IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: YEBOAH, JSC PRESIDING
BAFFOE-BONNIE, JSC
BENIN, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL MOTION
NO. J5/39/2016

9TH FEBRUARY, 2017

THE REPUBLIC

VRS

HIGH COURT (HUMAN RIGHTS DIVISION), ACCRA
ATTORNEY-GENERAL ..... RESPONDENTS

EX-PARTE: - KUDJO ANKU & 2 OTHERS ..... APPLICANT

AND

DANIEL GIBSON DANSO ..... INTERESTED PARTY

RULING

APPAU: JSC-

This is an application for Judicial Review brought under rule 61 of C.I. 16/96. The applicants are invoking the supervisory jurisdiction of this Court by way of certiorari to quash the decision or ruling of the High Court (Human Rights Division), Accra dated 2nd June 2016. The applicants are Directors of a company called Intecell Investment Limited, which is an investment company. The Interested Party herein, who is also the respondent, is a retired Police Officer. He invested the sum of Eighty Thousand Ghana cedis (GHc80, 000.00) in the applicants' company and received some of the monthly interest remittances as agreed between him and the applicants'

company. The applicants' company later reneged on its own contractual terms as stipulated in the contract document. The respondent reported the applicants to the police. They were arrested and arraigned before the Circuit Court, Accra on charges of: -

i. *Conspiracy to commit crime to wit: - Operating non-banking financial institution without licence contrary to section 23 (1) of Act 23 (1) of Act 29/60 and section 2 (1) of Act 774/2008;*
ii. *Operating non-banking financial institution without licence from the Bank of Ghana contrary to section 2 (1) of Act 774/2008; and*
iii. *Defrauding by false pretences contrary to section 131 of Act 29/60.*

Whilst the applicants were being prosecuted on the above charges, they filed a judicial review application before the High Court (Human Rights Division), Accra praying for an order prohibiting the Circuit Court from hearing the case and the Attorney-General from pursuing their prosecution. The reliefs they sought from the Human Rights Court were: -

a. *A declaration that the transaction between Intecell Investment Limited and the Interested Party (who instigated their arrest), was purely a civil transaction that does not give rise to a criminal charge;*
b. *A declaration that the trial of the applicants as accused at the Circuit Court is wrongful, unlawful and an infringement of their fundamental rights of the said accused persons and applicants herein, the same offending article 11 of the International Convention on Civil and Political Rights;*
c. *An order prohibiting, restraining the 1st respondent from hearing and determining the criminal case No. D2/175/13 and also prohibiting, restraining the 2nd defendant from prosecuting the accused persons.*

The Human Rights Court granted the applicants' prayer on the ground that the charges levelled against the applicants were wrongful and contrary to article 11 of the International Covenant on Civil and Political Rights of which Ghana is a signatory. The holdings of the trial court were as follows: -

1. *The transaction between Intecell Investment Ltd and the Interested Party is a purely civil transaction and does not give rise to a criminal prosecution.*
2. *That the trial of the applicants at the Circuit Court, Case No. D2/175/13 entitled THE REPUBLIC v 1. KUDJO ANKU; 2. DAVID FAMEYE and 3. DAVID OSEI MANU is wrongful, unlawful and an infringement on the fundamental rights of the applicants, the same offending article 11 of the International Covenant on Civil and Political Rights.*
3. *The trial Circuit Court and the Prosecution are prohibited from hearing the said criminal matter and from prosecuting same.*

4. *The proceedings in court case No. D2/175/13 be brought up to this court to be quashed and the same is hereby quashed by an order of certiorari.*

When the trial court made those declarations and prohibited the Attorney-General from prosecuting the case then pending before the Circuit Court on the 9th of July 2014, neither the Attorney-General nor the Interested Party took any step whatsoever to challenge the ruling of the trial court. The Attorney-General complied with the decision and that ended the prosecution of the applicants herein before the Circuit Court. About eighteen (18) months after the delivery of this ruling by the Human Rights Court, the complainant in the criminal case, who was the Interested Party in the said application and the Interested Party herein, filed an application at the same High Court (Human Rights Div.) Accra (but this time differently constituted), praying the court to quash its previous decision dated 9th July 2014 on grounds that same was void. The application was not brought as a review application because the applicant could not have done so as he was woefully out of time. It was brought as an invocation of the Inherent Jurisdiction of the trial High Court. It was headed:

"**NOTICE OF MOTION FOR AN ORDER TO SET ASIDE THE JUDGMENT OF THIS HONOURABLE COURT DATED 9TH JULY, 2014, PURSUANT TO THE INHERENT JURISDICTION OF THIS COURT**".

