IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)
PWAMANG, JSC
DORDZIE (MRS.), JSC
PROF. MENSA-BONSU (MRS.), JSC
KULENDI, JSC

CIVIL MOTION
NO. J5/33/2021

26TH MAY, 2021

THE REPUBLIC

VRS

THE HIGH COURT (COMMERCIAL DIVISION), ACCRA

EX PARTE:

1. NANA OWUSU AFRIYIE
2. DR. KWAME ADDO KUFUOR

..... APPLICANTS

FIRST ATLANTIC BANK LIMITED ..... INTERESTED PARTY

RULING

MAJORITY OPINION

DORDZIE (MRS) JSC:-

This is an application invoking the supervisory jurisdiction of this court under article 132 of the 1992 Constitution of Ghana and Rule 61 of the Supreme Court Rules 1996 C.I 16. The applicants are praying this court for an order of certiorari to quash the judgment of the High Court, Accra, dated 28th of March 2019, delivered in suit N0. CM/BFS/0638/2017 titled First Atlantic Bank Limited v KwasiBoampong Company Limited, AkwasiAmoako and

Victoria Boampong. AkwasiAmoako (2nd defendant and Victoria Boampong 3rd defendant) are directors of the first defendant company.

The background of the above named suit is that the first defendant company on 20th of May 2016 applied to the interested Party, First Atlantic Bank Limited (the bank) for a facility. The purpose of the facility was for the bank to provide bank guarantee to Guinness Ghana Breweries Limited for payment in respect of stock supplied to the first defendant company. To secure the facility Mr. KwasiBoampong mortgaged his property Plot N0. 3 3/MKT/A/13, Community 3, Tema to the bank. He did not execute the mortgage deed by himself, but appointed an attorney, one of the directors of the first defendant company AkwasiAmoako to act on his behalf. A copy of the Power of Attorney is exhibited with the interested party's affidavit as Exhibit FAB5. The contents of the Power of Attorney are as follows:

1. "To use my property located at Plot No.3 3/MKT/A/13, Community 3, Tema (herein referred to as "the House") and more particularly described in the schedule below to secure a facility (Bank Guarantee in the sum of One Million Ghana Cedis) granted to KwasiBoampong Company Limited By First Atlantic Bank Limited.
2. To sign as the Mortgagor on my behalf for the legal mortgage documents prepared by the Bank for the use of my property as collateral.

And I undertake to ratify whatever my Attorney shall do under the authority"

AkwasiAmoako did execute the mortgage agreement as an attorney of KwasiBoampong. The interested party bank on June 13th 20 17 provided the needed guarantee to the tune of one million Ghana cedis (Ghc 1,000,000)

Prior to this Mr. KwasiBoampong had died; he died on 31st of January 2017. The first defendant company defaulted in paying back the loan. First Atlantic Bank therefore sued KwasiBoampong Limited, AkwasiAmoako and Victoria Boampong for recovery of the outstanding debt. The reliefs the bank prayed for in the suit are:

a) An order for payment of the sum of Four hundred and sixty six thousand and eight hundred and fifty three Ghana Cedis and forty five Pesewas (GH₵ 466,853.45) being the amount due and owing for the Bank Guarantee Facility granted to 1st Defendant.
b) Interest on the said sum of Four Hundred and Sixty six thousand and eight hundred and fifty three Ghana Cedis and forty five Pesewas at the agreed interest rate of 40% per annum from 11th day of October, 2017 to the date of final payment.

c) Further or in the alternative an Order for the judicial sale of the properties described in the statement of claim and used as collateral for the said Facilities granted 1st Defendant.
d) Cost

According to the depositions in the affidavit of the applicants, the court granted the alternative relief, which is an order for the judicial sale of the property used as collateral for the bank facility.

It is significant to note that the applicants failed to file a copy of the judgment they are praying this court to quash with their motion contrary to the mandatory procedural requirements under Rule 61 (1) of the Supreme Court Rules C .I 16.

The rule reads: (***1) "An application seeking to invoke the supervisory jurisdiction of the Court under article 132 of the Constitution shall be by motion on notice as specified in the Form 29 set out in Part IV of the Schedule to these Rules and shall be filed with a copy of the decision against which the application is sought and accompanied by an affidavit."*** (Emphasis supplied)

Failure to make available to this court the judgment, which is the subject matter of this application, is a grave omission that renders the application incompetent and ought to be dismissed in limine.

Nonetheless, I would comment on the merits of the application.

The grounds of the application are that:

1. The judgment of the High Court (Commercial Division) Accra dated the 28th March 2019 was entered in breach of the *audialterampartem* rule of natural justice, and therefore entered without jurisdiction, as the Applicant was not served with any of the processes leading up to the judgment; and
2. The High Court (Commercial Division) Accra, committed an error patent on the face of the record, which goes to jurisdiction, when it made an order for the judicial sale of a deceased person's property who was not party to the suit.

The affidavit in support of the application was sworn to by one of the beneficiaries of the estate of KwasiBoampong, one Dennis Nana AkwasiBoampong. The respondents took strong objection to the deponent and argued in their statement of case that it is only the executors, who have taken probate of the will and therefore have authority from the will,

who could depose to the affidavit. The deponent, a beneficiary of the will has no capacity to do so.

This is not a correct statement of the law because case law in our jurisdiction had been developed to establish the principle that any person whose interest would be affected by the outcome of the application for certiorari is not restricted by the notion of locus standi. In the case of ***Republic v KorleGonno District Magistrate Grade 1; Ex Parte Ampomah [1991] 1 GLR 353a decision of the Court of Appeal, the court held: "The remedies of certiorari and prohibition were therefore not restricted by the notion of locus standi, and every citizen had a standing to invite the court to prevent some abuse of power; and in so doing he might claim to be regarded not as a meddlesome busybody but a public benefactor."***

The Supreme Court had followed this principle in the cases of ***Republic v High Court, Ho; Ex Parte DiawuoBediako II & Another (Odum& others Interested Parties) [2011]2SCGLR 704 and Republic v Court of Appeal, Accra; Ex Parte East Dadekotopong Development Trust (Lands Commission Interested Parties) [2015] JELR 64541 (SC)***

The deponent to the affidavit accompanying this application had demonstrated that he is a beneficiary of the estate of the late KwasiBoampong; the outcome of this application affects his interest. He is therefore not a busybody. He has the capacity to bring this application even if the executors have failed to do so. He being the deponent to the affidavit supporting the application is in place.

Submissions for and against the application

In arguing the grounds of the application, the applicants admitted that the application was brought out of time. They admitted rule 62 of the Supreme Court Rules has been breached but argued that the judgment they are complaining of is a nullity, as such, time limit is not applicable in the circumstances of this case. Counsel cited the following decisions of this court in support of his argument: **The Republic v The Court of Appeal & Anthony Thomford; Ex parte Ghana Chartered Institution of Bankers [2011] 2 SCGLR 941 and Republic v High Court (Fast Track Division) Accra; Ex parte Speedline Stevedoring Company Ltd. (Dolphyne Interested Party)[2011] 2SCGLR 941**. The main contention of the applicants is that the properties, the subject matter of judicial sale are properties of the late KwasiBoampong however the executors of

his will were not made parties to the suit; they were not notified either of the suit. The High Court in that circumstance lacked jurisdiction to entertain the suit. It is further argued by the applicants that the transaction being a mortgage transaction the action of the interested party in the High Court should have been in accordance with section 15 of the Mortgages Act, 1972 (NRCD) 96 which requires that the action ought to be brought against the mortgagor. The interested party however failed to sue the mortgagor or notify his personal representatives. The mortgagor was not given the chance to be heard. The *audialterampartem* rule of natural justice had been breached. That goes to jurisdiction therefore the impugned judgment is a nullity.

