IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ATUGUBA, JSC (PRESIDING)

ANSAH, JSC

YEBOAH, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL

NO. J4/30/2017

14TH FEBRUARY, 2018

NAI OTUO TETTEH .... PLAINTIFF/RESPONDENT/RESPONDENT

(SUING AS HEAD AND LAWFUL REPRESENTATIVE
OF ANONA CHOCHOE BOTWEY FAMILY OF AWUTU)

AND

OPANYIN KWADWO ABABIO (DECEASED) ... DEFENDANT/RESPONDENT/
RESPONDENT

(SUBSTITUTED BY NAACHE AWO CHOCHO
BOTWEY IV BY AN ORDER OF COURT DATED 25/03/15)

AND

NAI KOJO ADU II .... APPLICANT/APPELLANT/ APPELLANT

(HEAD AND LAWFUL REPRESENTATIVE OF
THE GYANDODEY ANONA FAMILY OF AWUTU)

JUDGMENT

PWAMANG, JSC:-

Before the court is an appeal against the judgment of the Court of Appeal dated 27th June, 2016. The facts relevant for the determination of this appeal are not in

dispute. By a writ of summons filed in the High Court, Agona Swedru on 31st December, 2002 the plaintiff/respondent/respondent, to be called the respondent, sued Opanyin Kwadwo Ababio of Awutu claiming that a parcel of land at Aboansa in the Central Region is the property of Anona Chochoe family of Awutu and for perpetual injunction. The Defendant filed a defence and counterclaimed for a declaration that the land was the property of Gyandodey Anona family of Awutu. Though the two families have a common origin, they each claimed exclusive ownership of the disputed land.

After Summons for Direction were filed the parties submitted themselves to an amicable out of court arbitration and arrived at a settlement. They filed the minutes of the arbitration in the High Court and prayed the court to adopt it as judgment in the suit. The trial judge, Senyo Dzamefe J (as he then was) directed them to file proper terms of settlement which could be adopted by the court. They complied and drew up terms of settlement based on the out of court arbitration, had it signed by the parties and their lawyers and filed in the court. It was agreed in the terms of settlement that the consent judgment shall be binding on the parties and their families; being the Gyandodey Anona Family and Chochoe Botwey family and that the families are separate and distinct. In the terms the Gyandodey Anona family was declared the allodial owner of the disputed land.

On 22nd December, 2004, in the presence of the parties, the High Court presided over Senyo Dzamefe J adopted the terms of settlement as consent judgment and made an order of injunction against Awo Chochoe Botwey restraining her from further development of the disputed land. The trial judge also made an order for the valuation of a house Awo Chochoe Botwey was constructing on the land in order for the court to make further orders in respect of it. The record does not indicate further proceedings pursuant to the order for valuation.

It appears not long after the judgment the respondent became dissatisfied with the terms of settlement so on 7th January, 2005 he caused a different lawyer, Kojo Anan Esq, to file a motion on notice seeking to set aside the consent judgment and the terms of settlement. In the affidavit in support of the said application the respondent deposed that though he signed the terms of settlement he did not agree with the contents. After a hearing the court dismissed the application on 20th July, 2005. The respondent appealed against the dismissal of his application to set aside. The notice of appeal was filed on 4th August, 2005 and though there was settlement of records of appeal respondent did not pursue it.

On 27th October, 2008, in very unusual circumstances, the registrar of the High Court, Agona Swedru issued a hearing notice to the parties to attend court for a hearing on 5th November, 2008. I say very unusual circumstances because there was no pending proceedings in the court, no motion had been filed and in fact we

do not find a letter applying for the hearing notice to issue. Nonetheless, on 5th November, 2008 the parties appeared before Justice B. O. Tetteh with lawyer Kojo Anan appearing for the respondent and no legal representation for the defendant. Lawyer Kojo Anan informed the court that they were making efforts to revisit the settlement and they needed an adjournment. The judge obliged and adjourned the case. Thereafter, on 10th December, 2008 minutes of a family meeting under the chairmanship of respondent headed "Anona Chochoe Botwey Family of Awutu Settlement, Bawjiase 5/12/08" were filed on the case docket. The minutes did not state any terms of settlement of any matter in dispute between the parties but only stated that the defendant made an affidavit in September, 2008 that he wanted settlement but even that affidavit was not attached. This was highly irregular because documents that are not court processes cannot be filed in the court unless they are exhibited to an affidavit filed in the case. The parties appeared before B.O. Tetteh J again on 13th January, 2009, and he pointed out to them that only minutes of a meeting held by the interested parties was on the case docket but no terms of settlement had been filed. The plaintiff's lawyer responded that they intended to file terms of settlement so the case was further adjourned. Despite the promise no terms of settlement were filed. What we find on the record is another record of minutes without a suit number, not addressed to the registrar of the court and containing no terms as would normally be stated in a settlement of a dispute. That document was dated 30th January, 2009 and filed on 2nd February, 2009. After a number of adjournments Justice B. O. Tetteh ruled as follows on 1st June, 2009:

