IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D. 2014

CORAM: WOOD (MRS.) C.J. PRESIDING
ANSAH, J.S.C
DOTSE, J.S.C
ANIN YEBOAH, J.S.C
GBADEGBE, J.S.C
AKOTO-BAMFO (MRS.), J.S.C
AKAMBA, J.S.C

WRIT NO. J1/12/2003
29TH JANUARY, 2014

ATTORNEY-GENERAL'S DEPARTMENT PLAINTIFF

VRS

SWEATER AND SOCKS FACTORY LIMITED
DEFENDANT

JUDGMENT

WOOD (MRS), C.J,

The articles 2(1) and 130 of the 1992 Constitution provide that:

2 (1) "A person who alleges that-

(a) an enactment or anything contained in or done, under the authority of that or any other enactment;

or

(b) any act or omission of any person;

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

130 (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in-

(a) all matters relating to the enforcement or interpretation of this Constitution;"

This action, which is brought under the above constitutional provisions, has its genesis in the confiscation of the assets of the Defendant, Sweater and Socks Factory Limited (Sweater and Socks), to the State in 1979. The order of confiscation was exacted by the Armed Forces Revolutionary Council (AFRC) under s. 1 and the Schedule thereof of the Transfer of Shares and Other Proprietary Interests (Babylos Co. Ltd. and Others Decree, 1979, (AFRCD 38). The Plaintiff alleges that this confiscation was never thereafter, at any point in time, reversed, either by virtue of the Confiscated Assets (Removal of Doubt) Law, 1993, (PNDCL 325) or by the President acting under the Transitional Provisions of the 1992 Constitution. It was further alleged that this

notwithstanding, the Plaintiff had successfully sued to recover possession of the assets. The Sovereign Republic of Ghana describing the court's orders in this regard as manifestly unconstitutional and a complete nullity has, through the Attorney –General, approached this court, under Articles 2(1) and 130 of the 1992 Constitution, per an amended writ for two main reliefs, namely,

1. "A declaration that by virtue of section 35 (1) of the Transitional Provisions of 1992 Constitution of Ghana, no court in Ghana has jurisdiction or competence to issue any order de-confiscating any property confiscated by the Armed Forces Revolutionary Council and /or to award any monetary reliefs against the Republic of Ghana for the possession and /or use of any such confiscated property;

2. A declaration that the judgment of the High Court , Accra dated 8th April 2003 in Sweater and Socks Factory Limited V Attorney-General and Ors (Suit No C.681/94) wherein the High Court made an order de-confiscating the assets of the defendant… is null, void and no effect as the said orders are in contravention of section 35 (1) of the Transitional Provisions of the 1992 Constitution of Ghana;"

The Plaintiff, who maintains that the purpose of this constitutional litigation is to ensure full compliance with section 35 of the Transitional

Provisions of the 1992 Constitution, prays for such consequential orders as would effectuate this intention. Stripped away of all fine details, this is a fair summation of the essential facts on which this action is grounded.

There is very limited common ground between the parties. It relates firstly to the confiscation; the fact that the assets of Sweaters and Socks were indeed confiscated to the State by the AFRC. The Defendant however contests the allegation that the property was never thereafter de-confiscated. They assert that to the contrary, the majority shareholders of the company lawfully utilised the existing laws of the land to have the confiscation duly reversed. This they did by petitioning both the AFRC and the Special Tribunal established under AFRCD 23, purposely to review inter alia all acts of confiscation, following which the assets were de-confiscated. This singular act, they assert, subsequently received full judicial approbation.

Secondly, they admit instituting as between the same parties in the High Court Accra, Suit No. C681/94, at which trial the issues which the plaintiff seeks to litigate in this instant action, were determined and judgment pronounced in defendant's favour for the reliefs of:

a) "A declaration that the true legal position now is that the Sweater and Socks Factory have not been confiscated and are therefore entitled to carry out their normal business operation.

b) An order for recovery of possession of the factory premises and all the machinery and or equipment thereof from the hold of the 2nd Defendant, National Industrial Company".

I would thus summarise the defence of Sweater and Socks to this action as follows:

1 Section 35(1), of the Transitional Provisions of the 1992 Constitution and Laws of Ghana are wholly inapplicable to this instant case; on the basis that:

2 As at January 1980, the status of Sweaters and Socks as a confiscated property had wholly altered; it having been legally and effectively de-confiscated.

3 This legal status or position of Sweater and Socks as de-confiscated property received judicial affirmation in Suit No. C681/94 entitled Sweater and Socks Factory Ltd. v Attorney General.