In response, the interested party argued that the High Court was seized with jurisdiction to entertain their action, which was for the recovery of funds. Unless the court had acted ultra vires the constitution or an express statutory restrictions, an error made by the High Court cannot be regarded as taking the judge outside the court's jurisdiction. Counsel for the interested party cited the case of **Republic versus High Court, Accra Ex Parte Commission on Human Rights and Administrative Justice (Addo interested party) [2003-2004] SCGLR 312** in support of this submission.

It is the position of the interested party that the High Court did not misapply the law or acted ultra vires the constitution or any statute. The defendants before the High Court were the defendant company that contracted the loan and two directors of the defendant company. The 2nd defendant in the suit was AkwasiAmoako a director of the company and the lawful attorney of the late KwasiBoampong. He executed the mortgage deed on behalf of KwasiBoampong; his acts were the acts of his principal. The interested party further maintained that at the time of initiating the action they were not aware that KwasiBoampong had died and therefore could not have known to join the executors of his will. Counsel further argued that the applicants were given the chance to be heard when they initiated an interpleader proceedings but abandoned same. The applicants lost their rights to certiorari when they took the option to fight for their interest in the property by interpleader action. Their conduct has taken them out of the ambit of certiorari, which is a discretionary remedy. The interested Party further argued that the applicants' right to be heard is preserved by statute i.e. Section 18(4) of the Mortgage Decree. They elected to be heard by the High Court on their interest in the property. The High Court gave them the opportunity to be heard, they abandoned that opportunity therefore, they cannot be heard to say they were not given a hearing. The case of **Republic v High Court, Accra;**

Ex Parte Attorney General (Delta Foods Case) [1998] GLR 595 was quoted in support.

The power of this court in granting or refusing the remedy of certiorari is a discretionary one, and the scope within which the court grants such a remedy had been defined in many decisions of this court over the years. One of such decisions was in the case of ***Republic v High Court, Accra; Ex parte Soku& another*** *[1996-97] SCGLR 525.* The Supreme Court in that case sounded the caution that the exercise of this court's supervisory jurisdiction over superior courts must be done with care because they are not inferior courts; but for article 132 of the 1992 Constitution which confer supervisory jurisdiction over all court on this court the Supreme Court would not have any supervisory jurisdiction over the High Court and the Court of Appeal. The Court held at page 529: ***"If therefore, it is claimed that there is an error of law appearing on the face of the record of a superior court which warrants intervention by this court by the exercise of our supervisory jurisdiction, it must be such an error as goes to the wrong assumption of jurisdiction or the error is so obvious as to make the decision a nullity"***

In the case of ***Republic v High Court, Sekondi; Ex parte Ampong Alias AkrufaKrukoko I (Kyerefo III & others Interested Parties***), [2011]2SCGLR 716 at 722 this court per AkotoBamfo JSC restated the scope as follows: ***"An order of certiorari, it is trite learning, is a discretionary remedy granted on grounds of excess or want of jurisdiction and or breach of a rule of natural justice…. Additionally it would issue to correct a clear error on the face of the ruling of the court; or an error which amounts to lack of jurisdiction in the court so as to make the decision a nullity"***

In a very recent unreported decision of this court, the case of ***Republic v High Court, Cape Coast; Ex Parte John BondzieSey, University of Education Winneba (interested party) Civil Motion NO. J5/74/2019 dated 12th February, 2020*** Dotse JSC re-outlined the circumstances under which certiorari could be granted by this court as follows: ***"The grounds for which the Supreme Court will exercise its Supervisory Jurisdiction ….are:***

1. ***Where there has been the breach of the rules of Natural Justice***
2. ***Error of law on the face of the record***
3. ***Excess of Jurisdiction***

4. Lack of Jurisdiction

The crucial question to be determined in this application is whether the High Court breached the *audialteramPartem* rule, in that it failed to give the applicants who are executors of the will of late KwasiBoampong a hearing before ordering judicial sale of a property that belongs to his estate.

The applicants do not dispute the fact that there was a mortgage transaction between the Interested Party, First Atlantic Bank and Boampong Company Limited in which the property in question was mortgaged to the Interested Party. The applicants do not also dispute the fact that the late Boampong gave a power of attorney to one of the directors of Boampong Company Limited to execute the mortgage deed with the bank on his behalf. This director, AkwasiAmoako is the 2nd Defendant in the suit that led to the judgment the subject matter of this application.

Section 15 of the Mortgage Decree (NRCD) 96 provides that: ***"Upon failure of performance of an act or acts secured by the mortgage the mortgagee may do either or both of the following:—***

> ***(a) sue the mortgagor or obligor or both on any personal covenant to perform;***
>
> ***(b) realise his security in the mortgaged property in all or any of the ways provided in this Part, and in no other way notwithstanding any provision to the contrary in the mortgage.***

Who then is the mortgagor in this case and who should be sued by the Interested Party? ***Osborn's Concise Law Dictionary (Eight Edition) defines a mortgagor as: "The person who mortgages his property as security for the mortgage debt, the borrower"***

In the case of ***Republic v High Court, Ex-Parte Chinto [1993-94]1 GLR 159*** the Supreme Court held that where a mortgagee is proceeding in court for judicial sale of the mortgaged property, the mortgagor shall be made a party to the suit. However, in this case, it has been established that Mr. Boampong whose property had been mortgaged as security for the loan, acted per an attorney, AkwasiAmoako who is a director of the limited

liability company, KwasiBoampong Company Ltd, the beneficiary of the fund, or the loan facility, and who has the responsibility to pay the debt.

In the suit that led to the impugned judgment KwasiBoampong Company Limited was the first defendant and AkwasiAmoako the mortgagor's attorney or agent was the 2nd defendant. In my view, the right people to be sued under section 15 of the Mortgages Decree had been sued and given a hearing. The acts of AkwasiAmoako are the acts of his principal KwasiBoampong. It must be emphasized that in so far as the transaction in question is concerned, AkwasiAmoako signed the mortgage documents; He was the one the bank knew as the mortgagor in the transaction. At the time the money was disbursed by the bank, he as a director of the KwasiBoampong Company Limited knew his principal was deceased but failed to inform the bank. At the time the bank instituted the action in the High Court a substantial amount of the loan had been repaid; in all these, the bank dealt with the directors of the company. The bank rightly sued AkwasiAmoako as the 2nd defendant. He was the main man who dealt with the bank, he was part of the trial; it would therefore be unconscionable for the applicants to claim that the mortgagor was not given a hearing.

The decision of the High Court therefore, is not a nullity.

