IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: DOTSE, JSC (PRESIDING)

YEBOAH, JSC

APPAU, JSC

PWAMANG, JSC

MARFUL-SAU, JSC

CIVIL MOTION
NO. J5/32/2019

10TH APRIL, 2019

THE REPUBLIC

VRS

THE HIGH COURT (FINANCIAL DIV. 3), ACCRA ..... RESPONDENT

EXPARTE: MS ARCH ADWOA COMPANY LTD. ..... APPLICANT

1. THE AUDITOR-GENERAL
2. THE ATTORNEY-GENERAL ..... INTERESTED PARTIES/RESPONDENTS

RULING

DOTSE, JSC:-

This Ruling is premised upon the twin applications of judicial review, namely Certiorari and Prohibition which the Applicants herein seek against specific Rulings/Orders of the

High Court (Financial and Economic Crimes Division 2) presided over by Her Ladyship Justice Afia Serwaa Asare-Botwe (Mrs) dated 23rd day of January 2019 in the Suit intitutled *Ms. Arch Adwo Company Ltd. v Auditor General & Attorney-General and numbered FT/0044/2018*.

In the words of the Applicants, they specifically want the said High Court Judge consequent upon the grant of the application for Certiorari to also be prohibited from determining and or adjudicating the suit that is before her.

GROUNDS OF APPLICATION

The grounds upon which the Applicant seeks these reliefs have been stated by them as follows:-

i. "That the High court (Financial and Economic Crime Division – 2) **made a jurisdictional error of law apparent on the face of the record when she declined jurisdiction to hear** and determine the suit intitutled Ms Arch Adwo Company Ltd v Auditor General & Attorney General suit numbered FT/0044/2018 **on the ground that the action relates to disallowance and surcharge and the avenue open to applicant is appeal and not Writ of Summons.**

ii. That by virtue of the inconsistent and /or contradictory rulings made by the Learned Justice of the High Court against applicant there is a likelihood of bias if she is permitted to proceed to hear the suit.

iii. That having regard to all the circumstances of this case applicant are unlikely to get a fair trial of the matter should Learned Justice of the High Court proceed to hear and determine Suit No. FT/0044/2018 intitutled ***Ms Arch Adwo Company Ltd v Auditor General & Attorney General.*** " Emphasis

DEPOSITIONS IN THE APPLICANT'S AFFIDAVIT IN SUPPORT OF THE INSTANT APPLICATION

In view of the novelty of this application arising as it is under the powers of the Auditor-General under his powers of disallowance and surcharge, it is considered appropriate to set out in detail the following paragraphs of the affidavit in support of the above application deposed and sworn to by Esther Adwo Archer as follows:-

5. "That on 24th September 2018, applicant invoked the original jurisdiction of the High Court **and commenced proceedings by writ of summons for the following mixed claims and or reliefs**:-

(a) A declaration that the findings and /or disallowance of plaintiff's claim per IPC no. 4 in the sum of GH¢4,153,506.33 contained in the 1st Defendants Audit Report dated 23rd January 2018 is unjustified.

(b) A reversal of the findings and/or decision by 1st defendant respecting the disallowance of plaintiff's claim per IPC no. 4 in the sum of GH¢4,153,506.33 contained in the Audit Report dated 23rd January 2018.

(c) An order directed at the defendants to immediately but not later than fourteen (14) days after judgment to ensure that Ministry of Finance, Ministry of Road & Highways and/or Department of Feeder Roads pays for IPC no. 4 in the sum of GH¢4,153,506.33 forthwith.

(d) An order for Recovery of the sum of GH¢4,153,506.33 from Ministry of Finance, Ministry of Roads & Highways and/or Department of Feeder Roads being legitimate claim for road construction works duly executed by plaintiff covered by IPC no. 4.

(e) Interest at the Commercial bank rate of 30% per annum from 23rd January 2018 to the date of full and final payment.

(f) An order directed at 1st defendant to publish a retraction of the adverse findings against plaintiff at the official website of 1st defendant and Joy FM edition of the Morning Show within seven (7) days from the date of judgment.

(g) General damages

(h) Cost on full indemnity basis

6. That the facts upon which Applicant commenced the proceedings about which I have deposed in paragraph 5 **are that on 23rd January 2018, 1st Interested Party pursuant to the provisions of the Audit Service Act 2000 (Act 584) Sec 16 conducted a special audit to ascertain the extent of Government liabilities/commitments to Ministries, Departments and Agencies (MDA's) as at 31st December 2016.**

7. That at the conclusion of the audit exercise a report dated 23rd January 2018 was issued in which report various persons and entities including applicant herein were indicted.

8. That in specific reference to applicant the report stated that the claim of GH¢4,153,506.33 covered by Interim Payment Certificate number four (IPC 4) pending for payment is illegitimate as same has already been paid the reason for which any payment will be overpayment. (Annexed hereto and marked Ms '1' is an extract of the report confirming same).

9. That although in normal audit exercise, confirmation letters are issued to third parties likely to be affected by the audit service to confirm the transactions, applicant received no such confirmation letter to afford it the opportunity to respond to the matters which affected its IPC 4.