4 This action is caught by the plea of estoppel per rem judicatam, namely, both cause of action estoppel and issue estoppel given that in the previous suit, No.C681/94 (supra), which action was between the same parties for virtually the same reliefs, the core issues relating to the de-confiscation of Sweater and Socks, and

the applicability or otherwise of the s. 35(1) of the Transitional Provisions, were decisively determined in defendant's favour by the High Court, a court of competent jurisdiction, which decision was never appealed from.

5 In any event, the judgment in C684/91 was merely declaratory of the rights of the parties at law, without the court usurping the powers of the President as exists under the Transitional Provisions, by ordering the subject property de-confiscated.

MEMORANDUM OF ISSUES

Rule 50 sub rule (1) of the Supreme Court Rules, CI 16, stipulates that in actions invoking the original jurisdiction of this court, the parties are, either, by agreement or on the court's orders, enjoined to jointly file a memorandum of agreed issues, failing which, parties who are unable to agree on the issues, must file separate memorandum of issues. This rule, which parties must do well to honour in its observance rather than its breach, reads:

"(1) The parties may agree to file, or shall, if so ordered by the Court, file a memorandum specifying the issues agreed by them to be tried at the hearing of the action.

(2)…

(3) Where parties cannot agree on the issues each party may file that party's own memorandum of issues."

What is the proper construction to place on the rule, and consequently its correct legal import, notwithstanding the use of the word "may". It ought, contextually, to be purposively construed as being directory rather than permissive or discretionary. It is contrary to the fundamental notions of justice, and plain logic that the framers of the law intended that the filing of memorandum of issues in respect of matters as grave as constitutional enforcement actions, remain permissive and not mandatory; so that the same be left entirely to the parties' discretion or convenience. Sound judicial policy and efficiency in the administration of justice requires that constitutional disputes, which allege a continuing violation of the Constitution, whether express or implied, be heard and disposed of effectually and in a timely manner. This sound policy can only be achieved with the maximum co-operation of parties on both sides of the divide, hence my opinion that the filing of memorandum of issues cannot be on sufferance of parties, most especially a plaintiff who is represented by counsel.

Certainly, as the court of first and last instance, our legitimate expectation is that this original jurisdiction of this court would be invoked in only serious constitutional interpretive or enforcement matters. Thus, and more especially, where parties are represented by counsel, it is their duty then, as officers of the court to assist the court to

justly and effectually determine all matters in controversy between the parties expeditiously. That duty, which understandably rests with the parties in litigation, includes the identification and comprehensive formulation of all the relevant issues for determination. Undoubtedly, the court may, in its purely complementary role, suo motu raise issues for its consideration, after giving parties sufficient notice and opportunity to address the issues so raised. But the primary duty of identifying the issues in any enforcement action rests with the parties, not the court.

Regrettably, the plaintiff, the initiator of this action, failed to file any memorandum of issues as required under the rules. I hesitate to attribute this neglect, to counsel's difficulty in identifying the issues which lie at the heart of this uncomplicated action. This notwithstanding, this court has a duty to examine the case as presented by the parties, but more particularly, the plaintiff, alongside the memorandum of issues formulated by the defendant, with a view to bringing out all other relevant issues arising therefrom and which may have escaped the defendant's scrutiny. The basic notions of substantive justice implicitly place this burden on the court, in the face of a default by one party or even where both parties, have filed agreed or separate memorandum of issues. The court has a duty to ensure that all issues, not just those identified by the parties, but all issues emanating from the statement of case on either side are determined.

The Memorandum of Issues filed by the Defendant were:

1. "Whether Sweater and Socks Factory Limited was de-confiscated prior to the suit intituled *Sweater and Socks Factory Limited v. Attorney- General and Ors.(*Suit No. C 681/94)?

2. Whether the High Court de-confiscated the assets of Sweater and Socks Factory Limited in the suit intituled *Sweater and Socks Factory Limited v. Attorney- General and Ors.(*Suit No. C 681/94)?

3. Whether section 35 (1) of the Transitional Provision of the Constitution, 1992 is applicable to the decisions of the High Court in the judgment dated 8th April, 2003 in the suit intituled *Sweater and Socks Factory Limited v. Attorney- General and Ors.(*Suit No. C 681/94)?

4. Whether decisions of the High Court of Justice in the suit intituled *Sweater and Socks Factory Limited v. Attorney- General and Ors.(*Suit No. C 681/94 which have been declared null and void by the said High Court can be the subject matter of a suit to invoke the original jurisdiction of the Supreme Court?