A principle the courts have emphasized time and again in proceeding where breach of the audialterampartem is alleged is that the application of the doctrine is not universal; the circumstances of each case determine its application. Thus in the case of **Republic v High Court, Accra; (Commercial Division) Ex parte Environ Solutions Ltd & Others, Suit N0 J5/20/2020, dated 24th April 2020 (Unreported.)** This court expressed its view on the issue per Pwamang JSC as follows: "……***whenever the doctrine of audialterampartem is touted in proceedings seeking to quash a decision, it must be remembered that the doctrine is not one of universal application in every enquiry and furthermore, it does not apply with the same rigour in all situations where a decision is to be taken that affects the interest of other persons***. He made reference to Tucker LJ's observation on the issue in the case of **Russell v. Duke of Norfolk [1949] 1 All E.R. 109, at page 118,** who saidthat: **"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural**

justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

Certiorari being a discretionary remedy, it may be refused in appropriate cases though grounds for it may be established. Having regard to the conduct of the applicants, opportunities for remedy having been given to the applicants and third party interests having vested, we would exercise our discretion to refuse the application.It had earlier been emphasized that the mortgagor's agent was a party to the suit and participated in the trial that resulted in the order for judicial sale of the mortgaged property, the plea of the doctrine of breach of a rule of natural justice particularly the audialterampartem rule would not avail the applicants in the circumstances.

Having found that the impugned judgment was properly obtained therefore not a nullity, the applicants are caught by ***Rule 62 of C. I 16***, which provides ***"An application to invoke the supervisory jurisdiction of the Court shall be filed within three months of the date of the decision against which the jurisdiction is invoked unless the time is extended by the Court".***

The judgment, the subject matter of the application was delivered on 28th of March 2019. The present application was filed on 18th of February 2021 without any prayer to the court to extend the time. The breach of **Rules 61 (1) and 62 of C. I 16** which are mandatory rules of this court had rendered the application incompetent and it is hereby dismissed.

We find it necessary to comment that where transactions with the banks are concerned particularly when it comes to recovery of loans obtained from the banks, frivolous applications of this nature affect the operations of the banks. When the banking sector is crippled, the economy of the nation will be affected. We therefore state our disapproval of protracted litigation that only obstruct the smooth operations of the banking sector.

A. M. A DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

KULENDI JSC:-

I have had the privilege of painstakingly reading and considering the majority opinion of my very learned and respected brothers and sisters in this case. However, I am unable, with all due respect, to agree with material aspects of the reasoning and the conclusions reached. In particular, I have struggled to come to terms with the proposition that the donee of a limited power of attorney continues to be vested with the powers and capacity of an attorney/donee even after consummating the express limited purposes of the power. My further difficulty is with the legal proposition implied in the reasoning of the majority that a donee/attorney of a limited power of attorney continues to be vested with the powers and capacity of an attorney/donee even after the death of the donor. And thirdy that the donor's (who is a mortgagor) right to redeem the equity in the mortgage is satisfactorily addressed if a donee/attorney whose only power was to execute the deed of mortgage is made a party albeit in a different capacity in an action for recovery of money outstanding under the liability secured by a mortgage and for judicial sale of the mortgagor's property.

In addition, I struggled with their holding on the question on whether notice to the donee of a mortgagor, pursuant to a limited power of attorney, satisfies the mortgagor/donor's right to natural justice in respect of proceedings commenced after the death of the mortgagor/donor and without giving notice of the foreclosure proceedings to the deceased

mortgagor/donor's estate to enable it exercise the right to redeem the equity in the mortgage.

It is for these reasons that I find it compelling to render this dissent.

INTRODUCTION

This is a motion on notice seeking an order of Certiorari to quash the judgment dated 28th March, 2019, of the High Court, Commercial Division, Accra, in suit no. CM/BFS/0638/2017 entitled **First Atlantic Bank Limited v. KwasiBoampong Company Ltd. and Ors**., which judgment granted the Interested Party an order for Judicial Sale of Property situate at Plot No. C3 Mkt/a/13 Community 3, Tema, which belonged to one KwasiBoampong (the Mortgagor) (now deceased) although he was not party to the suit.

BACKGROUND

The facts according to the affidavit in support of this motion are as follows; on 31st January, 2017, KwasiBoampong died and his Will was admitted to probate on 19th June, 2018. Meanwhile, on 16th October, 2017, over nine months after his death, the Interested Party herein initiated a suit at the Commercial Court against KwasiBoampong Company Limited (hereinafter "the Obligor or the 1st Defendant"), AkwasiAmoako and Victoria Boampong, for the following reliefs:

a) "An order for the payment of the sum of Four Hundred and Sixty Six Thousand and Eight Hundred and Fifty-Three Ghana Cedis and Forty-Five pesewas (GH¢ 466,853.45) being the amount due and owing for the bank guarantee facility to the 1st Defendant;
b) Interest on the said sum of Four Hundred and Sixty Six Thousand and Eight Hundred and Fifty-Three Ghana Cedis and Forty-Five pesewas (GH¢ 466,853.45) at the agreed interest rate of 40% per annum from the 11th day of October 2017 to the date of final payment;

c) Further or in the alternative, an Order for the Judicial Sale of the properties described in the statement of claim and used as collateral for the said facilities granted the 1st Defendant

d) Cost."

The Applicants, who are the executors of the Will of the late KwasiBoampong, claim that they were not made parties to, or made aware of the suit.

That notwithstanding, the Trial Court entered judgement in favour of the Interested Party herein and made an order for the collateral property to be sold at a price not below the forced sale value of One Million, One Hundred and Ten Thousand and Forty One Ghana Cedis (GH¢1,110,041.00).

The Applicants say that once they became aware of the judgment, they made an application for interpleader on the grounds that the property belonged to the deceased. They also filed a Notice of Claim which was challenged by the Interested Party herein. According to the Affidavit in Support of the present motion, the Interested Party, in its Affidavit of Interest indicated that it was aware that the property was owned by KwasiBoampong but alleged that KwasiBoampong had mortgaged the property to the Interested Party.

GROUNDS

The grounds for the motion were stated on the motion paper and are reproduced *verbatim* as follows;

1. That the judgment of the High Court (Commercial Division) Accra, dated the 28th March, 2019 (sic) was entered in breach of the *audialterampartem* rule of natural justice, and therefore entered without justification, as the Applicants were not served with any of the processes leading up to the judgment; and

2. The High Court (Land Division) Accra, committed an error patent on the face of the record, which goes to jurisdiction, when it made an order for the judicial sale of a deceased person (sic) who was not party to the suit

ARGUMENTS BY THE APPLICANTS

The Applicants state in paragraph 9 of their Affidavit in Support that, had they, being the executors of the Will of the late KwasiBoampong, been made parties in the substantive suit before the High Court, they would have "vigorously challenged" the assertion that the late KwasiBoampong had mortgaged the property to the Interested Party.

The Applicants argue that the failure of the Interested Party to make the estate of the late KwasiBoampong, a party to the suit, by way of a failure to add the Applicants herein, the executors of the estate, as defendants to the suit, robbed the High Court (Commercial Division) of the jurisdiction to make any orders affecting the property.