> **"BY COURT: Minutes of a meeting dated 5/12/08 have been filed. Parties have asked the court to adopt this minutes as their terms of settlement and proceed to enter consent judgment. In the spirit of settlement and peace between the parties the court has no objection to the attempts that have been made (sic) by the parties themselves. By consent of the Anona Chochoe Botwey Family of Awutu with the sub-title, settlement. Consent judgment is now entered. Judgment within the spirit of this settlement is now entered by consent. Suit struck out as settled."**

On 7th July, 2015 the applicant/appellant/appellant, hereafter to be referred to as the appellant, filed a motion seeking to set aside the above judgment of Justice B. O. Tetteh dated 1st June, 2009. He stated in the affidavit in support that he was applying on behalf of the Gyandodey Anona Family of Awutu of which he was the head and that having regard to the earlier consent judgment of 22/12/04, the order of B.O. Tetteh was a nullity. The motion was served on the respondent and Naache Awo Chochoe Botwey IV, who apparently had by then been substituted for the original defendant in the suit. They filed a joint affidavit in opposition. The High Court, Agona Swedru presided over by Peter Dei Ofei J on 27th October, 2015

dismissed the application to set aside the judgment of 1st June, 2009. In his ruling the High Court judge stated as follows:

> **"From the onset, three very important observations are hereby made which will go to the root of this application. First, the applicant is not a party to the suit. Secondly, the applicant's family is also not a party and since this consent judgment was entered on 1st June, 2009, the Gyandodey family has never applied to join the suit as a party. Thirdly and very important, the procedure adopted to set aside the consent judgment is unknown in law."**

In sum, those were the grounds upon which the High Court dismissed the application. Appellant appealed to the Court of Appeal and though they expressed dissatisfaction with the manner the case had been handled and even set aside certain parts of the ruling of Peter Dei Ofei J where he made findings of fact without evidence, they nevertheless dismissed the appeal. They gave the following as the grounds upon which they determined the appeal:

> **"The issue of the capacity of the Applicant/Appellant herein, NAI KOJO ADU II as well as the mode he adopted to obtain the relief he sought from the court, namely, an order to set aside the consent judgment entered on 01/06/2009 by B. O. Tetteh J."**

On the procedure to be adopted to apply to set aside the judgment the Court of Appeal endorsed the holding of the High Court that on the authority of **Lamptey v Hammond [1987-88] 1 GLR 327** the Gyandodey family was not party to the case and being a stranger it ought to have issued a writ of summons to set aside the judgment. On the issue whether the appellant had the capacity of Head of Gyandodey family in which capacity he applied to the court the Court of Appeal said that issue cannot be determined on affidavits alone but through evidence in an appropriate forum.

Being aggrieved, the appellant has appealed to this court as the final court. Having perused the whole record and examined closely the grounds of the appeal it is clear to us that both the High Court and the Court of Appeal did not give sufficient consideration to the issue of the legality of the proceedings conducted by B. O. Tetteh J. Before both courts the appellant argued that that those proceedings were a nullity but his submissions on that ground were not answered. But in our view, it is only after the court has determined the status of the judgment that is sought to be set aside that it would be properly placed to decide on the issues of the procedure to be adopted in setting same aside and the requirement of locus standi. The procedure by which a non party may set aside a default judgment is different from the procedure to be adopted if the judgment is void or is a final judgment.

If one takes a close look at the relieves that were placed by the respondent before the court in the writ of summons that commenced this case, and even those by the defendant in his counterclaim, it becomes clear that the consent judgment entered by Senyo Dzamefe J concluded the suit. It was a final judgment as it conclusively determined the rights of the parties in the subject matter land in contention between the parties. See **Bozson v Altrincham Urban Council [1903] 1 K.B. 547.** It is true that the court made an order for a valuation of a house to be carried out so that it could make further orders, but that did not detract from the finality of the judgment of Dzamefe J. The Respondent in his statement of case in this court has sought to argue otherwise and contended that the judgment was interlocutory. However, as was held in **Ababio v. Turkson (1950) 13 W.A.C.A. 35**, a final judgment does not mean the last judgment, but the judgment determining rights finally, such as a judgment establishing the liability to account and directing accounts to be taken. It therefore appears to us that there was nothing for B. O. Tetteh J to sit over unless to make the consequential orders after the valuation.