It is quite plain from the defendant's statement of case that the plea of res judicata is central to this case. The following relevant parts of the parties' statements lend support to this view:

Plaintiff had stated per paragraph 7 (1) of the statement of case:

a. "7 1) The Plaintiff says that the, Defendant on 22nd day of September 1994 issued a writ of Summons accompanied by a Statement of Claim against the Attorney – General and the National Industrial Company in Suit No.C681/94 claiming the following:

a. A declaration that the true legal position now is that the Sweater and Socks Factory have not been confiscated and are therefore entitled to carry out their normal business operation.

b. An order for recovery of possession of the factory premises and all the machinery and or equipment thereof from the hold of the 2nd Defendant [i.e. National Industrial Company].

c) An order of comprehensive account of all uses or transactions carried out by the 2nd Defendant [in that suit, National Industrial Company] on the premises of the factory floor and or use of the equipment or machinery by same.

d) An order of perpetual injunction against the Defendants[i.e. the Attorney-General and the National Industrial Company from interfering with the business operations of the plaintiff company

8. The Plaintiff says that on the 8th day of April 2003 the High Court presided over by Her Ladyship Justice H. Inkumsah Abban gave judgment in favour of the defendant for all the reliefs claimed.[the judgment is attached as Exhibit AGSS1]"

The defendant's response, as per the paragraph 9 of their statement of case reads:

"9 The Defendant admits paragraph 7(1) and says that when he instituted the action, the Plaintiff herein was served with the Writ of Summons and Statement of Claim. (A copy of the writ of summons has been attached as Exhibit 'SSFL3').

10. The Plaintiff herein filed a statement of defence (A copy of which is attached as Exhibit 'SSFL4'.)

11. In the Statement of Defence filed by the Plaintiff herein, the issue of the confiscation of the Defendant Company was raised. The Plaintiff herein in the said Statement of Defence averred that Sweater and Socks Factory Ltd. remained a confiscated company and that if the plaintiff wishes he could take advantage of section 35(2) of the Transitional Provisions of the 1992 Constitution to redress his grievance

12. The issue of confiscation or otherwise of Sweater and Socks Factory Limited was one of the issues set down for trial. And, the plaintiff herein also had the opportunity to argue this issue extensively in an address filed on the 27/2/2002. (A copy is attached as Exhibit 'SSLF5'). The Defendant will therefore contend that the issue Section 35(1) of the Transitional has been raised in the course of the trial of that suit and the same taken into consideration when the judge gave her judgment. It was argued that if the plaintiff therein wishes he could take advantage of Section 35(2) of the Transitional Provisions of the 1992 Constitution to redress his grievance".

These facts, verified by affidavit are indeed supported by the annexures, namely, the writ and statement of defence marked as SSFL3 and SSLF4 respectively.

THE LEGAL ARGUMENTS

The plaintiff's submitted that the assets of Sweater and Socks were confiscated to the State by the AFRC pursuant to AFRCD 38, s.1 and the schedule thereof. Under the existing laws, the argument further went, the only authority empowered to reverse de-confiscation orders is the President exercising the powers conferred on him pursuant to s.4 of PNDCL325 and s.29 (3) of the Transitional Provisions of the 1992 Constitution. It was submitted that since the President has not exercised any such power relative to the property, it remained confiscated to the

State. It was argued that under those circumstances, since s.35 (1) of the Transitional Provisions, completely ousts the courts from enquiring into the act of confiscation or making orders thereto, the High Court acted unconstitutionally and ultra vires its powers when it granted the orders complained of in suit No. C681/94.

The Defendant does not challenge the original act of confiscation. They maintain however that subsequent to this, the assets were lawfully de-confiscated, via due process, with the legal status of the subject property as a de-confiscated property, subsequently being judicially affirmed by a court of competent jurisdiction per suit No. C681 /94. They contended that, in exercising that judicial power, the High Court acted lawfully within its jurisdiction and never in contravention of the 1992 Constitution.

Two arguments were advanced in support of this contention. Firstly that, contrary to the plaintiff's submissions, the s.35 (1) of the Transitional Provisions was wholly inapplicable to the peculiar facts of Suit No C681/94. Allied to this, that the court by its judgment, never committed any of the acts prohibited under the s. 35 (1) and never ordered the de-confiscation of the property, a deed which had already been committed. The court only, they urged, by means of a declaratory judgment, and based on the facts and the law, pronounced on the true legal status of Sweaters and Socks. Finally, they argue that in any event, the plaintiffs are caught by the plea of res judicata in that the cause of action and

indeed the two important issues raised in this instant action, namely, the issue of whether the property had been de-confiscated before the commencement of suit No. C681/94, and the applicability or otherwise of the s. 35 (1) of the Transitional Provisions, were all duly considered and adjudicated upon by the High Court, a court of competent jurisdiction.