10. That upon conclusion of the exercise 1st Interested Party **made adverse finding of disallowance and/or surcharge against applicant to the effect that the claim per IPC 4 pending for payment is illegitimate as**

same had already been paid and that any additional payment will amount to overpayment. 1st Interested Party again failed to notify applicant of its decision disallowing the claim per IPC 4.

11. That 1st Interested Party instead published the report on its website with international coverage and subsequently granted interviews to various media networks including Joy FM and stated that applicant had submitted for payment a claim of GH¢4,153,506.33 which had already been paid the reason for which it had disallowed the claim as illegitimate.

12. That aggrieved by the decision of 1st Interested Party disallowing the pending claim of GH¢4,153,506.33, applicant invoked the appellate jurisdiction of the High Court by a Notice of Appeal filed on 19/03/2018 in accordance with Article 187 (9) of the 1992 Constitution and Section 17 (3) of the Audit Service Act 2000 (Act 584) in a suit numbered GJ/445/2018 and intitutled Ms Arch Adwo Company Ltd v the Auditor General which appeal was placed before respondent for determination.

13. That at the hearing of the appeal Counsel for 1st Interested Party raised a preliminary objection to the appeal on grounds that same had been filed out of time and that the decision of Interested party complained of having been published on 30th January 2018, applicant had 14 days to appeal and a further 14 days to apply for extension of time to appeal and that by filing the Notice of Appeal on 19/03/18 without first obtaining leave of court the appeal was out of time.

14. That in the course of the hearing the preliminary objection Counsel for 1st Interested Party who raised the preliminary objection **withdrew same and informed the court that it may grant application for extension of time to appeal in order to hear the matter on its merits since the entire**

appeal on disallowance and surcharge procedure was novel area of the law worldwide.

15. That notwithstanding, respondent struck out the appeal on grounds that "if one is to navigate unchartered waters, the best precedent to set would be to apply the law to the letter". (Annexed hereto and marked exhibits MS '2' and '3' are copies of the Notice of Appeal with the supporting written submission and ruling dated 24/05/2018 confirming same.)

16. That applicant's subsequent application for extension of time to appeal to the High Court was dismissed by a ruling dated 23rd July 2018. Equally an application to set aside the ruling of the court dated 24/05/18 on grounds of nullity was also dismissed (Annexed hereto and marked exhibits MS '4' and '5' are copies of the rulings dated 23/7/18 and 13/2/19 respectively confirming same.)" Emphasis supplied

From the above depositions, it is significant to note and observe the following procedural steps in the trial respondent court.

1. The first step taken by the Applicants, arising out of the Audit Report issued by the 1st Interested Parties dated 23rd January, 2018 was to invoke the **appellate jurisdiction of the High Court by a Notice of Appeal filed on the 19th of March 2018** pursuant to Article 187 (9) of the Constitution and section 17 (3) of the Audit Service Act, 2000 (Act 584) in a suit numbered as GJ/445/2018 and intitutled *Ms. Arch Adwo Company Ltd. v The Auditor General*. This appeal was placed before the Respondent court for determination.

2. During the hearing of the appeal, learned Counsel for the 1st Interested Party raised a preliminary legal objection to the effect that the notice of appeal had

been filed out of time. In the view of learned counsel for the 1st Interested Party, the Applicant's had only 14 days to apply for extension of time to file same.

3. However, during the hearing of this preliminary objection, learned Counsel withdrew same and in our opinion acted very honourably and in the best traditions of the Bar when he rather urged the Respondent Court to grant extension of time for the appeal as he claimed ***" in order to hear the matter on its merits since the entire appeal on disallowance and surcharge procedure was novel area of the law worldwide."***

4. Despite the overtures extended by learned counsel for the 1st Interested Party the Respondent court in a Ruling dated 24th May 2018 struck out the Applicants appeal on the grounds that ***"if one is to navigate uncharted waters, the best precedent to set would be to apply the law to the letter."***

5. An application by the Applicants to set aside the Ruing of the Court dated 24th May 2018 on grounds of nullity and another to apply for extension of time to appeal to the High Court ***were all dismissed by Rulings dated 23rd July 2018 and 13th February 2019 respectively.***

In the meantime, as had been stated supra, the Applicants on the 24th September 2018 filed their writ of summons for the mixed claims already referred to supra.

Undaunted in the pursuit of justice, the Applicants filed interrogatories pursuant to order 22 r. 1 of the High Court (Civil Procedure) Rules, C. I. 47 which were however opposed by the Interested Party.

On 23rd January 2019, the Respondent court delivered a Ruling in which it dismissed the Applicant's application for Interrogatories on the grounds inter alia that the

application was premature and that the High Court did not have original jurisdiction to entertain the suit.

Since this Ruling is the crux of the order that is sought to be quashed, we will revert to it later in this delivery. It is significant to observe at this stage that with the above Ruling, the doors of justice to the Applicant have been completely shut in respect of their desire to pursue the 1st Interested Party's surcharge and disallowance orders.