The ground for the application was stated as follows: - *"Having regard to the originating processes before the court, this court acted without jurisdiction or wrongfully assumed jurisdiction and to that extent, the judgment of 9th July 2014 based on those processes is void and of no consequence and same must be set aside".* Paragraphs 2 to 8 of the affidavit in support of the Interested Party/Respondent's motion in the High Court (Human Rights Div.), which was filed on 21/01/2016, are reproduced below since they are germane in the determination of the application before us.

"2. That this Honourable Court gave judgment in this suit on 9/7/14 a copy of which is attached as Exhibit '1'.

3. That I am the interested party in the suit and the instant judgment gravely affected my interest in the prosecution of the criminal suit before the Circuit Court.

4. That I have been advised by my lawyer and verily believe same to be true that having regard to the originating processes filed before this court, the court's jurisdiction has not been properly invoked.

5. That further, I have been advised by my lawyer and verily believe same to be true that this Honourable court wrongly assumed jurisdiction in determining the matter.

6. That I have been advised by my lawyer and verily believe same to be true that this Honourable court has the inherent jurisdiction to vacate or set aside its void orders or judgment.

7. That in moving the application, counsel shall seek leave of this Honourable court to refer to all processes filed.

8. That the Supreme Court in the civil motion entitled; "THE REPUBLIC VRS HIGH COURT, HUMAN RIGHTS DIVISION; EX-PARTE NAA OTUA SWAYNE (SUIT NO. J5/8/2015)" has already set the precedent that this Honourable Court does not have the jurisdiction to interfere with the lawful criminal prosecution pending before the lower courts. For ease of reference, I hereby attach a copy of the said ruling to this affidavit marked as Exhibit '2'."

The Human Rights Court, on the 2nd day of June 2016, granted the Interested Party/Respondent's motion and set aside its previous ruling dated 9th July 2014 on the ground that same was void. The court stated as follows:

"I am satisfied that this court differently constituted lacked jurisdiction to entertain the certiorari application brought on the basis that it was a civil matter and was therefore against the fundamental human rights of the respondent herein. <u>The procedure and the application brought before the court were not prescribed by any law or procedure and the decision emanated from it is void ab initio.</u> The judgment of this court differently constituted delivered on 9th July 2014 was decided without jurisdiction and same is hereby set aside as void. All the orders made by the court are hereby set aside as void." {Emphasis added}

The simple argument of the Applicant in this application before us is that the Human Rights Court lacked or exceeded its jurisdiction when it clothed itself with a purported inherent jurisdiction and quashed its own previous decision delivered by a different judge on the ground that same was void. It was Applicant's contention that when the Respondent realised that there was no way he could impeach the first decision of the court, having failed to do so either by: **(a)** *review before the very judge who delivered the ruling;* or ***(b)*** *by appeal to the Court of Appeal;* or ***(c)*** *by judicial review at the Supreme Court,* within the times stipulated by the rules; he took a back-door approach and sought to invoke what he called the inherent jurisdiction of the very court that delivered the decision he was complaining about

over eighteen (18) months earlier. He contended that what the respondent did was tantamount to a review which the rules did not permit him to do.