The first fundamental question for our determination is whether Sweater and Socks was ever de-confiscated. There is no doubt that the defendants successfully discharged the burden of proof which clearly, from the state of the pleadings and consequently the nature of their defence, and on the strength of ss. 10,11,and 12 of the Evidence Act, 1975, NRCD 323 rested on them. Their claim per paragraph 3 of statement of case that:

"…as at January 1980, the Sweaters and Socks Factory limited had been de-confiscated."

is corroborated by a statute of this land, namely, the CONFISCATED ASSETS (REMOVAL OF DOUBT) LAW, 1993 PNDCL 352, whose preamble clearly outlined the purpose of the law. It states:

"WHEREAS the Provisional National Defence Council is aware that the properties specified in the Schedule to this law have been in the possession of the Confiscated Assets Committee as assets confiscated to the State;

AND WHEREAS the Provisional National Defence Council considers it necessary to remove all doubt as to legal status of the specified properties;

NOW THEREFORE in pursuance of the Provisional National Defence Council (Establishment) Proclamation, 1981 this Law is hereby made:

1. (1) Notwithstanding any law or anything to the contrary –
(a) the immovable properties specified in Part 1 of the Schedule to this Law; and

2. …

are assets which shall be deemed to have been confiscated to the State from the date of the announcement or publication of the confiscation or from the date they were taken into possession by the Confiscated Assets Committee, and shall remain, subject to section 3 of this Law, confiscated to the state."

A careful examination of the schedule shows clearly that not a single asset of Sweater and Socks is included in the list of confiscated properties.

Secondly, the plaintiff is estopped per rem judicatam from asserting otherwise and re-litigating this issue, given that it was adjudicated upon by the High Court in the previous suit No. C681/94. The well

established principle is that a party who intends to rely on this plea must do so expressly, and make full disclosure of all the material facts on which it is anchored. The primary object of this sound and high public policy driven rule has also been fully discussed in many decisions of this court. It is in the interest of justice and the public at large that finality should attach to binding judgments and decisions of courts and tribunals of competent jurisdiction. Also, parties should not be vexed twice or more over the same matters in litigation. The rationale for the rule that a party who intends to rely on the plea must expressly plead same is to prevent the other party being taken by surprise by offering him or her full opportunity to prepare adequately to meet the plea.

Notwithstanding this requirement, the failure to do so with specificity, employing the well known legal terminology-"estoppel per rem judicatam" - is not fatal to a party's case. Courts of justice must always strive to strike a proper balance between substantive justice and procedural laws. Whenever legally justifiable or appropriate, substantial justice must never be sacrificed on the altar of technism, or technical rules of procedure. Thus, where the plea has not explicitly been set out, but the defendant's statement of case point unequivocally or substantially to the plea, the court is bound to consider it, as if the same had been specifically raised by the defendant. It can hardly be argued under such circumstances that an opponent has been taken by surprise or prejudiced.

Again, the full scope of the res judicata principle has been extensively discussed in a host of decisions of this court. (See for example; In re Sekyedumase Stool; Nyame v Kese Alias Konto [1998-1999] SCGLR 476, Lartey and Others v Otoo (2001-2002) SCGLR 80, Dahabieh v S.A.Turqui & Bros.[2001-2002] SCGLR 498, Gyimah & Brown v Ntiri (Williams Claimant) [2005-2006] 247, In re Asere Stool; Nikoi Olai Amontia IV (substituted by Tafo Amon 11) v Akotia Oworsika 111 (substituted by) Laryea Ayiku 111 [2005-2006] 637 at 651-652). Ampiah JSC, in the case of In re Kwabeng Stool; Karikari v Ababio 11 [2001-2002] SCGLR 515, lucidly set it out in these terms, at page 530:

"The doctrine or principle of estoppel is founded on the maxim *interest reipublicae ut sit finis litium* meaning, "it concerns the State that lawsuits be not protracted". Also, "no man ought to be twice vexed, if it be found to the court that it be for one and the same cause" (*nemo debet bis vexari, si constat veriae quod sit pro una et eadem causa).* If an action is brought, and the merits of the question are determined between the parties, and a final judgment is obtained by either, the parties are precluded, and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment.''

Also, in Adumua Okwei v. Ashieteye Laryea [2011] 1SCGLR 319, in laying the foundational principles on what documentary evidence , if

any, provides sufficient proof of the plea, this court rightly held that:

"In determining the existence of *estoppel per rem judicatam*, the judgment itself must be looked at; and where there had been pleadings, those should also be examined being part of the record."

