CRITIQUE: THE REPUBLIC v HIGH COURT (COMMERCIAL DIVISION), ACCRA, EX PARTE: YVONNE AMPONSAH BROBBEY, GLADYS NKRUMAH (INTERESTED PARTY)[1]

By Albert Gyamfi[2]

INTRODUCTION

When a person dies, his movable and immovable properties devolve on his personal representatives with effect from the date of his death.[3] Where a person dies testate, his personal representative is the executor(s) appointed by his will, but where the deceased dies intestate, it is a court that appoints his personal representatives; referred to as administrators. Until a vesting assent is issued by such personal representatives, the legal interest of the estate of the deceased is vested in his personal representatives as trustees of its intended beneficiaries.[4] The personal representatives of the deceased therefore acquire the legal right to possess, administer or deal[5] with the estate of the deceased to the exclusion of all other persons. Any person who takes possession of, administers or otherwise deals with the property of a deceased person may be guilty of intermeddling.[6] Order 66 rule 3 of C.I. 47 establishes intermeddling as a criminal offence punishable upon summary conviction, to a fine not exceeding 500 penalty units or twice the value of the estate intermeddled with or to imprisonment for a term not exceeding 2 years or to both.

Although it is widely acknowledged that intermeddling is an offence, the challenge among lawyers and the bench had always been the proper procedure for the prosecution of such cases. While some legal luminaries argue that it is a criminal offence and can only be prosecuted by the Attorney General in the exercise of his powers under Article 88 (3) and (4) of the 1992 Constitution, others argue that intermeddling, just like contempt of court, is a quasi-criminal offence and may be dealt with summarily by a civil court upon an application.

Although the Supreme Court until the case presently under review had not resolved this dichotomy, conflicting decisions had been made by the Court of Appeal in the cases of **Osei Kwaku and Another v Georgina Konadu Kusi**[7] and **Eric Akwetey Siaw & 2 Others v Tetteh Siaw-Sappore & 2 others**[8]

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[1] (Unreported) Civil Motion No. J5/82/2022 dated 1st February, 2023, SC

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[3] See s.1 of the Administration of Estates Act, 1961(Act 63)

[4] See Re Okyere (deceased) Peprah v Appenteng and Adomah (2012) SCGLR 65 at 75

[5] Subject to liabilities for breach of their fiduciary duties

[6] Order 66 Rule 3 of High Court (Civil Procedure) Rules, 2004 (C.I. 47)

[7] (Unreported) Civil Appeal No. H1/11/2005 dated 22nd April, 2005

[8] (Unreported) Civil Appeal No. H1/177/2014 dated 16th June, 2016

OSEI KWAKU AND ANOTHER v GEORGINA KONADU KUSI

In this case, following the death of one Kofi Nsiah, the appellant herein, claiming to have been appointed by the deceased in his last will as an executor took out an originating process by way of notice of motion under the provisions of the Intestate Succession Law, 1985 (PNDCL 111) for an order punishing the Respondent for intermeddling with the estate of the deceased and also for an order compelling her to surrender certain specified properties of the deceased which were alleged to be in her custody to the applicants. An objection was taken against the process filed by the Appellant. The grounds of the objection were that the section of the applicable legislation under which the appellants issued the processes before the lower court created a criminal offence and therefore since the appellants were neither the Attorney General nor claimed to have initiated the proceedings with his, (the Attorney General's), authority they could not initiate the action on their own against her as it was a criminal case. The trial court upheld the objection and dismissed the application on grounds of capacity.

Although, Order 66 rule 3 of C.I. 47 was not the provision under which the application was filed, Gbadegbe JA, (as he then was), who read the unanimous decision of the Court commented on the ruling as follows:

> *"I must observe, however that there is a similar provision in Order 66 rule 3 of the High Court Rules, CI 47. But since the section on which the application is based creates a crime, I think that the appellants could not by themselves have initiated what was in essence criminal proceedings; the power to do so having been vested in the office of the Attorney General of the Republic of Ghana. See Article 88 (3) and (4) of the 1992 Constitution. Further to this, I think that learned counsel for the respondent was right in his submissions regarding the form that a criminal trial should take in our jurisdiction. I am of the view that since the section on which the appellants relied created a criminal offence that is to be tried summarily…The result in my thinking therefore is that the application before the court below which sought to invoke its criminal jurisdiction was one that was incompetently instituted and thus rendered the proceedings before the court bad at law. I think that this was a clear instance of proceedings having been instituted without complying with essential statutory conditions namely the bringing of such an application by the Attorney General personally or proving that the application was initiated with his authority made under law. The said application was also fundamentally flawed in that the information on which the trial was to be based was not contained in a charge sheet that contained the statement of the offence together with its particulars, a condition precedent to the court's exercise of its summary jurisdiction in criminal trials. The consequence of this default is that the application before the court below was thereby constituted into incompetent proceedings that rendered everything planked thereon ineffectual".*

The decision of the Court in essence meant that intermeddling was a criminal offence, and just like any other criminal offence had to be prosecuted at the instance of the Attorney General. The charges against the accused person must be contained in a charge sheet and must be regulated under the procedure set out under the Criminal and other Offences Procedure Act, 1960 (Act 30).

ERIC AKWETEY SIAW & 2 OTHERS v TETTEH SIAW-SAPPORE & 2 OTHERS

In this case and contrary to the case of Osei Kwaku (supra) an application was filed under Order 66 Rule 3 of C.I. 47 in the High Court, Tema, praying the Court to punish the Respondents for intermeddling with the estate of one Angelina Mamle Siaw-Sappore, deceased. The Appellants had been appointed as administrators of the estate of the deceased but the Respondents had refused to hand over the estate to them. Similarly, the Respondents objected to the competence of the application on grounds that intermeddling is a criminal offence which ought to be tried under the Criminal Procedure Code. It was further argued that Section 1 of Act 30 provides the procedure to be followed in all criminal actions. Furthermore, Article 88 of the 1992 Constitution gives the Attorney General power to prosecute all criminal offences, as such the conduct of the respondents should be reported to the Attorney General who will enquire into the matter and institute a criminal action against the respondents. Counsel for the respondents supported this argument with the case of Osei Kwaku & Another v Georgina Konadu Kusi & Another (supra). The court below upheld the preliminary objection and dismissed the application. On appeal to the Court of Appeal, Dordzie JA (as she then was), who read the unanimous decision of the Court held as follows,

> *"Order 66 Rule 3 is the enactment that created the offence of intermeddling, as I have earlier said the main purpose is to preserve the estate which is the subject matter of probate and Letters of Administration applications before the court. In that vein Rule 3 imposes the obligations and liabilities of an executor or administrator on the intermeddler, which is civil; in addition to this is the punishment prescribed by the rule in the event of being convicted summarily of the offence. This makes the offence of intermeddling a quasi-criminal offence similar to other civil offences such as contempt of court which is tried summarily by the civil court".*

The Court of Appeal therefore declared its previous decision in Osei Kwaku and Another v Georgina Konadu Kusi (supra) as being *per incuriam* for failure of the Court to follow its previous decision in **Re Appau (deceased); Appau v Ocansey**[9] pursuant to Article 136 (5) of the 1992 Constitution of Ghana.

The Court of Appeal having declared its earlier decision in the Osei Kwaku case as *per incuriam* thereby settled the position of the law as regards the mode of commencing an action for intermeddling. Intermeddling was a quasi-criminal offence and could be commenced by an application! This position of the law has been followed in other

[9] (1993-94) GLR 146, CA

subsequent cases including the recent case of **Jamila Yakubu v Abdul Aziz Ishak**[10] where the Court of Appeal held as follows,

> *"As already objectively acknowledged by Counsel for the Appellant, in respect of the conflicting decisions of the Court on the matter as already discussed, the preferred approach or the correct approach in view of the ratio in the Ackah case is that intermeddling as a quasi-criminal offence can be properly and lawfully handled by way of an application under Order 66".*

FACTS OF THE CASE

As stated earlier, the Supreme Court has always missed the opportunity to comment on the appropriate procedure for instituting an action for intermeddling. This may probably be due to the fact that intermeddling is usually punished with a fine as of the first instance. Even in cases where the High Court or Circuit Court imposes a custodial sentence, same is usually of a short duration that the parties convicted may not want to appeal their way to the Supreme Court. The Court of Appeal and the High Court have therefore resorted to follow the decision as laid down in the Court of Appeal cases considered supra and have permitted an action for intermeddling by an application.