We further deem it appropriate at this stage to again refer to the depositions of the Applicants in paragraphs 40, 41, 42 and 45 of their affidavit in support of the instant application to elucidate in clear terms the grounds of the said application.

40. "That I am humbly advised by Counsel and verily believed same to be true that although respondent was fully aware of the position of the law being the court who delivered the said ruling, respondent erroneously refused both the application for extension of time to appeal and a subsequent application to set aside the ruling for nullity **on the grounds that applicant's appeal was brought pursuant to the void Order 54 A r 2 of CI 102 for which reason applicant had 14 days to appeal and not 60 days as provided by the prevailing Act; section 17 (3) of Audit Service Act 2000 (Act 584).**

41. That I am humbly advised by Counsel and verily believed same to be true that the respondent having held and declared Order 54A r 2 of CI 102 inconsistent with section 17 (3) Audit Service Act 2000 (Act 584) per the decision striking out the appeal **especially when the appeal filed on the 48th day after 1st Interested Party's decision was well within time per the applicable Section 17 (3) Audit Service Act 2000 (Act 584). Annexed hereto and marked exhibits MS 17 and 18 are copies of the application to set aside ruling dated 23/05/18 and affidavit in opposition**.

42. That respondent having per it contradictory rulings completely shut the doors of justice to applicant to resort to the much "cheaper" and expeditious mode of

seeking remedy upon disallowance and/or surcharge by 1st interested party **further threw applicant out of the justice seat when it declined jurisdiction to hear and determine the suit commenced by applicant even when subsequent development made it legitimate for applicant to invoke the original jurisdiction of the High Court for determination of the mixed claims**."

45. "That very respectfully, **applicant has suffered substantial miscarriage of justice under the circumstance and therefore humbly prays that this honourable court intervenes to quash the said ruling of the court dated 23/01/2019 and make the appropriate orders as to future conduct of the suit.**"

From the said depositions, the following concrete issues stand out very clearly in the quest of the Applicants for the instant application.

(a) That, the respondent court is the court which denied the Applicants of the application for extension of time to appeal the decision of the Auditor-General and also refused an application to set aside an earlier Ruling consequent upon the void order 54 A r. 2 of C. I. 102 which was clearly inconsistent and out of tune with the over riding provisions of Section 17 (3) of the Audit Service Act, 2000 (Act 584).

(b) In view of the provisions of Act 584, the original appeal filed by the Applicant on the 48th day was well within the time per the applicable section 17 (3) of Act 584.

(c) That the inconsistent, contradictory and void Rulings of the respondent court, have completely denied the Applicant of any rights whatsoever to seek justice in this novel procedure.

(d) Wherefore the Applicant concludes that they have suffered substantial miscarriage of justice under the circumstances, and for which reason they **pray this court to intervene by quashing the said Ruling dated 23rd January and make the appropriate orders as to the future conduct of the suit**.

RESPONSE OF THE INTERESTED PARTIES

In an affidavit deposed and sworn to by Tricia Quartey of the Civil Division of the office of Attorney-General, the prayers of the Applicants were denied and it had been urged upon this court ***"that the Applicant, having failed to cross the hurdle and put itself within the principles governing judicial review, the instant application ought to be dismissed in limine.*** " Emphasis

It is however interesting to observe that, in paragraphs 8, 9 and 10 of the Interested Party's affidavit in opposition, they depose to as follows:

8. "That the Applicant instituted this suit on the **basis of Section 17 (3) of the Audit Service Act, 2000 Act 584.**

9. That Section 17 (3) of Act 584 provides that **"a person aggrieved by a disallowance or surcharge made by the Auditor-General may appeal to the High court not later than the expiration of sixty days….."**

10. That the Applicant instead of complying with the mode of invoking the jurisdiction of the High Court, rather issued a Writ of Summons to challenge the findings of the Auditor-General." Emphasis

Finally, the Interested Party deposed to the following in paragraph 19 of their affidavit in opposition as follows:-

> *"That in any event assuming without admitting that the action was a mixed claim and the High Court declined jurisdiction,* ***it is still not a proper case for invoking the supervisory jurisdiction of the Supreme Court to quash the ruling of the High Court".*** *Emphasis*

In the accompanying statements of case, both parties did not differ from the positions canvased in their respective affidavits, save to provide legal arguments and decided cases in support thereof. On the reception of arguments before the Supreme Court on the 26th of March 2019, both learned counsel for the parties, Nana Ama Amponsah for the Applicant, and Nana Abuaa Brenya Otchere (Senior State Attorney) for the Interested Party did not differ from their original positions stated supra.

CONSTITUTIONAL, STATUTORY AND PROCEDURE RULES REFERRED TO

We have observed in this rendition that, some constitutional, statutory and Procedure Rules have been referred to in the written statements of case as well as the Rulings of the Respondent court surpa.

