IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/62/2016

2ND MAY, 2018

EBUSUAPANYIN NTIAKO E. KOBINA ..... PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. AHANTA TRADITIONAL COUNCIL)
2. EBUSUAPANYIN NKETSIA WEREKO) ..... DEFENDANTS/APPELLANTS/ RESPONDENTS

JUDGMENT

PWAMANG, JSC:-

My Lords, this appeal presents an interesting scenario wherein the Court of Appeal in the judgment on appeal before us unanimously departed from its own decision on a point of law. By Article 136(5) of the Constitution, 1992 the Court of Appeal is bound by its previous decisions but in this case the court reversed itself because it came to the conclusion that its previous decision was a nullity. A previous decision of the Court of Appeal which is null and void may certainly be departed from but whether

the previous decision in this case was a nullity or not, the analysis which follows will indicate.

The main issue that the Court of Appeal was confronted with in both decisions which were, except for one judge, by the same panel, was whether or not an action in the High Court praying for a declaration that a judgment of a chieftaincy tribunal is a nullity is a cause or matter affecting chieftaincy over which the High Court undoubtedly has no jurisdiction. Put in another way; whether the only jurisdiction exercisable by the High Court to quash a judgment of a chieftaincy tribunal said to be a nullity is by prerogative writ alone or the remedy of declaration may also be granted in an action commenced by writ of summons?

The background to the case is that the Ahanta Traditional Council on 30th December, 1998 gave judgment against the appellant in a chieftaincy matter filed by the 2nd respondent. After his appeal against that judgment was dismissed by the Judicial Committee of the Western Regional House of Chiefs, he commenced an action by writ in the High Court, Sekondi praying for only one relief; " Declaration that the judgement of the Ahanta Traditional Council in the case of...is null, void and of no effect for breaches of the provisions of LI 798 as well as the judgment of the Western Region House of Chiefs dated 9th day of December, 2002." The respondents filed their defence to the action together with a motion to dismiss the suit on the ground that it was a cause or matter affecting chieftaincy over which the High Court has no jurisdiction. The High Court refused the motion to dismiss and respondents appelled to the Court of Appeal. In its judgment on the interlocutory appeal dated 15th March, 2012, the Court of Appeal held that the High Court had jurisdiction in the matter and that it was not a cause or matter affecting chieftaincy. They remitted the case to the High Court for trial. After a trial the High Court granted the prayer sought by the appellant. In his judgment dated 11th April, 2013, Nicholas C. A. Agbevor J (as he then was) held that the Ahanta Traditional Council committed an error of law by proceeding to determine the chieftaincy cause when the provisions of the **Chieftaincy (Proceedings and Functions) Regulations,**

1972 (L.I. 798) had not been complied with and that the error went to the jurisdiction of the tribunal so the appellant was entitled to the declaration he sought.

The respondents appealed against the judgment of the High Court to the Court of Appeal and in their judgment dated 12th June, 2014 they allowed the appeal on the ground that the High Court had no jurisdiction in the case to begin with and that their earlier ruling that it had jurisdiction was a nullity. In their judgment the court referred to the Supreme Court case of **Republic v High Court, Accra, Ex parte Odonkorteye [1984-86] 2 GLR 148** and made a number of pronouncements on the position of the law on the jurisdiction of the High Court in relation to chieftaincy tribunals. However, the contention of the appellant in this appeal is that those statements were made in error and that the Court of Appeal misstated the law. In the circumstances, it is necessary to quote the Court of Appeal at length. At pages 8 to 9 of their judgment they delivered themselves as follows;

"The majority decision of 4-1(in Ex parte Odonkorteye)(sic) was made up of Sowah C.J., Francois, Taylor J. J.SC and Amua-Sakyi JA was that apart from the High Court's supervisory jurisdiction over all the lower courts and all the lower adjudicating bodies, the High Court *cannot entertain an action initiated by a writ to set aside a decision given by a judicial committee in a cause or matter affecting chieftaincy (emphasis supplied).* The court per Amua-sakyi JA held thus:

> **"The action brought by the respondents in the High Court was nothing more or less than an attempt to circumvent the law. It was couched as an option for a declaration that the articles of agreement were a forgery or otherwise illegal, but was, in fact, an invitation to the Court to exercise an appellate jurisdiction which it had not. Counsel for the applicant was right that by the express provision of section 52 of Act 372 and Section 15(1) of Act 370, the learned Judge was forbidden from entertaining the action brought before him. The proceedings were a nullity and ought to be quashed."**

Going by this decision, the two aforesaid decisions by the Court of Appeal were nullity as they allowed the High Court to entertain decisions rendered by Judicial Committees not in its supervisory jurisdiction but other jurisdiction which is equivalent or analogues to the High Court's appellate jurisdiction.

