SHUTTING THE STABLE GATES AFTER THE HORSE HAS BOLTED – THE ORDER 66 CONUNDRUM.

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1. MOTION EX-PARTE

In Civil procedure and practice, generally all applications must be made by giving notice of same to the party who is to be affected by the Order sought[2]. The days returnable on an application depends on the type of application[3].

Also by practice, an application for the grant of Letters of Administration (L.A.) or Probate being generally a "non-contentious" application, is made Ex-Parte[4]. The jurisdiction of the High Court (mutatis mutandis, the Circuit Court) to hear and determine such an application is founded under the Administration of Estates Act, 1961[5] and the High Court Civil Procedure Rules, 2004 (C.I. 47).[6]

The instructive provisions under ORDER 19 Rule 1 of C.I. 47 state as follows:

(1) Every application in pending proceedings shall be made by motion.

(3) Except where these Rules otherwise provide, no motion shall be made without previous notice to the parties affected.

(Emphasis mine)

It would appear then, that an Ex-Parte application for the grant of L.A. or Probate defies the general mandatory effect of the rule stated *supra* because the rules under **Order 66 of C.I. 47** fail to provide any express exemption. The latin maxim of interpretation, "*expressum facit cessare tacitum*" which translates as "expression precludes implication" applies here, as a result of the clear omission by the draftsman to provide for any express exclusion of Order 66 from the operative ambit of Order 19 Rule 1(3) of C.I. 47.

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[2] Order 19 Rule 1(3) of C.I. 47

[3] Generally, according to Order 19 of C.I. 47, all applications are returnable within 3 days from date of service; An application for summary judgment under Order 14 of C.I. 47 is returnable within 4 days; An application in a matrimonial suit is returnable within 5 days under Order 65 Rule 29 of C.I. 47.

[4] Samuel Marful-Sau; A Practical Guide to Civil Procedure in Ghana, p.180.

[5] Act 63.

[6] Order 66 Rule 1 of C.I. 47

The normative effect of Order 19 Rule 1(3) of C.I. 47 is thus reinforced by Order 19 Rule 3(1), which states as follows:

"Subject to rule 1 subrule (3), *an application by motion may be made ex-parte where any of these Rules provides or where, having regard to the circumstances, the Court considers it proper to permit the application to be made".*

By contrast, Orders 7 Rule 6(2)[7] and 25 Rule 1(7)[8] of C.I. 47 stipulate without any equivocation, the non-applicability of Order 19 Rule 1(3) of C.I. 47.

It becomes immediately apparent that the practice of instituting an application for the grant of LA or Probate Ex-Parte, constitutes an anomaly not sanctioned by the express provisions of the rules of court, but rather by the discretion vested in the Courts and the necessity of convenient practice.

Our courts have held that where the nature of the application leading to the grant of the court's Order was made Ex-Parte, the deponent owed a higher and more onerous duty to the Court, to disclose crucial facts which operated on the discretion of the judge in granting the Order sought.

Ex-parte applications being proceedings exclusively by one party in absence of, and without the knowledge of the other party, the Applicant of such an application must show utmost good faith in his/her depositions in support and must not contain any misrepresentation or distortion of the facts. The penalty for non-disclosure is that, when the other party is served with the order, the fellow affected by it may apply to the court to have the order discharged[9][10].

2. HAVE THE WORDS "GRANT" AND "ISSUE/ISSUANCE" BEEN USED INTERCHANGEABLY?

The instructive provisions under Order 66 Rule 1 of C.I. 47 state:

(3) Where the deceased has property within the jurisdiction of more than one court, the application shall be made to only one of the courts in respect of all the properties.