At this stage, it is considered appropriate to set out in detail these provisions as follows:-

Article 187 (9) of the Constitution provides thus:-

> ***"A person aggrieved by a disallowance or surcharge made by the Auditor-General may appeal to the High Court."*** Emphasis

> ***Article 187 (10)***

> "The Rules of Court Committee may, by constitutional instrument, make Rules of Court for the purposes of clause (9) of this article."

Audit Service Act, 2000 (Act 584)

17 (3) A person aggrieved by a disallowance or surcharge made by the Auditor-General ***may appeal to the High Court not later than the expiration of 60 days prescribed in subsection (2).***

(4) In accordance with article 187 (10) the Rules of Court Committee may, by constitutional instrument, make Rules of court for the purposes of subsection (3) of this Section.

ORDER 54A (1) AND (2) OF CI 102

The High Court (Civil Procedure) (Amendment) (No.2) Rules 2016 C.I. 102, inserts a new order 54A in the High Court (Civil Procedure) Rules, C. I. 47 as follows:-

Rules 1 and 2 of C.I. 102 provide as follows:-

1. Where the Auditor-General makes a disallowance and surcharge under clause (7) of Article 187 of the Constitution, a person aggrieved by the surcharge may appeal to the High Court in accordance with the Rules contained in this Order.

2. *Notice of Grounds of Appeal*

2(1) The appeal shall be commenced by filing with the Registrar **within fourteen days of the surcharge by the Auditor-General,** of five copies of the notice and grounds of appeal together with five copies of all the documents relevant to the appeal, in the possession of the person aggrieved.

(2) Where a person is not able to file the notice and grounds within the time prescribed in sub-rule (1), **the person may apply for extension of time to do so within fourteen days from the date of expiry fixed in sub-rule (1).**

(3) The Court may, if satisfied that the delay in filing the notice and the grounds of appeal was due to the absence of the person aggrieved from the country,

sickness or any other reasonable cause and that the delay is not unreasonable, **grant extension of time to file the notice and grounds of appeal.**

4. An application for extension of time shall not be entertained after the time specified in sub rule (2).

5. **The grounds of appeal shall be set out concisely and under distinct heads the grounds on which the person aggrieved relies without an argument or a narrative and shall be numbered consecutively."** *Emphasis supplied.*

Without prejudice to the generality of the above constitutional, legislative and procedural regimes, we are of the considered opinion that, pursuant to Chapter Four, Article 11 of the Constitution, which deals with the Laws of Ghana, the Constitution 1992, is the Grundnorm, that is to say, the basic law, followed by enactments made by or under the authority of Parliament established under the Constitution, followed by Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution, the existing law and the common law in that descending order.

It thus bears emphasis that the provisions of Section 17 (3) of Act 584 referred to supra are superior to the provisions of Order 54A (2) of C I 102. Where therefore there is any inconsistency or conflict between the two, by the provisions of Article 11 of the Constitution, the provisions in the enactment, Act 584 are superior to those of the subsidiary legislation in C. I. 102.

HOW DID THE APPLICANT COMPLY WITH THE LAW

In order to understand this issue, it is perhaps pertinent to refer in extenso to the original process, ***"The Notice of Appeal"*** filed by the Applicant on the 19th of March 2018.

"Notice of Appeal

Take Notice that the **Appellant herein being dissatisfied with the decision of the Auditor-General contained in a report dated 23rd January 2018 delivered by Mr. Daniel Yaw Domelevo more particularly stated at page 508 of the Report o**f the Auditor-General on Liabilities of Ministries, Department and agencies as at 31st December 2016 (Executive Summary) Appendix (A) page 508 items 30.4 of the report **do hereby appeals to the High Court upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the reliefs set out in paragraph 4**.

And the Appellant further states that the names and address of the person(s) most directly affected by the appeal are those set out in paragraph 5.

1. The part of the decision complained of is as follows:-

i. The part of the decision in the report of the respondent on disallowance and surcharge of Appellant's claim.

ii. The part of the report disallowing and/or blocking the payment of the total sum of GH¢4,153,506.33 of the appellant.

2. Part of Judgment/Decision Complained of:-

The whole decision

3. Grounds of Appeal

i. The Auditor-General erred in law when it disallowed and/or surcharged appellant's claims for the payment of the sum of GH¢4,153,506.33.

ii. Further grounds of appeal may be filed with leave of the court.

4. Reliefs Sought From the High Court

i. A reversal of the decision of the Respondent on disallowance and Surcharge affecting appellants claim.

ii. Judgment be entered in favour of the Appellant directing the Ministry of Finance and/or Urban Roads and/or Controller and Accountant-General to pay the total sum of GH¢4,153,506.33 to the Appellant forthwith."

From the above, it is clear that the Applicants complied with not only constitutional requirement of Article 187 (9) of the Constitution, but also with Section 17 (3) of Act 584 with the filing of the Notice of Appeal.

However, by various Rulings and decisions of the respondent court dated 24th May 2018, 23rd July 2018 and 23rd January 2019, respectively all attempts by the Applicants to appeal the surcharge and disallowance of the Auditor-General were refused and or dismissed.