Now, the defendant's contention that the previous suit, No 681/94, was between the same parties, and further that the court duly considered the issue of de-confiscation on the merits is clearly unassailable. The pleadings and judgment in that case which, which is a final judgment of the High Court, which was not appealed from and which was produced at this hearing, confirms these facts in every essential detail.

But, this definitive conclusion on the applicability of res judicata, invites a couple of other critical questions. The first is whether in the face of the section 35 (1) of the Transitional Provisions of the 1992 Constitution, and the arguments advanced by the plaintiff thereof, the High Court's jurisdiction was clearly ousted by the s. 35 (1) of the Transitional Provisions, wherefore the court acted in breach of the constitution when it assumed jurisdiction, thus rendering the decision complained of in suit No. C681/94 a complete nullity. Stated differently, can it be said that the court acted unconstitutionally and does not therefore qualify as a court of competent jurisdiction?

The defendant's counter argument is twofold. The first relates to the inapplicability of the s.35 (1), since Sweater and Socks was not confiscated property and the second to the fact that the matter is res judicata in any event, given that this issue, had been conclusively determined in the previous suit No. C681/94.

That s. 35 (1) of the Transitional Provisions of the 1992 Constitution is inapplicable, on the ground that the property is not a confiscated property is evidently unchallengeable. It arises from the clear constitutional provision itself which limits the s. 35 (1) to only confiscated assets. De-confiscated properties do not therefore fall within its ambit. The law provides:

"S.35 (1) Subject to subsection (2) of this section, **any confiscation of any property** and any other penalties imposed by or under the authority of the Armed Forces Revolutionary Council and the Provisional National Defence Council under any Decree or Law made by that Council, shall not be reversed by any authority under this Constitution." (Emphasis supplied)

The operative word is "**any confiscation of any property."** Therefore, a party who pleads reliance on rely on s. 35 (1) of Transitional Provisions, as ousting a court's jurisdiction, must of necessity prove that the property in question is confiscated property. Having held that Sweater and Socks is not a confiscated asset, the court which adjudicated on suit No. C681/94 was clothed with jurisdiction and its

decisions are binding on both parties and their privies, and we in this court have a duty to respect it.

In this regard, it is clear the only reason why the plaintiff's argument is not sustainable is because the property was not a confiscated property. The defendant's other contention that in the previous action, the constitutionality question was pleaded and taken into consideration by the court is not supported by the evidence (pleadings and judgment) provided at this hearing. Thus, contrary to the defendant's assertion, this issue was never adjudicated upon by the High Court.

Plainly, the plaintiff looses on the jurisdictional question because, as found, the assets are not confiscated property. It is not on the basis of res judicata, namely that the question had, in a previous action been adjudicated upon, that this action fails. But then, can it be rightly contended in the alternative that the plaintiff's failure to raise that fundamental question in the previous suit No C681/94, precludes them from doing so now? In fairness, it cannot be urged against the plaintiff that, in this instant action, in the alternative and based on the related doctrine of abuse of process; they are estopped and precluded from raising the constitutionality issue. They are indeed entitled to raise this critical question, of the applicability or otherwise of s. 35 (1) of the Transitional Provisions at this hearing. The only difficulty is that they cannot succeed. And the reason is again very simple.

This court has, in previous decisions, explained the nature of this doctrine. In the past, we have included it in the variants of the more commonly utilised defence of estoppel per rem judicatam doctrine. We have actually not merely identified it as the third branch, so to speak, of principle, but assigned to it the generic term 'res judicata' . My decision in Republic v High Court, Accra (Commercial Division); Ex Parte Hesse (Investment Consortium Holdings SA & Scasom Ltd; Interested Parties [2007-2008] SCGLR 1230, in which I relied on the old English case of Green Halgh v Mallard [1947] All ER 255, as well as this court's earlier decisions in Andani v Abdulai [1981] G.L.R.866, Dahabieh v S A Turqui & Bros. (supra), Gyimah and Brown v Ntiri (supra) are included in the fairly long list of decided cases in which we were persuaded by English authorities, to adopt this approach.