The Human Rights Court, in setting aside its previous decision, supported its position with an excerpt from the judgment of Denning (M.R.) in the celebrated case of **MACFOY v UNITED AFRICA COMPANY LIMITED [1961] All ER 1169 @ 1172** that; *"There is a well-established general principle of law that proceedings that are a nullity are automatically null and void and upon an application for the purpose, they must be set aside ex-debito justitiae and the court itself is under a duty to set them aside; time is not of essence here."*

The application before us raises two (2) pertinent issues. These are:

(i) *Whether or not the High Court (Human Rights Division), differently constituted, and in the exercise of its inherent jurisdiction, could quash its previous decision given by a different judge on the ground that the said decision was void? If yes, under what circumstances could it do so?*

(ii) *Whether or not the High Court (Human Rights Division) had jurisdiction to entertain the first judicial review application filed before it by the applicants herein.*

With regard to the first issue above, it is trite law that save as otherwise provided by statute, jurisdiction attaches to the court and not a judge – **REP. v HIGH COURT (FAST-TRACK DIVISION) ACCRA; EX-PARTE QUAYE & ANOTHER (YOVONOO & OTHERS - INTERESTED PARTIES) [2005-2006] SCGLR 660; STANDARD CHARTERED BANK (GH) LTD v WESTERN HARDWOOD LTD [2009] SCGLR 196 @ 201.** Aside of its general jurisdiction, a superior court has an inherent jurisdiction to correct its own errors in order to prevent abuse of processes and to ensure convenience and fairness when such errors are brought to its attention, irrespective of who presides over the court. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. Since the judge who delivered the ruling before us was presiding over the very court that made the orders of 9th July 2014, he could set the said orders aside at any time at all if it were established that the orders were made without jurisdiction and therefore ***void ab initio***. In doing so, the court would be exercising its inherent jurisdiction to correct its own patent errors made without jurisdiction. However, if the orders were made within jurisdiction then the same court can only set them aside upon a review application made within the statutorily sanctioned period provided under **Order 42 rule 2** of the High Court Civil Procedure Rules, 2004 **[C.I. 47]**.

The second issue raised above becomes pertinent because of the holding of the Human Rights Court in its second decision that it lacked jurisdiction to entertain the first judicial review application that came before it. The judge who delivered the second decision said at the last page of his ruling delivered on 2nd June 2016 as follows*:*

"I am satisfied that this Court differently constituted lacked jurisdiction to entertain the certiorari application brought on the basis that it was a civil matter and was therefore against the fundamental human rights of the respondents herein. The procedure and the application brought before the court were not prescribed by any law or procedure and the decision emanated from it is void ab initio. The judgment of this court differently constituted delivered on 9th July 2014 was decided without jurisdiction and same is hereby set aside as void". {Emphasis mine}

The question is; is it the case that the Human Rights Division of the High Court lacked jurisdiction to entertain the first certiorari or judicial review application brought before it?

Article 141 of the 1992 Constitution provides as follows: - ***"The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority; and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers".***

Section 16 of the Courts Act, 1993 [Act 459] also provides: - ***"In accordance with article 141 of the Constitution, the High Court has supervisory jurisdiction over the lower courts and a lower adjudicating authority, and may, in the exercise of that jurisdiction, issue orders and directions including orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto for the purpose of enforcing or securing the enforcement of its supervisory powers".***

The High Court exercises its supervisory jurisdiction as provided under article 141 of the Constitution and section 16 of the Courts Act quoted above through a process known as Judicial Review. It is provided under rule 1 and rule 2 sub-rules (1) and (2) of Order 55 of the High Court Civil Procedure Rules, 2004 [C.I. 47] on **'Application for Judicial Review'** thus:

"1. An application for (a) An order in the nature of mandamus, prohibition, certiorari or quo warranto; or (b) An injunction restraining a person from acting in any public office in which the person is not entitled to act; or (c) Any other injunction, shall be made by way of an application for judicial review to the High Court.

2. (1) On the hearing of an application for judicial review the High Court may make any of the following orders <u>as the circumstances may require</u>

(a) an order for prohibition, certiorari or mandamus;

(b) an order restraining a person from acting in any public office in which that person is not entitled to act;

(c) any other injunction;

(d) a declaration;

(e) payment of damages.

