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

CORAM: ATUGUBA, J.S.C. (PRESIDING)
DATE-BAH, J.S.C.
ADINYIRA (MRS), J.S.C.
DOTSE, J.S.C.
GBADEGBE, J.S.C.

CIVIL APPEAL.
No J4/4/2011

10TH APRIL, 2013

ENOCK AWASABI GBERTEY … PLAINTIFF/APPELLANT/RESPONDENT

VRS

E.A. ACCAM ESQUIRE & ANOR. … DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

ADINYIRA (MRS.) JSC:

The facts resulting in the present appeal are that the Defendant/respondent/appellant, (hereinafter Defendant) a legal practitioner, sued the Plaintiff/appellant/respondent, (hereinafter Plaintiff) in an earlier suit No. C48/2003 at the Koforidua High Court for his legal fees. He obtained judgment on 27th July 2005 in the sum of GH¢ 15,267.892.

The Defendant had a writ of *Fifa* issued on 10th December 2005 and the Deputy Sheriff, High Court, Koforidua seized the Plaintiff's Toyota saloon car no. GW 757-T, on 8th December2005, and handed it over to an auctioneer. On 10th December 2005, i.e two days after his vehicle had been seized in execution of the judgment debt, the Plaintiff filed a notice of appeal. On 3rd February 2006, the Plaintiff applied for stay of execution at the High Court which was granted on terms on 17th March 2006 by Bentil J. The Plaintiff was ordered to deposit GH¢10, 000 in the court registry and then collect his vehicle. He failed to meet the terms of the order but rather repeated the application for stay of execution at the Court of Appeal. The Court of Appeal dismissed the application on 18th July 2006 for the reasons that on the affidavit evidence before the court, execution had already commenced by virtue of the issue of a writ of fifa and the handing over of the vehicle to the auctioneer by the deputy sheriff; and that the Court below erred in granting the application when execution had already commenced. The vehicle was auctioned on 9th November 2006 and the auctioneer deducted his expenses and paid the balance into court.

Subsequently the Court of Appeal, on 14th December 2007, determined the appeal in favour of the Plaintiff. The Court of Appeal set aside the writ No. C48/2003 together with the proceedings of the High Court Koforidua, on the grounds that the writ was a nullity as the Defendant did not comply with section 30 of the Legal Profession Act of 1960, Act 32 before commencing the action. Section 30 provides:

> "A Lawyer shall not be entitled to commence any suit for the recovery of any fees for any business done by him as a Barrister or Solicitor until the expiration of one month after he has served on the party to be charged a bill of those fees."

After the Court of Appeal's decision, the Plaintiff, on 22nd February 2008 commenced this action, Suit No. BC 237/2008, at the Accra High Court against the Defendant for the recovery of

his Toyota saloon car among other reliefs. The Defendant brought an application praying the High Court to dismiss the Plaintiff's action on the grounds that:

1) It was in disobedience of the order of the High Court Koforidua, and
2) It was an abuse of the process of the court.

On 2nd December 2008, the High Court judge, Nabon J granted the application and delivered in his ruling as follows:

> *"[Again] in the case of **Chabin & Sons v. Epope Printing Press [1963] IGLR 163**, the Court held in Hol.[sic]3 that: An erroneous judgment is only voidable and even though an appeal may be pending, execution lies on it as a matter of course unless a stay is granted by the Court.*
>
> *An erroneous judgment creates an estoppel between the parties to it, and when it is reversed, it cannot be treated as though it never existed. Thus, a person "acting under the authority of a Court" or "in reliance on" or "on the faith of" a judgment which is subsequently reversed is protected. From the authorities above it appears to me the Defendant/Applicant is protected when they sold the Toyota vehicle before the judgment was set aside by the Court of Appeal."*

The Plaintiff, being dissatisfied, filed a notice of appeal on 10th December 2008. The Court of Appeal allowing the appeal on 11th March 2011, held per Kanyoke JA that:

