IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – AD 2013

CORAM: DR. DATE BAH, J.S.C. (PRESIDING)
ANIN YEBOAH, J.S.C.
BAFFOE BONNIE, J.S.C.
BENIN, J.S.C.
AKAMBA, J.S.C.

CIVIL APPEAL.
No J4/18/2011

24TH MAY, 2013

ATAA ASHIE NIKOI SUBSTITUTED BY CHRISTIAN NORTEY QUAYE	**…**	**PLAINTIFF/APPELLANT /APPELLANT**
VRS		
CHARLES QUIST	**…**	**DEFENDANT/RESPONDENT /RESPONDENT**

JUDGMENT

BENIN, JSC:-

This is an appeal against the ruling of the Court of Appeal dated 18th June 2009, brought by the Plaintiff/Appellant/Appellant, hereinafter called the Appellant. The Court of Appeal gave a decision dismissing the appeal brought by the Appellant against the Defendant/Respondent/Respondent, hereinafter called the Respondent.

The facts of the case are briefly as follows. The Appellant issued a writ of summons at the High Court claiming declaration of title to a piece of land described in the writ, among other reliefs. The Respondent entered appearance and filed a statement of defence and also served a counterclaim on the Appellant. The Appellant failed to take out summons for directions in the suit. The Respondent therefore filed an application for the High Court to dismiss the Appellant's claim and to enter judgment for him on his counterclaim. The High Court heard the application and dismissed the Appellant's claims. But with regard to the counterclaim the court adjourned it to enable the Respondent to lead evidence in proof thereof. On the return date the court heard the evidence but adjourned for judgment, which it delivered on 18th February 2004 upholding the counterclaim. A day later the Respondent filed entry of judgment.

The record shows that after the entry of judgment no proceeding took place in the matter until 13th October 2004 when notice of change of solicitor was filed on behalf of the Appellant. This was followed by motion to set aside the judgment of 18th February 2004. The principal ground was that he was not aware of the application as his previous solicitor did not communicate same to him. The long and short of it all is that the High Court dismissed the application on merit on 22nd December 2004, but gave reasons on 15th February 2005.

The next step in the proceeding took place on October 7th 2005 when the Appellant filed an ex parte application at the High Court asking for extension of time within which to appeal against the judgment of 18th February 2004. The High Court heard and granted the application. The Appellant filed a Notice of Appeal

pursuant to the extension of time granted by the High Court. After the parties had filed their written submissions, the Respondent raised a preliminary objection to the appeal. Two grounds were raised namely: i) the Appellant failed to attach a copy of the order granting him extension of time to appeal as required by Rule 9(6) of the Court of Appeal Rules, 1997 (C.I.19) so the failure rendered the appeal incompetent; ii) the appeal was filed over twenty-two months after the date of the decision appealed against, thereby rendering the appeal process a nullity.

The Court of Appeal heard arguments in respect of the preliminary objection and upheld it by a reasoned ruling. First the Court held that following the amendment made by C.I. 21, it was no longer a requirement to annex the order granting extension of time to appeal. However, the Court took the view that the amended rule still required the Appellant to disclose in the notice the date the extension of time was granted and the name of the Judge or the court which granted it, so the objection was still valid. The Court also held that the appeal was filed out of time and the extension of time granted by the High Court was done without jurisdiction and was therefore null and void.

It is against this ruling that the present appeal has been brought on these grounds:

1. That the Court of Appeal erred in law in failing to consider the effect of the fraud perpetrated on the Plaintiff/Appellant/Appellant in the High Court by Defendant/Respondent/Respondent in deliberately keeping the default judgment for more than six months before serving it on the Plaintiff/Appellant/Appellant.
2. The Court of Appeal erred in law in failing to consider the fact that the proceedings in relation to the counter-claim on which the Defendant/Respondent/Respondent obtained judgment at the High Court on 18th February 2004 were conducted ex parte- i.e. in the absence of the Plaintiff/Appellant/Appellant without notice of the proceedings.
3. That the default judgment was void and being void is not limited by time.