ARGUMENTS BY THE INTERESTED PARTY

The Interested Party filed an Affidavit in Opposition to the application. In it, they argue that the Deponent to the Affidavit in Support of the Application for Certiorari is "not clothed with capacity to invoke the jurisdiction of this Honourable Court". The Deponent referred to is Dennis Nana AkwasiBoampong, son of the late KwasiBoampong. The Interested Party states in paragraph 5 of their Affidavit in Opposition to the motion that, "the persons properly clothed with capacity to make this instant application before this Honourable Court are the Executors of the estate of the late KwasiBoampong."

The Interested Party further states that the Deponent has not averred or shown that he has any interest in the property in dispute, while saying in the same breath that the Deponent has described himself as a beneficiary under the Will of the late KwasiBoampong. The Interested Party also contends that the Deponent did not depose to the unwillingness, unavailability or incapacity of the Executors of the estate of the late KwasiBoampong to pursue this application. They then go on to state categorically in

paragraph 9 of their affidavit in opposition that "*… the Executors being alive and in full knowledge of this matter are the only persons clothed with legal capacity to depose to matters before this HonourableCourt.*" They add that the Deponent averred to having the authority of the Executors to depose to the matters before this Court, but exhibited no document to that effect.

The Interested Party then states that the Applicants, having become aware of the judgment they seek to quash in June 2020, had ninety days per the rules, to bring an Application for Certiorari. Since this Application was brought in February 2021, the Interested Party contends that this Application was brought out of time and is incompetent to invoke the jurisdiction of this Court.

LAW AND ANALYSIS

CAPACITY OF THE DEPONENT

C.I. 47 in Order 19 provides for who may depose to an affidavit.

Rule 4 states as follows:

"Rule 4—Affidavit in Support of Motion
Every application shall be supported by affidavit deposed to by the applicant or some person duly authorised by the applicant *and stating the facts on which the applicant relies, unless any of these Rules provides that an affidavit shall not be used or unless the application is grounded entirely on matters of law or procedure which shall be stated in the motion paper."* (emphasis added)

In the instant case, the Interested Party contends that the Deponent of the Affidavit in Support of this Application is not clothed with the proper capacity to depose to the affidavit. The Deponent is the son of the deceased owner of the property in question.

It is important to note that it is not the deponent to an affidavit in support who seeks to invoke the supervisory jurisdiction of the Court. It is the Applicant. The capacity of a

deponent of an affidavit in support, to invoke the jurisdiction of a court in the Application is therefore irrelevant. This is the case when law firms' or chambers' clerks depose to affidavits on behalf of clients of the firm or chambers. The clerk need not be someone who has capacity to bring the application but must be one seized of the facts and must disclose in the affidavit, the basis and/or source of his knowledge or belief in the matters contained in the affidavit, in order to come within the remit of order 19.

In view of the aforesaid, I am of the considered opinion, that the objection to the capacity of the Deponent to the Affidavit in Support of the Application is without merit and I will dismiss same. That said, it is important to note, that the Interested Party in their futile attempt to dislodge the Affidavit in Support show a clear understanding, that following the death of Mr. KwasiBoampong, it is, in their own words "*the persons properly clothed with capacity … are the Executors of the estate."* I am therefore at a loss as to why they did not appreciate or deem it necessary that the Executors of the estate be made parties to the action in which they are seeking judicial sale of the property of the deceased KwasiBoampong.

TIME

The Interested Party also raised an objection to the time when the application was brought, saying that the Applicants brought this application out of time.

The law governing the supervisory jurisdiction of this Court has its genesis in **Article 132 of the 1992 Constitution.** For clarity's sake, this provision is reproduced in full below:

"The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may, in the exercise of that supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power."

The Rules of Court Committee created the rules for the administration of the supervisory power of this Apex Court in **part 6 of the Supreme Court Rules, C.I. 16.** These rules,

particularly **Rule 62**, govern the supervisory jurisdiction of this Court and the time within which an application invoking this jurisdiction of this Court can be brought.

Rule 62 of CI 16 says;

"An application to invoke the supervisory jurisdiction of the Court shall be filed within 90 days of the date when the grounds for the application first arose unless the time is extended by the Court."

In this case, the Applicants became aware of the Judgment complained of in this Application in June of 2020, as admitted by the Applicants in paragraph 7 of their Affidavit in support of their Application. This Application was brought in February 2021, without having sought an extension of time, months out of time.

However, in the instant Application, the Applicants' plaint is that the order of the High Court was obtained without jurisdiction because the property that was attached belonged to the deceased, the mortgagor, who was the proprietor of the Defendant company, the obligor, and not the property of the obligor itself.

It is important to note here that in the instant case, it is not the attachment and sale of the property itself that is being challenged, but rather the originating proceedings pursuant to which an order for the judicial sale of the property was made by the High Court (Commercial Division), which order enabled the attachment. It is in respect of this original suit that the Applicants argue that neither the deceased, nor his estate, whom the Applicants represent, were made parties, heard and/or given the opportunity to be heard and consequently, the order for a judicial sale issuing therefrom, was made without jurisdiction and is for that matter, null, void and of no legal effect.

Since the case of **Salomon v. A. Salomon [1896] UKHL 1, [1897] AC 22,** common law courts have long held that after incorporation, a company gains separate legal identity and becomes a separate legal entity from its shareholder(s). Even if a company has only one shareholder, that shareholder is not the same as the company. This principle was applied by this Court in the case of **Morkor v. Kuma (East Coast Fisheries Case)**

[1998 - 1999] SCGLR 620. In that case, a company was sued alongside its main shareholder. This Court held that the shareholder was the wrong person to be sued in that case since the company was a distinct legal entity and the main shareholder had not executed a personal guarantee when incurring the debt for which the company was sued.

EFFECT OF THE JOINDER OF THE 2ND DEFENDANT ON THE REQUIREMENT OF NOTICE

There is a theory that postulates that since the 2nd Defendant who acted as an attorney for the late KwasiBoampong was joined as a party to the case, notice to the estate of Mr. Boampong can be imputed from that act. However, the stated capacity in which the 2nd Defendant was joined to the suit in the High Court erodes any basis on which this conclusion could be grounded. This is because, paragraphs 3 and 10 of the Statement of Claim read together clearly show that the 2nd Defendant was joined to the suit in his capacity as a director of the 1st Defendant and the signatory to a personal guarantee as security for the facility granted to the 1st Defendant. Therefore, any inference, conclusion or finding that the 2nd Defendant was sued in his capacity as attorney of the late KwasiBoampong, and/or any other capacity besides being a director of the 1st Defendant, will amount to making a case for the Interested Party that they themselves do not allege, let alone demonstrate.

In any event, a Power of Attorney, like any agency, is generally terminated by the death of the principal/donor or the agent/donee unless it is an irrevocable power of attorney for valuable consideration, creating an agency in which the donee or the agent has an interest in the subject matter property.

Specifically, powers of an attorney are governed by the **Powers of Attorney Act, 1998 (Act 549).** The Act in section 4 says that the donee of a power may execute an instrument with his own signature and do any other thing in the donee's own name and such act or instrument would be valid as though it was executed by the donor himself.

The powers are given for purposes specified in the instrument granting the donee the powers, and the donee of the power is not the agent of the donor for purposes that fall

outside the scope contemplated by the instrument. Therefore, in this case, the need to interrogate whether the power attorney executed by the late AkwasiBoampong vested in the 2nd Defendant, the power to undertake any purposes beyond the one off, single-purpose execution of the deed of mortgage is inescapable if this Court is to do justice to the parties in this application.