The Supreme Court finally had its opportunity in the case of **The Republic v High Court (Commercial Division), Accra, Ex Parte: Yvonne Amponsah Brobbey, Gladys Nkrumah (Interested Party).**[11] In this case the Interested Party filed a motion on notice under Order 66 Rule 3 of C.I. 47 praying for an order to punish the Applicant for intermeddling in the estate of one Richard Nkrumah (deceased), the father of the Applicant who died intestate on 31st October, 2019. The lawyer for the Applicant raised a preliminary legal objection arguing that since Order 66 of C.I. 47 created a criminal offence, it cannot be prosecuted by private citizens by motion in civil proceedings. He further argued that the Rules of Committee acted in excess of its jurisdiction by purporting to create a criminal offence under Order 66 rule 4 (sic) of C.I. 47 and that the High Court lacked jurisdiction to entertain an application for intermeddling in the manner prayed by the Interested Party. The High Court by its Ruling dismissed the preliminary legal objection and found that an action to punish for intermeddling may be commenced by civil proceedings and therefore it had jurisdiction to hear the same.

It is against this Ruling that that the Applicant brought an application invoking the supervisory jurisdiction of the Supreme Court under Article 132 of the 1992 Constitution for an order of Certiorari to quash the Ruling of the High Court. The grounds of the application were that the High Court had committed an error patent on the face of the record by holding that intermeddling proceedings may be commenced by civil proceedings in the form of an originating notice of motion and also on grounds that the

[10] (unreported) Civil Appeal No. H1/18/2022 dated 31st March, 2022, CA
[11] See f.n. 1

trial court wrongly assumed jurisdiction when it dismissed the Applicant's preliminary objection.

APPLICANT'S ARGUMENT

The Applicant argued that with the notable exception of contempt, which is quasi-criminal in nature and can be initiated by civil proceedings, all criminal offences can only be initiated at the instance of the Attorney-General or anyone acting under his or her authority. He further argued that an action may only be commenced by an originating notice of motion if there is an express statutory provision mandating same. Consequently, in the absence of such an express enabling statutory provision, the commencement of intermeddling proceedings by means of originating notice of motion is wrong in law.

ARGUMENT OF INTERESTED PARTY

The interested Party in his affidavit in opposition insisted that the High Court indeed has jurisdiction to hear applications for intermeddling and further argued that even if the High Court lacked the jurisdiction to entertain the proceedings by an originating notice of motion, the resulting complaint is better suited for redress through an appeal and not by invoking the supervisory jurisdiction of the Supreme Court.

DECISION OF THE SUPREME COURT

The Supreme Court in its unanimous decision read by Kulendi JSC allowed the application and quashed the Ruling of the High Court, Accra and further declared Order 66 rule 3 of C.I. 47 as a nullity. The Court in following its previous decision in **Mornah v Attorney General**[12] reasoned that the Rules of Court Committee established under Articles 33 (4) and 157 of the 1992 Constitution were only empowered to make rules to regulate the practice and procedures of the Court as against substantive legislation. Kulendi JSC stated the opinion of the Court as follows:

> *"Any rule promulgated pursuant to articles 157 (2) and 33 (4) of the Constitution that goes beyond the scope of rules of practice or procedure would be contrary to the enabling provisions and therefore ultra vires the Constitution. Jurisdiction may only be vested in the court by substantive statutes or the Constitution…The language of Order 66 (3) of C.I. 47 is one, which on the face of it, creates a criminal offence and prescribes punishment… Consequently, having held that the Rules of Court Committee cannot enact substantive legislation which criminal offences(sic) and vests jurisdiction, we are of the considered view that Order 66 (3) of C.I. 47 cannot constitute a valid basis for the conduct of an enquiry into an offence of intermeddling and therefore occasions a nullity"*

The Court however stated that such cases are better suited for section 17 of the Intestate Succession Law, 1985 (PNDCL 111) which preceded C.I. 47. Since the said provision

[12] (2013) SCGLR (Special Edition) 502

creates substantive criminal offences, the default procedure by which it could be tried will be under section 1 (2) of Act 30. It is also not open to anyone, other than the Attorney-General or any person acting lawfully under the instructions of the Attorney General, to initiate such criminal prosecutions.