(2) In granting an injunction or making a declaration under paragraphs (c) or (d) of subrule (1) of this rule the Court shall have regard to

(a) <u>the matter in respect of which relief may be granted by way of prohibition, certiorari or mandamus</u>;

(b) <u>the nature of the persons against whom relief may be granted by way of the order; and</u>

(c) <u>whether in all the circumstances of the particular case it would be just and convenient to grant an injunction or make a declaration on an application for judicial review"</u> {Emphasis mine}

It must be emphasized that when we talk of *'void judgments/decisions',* they are in two categories. There are those that are *void ab-initio* just because the court that determined or took those decisions in question had no jurisdiction in the first place, to entertain the matter or matters before it. Such decisions or orders are complete nullities because they go to jurisdiction and can be set aside at any time, even by the very court that made the void orders. This is because they go to jurisdiction and should not have been entertained at all by the court. Time does not therefore run when it comes to the setting aside of such void judgments or orders. Then there are those that are patent errors made within jurisdiction. The procedure to impeach this second category of void orders or judgments is forum and/or time regulated. Such errors of law that are patent or apparent on the face of the record but made within jurisdiction could be set aside as void upon an appropriate application made by an affected or interested party as specified under the rules or through the appeal procedure. In this second category of judgments or orders, time is of the essence, depending on the procedure adopted.

First, an aggrieved party may apply for a review of the judgment or orders before the very court that delivered the said void judgment or made the void orders. This is provided under Order 42 rules 1 and 2 of the High Court Civil Procedure Rules, 2004

[C.I. 47]. This rule provides that where the review sought is in respect of an interlocutory matter, the only time available to a party to apply for review is 14 days after the order complained of. The rule does not make room for the extension of the applicable time. However, if the review sought is in respect of a final judgment, the court may grant leave to the party after the expiry of the 14 days but within 3 months after the judgment was entered, to apply for review. On the other hand, an aggrieved party may decide to institute a fresh action in the same High Court or one with co-ordinate jurisdiction, to have the void judgment or order set aside. Again, an aggrieved party may decide to mount an appeal against the judgment or order to the appellate court to have the judgment or order set aside as void. Lastly, an aggrieved party may apply for judicial review in the Supreme Court to have the judgment or orders quashed on certiorari. All these processes are time regulated.

This Court, in the case of; *Ex-Parte Quaye and Another* cited supra, held at page 662 (holding 3) as follows: ***"An order made without jurisdiction was a complete nullity and it was only for convenience that a party affected thereby might apply to have it set aside. Even though in the case of a superior court, there was a presumption in favour of regularity, under section 39(2) of the Evidence Decree, 1975 [NRCD 323], the presumption was inapplicable when the question of jurisdiction was directly in issue. However, on grounds of public policy (to avoid rancorous confrontations) an order or process of a court of competent jurisdiction should be treated as valid until vacated by a legal process..."***

The first application that was decided by the Human Rights Court to quash, inter alia, the proceedings of the Circuit Court, was a Judicial Review application. Per article 141 of the 1992 Constitution; Section 16 of the Courts Act of 1993 [Act 459] and Order 55 of the High Court Civil Procedure Rules, 2004 [C.I. 47] as quoted above, the Court had jurisdiction to entertain the matter as it has power to superintend over lower courts including the Circuit Court when exercising both their civil and criminal jurisdictions. Though the applicable procedure is provided in the Civil Procedure Rules, it could be applied to interfere in criminal proceedings when the situation calls for its application. This Court made that point clear in its unreported judgment in the case of; **THE REPUBLIC v HIGH COURT (HUMAN RIGHTS DIVISION), ACCRA; EX-PARTE NAA OTUA SWAYNE – (PRINCE KOFI AMOABENG & THE ATTORNEY-GENERAL – INTERESTED PARTIES) – [Civil Motion No. J5/8/2013, dated 19th February 2013]** referred to us by the interested party, per Anin-Yeboah, JSC in the following words:

"Even though the learned High Court Judge had jurisdiction to supervise the Circuit Court under Article 141 of the 1992 Constitution and section 16 of the Courts Act, [Act 459] of 1993, his powers to supervise should be exercised within the limits imposed by law...