It is important to note that the death of a donor of a power of attorney terminates the power given or the agency relationship between the donor and the donee. In the old case of **Watson v. King (1815) 4 Camp. 272; 171 ER 87.,** Lord Ellenborough asked: "How can a valid act be done in the name of a dead man?"

According to **section 2 of Act 549** a power of attorney may only subsist after the death of the donor, if the instrument granting the power expressly states that the power is irrevocable, the donee has been given the power to secure a proprietary interest and that donee is entitled to that interest.

This section is reproduced in full below:

> *"Section 2—Powers of Attorney given as Security.*
>
> *(1) A power of attorney given as security for a proprietary interest of the donee or as security for an obligation owed to the donee may be expressed as irrevocable.*
>
> *(2) A power of attorney given to secure a proprietary interest may be given to a person entitled to the interest and persons deriving title under him in respect of that interest and those persons shall constitute donees of the power subject to the authorisation to appoint substitutes given by the power.*
>
> *(3) Where a power of attorney is expressed to be irrevocable and is given to secure—*
>
> *(a) a proprietary interest of the donee of the power; or*

(b) the performance of an obligation owed to the donee,

then, whilst that interest or the obligation remains undischarged, the power shall not be revoked—

(aa) by the donor without the consent of the donee; or

(bb) by the death, incapacity or bankruptcy of the donor or, if the donor is a body corporate by its winding up or dissolution.

For the avoidance of doubt, and to demonstrate the nature, scope or extent of the power granted the 2nd Defendant, I reproduce below the following relevant portions of the Power of Attorney which was exhibited by the Interested Party as Exhibit FAB "5":

"I, KWASI BOAMONG of HS/NO NO. 7 BLK F South Patasi, Kumasi (hereinafter called "the Principal") do hereby appoint AKWASI AMOAKO of HS/NO NIC 21/68 (hereinafter called "the Attorney") to be my true and lawful Attorney for the following purposes:

1. To use my property located at Plot No.3/MKT/A/13, Community 3, Tema, (hereinafter referred to as "the House") and more particularly described in the schedule below to secure a facility (Bank Guarantee in the sum of One Million Ghana Cedis) granted to KwasiBoampong Company Limited by First Atlantic Bank Limited.

2. To sign as the Mortgagor on my behalf for the legal mortgage documents prepared by the Bank for the use of my property as collateral.

3. And I undertake to ratify whatever my Attorney shall do under this authority or the purported authority of this power.

In witness whereof, I do hereby thumb print this power the day and year first above written."

From the face of exhibit FAB "5", this is not an irrevocable power or one that continues in effect after the death of the Donor of the power. On the totality of the three paragraphs of the power, the power was to execute a single act, the execution of the mortgage in favour of the Interested Party. Therefore, whilst the mortgage remained valid and enforceable until the obligation secured is fully discharged, the Donee did not remain an agent of the Donor for the purpose of the obligations under the mortgage. From the language of the Power of Attorney, the power expired after the execution of the mortgage.

In any event, from the terms of the Power of Attorney, it is clearly not one expressed to be irrevocable in terms of **Section 2(3) of Act 549** cited *supra.* Consequently, the power lapsed upon a completion of the acts envisaged and in any event, upon the death of the Donor, Mr. KwasiBoampong.

It is significant to note that in the pleadings in suit no. CM/BFS/0638/17 from which the offending order of judicial sale was issued, the Interested Party who was Plaintiff therein makes the following relevant averments:

> "*2. 1st Defendant is a Limited Liability Company engaged in the business of the distribution of products of Guinness Ghana limited*
>
> *3. 2nd and 3rd Defendants are Directors of the 1st Defendant Company.*
>
> *10. Plaintiff says 2nd and 3rd Defendants further signed a personal guarantee as security for the said facility granted 1st Defendant.*
>
> *…*
>
> *17. Plaintiff says it has made repeated and persistent demands on 1st Defendant for the repayment of the facility it granted it, but 1st Defendant failed, refused and/or neglected to pay the said amount which continues to attract the agreed interest rate of 40%.*"

As I intimated earlier, the above averments are material because they point to the reasons and capacities in which the 2nd Defendant was made a party to the suit. Nowhere in the pleadings is it alleged that it was the 2nd Defendant who executed the mortgage, let alone that he acted as the Attorney of Mr. KwasiBoampong (deceased) and was joined to the suit in that capacity. The Interested Party's own averments per its statement of claim are that the 2nd Defendant was joined to the proceedings because he is a director of the 1st Defendant and a personal guarantor as part of the security arrangements for the Bank Guarantee provided by the Interested Party. Clearly, the Interested Party did not address its mind to the necessity of joining the mortgagor which would have led to a joiner of his estate, given that the mortgagor had died at the time the action was commenced.

In the English case of **Martins Bank Limited v. Kavanagh 1948 2 AER 448**, which was cited with approval by this Court in the case of **Republic v. High Court Ex. Parte Chinto [1993-1994] 1 GLR 159-171**, the Defendant therein charged her farm by way of a legal mortgage with payments of certain sums to the Plaintiffs. The Defendant was adjudicated bankrupt but remained in occupation of the farm. The Plaintiff issued an originating summons, claiming possession of the farm and elected not to add as a defendant, the trustee in bankruptcy, in whom the equity of redemption was vested.

It was held that as the originating summons involved a step in enforcement of the security, which might prejudice the person entitled to the equity of redemption, the trustee in bankruptcy should have been joined and therefore the summons was defective.

The legal ramifications of the death of Mr. KwasiBoampong may be said to be, for want of a better word, in some ways similar to the bankruptcy of Kavanagh's farm in the **Martins Bank case**. Consequently, the equity of redemption of the mortgage, devolved to the Applicants in their capacity as executors of the estate of the late KwasiBoampong. The failure of the Interested Party to join them to the proceedings in the High Court, occasions a the estate a denial of natural justice, overriders its right to the equity of redemption and therefore renders the proceedings leading to the order for judicial sale null, void and of no legal effect.

THE MORTGAGES ACT AND OTHER RELEVANT STATUTORY PROVISIONS ON THE ISSUE OF NOTICE

There is also the theory that, thanks to section 15 of the Mortgages Act, where there is a default, a Mortgagee may go ahead and realize a mortgage property belonging to a Mortgagor without notice to the Mortgagor. Let us examine Section 15 in detail to see whether that conclusion can truly be drawn from the statute.

Section 15 of the Mortgages Act, NRCD 96, entitled "Remedies of Mortgagee on Default" reads as follows;

> "*On the failure of performance of an act secured by a mortgage, the mortgagee may*
>
> *A. Sue the mortgagor or the obligor or both of them on a personal covenant to perform or;*
>
> B. *Realise the mortgagee's security in the mortgaged property in all or any of the ways provided in this Act, and in no other way despite a provision to the contrary in the mortgage.*"

First, it is important to note that the element of election, that is the mortgagee deciding who to sue, only applies to 15(a) and not 15(b). Per 15 (a), once both the mortgagor and the obligor have executed personal guarantees, the mortgagee may elect to sue the mortgagor or the obligor on their personal guarantees.