(4) Notice of an application made under subrule (3) shall be given to the registrar of every Court with jurisdiction in the areas where the property may be found and ***any caveat filed in the courts shall be brought to the***

[7] An application for an order for substituted service **shall be made ex-parte** and shall be supported by an affidavit stating the facts on which the application is founded.
[8] In case of urgency, a party **may make the application ex-parte** supported by an affidavit.
[9] Republic v High Court, Accra; exparte Salloum (Senyo Coker Interested Party) [2011] 1 SCGLR 574.
[10] Francisca Serwaa Boateng: The Handbook on Civil Procedure & Practice in Ghana; p. 316.

notice of the court before which the application is pending, which may stay the hearing of the application until it is satisfied that no caveat has been filed in another court.

The relevant provisions under Order 66 Rule 10 of C.I. 47 state as follows:

(1) The Court shall not allow ***any grant of letters of administration to issue unless after the grant****, notice of it is given for a period of not less than twenty-one days, or such other period as the Court may order in the following manner: …*

(2) Where ***the grant is in respect of the estate of a person who died intestate****, notice must be given whenever practicable to all persons entitled to a share of the estate of the deceased under the Intestate Succession Law, 1985 (P.N.D.C. Law 111); the Court may, however, dispense with such notice to beneficiaries if it considers it expedient to do so.*

(3) The Court shall not allow any ***grant of probate or letters of administration to issue*** *until all inquiries which it sees fit to make have been answered to its satisfaction.*

Upon reflecting on the provisions stated *supra*, it becomes apparent that the word "issue/issuance" refers to the Order granting the L.A./Probate. Therefore, semantically, the judge issues the grant of the application. This meaning is further enhanced by Order 66 Rule 11(1)[11] which states that:

"(1) Any person who has or claims to have an interest in the estate of a deceased and who wishes to ensure that **no grant of probate or letters of administration is issued without notice to the person**, may file a caveat as in Form 24 specified in the Schedule."

More critically however, the provision under Order 66 Rule 11(2) of CI. 47 stipulates as follows:

"The caveat **may be filed either before or after an application has been made for probate or letters of administration, but before grant."**

Thus, an emphasis is placed on the timing of the caveat, i.e. either before or after the application is made but before the grant of same by the Court. This understanding of the provision is further affirmed by Order 66 Rule 1(4) (supra) which emphasizes that any caveat filed in the courts shall be brought to the notice of the court before which **the application is pending**, which may stay the hearing of the application until it is satisfied that no caveat has been filed in another court.

[11] Order 66 Rule 11 of C.I. 47.

It follows therefore, that in order to properly invoke the court's jurisdiction to hear and determine a caveat against the grant of an application for L.A./Probate, the application itself ought to be pending awaiting determination (issuance) by the Court.

In the case of **Coleman v Shang**[12], Van Lare CJ held that the filing of a Caveat signified an opposition to a grant. The learned jurist stated as follows: "*Caveat in opposition to application for letters of administration, together with an affidavit of interest filed in consequence of warning served upon the caveator, amounts to a counterclaim, as between the applicant for letters and the caveator, the latter has a better right to the grant of the letters*."

3. WHAT IS THE EFFECT OF A CAVEAT WHICH HAS BEEN FILED AFTER THE GRANT OF THE APPLICATION FOR L.A/PROBATE?

The law is clear that where an enactment had prescribed a special procedure by which something was to be done, it was that procedure alone that was to be followed[13].

Having noted that a typical application for grant of L.A/Probate is made Ex-Parte (without notice to any affected party), then it stands to reason that until the **Notice of the Grant**[14] is posted for 21 days, an affected party who wishes to oppose the grant may not be clothed with actual/formal notice of the pendency of the application.

We recall the true nature and character of an application for LA/Probate as being "non-contentious", the grant of which is entirely discretionary[15] on the basis of a supporting affidavit and other relevant documents[16] as warranted by the necessity of succession.[17]

In light of the foregoing, it is submitted that a caveat filed after the grant of an application for L.A./Probate is filed out of time, not capable of grounding the jurisdiction of the court to hear and determine the issues posed by the Caveat.