However, in Sasu v Amuah-Sekyi, [2003-2004] 742, Dr Date-Bah JSC took a different stance. He concluded differently as far as the proper nomenclature of this less commonly used principle - abuse of process- is concerned. He observed that the doctrine, though related to res judicata, is not strictly speaking res judicata, although it bears close affinity to it. I quote in extenso the observation of the honourable justice as found at page 768 of Sasu v Amuah-Sekyi (supra):

"In addition to the cause of action and issue estoppel explained in the quotation from Diplock LJ above, there is the related doctrine of abuse of process, commonly referred to as the rule in *Henderson v Henderson*

(1843) Hare 100 whose essence was set out by the English Court of Appeal in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 at 260 as follows:

> "The rule in *Henderson v Henderson* (1843) Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

…As Lord Bingham of Cornhill observed in Johnson v Gore Wood & Co [2002] AC 1 at 31 the three doctrines of cause of action estoppel, issue estoppel and the rule in *Henderson v Henderson* have a common purpose. He said:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter".

It is clear from this passage that the difference between the two positions relates to terminology rather than the real substance relative to how the rule functions or its underlying philosophy. Suffice it to say however that the thinking of Dr Date-Bah JSC does reflects the more current and more persuasively authoritative position of English law, the law from which we develop some of our principles.

More importantly, it is very clear from the abuse of process doctrine as discernible from all the decisions of this court, without a single exception, that special circumstances, would justify its exclusion or applicability and allow the litigation of issues which could have or ought to have been brought up for adjudication in a previous action, but were not. Given that estoppels of all kinds cannot override the laws of this land, I would include, constitutional questions, jurisdictional questions, arising from alleged constitutional or statutory violations, such as the one raised before us, as some of the exceptional grounds on which, in a fresh action involving the same parties or privies, a defendant cannot

successfully rely on the plea of abuse of process in defence. A plaintiff would therefore be at liberty to raise any such fundamental issue in a subsequent new action; with the success or other wise of a plaintiff's plea or claim being an altogether different matter for the court's consideration. In the light of the foregoing, the plaintiffs are well within their legal right, in this instant action, to question the constitutionality of the court's decision in suit No. C681/94. Unfortunately, they do not succeed; and the answer remains unalterable. The s.35 (1) of the Transitional Provisions would not apply for the simple reason that Sweater and Socks is not confiscated property.

Finally, in the previous action, the court was never invited to order a de-confiscation of the subject property. The action, as constituted by the reliefs and the pleadings were not disguised as such. Neither did the court issue a decree to that effect. The judgment was merely declaratory of the legal status of Sweater and Socks.

The answers so far provided, dispose of all the matters raised in the memorandum of issues filed and those emanating from the pleadings. The defendant's plea to us that we restore Ankumah J's ruling is without jurisdiction and merit and the same is hereby dismissed.

In the result, the plaintiff's action fails and the same is hereby dismissed

(SGD) **G. T. WOOD (MRS)**
CHIEF JUSTICE

DOTSE JSC

CONCURRING OPINION

I have been greatly privileged to have read the erudite judgment delivered by the Honourable and respected Wood C.J and President of this Court. Even though I agree with the reasoning and decision contained in the judgment that the plaintiff's writ be dismissed, I am minded to expatiate on an issue of procedure that I feel requires some further level of expatiation in view of some other instances of such unwarranted applications to this court.

In paragraph 32 of the amended statement of Defendant's case pursuant to leave granted on 29th day of July 2013, the Defendant's averred as follows:-

"It is respectfully submitted that the ***Supreme Court ought to exercise its powers to reverse the ruling of Mrs. Elizabeth Ankumah J*** *made on the 22nd day of April 2013,* ***and reinstate all the orders allegedly set aside by Mrs. Ankumah J's ruling*** *and order the Garnishee Order Absolute made by Justice Ocran to be enforced."*

In order to put into proper perspective this invitation of the Defendant's to reverse the orders made by Ankumah J on 22nd April, 2013, it is necessary to give some historical background to that scenario.

After the judgment of the High Court, Accra, Coram, Mrs. Helena Inkumsah Abban, rendered on 8th April, 2008 in Suit No. C.68/94 already referred to in the lead judgment of Wood C.J, Ankumah J, then made orders dated 27th July, 2011 pursuant to the judgment of 8/4/2003 and accepted amended estimates of the accounts of the Defendant's herein, therein plaintiffs which were tendered in evidence before the court in full blown proceedings in which the parties herein fully participated. These proceedings culminated in a ruling dated 16th May 2012 by which Ankumah J, awarded monetary compensation to the Defendant's herein to the value of USD$ 28, 595,600.00 or its cedi equivalent against the plaintiff's

herein based on the judgment of 8th April 2003 in suit No. C.68/94 already referred to supra.

