IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA-A.D. 2011

CORAM: **ATUGUBA, JSC (PRESIDING)**
AKUFFO,(MS.) JSC
ADINYIRA,(MRS.) JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL MOTION
NO. J8/1/2011

20TH DECEMBER, 2011

INTELSAT GLOBAL SALES
AND MARKETING LIMITED - - PLAINTIFF/RESPONDENT/RESPONDENT

VRS

NETWORK COMPUTER SYSTEM LTD - - -DEFENDANT/APPELLANT/APPLICANT

R U L I N G

ATUGUBA, J.S.C:

I have had the advantage of reading the opinion of my worthy brother Gbadegbe J.S.C. It is to the effect that the Ruling of the High Court dated 12/3/2010 refusing to set aside the registration of the foreign judgment herein is interlocutory and therefore the appeal therefrom dated 21/4/2010 being filed outside 21 days is a nullity, wherefore all pursuant processes founded on the same are also nullities and consequently this court lacks jurisdiction to entertain the applicant's repeat application for stay of execution.

The question whether a judgment or order is final or interlocutory has defied the courts here and in England to such an extent that the Legislatures in both countries have simply enacted that such a question should be finally determined by the appellate court when it arises in a case under appeal. This problem has persisted even though in England and Ghana the judicial test for finality has been harmonised in favour of Lord Alverstone C. J.'s test in *Bozson v. Altrincham UDC* (1903) 1 K.B. 547 at 548 namely whether the effect of the order made is to finally dispose of the parties' rights. Thus in *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* (1982) 2 All ER 481, P.C. at 486, the Privy Council per Sir William Douglas delivering the judgment of the court in an appeal from the judgment of the Federal Court of Malaysia, said:

> "It appears to their Lordships that *the Federal Court … has established over the years a settled practice of applying Lord Alverstone CJ's test in the Bozson case in order to determine whether an order is final or interlocutory.* Their Lordships are unable to find any error in this reasoning; on the contrary *their Lordships feel entitled to say that the test is both sound and convenient.*" (e.s)

Though it is sometimes easier to apply this test to judgments delivered on the merits of a case it is not so easy when it is to be applied to an order. Thus in *Atta Kwadwo v. Badu* (1977) 1 GLR 1 C. A. at pages 4 to 5 Apaloo J.A. (as he then was) delivering the judgment of the Court of Appeal quoted a passage from Halsbury's Laws of England (3rd Edition) Vol. 22 at 742 thus:

> "*a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required."* (e.s.)

In that case it was held that an order striking out an action following discontinuance, with costs, though *"with liberty for fresh action"* is a final one. However, one tends to agree with Adade JSC in *Pomaa v. Fosuhene* (1987-88) 1 GLR 244 S.C. that such an order, in view of the reservation of liberty as to fresh action is not final since that very order implies that nothing has been decided between the parties. The *Pomaa* case held that a judgement of declaration obtained upon admissions is final. One also tends to agree with the decision of the Court of Appeal in *Tawiah v. Brako* (1973) 1 GLR 483 C.A. that a ruling on an application to set aside a writ of *fi.fa.*is final. Clearly, in the latter case the rights of the parties involved in such an application depend on whether the writ of *fi.fa.* should be set aside or not.

On the other hand it has been held in *Agoti v. Agbenoku* (1978) GLR 14 C. A. that a decision on an interpleader summons is interlocutory since it arises out of some other matter. However, on the facts of this case it is immaterial whether the decision of 12/3/2010 is final or interlocutory.

Nullity

This matter cannot be disposed of solely on the final or interlocutory nature of the said Ruling. The applicant has contended that the order appealed from is a nullity because it is one prohibited by section 17 of the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180). If that contention be right then time cannot deprive this court of jurisdiction to entertain this application. It has persistently been held that a judgment or order obtained without jurisdiction can be set aside at any time (though an utter abuse of the process is another matter). The celebrated case of *Mosi v. Bagyina* (1963) 1 GLR 637 S.C. still reigns on this issue, see *Republic v. High Court (Fast Track Division) Accra; Ex parte Speedline Stevedoring Co. Ltd (Dolphyne Interested Party)* (2007-2008) 1 SCGLR 102 and *The Republic v. The Court of Appeal, Anthony Thomford, Ex parte Ghana Chartered Institute of Bankers* J5/21/2001 S.C. dated 22/6/2011, unreported.

It is true that in *Republic v. Asogli Traditional Council; Ex parte Amorni VII* (1992) 2 GLR 347 Acquah J (as he then was) tried to clip the wings of this principle by seeking to confine it to the court which made the void order. However such a distinction cannot hold good in view of the decisions of this court referred to supra. On the contrary the view of Abban J (as he then was) in *Republic v. Commissioner for Local Government; Ex parte Nii Amar II* (1975) 2 GLR 122 at 128 that

> "*The principles enunciated in Mosi's case are so fundamental that they cannot in any way be compromised, neither can they tolerate any exception in favour of any court*, be it a tribunal or a committee of enquiry. I therefore … hold that *once a decision is void, no matter the court or the tribunal from which it emanates, it is void for all time and, as laid down in Mosi's case, there will be no time limit within which steps should be taken to quash it.*" (e.s), prevails.