The Court ended by stating emphatically that *"any previous decisions of other courts inconsistent with these statements of the law are in obvious error and are to that extent overruled".*

CRITIQUE

While I am not in any way arrogating to myself the power to sit in judgment over the decisions of the apex court of our land and its honourable justices, I wish to make a few comments about this landmark case and give reasons why I respectfully and humbly feel that this case was decided wrongly.

First, it is my considered view that the trial High Court did not commit an error apparent on the face of the record which warranted its Ruling to be quashed by way of ***certiorari.*** It is trite learning that the Supreme Court possesses supervisory jurisdiction over all courts and adjudicating authorities.[13] The Supreme Court, for the purposes of enforcing or securing the enforcement of its supervisory jurisdiction, also has the power to issue prerogative writs in the nature of certiorari, mandamus, prohibition, etc.

It is my conceded view that to exercise its supervisory powers relative to certiorari, it must be shown was an alleged breach of the rules of natural justice; an error of law apparent on the face of the record or there was a want or excess of jurisdiction. This principle was amply stated by the Supreme Court in the case of **Republic v High Court, Commercial Division, Accra; Ex parte Kwabena Duffour (Attorney General and 8 others, interested parties)**[14] as follows:

> *"The grounds on which the supervisory jurisdiction of the Court may be invoked has been stated ad nauseam. In the Republic v High Court, Accra Ex-parte; Ghana Medical Association (Chris Arcmann-Akummey, Interested Party) (2012) 2 SCGLR 768, the Court referred to its previous decision in Republic v Court of Appeal; Ex-parte Tsatsu Tsikata (2005-2006) SCGLR 612 and reiterated that the grounds upon which this court proceeds to exercise its supervisory jurisdiction are as follows:*
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> *1. Want or excess of jurisdiction.*
>
> *2. Where there is an error of law on the face of the record.*
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> *3. Failure to comply with the rules of natural justice, and*
>
> *4. The Wednesbury principles."*

[13] See Article 132 of the 1992 Constitution.
[14] (2021) 171 GMJ 80, SC

Error of law apparent on the face of the record

Although the Supreme Court has readily exercised its supervisory jurisdiction in cases alleging want or excess of jurisdiction and breach of the rules of natural justice, it has been slow in exercising its supervisory jurisdiction when the other grounds are alleged. This was stated in the case of **The Republic v High Court (Commercial Divison 6, Accra) Ex parte Nowfill Laba**[15] where the Supreme Court in issuing an order of certiorari where an error of law was alleged held as follows:

> *"Indeed, there are a number of respected judicial opinions that where a lower court such as the instant trial High Court had jurisdiction and there was no error of law patent on the face of the records as to make the decision a nullity, the superior court such as this court would not grant an order of certiorari on the grounds that the court had misconceived a point of law. To correct the misconception or otherwise of the wrong decision, the remedy opened to the party aggrieved was an appeal and not certiorari" (emphasis supplied).*

The superior courts are slow in quashing a decision or ruling made within the jurisdiction of a court on grounds of error of law. Certiorari will only lie to quash such decisions only where the error is so plain as to make the impugned decision a nullity. In the oft-cited case of **Republic v Court of Appeal, Ex-Parte Tsatsu Tsikata**[16] Wood JSC, (as she then was), delivered herself as follows:

> *"The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then that the error (s) of law as alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. A minor, trifling, inconsequential or unimportant error which does not go to the core or root of the decision complained of, or stated differently, on which the decision does not turn would not attract the courts supervisory jurisdiction".*

Did the trial judge commit an error of law?

The contention of the Applicant grounding the application for certiorari was that the trial judge had committed an error of law apparent on the face of the record by holding that

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[15] (2019) 151 GMJ 39. See also Republic v High Court, Kumasi Ex Parte Fosuhene (1989-90) 2 GLR 315; Republic v High Court, Ex-parte CHRAJ (2003-2004) 1 SCGLR 312; Republic v High Court (Commercial Division) ex parte The Trust Bank Limited (2009) SCGLR 164

[16] (2005-2006) SCGLR 612. See also Republic v High Court, Ex-Parte Industrialization Fund for Developing Countries and Another (2003-2004) SCGLR 348 where Bamford-Addo JSC emphasized the fact that when a High Court acts within it's jurisdiction, it's decision which is erroneous is normally corrected by appeal whether the error is one of fact or law.

intermeddling proceedings could be instituted by an originating notice of motion. The question to be answered is, could the trial judge could have ruled otherwise?