Furthermore, as has been pointed out earlier in this judgment, there was no valid legal process that invoked the jurisdiction of B. O. Tetteh J to hold proceedings in the case after final judgment had been given in the matter. The minutes of the family meeting subsequently filed in the case docket on 05/12/2008 is not a court process. It is completely unknown to the rules and procedures of the court and proceedings in court cannot be conducted any how without regard to the practice and procedures of the court. The High Court registrar in this case was not alive to his duties. It undermines the integrity of the adjudication process for parties to throw documents into court dockets without regard to the practice of the court. Meanwhile it is that document that B. O. Tetteh J purported to adopt as consent judgment. A close reading of those minutes at page 78 of the record does not show the defendant agreeing to a revision of the terms of the consent judgment of 22/12/04. In fact no mention is made of those terms in the minutes adopted by the judge and there are no terms in those minutes. No legal rights arise out of those minutes and it appears to us that both parties to this case have been disputing over a non issue.

The trial judge in his ruling refusing to set aside the judgment of B.O. Tetteh J quoted from the document filed on 2/2/09 but that was not the document adopted by B.O.Tetteh J. It is the minutes of the family meeting dated 5/12/08 that were adopted and they do not create any enforceable legal rights that can be adopted as a judgment. Probably that was why the judge entered the judgment in terms of the spirit and not the letter of those minutes. This is a judgment which on it face is vacuous and it takes only an inspection of the judgment roll to demonstrate its want of vitality. It is the type of judgment that is described as 'a dead limb upon the

judicial tree, which should be lopped off'. In our respectful opinion, what took place in the court on 01/06/09 was an absolute nullity and the judgment is therefore void.

The question then is what is the procedure to be adopted to apply to a court to set aside its own void order. The *locus classicus* in this area of the law in Ghana is **Mosi v Bagyina [1963] 1 GLR 337** and it is still good law. We wish to set out the facts and holding of the Supreme Court as in the headnote of the law report;

"The respondent who had obtained judgment in the native court for possession of certain land, applied to the High Court on a motion ex parte "for an order of this court for writ of possession to be issued for the enforcement of the [native court] judgment." A writ of possession was subsequently issued out of the High Court by Mr. Commissioner Christian and executed in September 1959.

In December 1960, the appellant applied to High Court by motion on notice asking that the writ of possession be set aside on the grounds that (1) under Order 47 it was irregular because it was obtained ex parte and (2) the High Court had no jurisdiction to order issue of the writ because the decree for possession was made by the native court. Crabbe J. refused the application holding that, "If this is an appeal from the decision of the Commissioner of Assize and Civil Pleas then the High Court has no jurisdiction to entertain such appeal. If it is an application for a review of Mr. Christian's order . . . Then the applicant is out of court because under Order 39, r. 2 such application should be made to the same judge who made the order." The appellant appealed from Crabbe J.'s ruling.

Held, allowing the appeal:

(1) the High Court acts under Order 47 only where, either in its original or in its appellate jurisdiction, it has itself made an order or given a judgment for the recovery or delivery up of possession. The High Court does not decree or order possession or give judgment for the recovery or delivery up of possession where it, in its appellate jurisdiction, merely affirms a decree or order or judgment for possession made by a lower court. It follows therefore that Mr. Commissioner Christian sitting in the High Court, Sunyani, had no jurisdiction to order the issue of the writ of possession, and the order was therefore void.

(3) The application before Crabbe J. was neither in the nature of an appeal nor one that called for the exercise of appellate jurisdiction and it was also not an application for a review. It was an application for the court to exercise its inherent jurisdiction to set aside an order which is void.

(4) Where a judgment or an order is void either because it is given or made without jurisdiction or because it is not warranted by any law or

rule or procedure, the party affected is entitled ex debito justitiae to have it set aside, and the court or a judge is under a legal obligation to set it aside, either suo motu or on the application of the party affected. No judicial discretion arises here. The power of the court or a judge to set aside any such judgment or order is derived from the inherent jurisdiction of the court to set aside its own void orders and it is irrespective of any expressed power of review vested in the court or a judge; and the constitution of the court is for this purpose immaterial. Further, there is no time limit in which the party affected by a void order or judgment may apply to have it set aside. Craig v. Kanseen [1943] 1 K.B. 256, C.A.; Forfie v. Seifah [1958] A.C. 59, P.C.; Amoabimaa v. Badu (1957) 2 W.A.L.R. 214, W.A.C.A.; Concession Enquiry No. 471 (Ashanti) [1962] 2 G.L.R. 24, S.C., and Ghassoub v. Dizengoff [1962] 2 G.L.R. 133, S.C. applied.