The Courts Act, Act 459 forbids the High Court from entertaining any cause or matter affecting chieftaincy at first instance or on appeal. Section 57 of the Courts Act, Act 459 provides as follows;

> **"Subject to the Constitution, the Court of Appeal, the High Court, Circuit Court and a District Court shall not entertain either at first instance or on appeal a cause or matter affecting chieftaincy."**

The exception to the above ratio is that the court could set aside void judgment that comes to its notice through an appeal but it does not include a judgment of the Judicial Committees in a cause or matter affecting chieftaincy, which the jurisdiction of the Traditional Courts have been completely ousted apart from the exercise of supervisory jurisdiction of the High Court.

It must be stated that a void judgment of judicial committees could be set aside by an appellate Judicial Committee no matter how and in what shape or form it comes to it on appeal. ***The void judgment of the Judicial Committee could be set aside on appeal, review, or a writ or an application but it must be in the Judicial Committee. The only exception is the High Court's supervisory jurisdiction in the nature of certiorari or prohibition (emphasis supplied).*** **The Courts would be astute enough to see through and thwart attempts by litigants such as the Plaintiff/Respondent to circumvent the law by using the High Court to interfere in cases determined by the Judicial Committees, which its jurisdiction has been ousted apart from its supervisory jurisdiction."**

From the above quotation, the Court of Appeal rested its judgment on the majority decision of this court in **Ex parte Odonkorteye (Supra)**. Though that case was not cited by any of the parties in their submissions, the Court of Appeal considered it determinative of the case before it. It is obvious that the court became aware of that decision only after the delivery of their judgment in the interlocutory appeal. But learned Counsel for the appellant, Joseph. A. Dawson (of blessed memory), argued forcefully in the appellant's statement of case that the majority decision in **Ex parte Odonkorteye** ought to be understood within the confines of the facts of that case. The facts of that case as narrated in the Headnote of the Report are as follows;

On the death of Nene Korle II, the stool occupant of the Tekperbiawe Division of Ada, a dispute arose between the second applicant and the second respondent as to which of them had been duly nominated, elected and installed as chief in succession to the deceased. Relying on a document described as "articles of agreement", the judicial committee of the Ada Traditional Council which adjudicated upon the matter found in favour of the second applicant. Having lost the case, the second respondent sought a remedy in the High Court, Accra. He prayed for a declaration that the "articles of agreement" were a forgery or otherwise illegal and consequently the judgment of the Ada Traditional Council founded on it was null and void. Counsel for the applicant raised a preliminary objection that having regard to section 52 of the Courts Act, 1971 (Act 372), and section 15 (1) of the Chieftaincy Act, 1971 (Act 370) which had accorded exclusive jurisdiction in chieftaincy matters to traditional courts, the trial judge had no jurisdiction to entertain the matter. The trial judge ruled, however, that he was exercising the supervisory powers of the High Court and that the suit was not a call for the determination of a cause or matter affecting chieftaincy; that it was only a call to determine whether the judgment obtained at the traditional council was regular and untainted or otherwise; and whether or not the alleged document upon which the judgment was said to have been made was a forgery; and whether or not any fraud had been perpetrated on the traditional council. He therefore heard the suit and entered judgment for the respondent. The applicant applied in the Supreme Court for certiorari to quash the judgment of the High Court on the main ground that it acted without jurisdiction.

By majority decision the Supreme Court granted the application. The reason the majority held that the High Court acted without jurisdiction was that, and this is evident from the portion of Amua-Sakyi JA's judgment quoted by the Court of Appeal, the High Court reviewed the evidence that had been led before the Ada Traditional Council in proof of the allegation of forgery and came to a conclusion that there was forgery whereas the allegation of forgery had been made in the proceedings before the Traditional Council which evaluated the evidence and concluded that there was no forgery. That exercise, the majority of the Supreme Court held, was in the nature of appellate jurisdiction being exercised by the High Court over the judgment of the Ada Traditional Council and since it had no such appellate jurisdiction the proceedings were a nullity.