It is received learning that a court of law dispenses justice in accordance with three and only three yardsticks: statute law, case law and the well-known practices of the courts.[17] Although, it is admitted that these three (3) yardsticks are ranked in order of priority a decision of a court would not be described as being in error where it is based on one of lesser priority in the absence of the other(s). Thus, in dispensing justice, a court may fall on case law in the absence of a statute touching on the issue for determination and so can a court of law fall on a well-known practice of the courts to ground its decision in the absence of a statue or case law. A court cannot however, ignore a statute and apply a case law. In such cases, the decision arrived out may be susceptible to be quashed by certiorari as same may amount to an error apparent on the face of the record as it flies contrary to a statute.

Respectfully, in the case under consideration the trial judge in coming to his decision relied on Order 66 (3) of C.I. 47 which prior to its decision was a good and subsisting law and particularly so when this provision had been pronounced on by the superior courts, particularly the Court of Appeal in ERIC AKWETEY SIAW & OTHERS v SIAW, supra which by operation of the principle of *stare decisis*, was binding on the trial High Court, anyway. The trial High Court judge could not have therefore ignored this law and held that he did not have jurisdiction to hear a case of intermeddling.

Further, the High Court judge had no jurisdiction to declare a legislation as unconstitutional as the Supreme Court did, even if he had his own reservations about it. The Supreme Court has been unmerciful to any court that attempts to usurp its supervisory jurisdiction to declare as void any enactment. In the case of **Yirenkyi v The Republic**,[18] the Supreme Court criticized the Court of Appeal for declaring as void, the new formulation in section 23 (1) of Act 29. The Supreme delivered itself as follows:

> *"Indeed, it would appear that the Court of Appeal itself erred by usurping the powers of the Supreme Court to render as unconstitutional a law that had been passed by Parliament. In the view of this court therefore, the new formulation in s. 23 (1) of Act 29 is the law on conspiracy in Ghana and until that formulation has been changed by constitutional amendment or recourse to the Supreme Court, the changes brought about by the work of the Statute Law Revision Commissioner are valid and remain the laws of Ghana".*

At best, the only reasonable thing the High Court Judge could have done was to have stayed proceedings and referred the constitutionality of the said provision to the Supreme Court pursuant to its reference jurisdiction under Article 132 of the 1992 Constitution if it had arisen in the course of the proceedings. Unfortunately, the

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[17] See Harley v Ejura Farms (Ghana) Ltd (1977) 2 GLR 179 at 214

[18] (2016) 99 GMJ 1, SC

constitutionality of the said provision did not arise in the Court below as the only challenge to jurisdiction by the Applicant was the procedure by which an intermeddling action ought to be commenced. The trial Judge therefore had no obligation to raise its constitutionality *suo motu*, stay proceedings and refer the matter to the Supreme Court. Even if it is argued that the trial judge ought to have referred the matter of constitutional interpretation to the Supreme Court, it is humbly submitted that his failure to do so cannot constitute his decision to assume jurisdiction as an error apparent on the face of the record particularly when the said issue never came up at the trial court in the face of clear and express statutory provision conferring jurisdiction on him.

Again, although the offence of intermeddling existed in our statute books prior to this case, the Rules of Court committing had failed to provide the procedure by which it could be prosecuted. The Court of Appeal had in a number of cases prior to this case, including the **Re Appau (deceased); Appau v Ocansey** (supra) classified the offence of intermeddling as a quasi-criminal offence capable of being tried in a civil court. The Court of Appeal has also been resolute and has insisted that the proper means by which intermeddling was to be prosecuted was through an application filed in a civil court. With these authorities being cited to the trial judge, I am of the humble view that he was totally helpless and had to apply the law as it existed.