From the above statement of the law the procedure of applying by motion on notice adopted by the appellant in this case was proper. Beyond that, where the order is void as in this case, no matter how the court comes by the knowledge of its existence the court on its own motion is required to set same aside. The policy of the law is to deny void orders the coercive authority of the court or accord them legality as that would turn the court into an instrument of injustice.

The lower courts concerned themselves with the procedure whereby a stranger may apply to set aside a judgment discussed in **Lamptey v Hammond [1987-88] 1 GLR 327**, and that line of cases but that procedure is where a default judgment has been taken and a stranger to the proceedings who is affected seeks to set the default judgment aside and defend the action. Even in those cases the summons that is referred to in the decisions is application by summons as distinguished from application by motion and it is not a reference to writ of summons. Having regard to the fact that our current High Court rules have done away with applications by summons that procedure prescribed in **Lamptey v Hammond** would be satisfied if a stranger filed a motion and served both the plaintiff and the defendant praying for leave to set aside a default judgment that affected him. In this case the appellant had his application to set aside served on the plaintiff and the defendant. That appears to be the intendment of **Order 19 Rules 1 and 2 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).**

Where a direct application is made to the court that made a void order praying for the order to be set aside, the only locus that needs to be proved by an applicant is that he stands to be affected by the order. He does not necessarily need to be a party to the proceedings in which the order was made. If the court upon knowledge of the voidness of its order can set same aside by itself then what use will be served by insisting that the applicant has to be a party. In this case the appellant in his affidavit in support of the application to set aside the order of B. O. Tetteh deposed

that the Gyandodey Anona family of which he is the head stood to be affected by the order of B. O. Tetteh J as it appeared to override the consent judgment of 22/11/04 which declared his family as the allodial owner of the land in dispute. To that extent he had locus to apply to the court to set aside its void order though he was not a party.

The next issue is the question of the capacity of the appellant and whether he was indeed the head of the Gyandodey Anona family or not. The Court of Appeal was right in saying that where a party to court proceedings alleges a certain capacity and he is challenged, then he is required to prove it with evidence. It is equally correct to say that the challenge to the capacity of a party to proceedings can be raised by the court *suo moto*. However, in this case neither the respondent nor the trial judge challenged the capacity of the appellant as Head of Anona Gyandodey family in the course of the hearing of the application to set aside. At paragraphs 7 and 17 of the affidavit in opposition to the motion to set aside in the High Court, the respondents deposed as follows:

> "7. That paragraph 8 is admitted as Applicant's own admission confirms that he and/or his Gyandodey Anona family are not parties to (sic) the suit.
>
> 17. That paragraphs 22 and 23 are denied to the extent that Applicant's Gyandodey Anona family was ....."

The record does not show that at the hearing of the application to set aside the trial judge challenged the capacity of the appellant and requested him to provide evidence to prove same and he failed to offer proof. It is clear from the above that the capacity of the appellant was admitted by the respondent and accepted by the trial court. It was therefore not competent for the Court of Appeal to raise that issue in their judgment when the appellant was no longer in a position to lead evidence to prove his capacity.

In our opinion, the proceedings that were conducted in this suit after the refusal of the application to set aside the judgment of 22/11/04 were null and void except those relating to contempt which in fact constitute a separate and distinct action. The High Court was therefore duty bound to set aside the void judgment of B.O. Tetteh J dated 1st June, 2009.

In conclusion, we allow the appeal and set aside the ruling of the High Court dated 27th October, 2015 and the judgment of the Court of Appeal dated 27th June, 2016. We restore the judgment of Senyo Dzamefe J dated 22/12/04. The appellant in his amended notice of appeal prayed the court to make orders in relation to the substitution of the original defendant in this case but we decline that prayer. Those orders were not made as part of the application that is on appeal before us. Similarly we decline to make changes in the terms of settlement filed on 20/12/04 since the

court has no authority to change the agreement of the parties, without going through the appropriate legal processes

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ATUGUBA, JSC:-

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

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

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

J. ANSAH
(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)

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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