With due respect to the judges of the Court of Appeal, in **Ex parte Odonkorteye** the majority of the Supreme Court never decided that apart from the prerogative writs, the High Court has no original jurisdiction to grant, upon an action commenced by writ of summons, a declaration that a judgment of a chieftaincy tribunal is fraudulent or a nullity. Furthermore, though in the judgment of Amua-Sakyi JA for the majority, he stated that it was within the competence of the Ada Traditional Council to set aside its own judgment on grounds of fraud and nullity, he did not say that it was only the inferior tribunal that gave a judgment that had jurisdiction to set such judgment aside on grounds of fraud or nullity and that the High Court has no such jurisdiction. Those opinions appear to be the Court of Appeal's own views but, with great deference to them, those statements are contrary to the provisions of the rules of the High Court and well-established judicial authorities on the common law jurisdiction of the High Court to grant declaratory relief in any matter that is justiciable. See **Banard v National Dock Labour Board [1953] 2 Q.B. 18.** In the House of Lords case of **Pyx Granite Co. Ltd v Ministry of Housing and Local Government [1960] AC 260,** the appellant argued that if there was any remedy obtainable by the respondent from the High Court then it must be by way of certiorari. Lord Goddard answered that argument as follows at page 290 of the Report;

" I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive."

In fact, the Court of Appeal in the cases of **Dzaba v Tumfour [1978] 1 GLR 18** and **Kwagyena & Ors v Agyei [1992] 1GLR 189** considered in some detail the issue of the jurisdiction of the High Court to grant declaratory relief in respect of void and fraudulent judgments of chieftaincy tribunals but unfortunately those decisions which were binding on the lower court were not referred to by the lawyers and the court too did not consider those cases. In **Kwagyena v Agyei (supra) Ex parte Odonkorteye** was relied upon by the appellants who argued that the High Court had no jurisdiction to declare a judgment of the Benkumhene of Kwahu given in 1931 in a chieftaincy matter fraudulent and a nullity as doing so amounted to hearing a cause or matter affecting chieftaincy. In rejecting that submission of the appellant, Ampiah JA in the lead judgment of the unanimous decision of the court said as follows at pages 198/199 of the Report;

" I must however clear the question as to whether or not an action for a declaration could be one of the High Court's supervisory powers over decisions of the inferior courts, exercisable to the same purpose as the prerogative writs. Our rules of court, i.e. L.N. 140A, empowers the court to make declaratory judgments and orders in appropriate cases. It states in Order 25, r. 5 that:

"5. No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

Order 25 Rule 4 in the **High Court (Civil Procedure Rules, 1954 (LN 140A)** has been repeated at Order 41 Rule 1 of **High Court (Civil Procedure) Rules, 2004 (CI 47)** which are our current rules. The plain meaning of the provision is that in cases where relief could be obtained by prerogative writs, declaratory remedy could be granted, meaning the remedies are not mutually exclusive. Order 55 of CI 47 on Judicial Review has now by Rule 2(1)(d) expressly added the remedy of declaration

to the orders obtainable by judicial review but that does not affect the general jurisdiction of the High Court to grant declaratory relief in an action commenced by writ of summons which has been preserved by Order 41 Rule 1 of the same CI. 47. The Court of Appeal therefore fell in error when in their judgment on appeal they held that any challenge to the validity of a judgment of a chieftaincy tribunal on grounds that it is a nullity or was obtained by fraud must be only by the prerogative writs. The High Court has jurisdiction to, in appropriate cases, declare a judgment of a chieftaincy tribunal or other inferior tribunal a nullity or to have been obtained by fraud upon an action commenced by writ of summons.

Policy justification for maintaining the jurisdiction of the High Court to grant the remedy of declaration of nullity in a case where certiorari is obtainable was given by Ampiah J.A in **Kwagyena & Ors v Agyei & Ors** at page 199 of the Report as follows;

"There may be very good reasons why a person may decide to resort to an action for a declaration instead of an application for certiorari. For example, where he could not have known that he had sufficient grounds for challenging the tribunal's decision within the six months' time limit prescribed for applications for certiorari."

We approve of this policy since maintaining declaration as an alternative to certiorari enables the High Court, in appropriate cases, to control statutory bodies in situations where certiorari is not available due to the statutory conditions for its grant. That is not to say that the relief of declaration is freely given by the courts. It is discretionary and would be granted only in deserving cases. See **Ibenewura v Egbuna (1964) 1 WLR 219. PC.**

We are not without sympathy for the concern raised by the Court of Appeal in this case, which concern was also expressed by the majority in **Ex parte Odonkoteye,** that additional jurisdiction of the High Court to grant remedy by declaring the judgment of a chieftaincy tribunal a nullity is susceptible to abuse by litigants who, after losing a case before a chieftaincy tribunal, may re-litigate the chieftaincy cause in the High Court under the guise of seeking a declaration of fraud or nullity.

However, that concern is not absent from the exercise of the High Court's acknowledged jurisdiction to grant prerogative writs in respect of decisions of chieftaincy tribunals. The law reports are replete with cases whereby losing litigants before chieftaincy tribunals attempted to re-litigate their chieftaincy causes in the High Court under the guise of prerogative writs. In all cases the solution is vigilance by the courts and not the denial of a jurisdiction which has been so firmly rooted in our legal system.