4. The Court of Appeal misdirected itself in failing to consider the fact that the default judgment was founded on a title document that had been cancelled by the Land Title Registry.
5. That the Court erred in law in dismissing the appeal without due regard to the exceptional circumstances in relation to the fraud surrounding the appeal.
6. That the decision of the Court of Appeal has occasioned a substantial miscarriage of justice.

The Appellant consequently seeks the following orders from this Court:

i) An order setting aside the default ruling of the Court of Appeal dated 18th June 2009.
ii) An order setting aside the default judgment of the High Court dated 18th February 2004.
iii) An order remitting the case to the High Court for a proper/full trial of the action on its merits.

The main points canvassed in support of this appeal are that the Appellant was not given notice to attend court for the trial of the Respondent's counterclaim; that the evidence of title given by the Respondent was based on a document that has been cancelled by the Land Title Registry; that the entry of judgment was not served on the Appellant until six months after the judgment.

These points are strong and weighty. Yet the Court of Appeal did not go into the merits but dismissed the appeal on the ground that the foundation of the appeal process was a nullity. It seems to me, therefore, that this court does not have to delve into the merits or otherwise of these points which have been raised by the Appellant at this stage. This is because if, as the Court of Appeal held, the foundation of the appeal process was a nullity, nothing founded on it could stand.

The fact that the judgment of the High Court which was appealed against was delivered on 18th February 2004 is not in dispute. Also not in dispute is the fact that the application to set aside that decision was dismissed by the High Court on 22nd December 2004. The Appellant did not appeal against the order of the High

Court rejecting the application to set aside the judgment of 18th February 2004. The position then was that in law the Appellant had accepted the decision of 18th February 2004. If he had cause to challenge the 18th February 2004 decision this was the opportunity the Appellant had to do so. After the statutory period allowed for an appeal to be filed against the 22nd December 2004 ruling had elapsed, the judgment was in law executable against the Appellant without any hindrance.

On 22nd December 2005 the Appellant filed a notice of appeal against the decision of the High Court dated 18th February 2004. The Appellant's claim that it was filed pursuant to the leave of court was challenged. But no attempt was made to provide the requisite evidence to the Court of Appeal hence the court below accepted the objection as being valid, thereby rendering the appeal incompetent before the court. The Court of Appeal was justified in this matter.

However, the Court of Appeal did not base its decision on this. It held that the appeal was filed after twenty-two (22) months so it was out of time regardless of the merits. The record shows that it was not until October 2005 that the purported application for extension of time was put in. The question is whether the High Court and for that matter any other court had jurisdiction to consider an application for extension of time to appeal against a High Court final judgment given twenty-two months earlier. The rules do not permit that. But the Appellant's counsel forcefully argued that since the judgment was obtained by fraud and therefore a nullity, time to set it aside did not arise. Counsel relied heavily on the oft-cited case of **Mosi v. Bagyina (1963) 1 G.L.R. 337 S.C** where the Court held that there is no time limit in which a party affected by a void order or judgment may apply to have it set aside.

I think it has become necessary to put the decision of **Mosi v. Bagyina**, and others that have followed it in proper perspective, in view of the rather unfortunate trend that is gradually emerging. It is this, that litigants, with the aid of solicitors, choose any process in order to have a void decision of a court vacated regardless of whether it is suitable or appropriate or not. And they always cite **Mosi v. Bagyina** and allied cases to support their argument. Without doubt **Mosi v.**

Bagyina states clear principles of law which remain good law to date. But what it did not do is that it did not say that if a decision of a court is void you can adopt any process to have it vacated. In that particular case the appellant applied by motion on notice to the High Court to vacate what he perceived to be void orders the court had made. When the court refused to accede to the application he appealed to the Supreme Court against the court's refusal. The procedure adopted was perfectly legal because under the rules he could apply by motion to the court to vacate the order made ex parte.