Article 136 (5) of the 1992 Constitution provides; *"subject to clause (3) of Article 129 of this Constitution, the Court of Appeal shall be bound by its previous decisions; and all courts lower than the Court of Appeal shall follow the decisions of the Court of Appeal on questions of law"*. The above provision presupposes that in the absence of a Supreme Court decision which is contrary to a decision of the Court of Appeal, the High Court, being a court lower to the Court of Appeal is always bound to follow the decisions of the Court of Appeal on questions of law and cannot depart from it. Where a High Court refuses to follow such binding decisions of the Court of Appeal, the resulting decision is *per incuriam* and is susceptible to be quashed on appeal and even by a certiorari. A decision of a court is described as *per incuriam* if it is made contrary to a binding case law or a statutory authority on the issue.[19] For instance, in the case of **S.A Turqui & Bros v Dahabieh**[20] Taylor JSC in bemoaning the attitude of judges in the court below in refusing to follow the decisions of the Court of Appeal held as follows:

> *"The question of law as to the propriety of suing a person by using the name under which he carries on business has been pronounced upon by the Court of Appeal in the said Vincenta case (supra) and the Court of Appeal cited statutory provisions in support. In holding that a name under which a person carries on his business activities cannot be used to sue the man, after the Vincenta case (supra) which decided the contrary had been cited to him, the learned judge was clearly in error and violated the provisions of the articles of the Constitution, 1979 already referred to in this judgment. When this is coupled with his utter failure to consider the*

[19] See Morelle Ltd v Wakeling (1955) 2 QB 379 at 406
[20] (1987-88) 2 GLR 486

enabling provision of Order 48 A, r. 11, it becomes clear that his decision is per incuriam and I hold therefore that his declaring the ex parte decision void and setting it aside as a nullity on this ground is wrong and not sound".

These sentiments were approved and applied by the Supreme Court in the case of **Rowland Kofi Dwamena v Richard Nartey Otoo & Anor,**[21] where it expressed an uproar at the attitude of lower court judges in refusing to follow its decisions even after becoming aware of them. The Court in expressing its utter disapproval to such practice held as follows:

"This Court has become painfully aware that ownership of lands that this court has settled in final judgments are clandestinely re-litigated in the lower courts by parties who lost. Even when some lower courts become aware that the Supreme Court has given judgment in respect of land in dispute before them, instead of ensuring that the case is determined in line with our decision, they condone this contemptuous conduct and render rulings that are either plainly contrary to our decision or eviscerate our decisions of their potency. This attitude towards judgments of the apex court of the country must cease".

It is thus humbly submitted that the learned trial High Court judge having been confronted with decisions of the Court of Appeal which had held categorically that intermeddling proceedings could be commenced by an originating notice of motion could not have held otherwise. Any decision contrary to what the learned trial judge had delivered would have been *per incuriam* and unconstitutional as it would have been contrary to the clear dictates of Article 136 (5) of the 1992 Constitution. The decision of the High Court, in my humble view, was therefore not in error of law (not to talk of being patent on the face of the record), as it was in accordance with a subsisting legislation and a decision of the Court of Appeal binding on the trial judge. It is therefore my respectful opinion that the honourable Justices of the Supreme Court erred in law in holding that the trial High Court judge had committed an error patent on the face of the record and quashing his decision on the basis of a certiorari.

Whether the Supreme Court had jurisdiction to declare as null and void a legislation on the invocation of their supervisory jurisdiction.

It is known law that the Supreme Court administers justice in the exercise of four (4) forms of jurisdiction; original, appellate, supervisory and review jurisdictions. The rules of court also provide separate procedures under which each of these jurisdictions may be invoked. The original jurisdiction of the Supreme Court is to be invoked by a Writ of Summons[22] or by reference under Article 130 (2) of the 1992 Constitution. The appellate

[21] (2019) 147 GMJ 1, SC

[22] See Rule 45(1) of the Supreme Court Rules, 1996 (C.I. 16)

jurisdiction is invoked by a notice of appeal.[23] The supervisory and review jurisdictions of the Court is invoked by an application.[24]

The original jurisdiction of the Supreme Court is provided for under Article 130(1) of the 1992 Constitution of Ghana and provides as follows:

"Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution".

As indicated earlier, the original jurisdiction of the Supreme Court under Article 130(1) of the 1992 Constitution is to be invoked by a Writ of Summons. The Plaintiff to such an action is required to serve the Attorney-General with a copy of the writ and all other subsequent process even if the Attorney-General is not named as a party.[25] The Court may at any time on its motion or on application by a party, order any other person, including the Attorney General to be joined to or substituted for a party to the suit.[26] The Attorney-General also has the right to file an answer to the Plaintiff's claim if he chooses and be heard in the suit.[27] The policy rationale for this rule is not far-fetched. All laws are made by the state or under the authority of the state and as such where the constitutionality of any law is impugned, it will only be proper and fair for the Attorney-General, who is the representative of the state in all civil proceedings commenced against the state [28] to be heard on the matter.