On the 24th May 2018 for example the respondent court presided as stated supra delivered a Ruling to the following effect:-

> "This is a Ruling on an Appeal brought per a ***Notice of Appeal filed on the 19th of March 2018*** "that the Appellant, being dissatisfied with the decision of the Auditor-General contained in a report dated 23rd January, 2018 by Mr. Yaw Domelevo more particularly stated at page 508 of the report of the Auditor-General on Liabilities of Ministries, Departments and Agencies as at 31st December 2016 (Executive Summary) Appendix (A) page 508 items 30.4 of the **report do hereby appeals (sic) to the High Court upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the reliefs set out in paragraph 4.**
>
> **The Rules dictate that the appeal be lodged within fourteen days of the surcharge by the Auditor-General, further, the Rules also dictate that**

the person may apply for extension of time to do so within fourteen days from the date of the expiry fixed in sub-rule (1).

In this case, rather than to go by the Rules and to appeal the decision of the Auditor-General, what the Applicant did was to publish Exhibit C, which is not dictated by the Rules. Thus although the Applicant was aware of the disallowance as far back as January, 2018 it failed to comply with the Rules as laid down.

It is a well-known principle of law that where an enactment sets out the procedure for invoking the jurisdiction of a court (or tribunal), the party must comply with it or he will be thrown out of court. See:-

1. **Adryx Mining and Metals Ltd and Others v Ashanti Goldfields Co. Ltd. [1999-2000] 2 GLR 758**

2. **Republic v High Court, Sekondi; Ex Parte Perkoh II [2001-2002] 2 GLR 460 @ 467 per Benin JA (as he then was) Obiter CA**
3. **Jonah v Kulendi & Kulendi [2013-2014] 1 SCGLR 272 @ 288 per Anin Yeboah JSC.**

Thus, having failed to appeal the decision of the Auditor-General within the period stipulated by law, it would be improper to entertain the instant action.

In the hearing of this application, Nyame for the Respondent did state that since this is such a novel area of the law the world over, the court in principle should allow the application for extension of time so that the appeal would be heard on its merits.

In my view, however, **if we are to navigate unchartered waters, the best precedent to set would be to apply the law to the letter. In that regard, having failed to invoke the jurisdiction of this court in accordance with**

the Rules, the application would be dismissed for non-compliance with the Rules as same has been filed out of time." Emphasis

RULING OF 23RD JULY 2018

On 23rd July 2018, the respondent court delivered yet another Ruling, and gave the following preamble before the delivery:-

This is a Ruling on an Appeal brought per a Notice of Appeal filed on the 19th of March, 2018 *"that the Appellant being dissatisfied with the decision of the Auditor-General contained in a report dated 23rd January 2018 by Mr. Yaw Domelevo more particularly stated at page 508 of the report of the Auditor-General on Liabilities of Ministries, Departments and Agencies as at 31st December 2016 (Executive Summary) Appendix (A)".*

Continuing further, the court specifically dismissed the appeal on the following grounds as captured on pages 2, 4 and 5 of the Ruling:

> "This Court, on the 24th May 2018 determined that in view of the fact that this application had been filed under the High Court (Civil Procedure) (Amendment) (No. 2) Rules, 2016 C. I. 102, which inserts a new Order 54A in the High Court Rules, the appeal had been filed out of time.
>
> **This application has been brought for extension of time within which to appeal against the Disallowance and Surcharge by the Auditor-General.** There is Order 54A of C. I. 47 as contained in the High Court (Civil Procedure) (Amendment) (No. 2) Rules, 2016 C. I. 102, inserts a new order 54A in the High Court Rules. Under Rules 1 and 2 of the said Order.
>
> **It is quite apparent that the two statutes conflict with each other on the same subject matter and the conflicts are irreconcilable. There is the issue of the hierarchy of laws in this country and how to deal with them.**

It was my view in the G.S International case that in view of the irreconcilable differences in C. I. 87 and section 17 of Act 584 regarding the time within which to appeal and the hierarchy of laws, the **accrual of the right to appeal ought to be as exists in Act 584.**

Thus in my considered opinion, a person or an institution, as the case may be has a period limited to sixty days within which to appeal.

In this case, the surcharge and disallowance complained was published on the 31st January 2018. The Applicants caused to be published a rebuttal of the finding of the Auditor-General. **The first application was filed on 21st March 2018. It was held then to be out of time as same had been filed under C. I. 87. In that case then if same had been brought under the proper legislation it may have been entertained but, that is now a moot point. The instant application was filed on the 1st of June 2018**.

Thus, having failed to appeal the decision of the Auditor General within the period stipulated by law, it would be improper to entertain the instant action. The application is accordingly dismissed."

On the **23rd day of January 2019,** the respondent court in a Ruling rendered therein, delivered itself in the following terms:-

"This is a Ruling on two processes;

1. For leave to issue interrogatories

2. On a notice of preliminary objection by Ms Nana Abuaa Brenya-Otchere on behalf of the Defendants"

After stating the facts and the law as well as arguments of learned counsel, the learned trial Judge delivered herself thus on pages 16 and 17 as follows:-

"There is no question and it is also a well known principle of law that where an enactment sets out the procedure for invoking the jurisdiction of a court (or tribunal) the party must comply with it or he will be thrown out of court". Emphasis

The court then referred to cases already referred to in the Ruling of 24th May 2018 supra.