In this case the appellant had a similar opportunity and indeed applied to set aside the judgment of 18th February 2004. This he did by motion on notice which was dismissed by the court. He had a good opportunity to have appealed against this refusal and to raise on appeal all the fine points he is now talking about, but he let the chance slip. After several months he sought to appeal against the 18th February 2004 judgment. That process, the Court of Appeal held, was wrong.

It must be noted that whatever process you embark upon in court, it has got its own rules of practice and procedure which you must comply with so as to enable the court to determine whether the decision complained of is indeed void. Before then several factors come into play among them, the appropriate court or forum to hear the matter; also what process to adopt, whether by way of an appeal, or review, or by writ of summons, and what have you. These factors will depend on the particular case under consideration and the circumstances surrounding it, like the stage the matter has reached when the decision complained of as being void was given.

What is important to note is that whatever step you choose in order to have a void decision vacated, the party is bound to respect all the rules of practice and procedure governing it. If you default in following the rules, the court will not ignore that simply because you have a case on merits as the decision you seek to upturn was void. So the party and especially solicitors who advise must be wary of this. If you choose the appeal process, you must bear it in mind that an appeal is a creature of statute, so before the court assumes jurisdiction it must be satisfied that it was filed within the time stipulated by the rules on appeal. If it is filed out of time the court has no jurisdiction to hear the appeal, except to dismiss it *in*

limine and award costs. Every appellate court has a primary duty to ensure that all the rules on appeal are satisfied to begin with before embarking upon hearing the appeal on merits. This is because an appeal is a creature of statute, hence neither the parties nor the courts have the right to compromise the rules. If the appeal is filed out of time the court is bereft of jurisdiction to hear it and so must dismiss same whether the parties raise the issue or not. Indeed the court has a greater responsibility to ensure compliance with the rules on appeal. The question whether the decision being complained of is void does not arise, because the court has no jurisdiction to hear the argument at all. And without jurisdiction to hear the matter, any purported decision that will be given on the merits is equally void in line with the same decision in **Mosi v. Bagyina**. So you will have compounded the original problem by placing one nullity upon another. The cycle will then go on *ad infinitum*. That is the reason why parties who seek to vacate a void order must be careful to select the appropriate forum and process to invoke the court's jurisdiction.

Indeed the position taken by Counsel for the Appellant was the state of the law when the case of **Nye v. Nye (1964) G.L.R 95** was decided by the Supreme Court. In that case an application for extension of time to appeal was allowed by the Supreme Court on ground that it raised serious issues of law to be determined including jurisdiction. But that was as far as that decision could go, for it was disapproved and reversed by the Full Bench of the Court of Appeal, sitting as the Supreme Court in **Nye v. Nye (1967) G.L.R 76**. The court held that the Supreme Court had no jurisdiction to enlarge time to appeal after the statutory time limits have expired. That is the law to date and it is the correct position and there is no going back to the first **Nye v. Nye** decision. If even the Supreme Court has no power to enlarge time to appeal outside the statutory time limits, a fortiori no other court in the land has that right or power. The contrary practice that is going on must therefore cease regardless of whatever the merits of the appeal are. It is an arbitrary and capricious exercise of power. It is not a matter of discretion for none arises when the statutory period has elapsed.

From the foregoing it is clear the authority of **Mosi v. Bagyina** was cited out of context. The time to appeal had long lapsed; any purported extension of time given by the High Court was null and void. The Court of Appeal was thus perfectly justified in dismissing the appeal. This court cannot go into the merits of the

arguments put up by the Appellant as the appeal before the Court of Appeal was a nullity the same having been filed out of time.

The appeal is therefore dismissed.

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

(SGD) DR. S. K. DATE BAH
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

COUNSEL

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RANDALL OBENG-SAKYI ESQ, FOR THE DEFENDANT/ RESPONDENT/ RESPONDENT.