The Supreme Court has in a number of cases refused an invitation to pronounce on the legality or otherwise of a statute by the invocation of its supervisory jurisdiction. The case of **The Republic v High Court (Commercial Division), Accra Ex-Parte, the Attorney General (Balkan Energy Ghana Ltd and 2 other, Interested Parties)**,[29] is a case in point. In that case the Attorney General brought an application in the Supreme Court for the following reliefs:

i. "A declaration that the failure of the High Court (Commercial Division) to refer the constitutional issues arising in Suit No. BDC 32/2010…to the Supreme Court is in breach of article 130 of the 1992 Constitution of Ghana…"
ii. A declaration that each of the power purchase agreements between the Government of Ghana and Balkan Energy (Ghana) Limited dated 27th July 2007

[23] See Rule 6(1) of C.I. 16
[24] See Rule 61(1) and Rule 55 of C.I. 16
[25] See Rule 45(3) of C.I. 16
[26] See Rule 45(4) of C.I. 16
[27] See Rule 48(3) of C.I. 16
[28] See Article 88(5) and (6) of the 1992 Constitution of Ghana.
[29] (2011) 2 SCGLR 1183

('PPA') and the arbitration agreement contained therein, being an international business transaction is unenforceable, Parliamentary approval not having been obtained.

iii. any further or other relief...."

The Supreme Court declined to determine issue (ii) in the exercise of its supervisory jurisdiction. Although the Court held that the trial judge erred in referring the issue to the Supreme Court pursuant to Article 130 (2) of the 1992 Constitution, the Court refused to determine the same in the exercise of its supervisory jurisdiction but referred the question to itself under the said Article 130 (2) for determination. The Supreme Court per Akuffo JSC, (as she then was), held as follows:

> *"Now, as was made patently clear in the abovementioned case of Ex Parte Electoral Commission, the remedies available to the Supreme Court, when exercising its supervisory jurisdiction under Article 132, are not limited to the issuing of the conventional writs of certiorari, mandamus, prohibition, etc. We also have the power to issue orders and directions as shall be necessary to prevent illegalities, failure of justice and needless delays in the administration of justice, 'for the purpose of enforcing or securing the enforcement' of our supervisory power… Consequently, in order to expedite the determination of the constitutional question at stake, we hereby refer to this Court the following questions…"*

The Supreme Court[30] in the resultant case of **The Attorney General v Balkan Energy Ghana Ltd and 2 others,**[31] **and** after considerable discussions declared that the Power Purchase Agreement dated 27th July, 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constituted an international business transaction within the meaning of Article 181(5) of the Constitution and as such required parliamentary approval. Thus, although the Supreme Court had ample opportunity to pronounce on the constitutionality of the Power Purchase Agreement between the Government of Ghana and Balkan Energy (Ghana) Limited, the Court insisted that its original jurisdiction be properly invoked and it was only when it had been so invoked that it determined the same.

In contra-distinction to the instant case, the Applicant sought from the Supreme Court a declaration that the Rules of Court Committee had acted contrary to its jurisdiction by purporting to create a criminal offence under Order 66(3) of C.I. 47. The Court, unlike the Balkan Energy Ghana Ltd case (supra) proceeded to exercise its original jurisdiction by declaring the said provision and all decisions made pursuant to the same as a nullity. The judgment of the Court does not even disclose that an opportunity was offered to the Attorney General to be heard on the constitutionality or otherwise of the said provision. This, in my respectful view was in error and sins against the clear dictates of Article 130

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[30] It must be noted that the panel that decided this case include 4 out of the 5 judges that sat on the earlier case invoking the supervisory jurisdiction of the Court.

[31] (Unreported) Reference No. J6/1/2012 dated 16th May, 2012

of the 1992 Constitution of Ghana. It is my humble submission that the original jurisdiction of the Supreme Court cannot be invoked or exercised on the basis of affidavit evidence and in an application invoking the supervisory jurisdiction of the Court.