Continuing further on pages 17, 18 and 20, the learned trial Judge (Respondent Court) herein delivered herself finally in the following terms:-

"There is also no question that to determine whether the jurisdiction of this court has been properly invoked. The authorities are quite clear that same would be shown by the reliefs being claimed or the effect of its success." Emphasis

The Court also referred to these cases:-

1. **Ghana Bar Association v Attorney-General & Anor (Abban Case) [2003-2004] SCGLR 250**

2. **Nana Yiadom I v Nana Amaniampong [1981] GLR 3**

3. **Tuffour v Attorney-General [1980] GLR 637**

The laws quoted above, whether it is the constitutional provision or the provisions of C. I. 102, despite the disparities in the times allowed for lodging an appeal, clearly state that a person who is aggrieved by the Auditor-General's findings may appeal against it. There is no mention of the issuance of a writ or some other mode of taking legal action.

Further, it is quite clear from the reliefs endorsed on the Writ of Summons that, what the Plaintiff is seeking to do is to have inter alia "A reversal of the findings and /or

decision by defendant respecting the disallowance of Plaintiff's claim." **Clearly then, being aggrieved with the finding of the Auditor-General, the procedure, to take is to appeal such a decision and not to issue a writ**." I have duly noted the relief couched as **"An order directed at** the defendant to publish a retraction of the adverse findings against the Plaintiff at the official website of defendant and Joy FM edition of the morning show within seven days of judgment. This court, is however unable to consider this as a defamation suit because it does not meet the requirements of one." Emphasis

After referring to Order 57 rule 22 of the High Court (Civil Procedure Rules, 2004, (C.I.47) and the principle of law that, **once a claim has sufficient particulars to establish a cause of action, the reliefs would supercede any defect on the writ of summons,** the court subsequently referred to and distinguished the following cases as inappropriate and therefore not applicable.

1. **Unilever Ghana Ltd. v Kama Health Services Ltd. [2013-2014] 2 SCGLR 861@884-885 per Benin JSC , Owusu JSC and others**

2. **Hydrafoam Estates Ltd [2014] 78 GMJ. 28 @ 44 per Anin Yeboah**

After these renditions, the learned trial Judge lost another glorious opportunity to "ex debito justitiae" correct a wrong that had been perpetuated against the Applicants when she concluded this Ruling of the 23rd January 2019 in the following terms:-

> ***"For the above reasons, the Preliminary Legal Objection is accordingly upheld and the suit is dismissed."*** Emphasis

SUPERVISORY JURISDICTION OF THE SUPREME COURT

It is provided under Article 132 of the Constitution as follows:-

> "*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."

There is no doubt that, the High Court, even though one of the superior courts of judicature, is one of those courts in respect of which this court's supervisory jurisdiction extends.

This court has in a long line of very well respected decisions settled the parameters of this courts supervisory jurisdiction. Even though these parameters are subject to expansion, it is considered worthwhile to state them as settled in the following case and subsequent references.

In the ***Republic v High Court, Kumasi; Ex-parte Bank of Ghana and Others (Sefa and Asiedu –Interested Parties) (No. 1), Republic v High Court, Kumasi; Ex-parte Bank of Ghana and Others (Gyamfi and Others –Interested Parties) (No. 1) (Consolidated) [2013-2014] 1 SCGLR 477 at 509-511*** this court, examined the parameters upon which this court will grant an application for Certiorari and reviewed a number of cases by stating as follows:-

> "It was well settled that the Supreme Court would exercise its supervisory jurisdiction on grounds of want or excess of jurisdiction, failure to comply with the rules of natural justice, breach of the Wednesbury principle, namely that an administrative action or decision would be subject to judicial review on the grounds that it was illegal, irregular or procedurally improper; and the superior court must have made an error patent on the face of the record. In case of an error not patent on the face of the record the avenue for redress was by way of appeal. Furthermore, an erroneous decision of a High Court, acting within its jurisdiction, would normally be corrected by appeal whether the error was one of fact or law, and that the supervisory powers of the Supreme Court under article 132 of the Constitution was wide. Instead of specific orders, the court might issue directions as a means of enforcing its supervisory powers."

The Court relied on the following decided cases:-

"Republic v High Court; *Ex-parte Commission on Human Rights and Administrative Justice (Addo Interested Party [2003-2004] 1 SCGLR 312*, *Republic v Court of Appeal; Ex-parte Tsatsu Tsikata[2005-2006] SCGLR 612, Republic v High Court, Ex-parte Industrialisation Fund for Developing Countries [2003-2004] 1 SCGLR 348*, dictum of Prof. Ocran JSC Accra, ***Ex-parte Electoral Commission (Mettle-Nunoo- Interesteed Party) [2005-2006] SCGLR 514. And In re Appenteng (Dec'd) Republic v High Court, Accra Ex-parte Appenteng [2005-2006] SCGLR 18*** cited.