It was not the case that the Circuit Court had no jurisdiction to hear the case in which the charges which the accused persons were facing were mere demeanours. It was not the case that the learned Circuit Court Judge was by law not qualified to sit on the matter or that there were traces of any patent procedural irregularities apparent on the face of the proceedings or any ground which could have called for the superintendence by the High Court. It was not the case that the learned Circuit Court Judge went outside his statutory limits and exceeded his jurisdiction or breached any common law rules of natural justice...

His Lordship did not say that the charges the interested party was facing at the Circuit Court were unknown to the Criminal law of this country. His main intervention in the proceedings as a superintending judge was on grounds of breaches of the interested parties' fundamental human rights... The legal requirements to warrant the grant of certiorari never existed..."

What the above statement of this Court per Anin-Yeboah, JSC means is that; if the Circuit Court had no jurisdiction to hear the criminal case before it, or if the Circuit Court Judge was not qualified to preside over the court, or if there were patent procedural irregularities apparent on the face of the proceedings like breaches of the natural justice rules or in sum, if the circumstances of the case had warranted the exercise of its supervisory powers, the High Court (Human Rights Div.) could have issued orders of certiorari and prohibition against the Circuit Court in the exercise of its supervisory role. This Court never said anywhere in its judgment that in exercising its supervisory jurisdiction, the High Court could not make orders affecting a lower court exercising its criminal jurisdiction. Having no jurisdiction to entertain a matter is different from making erroneous orders or decisions within jurisdiction. If a court has no jurisdiction to entertain a matter or an application before it but goes ahead to entertain it, whatever it does in pursuance of that matter or application from the beginning to the end becomes a nullity because it was ***void ab initio***. Any decision taken in respect of such a matter, could be set aside even by the very court that made the order at any time. That is the crux in the *Macfoy case* (supra) which formed the bedrock of this Court's decision in **MOSI v BAGYINA [1963] 1 GLR 331.** In the *Mosi v Bagyina case* (supra), the operative words are; ***"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..."*** {Emphasis mine}.

However, where the court (a superior court for that matter) has jurisdiction to entertain a matter or application but exceeds its jurisdiction in the orders or decision it makes, the said decision or orders are not void ab-initio but could be declared 'void' when the proper procedure is employed for that purpose. In that sense, the

same court that made the erroneous order cannot assume jurisdiction to set it aside at any time except upon an application for review made within the statutorily applicable time. This is the reason why this Court, per Anin-Yeboah, JSC in the Naa Otuaa Swayne case stated that; **a dangerous precedent would have been set had the applicant not moved timeously to have the decision set aside.**

If the supervisory jurisdiction of the High Court (Human Rights Division) does not extend to superintendence over criminal proceedings in lower or subordinate courts, then the Human Rights Court would have been right in setting aside its own previous decision as it would have exercised that power not warranted by any rule or procedure or without jurisdiction making its previous decision ***void ab initio***. But if the supervisory jurisdiction of the said court extends to superintendence over lower or subordinate courts including the Circuit Court in the exercise of their criminal jurisdiction, then the court was wrong in setting aside its previous erroneous orders made within jurisdiction eighteen (18) months afterwards on the ground that the court had no jurisdiction to entertain the first application.

It is the position of this Court that the High Court (Human Rights Division) has power to entertain Judicial Review Applications to superintend over courts lower than it in the exercise of both their civil and criminal jurisdiction. However, the court's decision in quashing the criminal proceedings of the Circuit Court and prohibiting the Circuit court and the Attorney-General from continuing with the hearing of the criminal case without any legal basis was erroneous. The court made a patent error within jurisdiction so the same court (differently constituted), could not declare its decision void eighteen (18) months afterwards on the ground that it was ***void ab initio***. The decision was valid until declared void when the appropriate statutorily sanctioned steps are taken to address it. The High Court (Human Rights Division) therefore erred when it proceeded to set aside its previous decision made within jurisdiction eighteen (18) months earlier, on the faulty ground that the court had no jurisdiction to entertain the matter. The court could only have done so on a review application but not otherwise.

We, accordingly, allow the application.

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