Effect of the Judgment

It is acknowledged that the decisions of the Supreme Court being the apex court of the land is binding on all other courts.[32] The Supreme Court in the case under consideration declared Order 66 (3) of C.I. 47 as a nullity. The decision of the Court would therefore mean all persons "tried" under the said law are to be acquitted and discharged as there is no longer any law conferring validity on their "prosecution". This submission is in line with the provisions of Article 19 (11) of the 1992 Constitution of Ghana which requires that no person shall be tried for a criminal offence unless the offence is defined under a written law and the punishment prescribed.

Again, the Supreme Court having declared the said law to be a nullity, the effect is that same is void *ab initio*. This is to be distinguished from a law which has been repealed and has ceased to take effect from the date of the repeal. All persons convicted under the said law, in my humble view, are therefore entitled *ex debito justiciae* to have their convictions set aside as same is not supported by law. One may even argue that since the law under which they were convicted was void ab initio, same would imply that their fundamental human rights as contained under Article 19 (5) have been violated as they would have been convicted under a non-existing law. All persons convicted under the said law may therefore bring an action against the state for adequate compensation for their unlawful prosecution and incarceration.

CONCLUSION

In conclusion, I would suggest that the Supreme Court should hasten slowly in declaring enactments, particularly those that bother on criminal law as a nullity. Although the Supreme Court has jurisdiction under Article 2(1) and 130(1) of the 1992 Constitution to pronounce on the constitutionality of any law, it does not necessarily have to declare such laws as a nullity. The 1992 Constitution of Ghana gives the Supreme Court to power under Article 2(2) to make such orders and give such directions as it may consider appropriate for giving effect or enabling effect to be given to the declarations it may make. Where such orders are made, any person or group of persons to whom an order or direction is addressed shall duly obey and carry out the terms of the order or directions.[33] Where the orders or directions of the Supreme Court are not carried out or obeyed, same constitutes a high crime under the Constitution.[34] In the case of the President or the Vice-President same can even occasion their removal from office.[35] Thus, although the Supreme Court may declare a law inconsistent with the Constitution as a nullity, same is

[32] See Article 129(3) of the 1992 Constitution.
[33] See Article 2(3) of the 1992 Constitution of Ghana.
[34] See Article 2(4) of the 1992 Constitution of Ghana.
[35] Id.

not the only remedy available to the Court. The Court may make orders and directions to cure the Constitutional infractions, particularly, where the declaration of nullity would have dire consequences on the state.

This principle of law was applied by the Supreme Court in the case of **Mrs. Margaret Banful and Another v The Attorney General and Another.**[36] In that case, the Plaintiffs, in their capacities as citizens of Ghana invoked the original jurisdiction of the Supreme Court pursuant to Articles 2(1)(b) and 130(1) of the 1992 Constitution and Rule 45 of the Supreme Court Rules, 1996 (CI 16) for a declaration inter alia a declaration that on a true and proper interpretation of Article 75 of the 1992 Constitution of Ghana, the President of the Republic of Ghana acted unconstitutionally in his failure to obtain the requisite ratification by an Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament when he agreed with the Government of the United States of America to transfer Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby to the Republic of Ghana and a further order order directed at the President and his Assigns, for the immediate removal and return of Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby from the Republic of Ghana to Guantanamo Bay.

Although the Supreme Court (by a 6-1 majority) found the international agreement between the Government of Ghana and the Government of the United States of America to be unconstitutional, it restrained itself from making any further orders, particularly for the deportation of the detainees. This, in my view, was to avoid straining the long standing diplomatic relationship between Ghana and United States of America. The aftermath of the Supreme Court's decision was that the said agreement was *post facto* taken to parliament for the necessary ratification.

It is therefore humbly submitted that the Supreme Court must exercise its original jurisdiction under Article 130 of the 1992 Constitution only in such clear and obvious cases and as an action of last resort. The Supreme Court just like their American counterparts must exercise its original jurisdiction in declaring enactments as a nullity only in cases of extreme necessity. The Supreme Court must also insist that its original jurisdiction is properly invoked and must restrain itself from commenting on the constitutionality or otherwise of laws unless its jurisdiction has so been invoked. The Supreme Court must be quick to issue orders and directions for the amendment or repeal of offending legislations rather than declaring same a nullity.

[36] (Unreported) Writ No. J1/7/2016, dated 22/06/2017