After all, the essence of the principle of *Mosi v. Bagyina supra*, as earlier laid down by Akufo-Addo JSC (as he then was) in *Ghassoub v. Dizengoff (W.A.)* (1962) 2

GLR 133 SC at 137 is that " *lapse of time can never render valid that which is void ab initio.*" (e.s). That being so it means that the effect of lapse of time on "*that which is void*" should be the same wherever such a void matter falls for consideration and cannot with any logic be confined only to the court which made it. I must however remark that that principle was enunciated in the context of breach of originating time limits prescribed, as in this case, by subsidiary legislation. I will desist from pronouncing obiter as to the case of breach of time limits under substantive legislation.

For the foregoing reasons as aforesaid, it is clear that if the order of the High Court dated12/3/2010 or any subsequent order is a nullity it matters not that the appeal to which the present application is traceable is out of time. Indeed in *Okomfo Afuah v. Sarbah* (1974) 1 GLR 147 at 160 Abban J (as he then was) stated this principle in no uncertain terms thus:

> "With great respect to the learned High Court judge, *since it was crystal clear to him that at the time the judgment was delivered, the local court had completely been deprived of jurisdiction*, the judgment, as I have said, was a nullity and the appellant was entitled, ex debito justitae, to have it set aside. *The learned judge therefore had an inherent jurisdiction, even on his own motion, to set it aside irrespective of the fact that the notice of appeal was filed out of time.* Because "there is no time limit in which the party affected by a void order or judgment may apply to have it set aside": *Mosi v. Bagyina* (1963) 1 G.L.R. 337 at page 347, S.C. per Akufo-Addo J.S.C. (as he then was).
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> *The dismissal of the appeal by the High Court on 6 November 1964, did not therefore convert the local court judgment into a valid judgment. A judgment which is void is void for all time.* However, out of the abundance

of caution, *I will here and now and on my own motion, set aside the said local court judgment, and it is accordingly set aside."* (e.s)

Curtailment of Case

It is clear from *Pioneer Construction Products Ltd. v. Faddol* (1974)1 G.L.R. 76 that as provided by s.17 of the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) no action or civil proceedings, except an action by a secured creditor can be commenced or proceeded with upon the passing of the special resolution by the directors winding up the company on 9/10/2009. It is said in effect, in the *Pioneer Construction Products Ltd*. case supra and *Attorney-General v Faroe Atlantic Co. Ltd* (2005-2006) S.C.G.L.R. 271 that where there is infraction of a mandatory statutory requirement it matters not that a court in making its order is factually ignorant of the same. That is a very revolutionary and proactive judicial stance towards upholding the supremacy of statutes. However, in this case at least at the Court of Appeal level the liquidation status of the defendant company was brought, without objection, to the notice of the Court of Appeal which then should have applied the provisions of s.17 of Act 180 to the matter.

In *Agbemabiese v. Dzisam* (1973) 1 GLR 291 at 295 Ata-Bedu J quoted the definition of 'proceeding' in *Cheney v. Spooner* (1929) 41 CLR 532 at 536-537 as follows:

> " 'proceeding' used broadly as it is used in section 16 of the Federal Service and Execution of Process Act (Australia), merely some method permitted by law for moving a court or judicial officer to some authorised act, or some act of the court or judicial Officer"

He then took the view that an application to the sheriff for execution is an administrative act. Nonetheless it is clear from the authorities Charles Crabbe J (as he

then was), considered in the *Pioneer Construction Products Ltd* case at 85 that steps towards execution are proceedings. It is also clear from *Takyi v. Ghassoub* (1987-88) 2 GLR 452 SC and Rule 20 of the Rules of this court that steps towards execution are proceedings. In any case as has been made clear in the *Pioneer Construction Products Ltd* case and by Taylor J (as he then was) in *Osman v. Hausa* (1971) 2 GLR 195 at 198 the word "proceeding" has to be considered in the context of that expression. I have no doubt that the intendment of Act 180 is substantially, *mutatis mutandis*, as was stated by Lawton L.J. in *Re Lines Bros Ltd* (1982) 2 All ER 183 C.A. at 189 thus:

> "Counsel for the liquidators provided an answer in the way they put the liquidator's case. They submitted that *liquidation, whether compulsory or voluntary, was a form of collective enforcement under the law.* The liabilities could be in the form of judgment debts, present unpaid debts or likely future or contingent debts or claims. *Once a winding-up order has been made by the courts creditors have to accept the collective enforcement procedure unless the court gives leave to enforce in some other way*: see s. 231 of the Companies Act 1948."