However, when a mortgagee chooses the option under 15(b), that is the realization of the mortgage security as opposed to suing under a personal guarantee, the mortgagee has to proceed against the mortgagor in who the equity of redemption is vested. Section 15 (b) does not provide for an election in this recourse. The mortgagee is limited to proceeding as provided for under the act. In this case, the Interested Party opted to proceed by a judicial sale. Judicial sale of a mortgaged property is governed by section 18 of the Act.

The requirement for notice and consequences for failure to give notice for an application for judicial sale under section 18(1) is different from the requirement of notice and consequences of failure of notice for the *sale* under section 18(4) and (5). For purposes of clarity, the relevant provisions are reproduced in full below.

> *18. Judicial sale*
>
> *(1) On the failure of performance of an act secured by the mortgage, the mortgagee may **apply** to the Court for an order for the judicial sale of the mortgaged property, and on being satisfied as to the existence of grounds for the application, the Court shall, on the conditions that it considers just and equitable, grant an order for judicial sale of all or a part of the mortgaged property.*
>
> *…*
>
> *(4) Prior to a judicial sale ordered under this section, the mortgagee requesting the judicial sale **shall give reasonable notice of the sale** to the mortgagor and every encumbrancer of whom the mortgagee has notice.*
>
> *(5) Failure to give that reasonable notice **shall not affect the judicial sale but shall render the mortgagee personally liable for the loss** caused by the failure. (emphases added)*

As can be surmised from the above, under 18(1), the application cannot be made without due notice to the mortgagor or any obligors. Failure to give such notice, will render the process a nullity because of the failure of the Court to adhere to the *audialteramparterm* rule. Therefore, an application for judicial sale under 18(1), without notice to the mortgagor, and a subsequent sale of the attached property is a nullity which may be reversed by the Court at any time that the nullity is brought to the attention of this Court.

There is no obvious or implied legislative intent to waive notice in an application under Section 18(1). I am of the view that unless expressly prescribed, any originating process required by a statute to be undertaken by an application ought to be on notice to any party or parties against whom a relief is sought. Notice of adverse proceedings and for that matter, a directly affected party's right to be heard can only waived, curtailed or overruled by the express terms of a statute and not by implication.

In contrast, section 18(4) relates to execution proceedings which result from an originating application under 18(1) for an order for judicial and for that matter, the effect of a failure, neglect or omission to give notice under Section 18 (1) cannot be the same as the effect of the failure to give notice of an auction sale pursuant to an order for judicial sale under Section 18(4) and (5). The consequences of a failure to give notice under Section 18(4) and (5) are diluted and less fundamental, relative to the consequences of failure to give notice under Section 18(1). This because by the time proceedings for the an order of judicial sale of a mortgaged property have reached the stage of a sale, under normal circumstances, the owner of the property sought to be sold, be it the mortgagor or the obligor, would already have been given notice, whether actual or even constructive, of the originating proceedings, (the application for judicial sale) and the consequential steps leading up to the attachment and notice of an auction sale of the property. Therefore, if, after an order for judicial sale of the mortgage property has been granted by a Court upon a consideration of the application prescribed in section 18(1), the mortgagee requesting the sale does not give notice of the sale to the mortgagor or obligor, this failure to give notice would not render the sale of the mortgage property a nullity, but rather, the mortgagee who sought the sale of the property shall be liable to the mortgagor or the obligor for any losses resulting from or occasioned by the failure to give notice. This is because, by this time, the mortgagor or obligor would have had notice of the proceedings leading up to the eventual sale – unless we are dealing with a completely uncooperative mortgagor.

It is a completely different situation where, as in this case, a mortgagor, or an obligor has not been given any notice of the originating proceedings for an order for a judicial sale, under section 18(1) that led to the sale of the mortgage property. It is worthy of note that in this case, the Interested Party's originating proceeding was by way of a writ, whereby it

sought the order for a judicial sale. The mortgagor, and for that matter, his estate, was, in my opinion, entitled to notice. In such a case, the *audialterampartem* rule remains sacrosanct and unimpeachable, and failure to give notice of the suit seeking an order for a judicial sale, to the mortgagor or obligor (or in this case, the estate of KwasiBoampong), denies the High Court (Commercial Division), the jurisdiction to grant the relief of an order for judicial sale.

I wish to point out that the rest of the writ and the reliefs sought, were nevertheless within the jurisdiction of the Court, but not the endorsement for an order for judicial sale.

I am of the considered view that in the context of the Mortgages Act, the realisation of a mortgage property, whether under section 18(1) by way of an order for judicial sale, section 16(1) by way of the appointment of a receiver, or an action for possession under section 17(2)(b), cannot be validly done on the blind side of, or without notice to the owner of the property sought to be realised. When it comes to a realisation by way of an order for a judicial sale, the Act is clear that the owner of the property must be given every opportunity to redeem the mortgage before a judicial sale is ordered.

Section 18(2) of NRCD 96 reads as follows,

"*In considering what conditions, if any, to attach to an order for judicial sale, the court shall have regard to what opportunity, if any, the mortgagee has afforded, to the mortgagor or obligor, or both, to remedy the failure of performance*."

This necessarily implies that before a judicial sale can be ordered by a court, the mortgagor must be given a chance to be heard by Court on what opportunities have been offered to the owner of the property to redeem the property. By what means can the Court be enabled to give meaning to section 18(2) *supra* if the Court's jurisdiction may be properly seized by ex parte originating proceedings for an order for judicial sale. Further, by what means can an affected Mortgagor, or Obligor, or both, avail themselves of the relief contemplated by the legislator under section 18(2) if it is permissible to embark on the originating proceedings for an order for judicial sale without notice to the Mortgagor, Obligor or both, as was done in this case. Thus, this Court, giving legitimacy to the

hearing of proceedings, whether by an originating motion or by writ of summons, for an order for judicial sale of a mortgage property without hearing and/or giving the mortgagor the opportunity of being heard, is a recipe for overreaching, unfair dealing and even fraud. The purpose of the intervention of NRCD 96 was to protect unwitting landowners from sly moneylenders who conspired with auctioneers to deprive people of their properties. Hayfron Benjamin JSC (as he then was) in the case of **Republic v. High Court Ex. Parte Chinto [1993-1994] 1 GLR 159-171** aptly put it as follows:

> *"In my view, the history of mortgages in this country shows that NRCD 96 was passed in answer to the crying need of borrowers for protection. A court ought not therefore rush to grant an order for judicial sale if other alternatives exist which may with advantage be used in the protection of borrowers."*

All things being said, not only can it not be said that any implied waiver of an owner of a property's natural justice rights exists in this law, but on the contrary, there is a strong implied requirement of notice or audialterampartem, besides the normal implied requirement of a party to be heard in a matter affecting their rights.