> *"In the instant case, this court had already set aside the judgment in Suit No. C 48/2008 for being a nullity. It followed that every process founded on that void judgment such as the writ of fifa and the attachment and eventual sale of the appellant's car are equally nullities, void ab initio and incurably bad…It is my view that the act of the appellant in seeking a recovery of his car or its value by due court process was in accord with the law and not an abuse of the court's process. In conclusion, I hold that the learned trial judge erred in law in striking out the applicant's writ in Suit No C 48/2008 thereby shutting him out from seeking to recover his car that had been sold on the basis of a void judgment of the Koforidua High Court."*

The Defendant has appealed to the Supreme Court on the grounds that:

a. The Court of Appeal misdirected itself and failed to appreciate that the Order of Tom Bentil J made on 17 March 2006 and subsequent execution was a lawful order of a court of competent jurisdiction at the material time until set aside by the Court of Appeal in Civil Suit No. H1/242/2006 on 14 December 2007 and ought to be obeyed or set aside by the respondent timeously.

b. The Court of Appeal acknowledged the ratio decidendi in Republic v. High Court, Accra, Ex Parte Afoda [2001-2002] SCGL 768 notwithstanding the Court erred and misdirected itself in

holding that the willful disobedience or non-compliance of the Order of Tom Bentil J made on 17 March 2006 by the Respondent was not contemptuous.

c. The holding of the Appellate Court that "the auctioning and sale of Appellant's vehicle No. GW 757-T was null and void" is inconsistent with the law in that a person "acting under authority of the Court" or "in reliance on" or "on the faith" of a judgment which is subsequently reversed is protected."

d. The Appellate Court erred or failed to consider the totality of the ruling of Mohammed Nabon dated 2 December 2008.

Submissions of Defendant

The submissions by learned counsel for the Defendant centered on the failure by the Plaintiff to comply with the High Court order to deposit GH¢10,000 in the Court Registry. He submits that it was due to Plaintiff's disobedience of Bentil J's order of 17th March 2006, that the vehicle was auctioned and he was thereby protected under the law. He submits further that even if Bentil J's order of 17th March 2006 was void, voidable or erroneous at the material time, the Plaintiff was under an obligation to obey the order or have it set aside. He concludes that it was contemptuous for the Plaintiff to refuse to comply with the Court's Order.

Counsel further submits that the Court of Appeal misdirected itself in holding that the willful disobedience or non-compliance with the said order was not contemptuous and that the holding is inconsistent with the rational in ***Republic v. High Court, Accra, Ex Parte Afoda*** **[2001-2002] SCGL 768**. Counsel contends:

> "The Appellate Court is also confused, with respect about the basis of the ruling delivered by the learned judge on 2nd December 2007. The issue involved here is not the judgment delivered by Tom Bentil on 27 July 2005. It is disobedience to the order for stay of execution made by Tom Bentil J on 17 March 2006 resulting in the sale of the vehicle that was in issue before the learned judge."

Submissions by Plaintiff

Counsel for Plaintiff submits that the Court of Appeal in refusing the repeat application by Plaintiff for stay of execution ruled inter alia that the court below erred in granting the application when execution and already commenced and therefore the Plaintiff cannot be said to have disobeyed the ruling of Bentil J. He further submits that the interpretation being placed by counsel for the Defendant on ***Republic v. High Court, Accra, Ex Parte Afoda*** is misplaced.

Consideration

We do not think it is necessary to discuss void, voidable or irregular judgments/rulings/orders in this judgment. Perhaps it may suffice to say we affirm the opinion of their Lordships of Appeal that it was erroneous for counsel for the Defendant to state that the ***Republic v. High Court, Accra, Ex Parte Afo****da* case abolished the distinction between void, voidable or irregular judgments/rulings/orders. The *ratio decedendi* in ***Republic v. High Court, Accra, Ex Parte Afoda*** is reflected in the holding by the Supreme Court at page 773 that:

"The fact that an order of, or a process from, a court of competent jurisdiction is perceived and considered void or erroneous should not give a part y who is affected by the order, or to whom the process is directed, the slightest encouragement to disobey it; and when cited for contempt, only to turn round to justify the said disobedience by the fact that the order ought not to have been made or the process issued in the first place. The proper thing to do is to either obey or sue for a declaration to that effect or apply to have it set aside. The proponent of the order then assumes the burden to justify the order on which he relies and so prove that the order or process was not improvidently made."