The reason we have given the long narration of the facts and the various procedures and Rulings delivered in this case was to lay bare the raw facts for this legal analysis and conclusion.

From the facts and the law, what is evident and clearly unmistakable is that, an appellant who desires to challenge the Auditor-General's surcharge and disallowance is required under both the constitutional provision in Article 187 (9) of the Constitution and Section 17 (3) of Act 584 to do so by an appeal process, to the High Court.

Further, by section 17 (3) of the Audit Service Act, Act 584, the appellant must do so within 60 (sixty) days.

There is a saying which has crystalised into a principle of law that, *"the law is in the bosom of the Judge".* Even though this might be a fallacy, that is an accepted and widely held principle which has been applied in common law jurisdictions. Generally when it is stated that the law is in the bosom of the judge, what this means is that the law is a minefield, even for very experienced lawyers. Rulings or decisions may go against one or the other party and an appeal though filed may also not be successful.

How then can a court or Judge correct apparent errors that are made since as human beings, to err is human and that sometimes is the portion and occupational hazard of Judges.

In our view, that explains why the principle of law enunciated in the locus classicus case of ***Mosi v Bagyina [1963] 1 GLR 337, SC*** has been applied times without number, to help a court correct errors of law that it has made without necessarily been requested to do so by any of the parties.

In this instance, we cannot but refer in extenso to the excellent statement made by that pillar of legality, Akuffo-Addo JSC (as he then was) when he stated in ***Mosi v Bagyina*** supra as follows:-

> "***Where a court or a Judge gives a judgment or makes an order which it has no jurisdiction to give or which is irregular because it is not warranted by any enactment or rule of procedure, such a judgment or an order is void, and the court has an inherent jurisdiction, either suo motu or on the application of the party affected, to set aside the judgment or the order." Emphasis***

The principle of law enunciated in ***Mosi v Bagyina*** has been followed in a long line of cases such as the following:-

1. **Mechanical Lloyd Assembly Plant Ltd v Nartey [1987-88] 2 GLR 599 at page 638 where Taylor JSC reiterated the principle that "where a judgment or order is void it must be set aside."**

2. **In Fosuhene v Pomaa [1987-88] 2 GLR 105, at 126 Adade JSC, also reiterated the principle as "It is generally conceded that when a judgment is void the court had inherent jurisdiction to set it aside, either on application or on its own motion." Emphasis**

3. See also ***Munji (substituted by) Mumuni v Iddrisu & Others, [2013-2014] 1 SCGLR 429***, where Wood C.J speaking on behalf of the court also refined the principle thus "…but, equally importantly the Court of Appeal clearly

and accurately **outlined the legal parameters within which by *employing it's inherent jurisdiction, void orders may also be set aside by a court which makes that void order.*** The court analyzed two important cases, namely ***Mosi v Bagyina [1963] 1 GLR 337, SC*** *and* ***Dankwa v Fuller [1958] 3 WALR 168 CA*** and came to *the undoubted conclusion that* ***"...unequivocally,... a superior court or Judge has power to set aside its own void orders either under the court's inherent jurisdiction or under the provisions of order 42 of C. I. 47 upon an application for review for lack of jurisdiction."*** Concluding the opinion of the Court, Wood C. J, correctly refined the principle thus, ***"It is an intractable rule of law, that a court of justice has a duty, suo motu, to set aside its own void orders once this comes to its notice.... It is therefore no longer permissible, in deserving cases, particularly for a Judge of a superior court, confronted with his or her own order which is plainly void or a clear nullity, to wring his or her hands in despair and lament that the mode by which that order is sought to be vacated does not conform strictly to the traditional procedures for setting aside void orders, namely a formal motion supported by an affidavit to vacate the order"*** **Emphasis**

See also the case of ***Network Computer Systems Ltd v Intelsat Global Sales and Marketing Ltd, [2012] I SCGLR 218***, where the court per Atuguba JSC re-stated the position thus:-" **It has been persistently held that a judgment or order obtained without jurisdiction can be set aside at anytime (though an utter abuse of the process is another matter).** The celebrated case of ***Mosi v Bagyina*** still reigns on this issue."

The clear legal principle deducible from these decided cases and others is 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. Emphasis***

In these proceedings, despite the setback of the Applicant's to their 23rd January 2019 Ruling which had been referred to copiously and the subject matter of these certiorari and prohibition applications, the Applicants nonetheless on 13th February 2019 applied under the inherent jurisdiction of this court to set aside the court's Ruling dated 24/05/2018, on the basis that the court had miscalculated or reckoned the dates in this case and had as a result come to an erroneous conclusion that the Appeal filed by Applicants on the 19th of March 2018 had been filed out of time leading to its dismissal.