In granting an application at the instance of the Plaintiff's to set aside the orders made by Ankumah J dated 16/5/2012 it is perhaps instructive to state the exact words used by the learned trial Judge. She stated thus:

"*From the above, it is manifestly clear* ***that this Court is clothed with jurisdiction to set aside its own order of 27th July 2011, the proceedings based on the said order of 27th July 2011 and the ruling of this Court dated 16th May 2012 as being void.*** *Motion on notice under the inherent jurisdiction of the Court for an order to set aside void orders and proceedings of the High Court filed on 13/3/2013 is hereby granted." Emphasis supplied.*

The above are the orders that the defendant's are inviting this court to use its powers to reverse and to reinstate all the orders allegedly set aside by Ankumah J.

Unfortunately, learned Counsel for the defendant's has not identified and or pointed out to the court, the powers of this Court which as it were would have clothed us with jurisdiction to reverse and reinstate the said orders.

It must be noted that, the instant suit is one which has invoked the original jurisdiction of the court pursuant to articles 2 (1) (a) and (b) and 130 (1) (a) of the Constitution 1992 of Ghana.

Since the orders which this court has been invited to **reverse** and **reinstate** had all been made by the High Court, and there is no appeal against those decisions to the Court of Appeal and finally to this court which has been brought to our attention, the invitation to this Court is not only strange but bizarre and is a recipe for disaster if it is acceded to.

PROCEDURE TO INVOKE JURISDICTION OF SUPREME COURT

One other process by which the orders of the High Court could be reversed is to have invoked the supervisory jurisdiction of this court pursuant to article 132 of the Constitution 1992 and rules 61 to 66 of the Supreme Court Rules, 1996 C. I. 16.

It should be clearly noted that, this court's jurisdiction has been categorized under various sub-sets and clearly marked out in the Constitution 1992 and the Supreme Court Rules, C.I. 16.

Out of abundance of caution, these jurisdictions are:

1. Civil and Criminal appellate jurisdiction

2. Original jurisdiction, just like the instant case
3. Review jurisdiction
4. Supervisory jurisdiction
5. References to the court by courts lower to the Supreme Court
6. Challenge of election of President
7. Chieftaincy appeals from the National House of Chiefs
8. Single Judge jurisdiction

Where a particular jurisdiction of the court has been invoked, reference is made to the constitutional provisions delineating the confines of the jurisdiction of the Court as well as the rules of court as contained in the Supreme Court Rules 1996, C. I. 16. This latter legislation prescribes the procedure by which the particular jurisdiction is to be exercised, the time within which the required processes are to be filed and by what originating process.

Applications made to the Supreme Court and indeed to any Court of record should be based upon clear jurisdictional criteria of the Court. This is because jurisdiction is key to the proper functioning of any court of competent jurisdiction, and where this is lacking

the court which wrongly assumes jurisdiction stands the risk of its orders being set aside either suo motu or upon application.

In this case for instance, where it is the original jurisdiction that has been invoked, the power of the court is clearly limited to the reliefs endorsed on the writ and more importantly, the memorandum of issues that have been set out and agreed upon.

Even though I agree that in appropriate cases and circumstances, this court can and does grant some reliefs where it is referable to the matters in controversy, i.e. in a supervisory jurisdiction case or review application where the application succeeds and therefore consequential orders are made the Supreme Court generally will not depart from its core jurisdictional mandate and limitations.

The invitation by learned Counsel for the Defendant's to this Court in the manner in which it has been stated is not warranted by any of the known rules of this court and should not be countenanced.

In any case, I am surprised that such an application has been made especially as the Defendant's are well aware that the

plaintiff's have had to amend their writ which has completely taken out of the remit of the instant suit, the orders made by Ankumah J.

I would accordingly want to sound a note of caution to all legal practitioners who are considered as officers of the courts to be mindful of their core duty to the Court which is to advance the course of justice and not to mislead the courts into making unwarranted orders.

Subject to the above clarification on the non-jurisdictional invitation made to the court by Defendant's to reverse orders which are not the subject matter of dispute, the Plaintiff's writ stands dismissed as being without any merit whatsoever.

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

CONCURRING OPINION

GBADEGBE JSC:

My Lords, the relevant facts and laws to which this case relates have been so fully stated in the judgment of Wood CJ (presiding), the draft of which I have had the advantage of reading beforehand and as I set out to make this delivery, I recollect the issues for our determination in these proceedings. Having read the well thought out judgment of the learned Chief Justice, I agree that the claim herein be dismissed. However, for reasons that follow shortly, I desire to add a few words of my own that are limited only to the question of the alleged absence of jurisdiction in the High Court to hear the case numbered as Suit No C. 681/94 bearing the title Sweater and Socks Limited v the Attorney General.