My learned and respected brother Pwamang JSC in the case of Republic v. High Court Accra ex Parte Environs Limited suit no. J8/1/2011, delivered on 20th December, 2011 cited with approval, the dictum of **Tucker LJ in the case of Russell v. Duke of Norfolk [1949] 1 All E.R. 109, at page 118** as follows:

> "*There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.*"

I would venture to posit at this point that an action to determine whether a person should be deprived of his property by way of an order for judicial sale being one where, his fundamental right to own property under **article 18(1)**is involved, the nature of the case demands that that person be heard. In other words, in a situation where a person is to be

deprived of his property through a judicial order, the audialterampartem principle must, as a matter of necessity, operate. I think that finding otherwise is a recipe for disaster and any apex court should tread extremely carefully in that direction.

As discussed supra, I am not of the opinion that a party's audialterampartem rights cannot be waived by statute. My humble opinion is that if a statute is going to take away such a fundamental right, that waiver must be expressly stated in the letter of the law and a court should not have the need to resort to complex constructions of the statute in order to arrive at a waiver of the right to natural justice, a generally hallowed common law principle which has become integral to our sense of justice.

The Ghanaian lawmaker, when it intended to go as far as, sidestepping the Courts in specific respects and overriding routine considerations of due process, expressed that legislative intent clearly in respect of special mortgages created under the **Home Mortgage Finance Law 1993, PNDCL 329.** This decree provides the mortgagee with a right to sell the mortgage property without giving the mortgagor or obligor a right to be heard.

However, PNDCL 329, does not, in my humble view, apply to the mortgage at the centre of this action for a myriad of reasons, of which I would list a few. Firstly, PNDCL 329 applies to mortgages taken under the Home Mortgage Financing Scheme created by that law. Secondly, the mortgages under this scheme and law are those that are administered by the Home Finance Company Limited. Thirdly, the mortgages are administered through very specific companies listed in the 3rd Schedule to the law. Fourthly, section 11 of that Act defines "mortgage" for the purposes of that Act, as a Mortgage Agreement entered into between the Home Finance Company Limited by itself or with any other party and the mortgagor.

By way of comparison, in other jurisdictions, there is a concept known as a 'statutory power of sale' which is granted to mortgagees who may sell a mortgage property if the time limit for redemption by the mortgagor has elapsed. In these jurisdictions, the mortgagee can sell the property without obtaining a court order first. In the UK, this

provision can be found in section 101 of the Law of Property Act, 1925. The provision reads as follows:

> "*(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):*
>
> *A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby;"*

In Nigerian statutory law, there are three statutory regimes governing mortgages. These are, the Conveyance Act 1881 applicable in States created from the old Northern and Eastern regions, the Property & Conveyancing Law, 1959 applicable in States created from the old Western and Midwestern regions and the Mortgage & Property Law 2010 which is applicable in Lagos. The corresponding provisions may be found in section 19(1) of the Conveyance Act, 1881, section 123(1) of the Property & Conveyancing Law, 1959 and section 40 of the Mortgage & Property Law 2010. These provisions provide that every legal or equitable mortgagee whose mortgage was created by a deed may enforce the security after the facility maturity date by selling the mortgaged property. The power of sale here is automatic and the mortgagee does not require a court order before they can sell. However, for the mortgagee to be entitled to exercise its power of sale, the power must havearisen and become exercisable. For the power of sale to arise, the following conditions must be fulfilled:

1. The mortgage must have been created by a deed;

2. There must be no contrary intention against sale in the mortgage deed; and

3. The facility maturity date, which is the date of redemption of the mortgage must have passed

For the power of sale to become exercisable, it must be shown that:

1. A notice requiring payment has been served on the mortgagor at least three months before the proceedings;

2. Interest on the facility has been in arrears for at least two months; and

3. The mortgagor is in breach of some covenants in the mortgage deed or some other provisions of the law.

These statutory comparisons therefore reinforce my view that in the absence of express provisions to the contrary, a reading of the Mortgages Act as a whole, lends compelling plausibility to a requirement that any process for an order for judicial sale of a mortgage property under section 18(1), be it by writ or by application ought to be on notice to the mortgagor and any obligor where applicable in order to properly found the jurisdiction of the Court to entertain the cause of action for an order for judicial sale. Otherwise, such proceedings in relation to an order for judicial sale, shall, in my opinion, be null and void as the jurisdiction of the Court concerned would have been improperly seized.

ON THE VIEW THAT NOTICE TO THE 2ND DEFENDANT WAS NOTICE TO THE MORTGAGOR AND/OR HIS ESTATE

There is a view that since the 2nd Defendant had executed a power of attorney to act as the Mortgagor's attorney, by suing him in this action, the Mortgagee had given notice to the Mortgagor's estate. This view is misplaced for two main reasons:

1. The 2nd Defendant was sued in his capacity as a director of the 1st Defendant, and not in his capacity as the attorney of the Mortgagor.

2. More importantly, the power granted to the 2nd Defendant by the Mortgagor, limited in scope, expired upon the performance of the acts specified in the deed granting the 2nd Defendant powers, or at the very latest, upon the death of the Mortgagor.

There are general powers of attorney and there are limited powers of attorney. General powers of attorney are described in **section 6 of the Powers of Attorney Act, 1998 (Act 549)**. In that section, the effect of a general power of attorney is that it transfers to the donee of the power (or joint donees of the power), the authority to do **anything** on behalf of a donor which can be lawfully done by an attorney.

In the old case of **Dzanku v. Afalenu [1968] GLR 792-794**, the learned judge Kinglsey-Nyinah J (as he then was) helpfully couched the above in the following terms

"What is a "power of attorney"? It is described as a formal document whereby one person empowers another to stand in his stead, or to represent him, for certain specific purposes. It may either be a special power, or else a general power. In the case of the latter, the general power, the person unto whom the power is given, the donee, becomes invested with full power to do such periodic acts as carrying on a business or collecting debts belonging to the donor of the power. ***Where the power is special, however, the donor of the power confines the donee to the doing of certain specified acts****."* (Emphasis mine)

In this case, the deed states that the Mortgagor (the donor) was giving the 2nd Defendant (the donee) the power of attorney for the specific purpose of executing the mortgage agreement with the Interested Party. The donee therefore cannot be forced to, or purport to, carry out acts which fall outside the remit of this specified act. Once the acts specified under the power are performed, the power of attorney is terminated.

It is also worthy of note that the law says that a general power of attorney must be set out in the form laid out in the schedule to the act. For the sake of exactitude, the said section 6 is reproduced in full below.

6. Effect of General Power of Attorney

Subject to the other provisions of this Act, a general power of attorney in the form set out in the Schedule shall operate to confer

(a) On the donee of the power

(b) If there is more than one donee, on the donees acting jointly or acting jointly or severally,

Authority to do on behalf of the donor, anything which can lawfully be done by an authority.

The implication of this is that a power of attorney, which is not expressed in the form set out in the schedule of the act, or at the very least which is not expressed to be a general power of attorney, is not a general power of attorney under this act.

A power of attorney expressed for a single or specific purpose, such as the one in this case, referred to as a limited power of attorney, is therefore not a general power of attorney. According to **section 4(b)** of the act, when a power of attorney specifically delimits the acts which the donee of the power can perform on behalf of the donor, the donee may only do those things. Again, for the sake of precision, the provision is reproduced in full below.