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[12] [1959] GLR 390 at 398
[13] Holding 3 in Boyefio v NTHC Properties [1997-98] 1 GLR 768-786
[14] Form 23 of the Schedule. See: Order 66 Rule 10(5) of C.I. 47.
[15] ADMINISTRATION OF ESTATES ACT, 1961 (ACT 63); Section 79.
[16] Order 66 Rule 8(1) of C.I. 47
[17] ADMINISTRATION OF ESTATES ACT, 1961 (ACT 63); Sections 1 and 2.

4. THE CONTENTS OF THE NOTICE OF GRANT/NOTICE TO NEXT-OF-KIN ("FORM 23").

NOTICE TO NEXT-OF-KIN
(Order 66 rule 10(5))

IN the matter of the estate of deceased. TO NEXT-OF-KIN (if any) and all other persons claiming any interest in the movable or immovable property of late of who died at intestate on the day of .

TAKE NOTICE that letters of administration of the movable and immovable property of the above-named have been applied for by of claiming to be of the deceased and that **unless a notice to prohibit the grant is lodged in the Court within days from the date of this notice letters of administration will be granted to the applicant.**

Dated at the day of .

Registrar

High/Circuit Court

(Emphasis mine)

The discernible expression of the Notice (supra) informs all interested parties that unless a Notice to prohibit the grant is lodged in Court within a specific period (usually 21 days) from the date of the Notice, the Letters of Administration will be granted to the applicant. Clearly therefore, the use of the word "grant" in the Notice (Form 23) poses a challenge, because the issuance of the Notice (Form 23) *ipso facto* denotes that the application has already been granted.

More importantly, does the term, "Notice to prohibit the grant" constitute a euphemism for Caveat? It is submitted that if the framers of the law meant "Caveat" instead of "Notice to prohibit grant", they would have stated so expressly without any room for ambiguity.

It must also be noted that the forms at the appendix of the C.I. 47 constitute part of its schedule. It has been held by our Courts that the Schedule of an enactment forms part of same as much as any other part, including the section which introduced it[18]. However, where there is a dispute between the provisions of an enactment and its schedule, the provisions prevail.

[18] KUENYEHIA and Others v ARCHER and Others [1993-94] 2 GLR 525—643.

5. CONCLUSION

According to the famous English jurist, Denning LJ**:** "*… It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word as to give 'force and life' to the intention of the legislature*[19]*."*

As students and practitioners of the law, we know that context is crucial in the process of ascertaining the meaning and effect of legal texts. This accounts for the reason why the courts in the Commonwealth have generally departed from the strict constructionist approach to interpretation and have adopted a more functionalist approach to interpretation such as the Purposive Rule[20]. The challenge however is that where the draftsman adopts a language which is restrictive or less accommodative of the exigencies and practicalities that may ensue during the life of the statute/enactment, then the judge finds difficulty in expanding the relevant provisions of the law to remedy the legal predicament. I refer to the decision in **Humphrey Bonsu & Anor. v Quaynor & Others**[21].

In light of the foregoing, it is submitted that in the absence of any intervention by the **Rules of Court Committee**[22] to provide for the filing of a Caveat post grant of the application for L.A./Probate, the proper procedure for challenging the issuance of the Order granting the Ex-Parte application for L.A/Probate is to apply to set same aside (*ex debito justitiae*), based on the principle of law that the grounds contained in the affidavit in support of the Motion Ex-parte for the grant of L.A./Probate was a statement on oath[23] and that the court must not be misled into making an Order on the basis of a perjurious affidavit.

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[19] Seaford Court Estates Limited v Asher [1949] 2KB 481 at 498-499
[20] Memorandum to the Interpretation Act, 2009 (Act 792)
[21] [1999-2000] 2 GLR 781
[22] Article 157 of the Constitution, 1992
[23] MAHAMA AND ANOTHER v. MOSHIE [1984-86] 2 GLR 708-716