Unfortunately, the learned trial Judge per the Ruling delivered on the said 13th February 2019 refused to take advantage of the opportunity offered it and held as follows:-

> *"However, per their own Exhibit MS1, the Appellants/Applicant's first appeal* ***was lodged on the 19th of March 2018 by Mr. Aboagye who was*** *then the counsel on record, and who argued the matter under Or 54A of C. I. 102. Mr. Aboagye did not indicate on the record that the Appeal was not being lodged under C. I. 102 but under the Audit Service Act, (Act 584).* ***It was as a result of the concession on the part of the lawyer of record at the time of their failure to elect to come under Act 584 that a subsequent appeal was lodged on the 1st of June 2018.***
>
> ***In such circumstances, I fail to see the error of this Court in Ruling under the relevant legislation which they opted to come under, and which Ruling then ought to be set aside. This application is accordingly dismissed."***

In coming to the decision we have made in this Ruling, we have been guided by the fact that as the apex court of the land, our decisions should be aimed more at liberating people from the harsh realities of the law, rather than enslaving them.

By this Ruling and the earlier ones referred to supra, it is apparent that this court can under the circumstances apply the principle of law decided in the consolidated case of

Republic v High Court, Kumasi; Ex-parte Bank of Ghana and Others (Sefa and Asiedu –Interested Parties) (No. 1), Republic v High Court, Kumasi; Ex-parte Bank of Ghana and Others (Gyamfi and Others –Interested Parties) (No. 1) (Consolidated) already referred to at pages 509-511 where the court unanimously held as follows:-

> *"The supervisory jurisdiction of the Supreme Court under Article 132 of the 1992 Constitution was not limited to the issuing of the traditional conventional writs of certiorari, mandamus, prohibitions etc. under articles 132 and 161.*
>
> *The Supreme Court would, in **appropriate circumstances,** give directions in cases such as the instant one, to ensure the prevalence of justice, equity and fairness. The Supreme Court, indeed, had wide powers in exercising its supervisory jurisdiction, that was particularly so in view of its previous decision that so long as the separate requirements of an appeal and of an application for the exercise of the supervisory jurisdiction had been complied with, a party should be able to avail himself or herself with either avenue for redress at the same time. Consequently, despite the fact that the instant application for certiorari would be dismissed as being untenable, the court on the principle of ensuring fairness and justice, would grant a stay of execution of all processes aimed at executing the default judgments of the High Court, Kumasi until the final determination of the appeal currently pending before the Court of Appeal. See cases like **British Airways v Attorney-General [1996-97] SCGLR 547, Republic v High Court, (Fast Track Division) Accra, Ex-parte Electoral Commission, [2005-2008] SCGLR 514, and Republic v High Court, CapeCoast, Ex-parte Ghana Cocoa Board (Apotoi III- Interested Party) [2009] SCGLR 603 cited**. "*

By parity of reasoning, whilst adopting the principle in the ***Ex-parte Bank of Ghana*** case just referred to supra, as well as the principle in ***Mosi v Bagyina*** line of cases supra, this court in order to prevent a total failure of justice sets aside the void

decisions of the respondent court, especially those dated 24th May 2018 and 23rd July 2018 respectively and direct the "Notice of Appeal" filed by the Applicants on the 19th March, 2018 as the duly filed process challenging the surcharge and disallowance granted by the Auditor-General against them and direct that it is valid and deemed as filed within time. By this decision, we hereby confirm the position of Act 584 as the dominant legislation in terms of procedure in addition to the constitutional provisions in Article 187 (9) of the Constitution. By this decision the erroneous views espoused by the respondent court that order 54 A rule 2 of C. I. 102 thereof is applicable when computing time for the purposes of filing appeals is hereby also corrected and set aside.

We however do not find any reason to grant the order of Prohibition against the learned trial Judge. There are clear legal grounds upon which a court or Judge might be prohibited from determining a suit. To disqualify a Judge the ground of the objection had to be supported by cogent and convincing evidence. A mere or reasonable suspicion of bias was not enough. The law recognized not only actual bias, but also that interest other than direct pecuniary or proprietary nature which gave rise to a real likelihood of bias. The fact of the trial Judge serially giving Rulings against the Applicant by itself does not qualify to disqualify the Judge on the basis of real likelihood of bias which is the standard test in this jurisdiction.

See cases of ***Sasu v Amua Sekyi [1987-88] 2 GLR 221, at 225 and Republic v High Court Denu, Ex-parte Agbesi Awusu II (No.2) Nyonyo Agboada Sri III Interested Party [2003-2004] 2 SCGLR 907***.

We accordingly dismiss the prohibition application as not properly made out. Save for the directions given in this Ruling supra to ensure that there is no failure of justice, the Certiorari application also fails.

The Applicants are however directed to pursue their notice of appeal filed on 19th March 2018 which is validated herein and the processes have been activated as if the Notice of Appeal had been filed on the date of this Ruling.

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

YEBOAH, JSC:-

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

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-

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

S . K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL
NANA AMA AMPONSAH FOR THE APPLICANT.

NANA ABUAA BRENYA OCHERE, SENIOR STATE ATTORNEY FOR THE INTERESTED PARTIES/RESPONDENTS