- RESPONDENT
GHANA AUDIT SERVICE
ACCRA

The Appeal is upheld on all grounds.

(SGD)
AFIA SERWAH ASARE-BOTWE (MRS.)
(JUSTICE OF THE HIGH COURT)

CERTIFIED TRUE COPY

.....REGISTRAR
HIGH COURT
FINANCE & ECONOMIC CRIME COURT,
LAW COURT COMPLEX - ACCRA