The scope of the proceedings in the High Court wherein an order or decision of a chieftaincy tribunal, and for that matter of any other inferior tribunal with exclusive jurisdiction, is sought to be declared a nullity or quashed by prerogative writ ought to be limited to the legal competence of the tribunal and the lawfulness of its processes with regard to enactments binding on it. Those proceedings ought not to involve factual evidence led before the tribunal except where such evidence is really necessary for the determination of the issues of legal competence and lawfulness of processes of the tribunal. So whatever form the proceedings before the High Court take, the court has a duty to ensure that the parties walk that narrow path.

On the facts of this case, it has not been shown that the High Court, Sekondi reviewed the evidence led before the Ahanta Traditional Council with regard to the chieftaincy dispute. What the High Court did was that it looked at the processes by which the jurisdiction of Ahanta Traditional Council was invoked and held that the tribunal committed an error of law by failing to comply with the provisions of **L.I. 798** and that the error went to the jurisdiction of the tribunal so it declared the judgment of the tribunal a nullity. That, in our respectful view, was not a cause or matter affecting chieftaincy as defined by Section 177 of the **Courts Act, 1993 (Act 459).**

In the case of **Dzaba III v Tumfour (supra),** the Court of Appeal was faced with facts similar to those in this case. In that case the Akpini Tradidional Council was irregularly constituted in view of the provisions of the Chieftaincy Act, 1961 (Act 81). It nevertheless held proceedings against the appellant, found him guilty of destoolment charges and declared him destooled. Furthermore, in the proceedings

the Traditional Council failed to comply with statutory regulations in L.I. 309 which were binding on it. He brought an action by writ of summons for a declaration that the decision of the Akpini Traditional Council was a nullity for want of jurisdiction. The High Court dismissed the action. On appeal the Court of Appeal gave judgment for the appellant. They stated that the case in the High Court was not a cause or matter affecting chieftaincy but related to the competence of the Traditional Council to hear the case against the appellant and declaration was available as an alternative to certiorari.

The substantial argument of the respondents in their statement of case is that the question of whether the error of the Ahanta Traditional Council in relation to the provisions of LI 798 went to its jurisdiction or was a mere irregularity had been determined by the Judicial Committee of the Western Regional House of Chiefs so the High Court by determining that same issue waded into a cause or matter affecting chieftaincy. By that argument the respondents imply that when in the course of hearing a chieftaincy matter a tribunal construes a statute then that construction becomes a chieftaincy cause or matter not cognisable by the High Court in its jurisdiction to exercise control over such tribunal. If that argument is pressed to its logical conclusion it would mean that if objection were taken to the jurisdiction of a chieftaincy tribunal on account of provisions of an enactment binding on it and it were to hold that it had jurisdiction then thereafter the High Court would be precluded from entertaining even a certiorari application on ground that the tribunal had no jurisdiction. That argument runs counter to the a well-settled principle of law that one of the grounds upon which a decision of an inferior tribunal would be held to be a nullity is where the tribunal commits an error of law that goes to its jurisdiction. We therefore dismiss that argument of the respondents.

Based on the above analysis, we are of the considered view that the Court of Appeal erred when they held that the High Court had no jurisdiction in this case and that the proceedings it embarked on were in a cause or matter affecting chieftaincy. It is clear to us that the Court of Appeal, with due regard, misread and misapplied **Ex parte Odonkorteye**. In fact, the original position taken by the court in the

interlocutory appeal that the case did not involve a cause or matter affecting chieftaincy was right. It also means that the Court of Appeal case of **Nana Efua Okeremah III & Anor v Ajumako Traditional Council & 3 Ors with Suit No. A1/100/07 dated 14th February, 2008** which was declared null and void by the Court of Appeal in this case was determined within jurisdiction and not null and void on grounds of jurisdiction.

Before ending this judgment, there is one point of procedure that we wish to draw attention to for the benefit of practitioners. When a party is proceeding by writ of summons for a declaration that a judgment of a tribunal is a nullity or was obtained by fraud it is wrong to add the tribunal as a party to the action. The determination by the tribunal whether valid or a nullity does not give rise to any cause of action against it. The action ought to be brought against parties who may seek to enforce the decision being challenged. See **Diplock L.J in Anisminic Ltd v Foreign Compensation Commission (1967) 3 WLR at 413.** Declaration as a remedy in these circumstances does not involve any directly enforceable order but is effective in resisting any enforcement of the impugned decision. But since misjoinder does not vitiate proceedings in court, these comments do not affect our judgment in this case.

In conclusion, the appeal succeeds and same is allowed. The judgment of the Court of Appeal dated 12th June, 2014 is hereby set aside.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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