As the learned Chief Justice has in her judgment carefully set out the facts on which this action is based and correctly expounded the applicable law, I shall not spend any further time in referring to them except where it is necessary for the purpose of the opinion that I am about to deliver. After a careful examination of the writ and the supporting documents filed by the plaintiff before us as well as the processes filed by the defendant; I am of the view that the plaintiff appears not to have appreciated the real nature of the previous action initiated by the defendant in 1994

whose decision is being attacked in the proceedings herein on jurisdictional grounds. It seems to me that the lack of appreciation of the 1994 case must have informed the plaintiff in initiating the action herein. In my view, although the previous action demanded from the court reliefs other than a declaration, the ancillary reliefs were subject to the declaratory relief which was formulated in the 1994 action entitled Sweater and Socks Limited v Attorney-General as follows:

> **a)"A declaration that the true legal position now is that the Sweater and Socks Factory have not been confiscated and are therefore entitled to carry out their normal business operation."**

At the trial, while the plaintiff asserted that although the company had been confiscated earlier, by virtue of a petition submitted to it by shareholders, the Special Tribunal acting under AFRCD 23 had set aside the confiscation with the result that when PNDCL 325, THE CONFISCATED ASSETS (REMOVAL OF DOUBT) LAW was subsequently passed, it made no mention of any of the assets of Sweater and Socks Factory Limited. To counter this, the defendant averred that the confiscation remained in force and that consequently, the court by virtue of Section 35(1) of the Transitional Provisions of the 1992 Constitution was precluded from questioning the confiscation. The plaintiff, it appeared to me

commenced the 1994 action to prevent the defendant from continuing to treat its assets as confiscated contrary to law. It is settled law that in determining what was in controversy in a previous action such the 1994 action to which reference has been made, we must look at the pleadings and indeed the judgment in order to ascertain the remit of the court.

In my view, as the parties to the 1992 dispute had placed different legal consequences on the prior act of confiscation and the matters that arose subsequently including the establishment of the Special Tribunal and the enactment of PNDCL 325, the latter which I regard as declaratory in nature, there was clearly before the court an issue to be decided on whether or not before the 1994 action issued the assets of Sweater and Socks that were previously confiscated by the AFRCD continued to be so confiscated? It being so, there was a legitimate question that the High Court was called upon to determine in relation to the status of the assets of Sweater and Socks Factory Limited. The determination of that question turned on the examination of the circumstances that came lawfully into being subsequent to the confiscation and had nothing to do with whether or not the confiscating authority had properly taken all relevant matters into account before making the order of confiscation. The mere pronouncement of the legal status of the said assets does not

amount to questioning the act of confiscation, which is what section 35(1) of the Transitional Provisions of the 1992 Constitution prohibits. On the contrary, the decision under attack is in substance one that ascertained the true state of the law regarding the assets in question and having been so ascertained made a pronouncement to that effect. One would have thought that the declaration as to the status of the said assets put to rest any view to the contrary and for myself, I am surprised that the plaintiff who was a party to the 1994 action persists in pursuing the same contention before us in these proceedings.

Accordingly, in my opinion the High Court in the 1994 action did not veer outside its jurisdiction such as to render its decision a violation of section 35(1) of the Transitional Provisions of the 1992 Constitution as the plaintiff invites us to hold by the making of the declaration in terms of relief 1 of the indorsement to the writ of summons herein. Whiles the truth of the contention contained in section 35(1) of the Transitional Provisions has not been doubted, I do not think that it has any application to the 1994 action that did not require the High Court to make any independent determination that has the effect of de-confiscating any asset belonging to Sweater and Socks Factory Limited. The jurisdiction that the High Court assumed in the 1994 case was essentially to ascertain and determine the rights of the parties to it based upon

matters that were in existence before the issue of the writ. In its nature, a declaratory judgment serves the public interest by making binding pronouncements on disputed rights as was done by the trial High Court in the 1994 case on 8 April, 2003. The utility of declaratory reliefs to the judicial process and the development of the law must explain why today, unlike previously under common law when an action for a declaration was unknown , no action or proceeding is open to an objection on the ground that by the claim only a declaratory judgment or order is sought. See: Order 41 of the High Court (Civil Procedure Rules,) 2004, CI 47.

For these reasons, the plaintiff's action fails and is dismissed.

(SGD) **N. S. GBADEGBE**
JUSTICE OF THE SUPREME COURT

(SGD) **J. ANSAH**
JUSTICE OF THE SUPREME COUR

(SGD) **ANIN YEBOAH**
JUSTICE OF THE SUPREME COURT

(SGD) **V. AKOTO- BAMFO (MRS)**
JUSTICE OF THE SUPREME COURT

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

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