4. Execution of instrument by donee of power of attorney

The donee of a power of attorney may—

(a) execute an instrument with his own signature; and

(b) do any other thing in his own name ***if authorised by the donor*** *and the document executed and thing done shall be as effective as if done by the donor of the power. (emphasis added)*

Again, the implications of the above are clear. In a power of attorney not expressed to be a general power, the donee of the power may **only** do things which are **authorised by the donor of the power**. Therefore, statutorily speaking, a donee cannot purport to do acts on behalf of a donor which were not authorised by the donor, and much less so when the donor is dead.

Legal Effect of the Donor's Death/Irrevocability of a Power of Attorney

Section 2 says that a power of attorney given as a security for a proprietary interest of the donee or as security for an obligation **owed to the donee** may be expressed as irrevocable. The deductive implication of this is that all other powers of attorney may not be expressed as irrevocable.

Section 2 is also quite clear that the only time that a power of attorney is irrevocable by the death (incapacity, or bankruptcy) of the donor of the power is where the power is:

1. Expressed as being irrevocable

2. Given to the donee as security for a proprietary interest **of the donee**, or as security for the performance of an obligation **owed to the doneeAND;**

3. The obligation is undischarged.

None of these conditions for irrevocability are extant in this case and therefore the power of attorney could most definitely not purport to survive the death of the donor.

Section 2 is reproduced in full below.

Section 2—Powers of Attorney given as Security.

(1) A power of attorney given as security for a proprietary interest of the donee or ***as security for an obligation owed to the donee*** *may be expressed as irrevocable.*

(2) A power of attorney given to secure a proprietary interest may be given to a person entitled to the interest and persons deriving title under him in respect of that interest and those persons shall constitute donees of the power subject to the authorisation to appoint substitutes given by the power.

(3) Where a power of attorney is expressed to be irrevocable and is given to secure—

(a) ***a proprietary interest of the donee*** *of the power; or*
(b) the performance of ***an obligation owed to the donee****,*

then, ***whilst that interest or the obligation remains undischarged****, the power shall not be revoked—*

(aa) by the donor without the consent of the donee; or
(bb) by the death, incapacity or bankruptcy of the donor or, if the donor is a body corporate by its winding up or dissolution.

From the above, it is clear that in all other cases where the donee of the power is NOT the one owed the obligations secured by the power of attorney, a power of attorney is always revocable by the death of the donor of the power. The Indian Supreme Court, in the case of **Seth Loon Karan Sethiyavs Ivan E. John AndOrs. AIR 1969 73**, when dealing with a similar statutory provision held as follows,

"It is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure the interest of the agent, the authority cannot be revoked."

In that case, the appellant, who was indebted to a bank, executed a power of attorney, making the bank the donee of the power for the purposes of dealing with monies owed him which were to be applied to defray the debt owed to the bank, and expressed such power of attorney to be irrevocable. The court held that because the power was given to the donee to secure interests or obligations **owed to the donee**, that power was irrevocable as long as the obligation or interests **of the donee** remain undischarged.

In this case, the donee is not a person to whom the donor owed obligations secured by the power of attorney. It therefore stands to reason that the power of attorney granted by the donor in this case, like any limited power of attorney, is terminated upon the performance of the acts specified in the deed as stipulated by **Section 4** of the act, and in any event, by the death of the donor since it is not expressed to be irrevocable, and was not given to secure the interests of the donee of the power.

The Interested Party in this case therefore cannot purport to give notice to the donee of the power since the power lapsed on the performance of the acts stated in the power or at the very latest on the death of the donor. For all intents and purposes, the donee stopped being the attorney of the donor a long time ago.

CONCLUSION

Consequently, where the Interested Party commenced an action by writ, seeking among others, an order for a judicial sale of the mortgage property, belonging to the deceased mortgagor, whose estate the Applicants administer, without notice to the mortgagor (if he were still alive) or his estate (after his demise) as a party to that suit it obviously occasions a breach of natural justice. Since the mortgagor and his company, the obligor, are looked upon by the law as separate entities, property in his name which is not also in the name of his company cannot purport to be attached to satisfy debt of his company unless the right legal circumstances are extant. Doing so will amount to a nullity, and it is trite knowledge that a Court can set aside a nullity once it comes to the attention of the Court.

If this Court has the power to set aside a nullity, does it matter that the process bringing the nullity to the attention of this Court was brought out of time? The answer to this question surely must be no. In the celebrated case of **Mosi v. Bagyina [1963] 1 GLR 337 - 348,** this Court, speaking through Akufo-Addo JSC stated as follows;

> *"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 debitojustitiae to have it set aside, and the court or a judge is under a legal obligation to set it aside, either suomotu 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."*

In the case of **Network Computer System (NCS) Limited v Intelsat Global Sales And Marketing Ltd [2012] 1 SCGLR 218,** this Court sought to reiterate the point that as the order was void this court ought to exercise its jurisdiction to set it aside when its attention was drawn to it. In holding 3 of that decision, this Court, stated as follows at page 229,

> "It is now trite law that *a court which makes a void order or a superior court can set aside such a void order no matter how the void order is brought to its notice."*

In that same case, Justice Gbadegbe cited the opinion of Akufo-Addo JSC with approval, saying

> "*After all, the essence of the principle of Mosi v. Bagyina supra, as earlier laid down by Akufo-Addo JSC (as he then was) in Ghassoub v. Dizengoff (W.A.) (1962) 2 GLR 133 SC at 137 is that "lapse of time can never render valid that which is void ab initio." (e.s). That being so it means that the effect of lapse of time on "that which*

is void" should be the same wherever such a void matter falls for consideration and cannot with any logic be confined only to the court which made it."

This principle has been applied several times in other cases such as **Republic v. High Court (Fast Track Division) Accra; Ex parte Speedline Stevedoring Co. Ltd (Dolphyne Interested Party) (2007-2008) 1 SCGLR 102 and The Republic v. The Court of Appeal, Anthony Thomford, Ex parte Ghana Chartered Institute of Bankers J5/21/2001 S.C. dated 22/6/2011, unreported**.

In my humble view, while under normal circumstances the failure to seek an extension of time within which to bring the current Application would be fatal, it has been made exceedingly clear in previous authorities that this Court has the power to declare a nullity a nullity, no matter how that nullity comes to our attention and however long the nullity has subsisted before it comes to the Court's attention. The Application ought to be granted because this Court reserves the right, in fact a *duty* (emphasis mine) to invoke its inherent jurisdiction to declare a nullity as such at any time, no matter how the nullity was brought to our attention. The grant of an order for judicial sale of the Property situate at Plot No. C3 Mkt/a/13, Community 3, Tema without notice of the suit to the executors of the estate of the mortgagor occasions a nullity as the jurisdiction of the High Court (Commercial Division), was not properly seized in relation to the grant of the order for judicial sale. The Applicants were thus denied their right to be heard in respect of the action for the judicial sale. In the circumstances, this application ought to have been granted. It is for these reasons that I am unable to agree with the decision of the majority.

I would end by paraphrasing the words of Hayfron Benjamin JSC (as he then was) in the case of **ex Parte Chinto (supra);** Mr. KwasiBoampong was most unfortunate. He (or his estate) did not litigate yet stood to lose his property. The judgment ordering the judicial sale of his property was null and void and the applicants are entitled ex debitojustitiae, to have it set aside.

E. Y. KULENDI

(JUSTICE OF THE SUPREME COURT)

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