We note that counsel for Defendant is merely repeating his arguments that have already been ruled on by the Court of Appeal. We find, with due respect, that learned counsel did not appreciate the import of the reasoning of the Court of Appeal in declaring the judgment in Suit No. C 48/2003 a nullity on 14th December 2007 in Civil Appeal No. HI/242/2006. It is recalled that, in that case, the writ the defendant instituted against the Plaintiff to recover his professional

fees was declared a nullity as the Defendant did not comply with section 30 of the Legal Profession Act of 1960, Act 32. This decision by the Court of Appeal follows the jurisprudence of the Supreme Court that the non-compliance with a mandatory statutory requirement invalidates the writ of summons on which proceedings in a matter were based. See ***Republic v. High Court, Accra, Ex-parte Allgate Co. Ltd.*** **[2007-8] SCGLR 1041**.

This Court has over time enforced the requirement of section 30 of the Legal Profession Act in cases such as, ***Ayarna v. Agyemang*** **[1976]1GLR 306,** ***Nartey v. Gati*** **[2010] SCGLR 745** and more recently in ***Gaisie Zwennes Hughes &Co,*** **Civil Appeal 1/24/2011**, **unreported dated 1st February 2012.** The Court of Appeal was therefore bound by Article 129 of the 1992 Constitution to follow the decisions of the Supreme Court on a question of law.

The Defendant before us is misguided in trying to justify the order of Bentil J on which he relies and to prove that the execution and auction was not improperly made. Counsel failed to appreciate the significance and effect of the judgment of the Court of Appeal in setting aside the judgment of the High Court, Koforidua, and thereby argues that the execution of the judgment in that suit on the basis of which the Plaintiff's car was attached and sold could be protected. This is erroneous as, with the setting aside of the writ, it follows that every process founded on that judgment is accordingly obliterated.

The Court of Appeal certainly did not misdirect itself in holding that the Court's decision in declaring the writ a nullity, (and which judgment has not been appealed against or set aside by the Supreme Court and affected the parties in the present case), it followed that:

> "[e]very process founded on that void judgment such as the writ of fifa, attachment and eventual auction and sale of the appellant's car are equally nullities, void ab initio and incurably bad."

The Court of Appeal buttresses its position with the oft quoted dicta of Lord Denning in ***Mcfoy v. UAC Ltd*** supra that:

> *"If an act is void then it is in law a nullity. It is not only bad, but incurably bad… And every proceeding which is found on it is also bad and incurably bad. You cannot put something on nothing and expect it to stand there. It will collapse."*

We affirm this position by the learned Justices of Appeal as the order on which the Defendant is now seeking to anchor his submissions collapsed with the setting aside of the writ of summons on 14th December 2007.

The appeal therefore is without merit.

We affirm the decision of the Court of Appeal that the writ by the Plaintiff in seeking recovery of his vehicle or its value was in accord with the law and not an abuse of the court's process. The High Court therefore erred in law in striking out the Plaintiff's writ in Suit No. 237/2008. We further affirm the decision of the Court of Appeal in setting aside the ruling of the High Court, dated 2nd December 2008.

Parenthetically, it may be worth reminding the parties, although it is trite law, that the nullity of the writ discussed above does not extinguish any pre-existing cause of action that the defendant may have had to sue for his fees, subject to the limitation statute.

The appeal is accordingly dismissed.

It is hereby ordered that Suit No.237/2008 be restored on the cause list before a different High Court Judge.

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

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

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

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

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