This position is reinforced by the respondent in paragraph 45 of its written submissions as follows:

> " 45. That … as is shown by **Exhibit GC 11**, the *Respondent has applied to the High Court for leave in accordance with section 17 of Act 180.* If that court *refuses to grant leave, the Respondent will have no option but to make a claim with the Liquidator under the provisions of Act 180*." (e.s)

There is therefore no doubt that the order for the registration and enforcement of the foreign judgment is a proceeding which should not be continued once it became clear at the Court of Appeal level that the defendant company was in liquidation. The Court

of Appeal by granting a conditional stay of execution of the registered judgment clearly meant that in default the judgment creditor could go ahead with the process of execution. That would be contrary to s.17 of Act 180 aforesaid.

It is now trite law that a court which makes a void order or a superior court can set aside such a void order no matter how the void order is brought to its notice. Therefore even though the application before this court is only for stay of proceedings under the order of stay of execution, pending appeal made by the Court of Appeal, yet, since its nullity is clear it can be vacated here and now without waiting for the substantive appeal to be heard on its merits. The appeal is only one mode of impeaching a void order but it is not the only mode; any other mode whatsoever will serve the same purpose.

A court cannot shut its eyes to the violation of a statute as that would be very contrary to its ***raison d'être***. If a court can ***suo motu*** take up the question of illegality even on mere public policy grounds, I do not see how it can fail to take up illegality arising from statutory infraction which has duly come to its notice. The matter has been fully treated in *Republic v. High Court (Fast Track Division) Accra; Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties)* 2009 SCGLR 390. At 397 I said:

> "It is ***communis opinio*** among lawyers that the courts are servants of the legislature. Consequently any act of a court that is contrary to a statute is, unless expressly or impliedly provided, a nullity."

At 402 Date-Bah JSC also stoutly said:

> "*No judge has authority to grant immunity to a party from consequences of breaching an Act of Parliament*."

But this was the effect of the order granted by the learned judge. *The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament*

by their orders. The end of the judicial oath set out in the Second Schedule of the 1992 Constitution is as follows: "I will *at all times uphold*, preserve, protect and defend the Constitution and *laws of the Republic of Ghana.*" This oath is *surely inconsistent with any judicial order that permits the infringement of an Act of Parliament.*" (e.s)

This principle is of long standing. In *Asare v. Brobbey* (1971) 2 GLR 331, CA at 338, Archer J.A. (as he then was) delivering the judgment of the Court of Appeal said:

"In *Phillips v. Copping* (1935) K.B. 15 at 21, CA Scrutton LJ said: ' *it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it* ." (e.s.)

In *Ghana Commercial Bank Ltd v. Commission on Human Rights and Administrative Justice* (2003-2004) 1 SCGLR 91 at 109 Brobbey JSC said of proceedings by the CHRAJ to enforce its recommendations thus:

"Where the decision or recommendation following the investigation is to be enforced the enforcement is to be taken out of the Commission into the court. *The court is bound to give effect to all the laws of the land in seeking to order the enforcement. If the enforcement breaches any existing law, it will not have to be ordered.*" (e.s.)

Unless a substantive Act can be regarded as directory and not mandatory or its infraction is so minimal that it can be covered by the maxim ***de minimis non curat lex*** or is such that complaint about it is mere fastidious stiffness in its construction or the breach relates to a part of it which, in relation to others can be regarded as subsidiary and therefore should not be allowed to prejudice the operation of the dominant part or purpose thereof, or the strict enforcement of the statute would amount to a fraudulent or inequitable use of the statute or some other compelling reason, I do not see how a court can gloss over the breach of a statute.

For these reasons I would set aside the order of conditional stay of execution made by the Court of Appeal and stay any further steps or proceedings under the registered judgment herein as required by section 17 of Act 180 unless the same, i.e. section 17 be complied with. There is additional plenary jurisdiction under articles 125(4) and 297(c) of the Constitution so to do.

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

AKUFFO (MS.) JSC

I am in agreement with my brother Gbadegbe, JSC.

(SGD) S. A. B. AKUFFO (MS.)
JUSTICE OF THE SUPREME COURT

ADINYIRA(MRS.) JSC

I have read beforehand the opinions of my brothers Atuguba and Gbadegbe JJSC. I however agree with the reasoning and conclusions of Atuguba JSC that once it became clear to the Court of Appeal that the defendant company was in liquidation the court any proceedings for execution of the judgment debt should not be continued unless by leave as required by section 17 of the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180)

In the circumstances the order of stay execution made by the Court of Appeal was a nullity that can be vacated even though the application before us is for stay of execution. Once the infraction of the statute has come to our notice regardless of the mode , it is trite law that this court is under a duty to take up the point.

Accordingly I set aside the order of conditional stay of execution made by the Court of Appeal and stay further steps or proceedings under the registered judgment herein as required by section 17 of Act 180 unless the same be complied with.

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

GBADEGBE, JSC

I have had the advantage of reading before-hand the opinion of my noble brother, Atuguba JSC in the matter herein and although his opinion is deserving of great respect, I am unable for reasons that follow shortly to agree with him that the application herein be granted.

We have before us at the instance of the applicant herein, a motion on notice for stay of execution of a foreign judgment in respect of which the High Court, Accra had on the 16 October 2006 granted an order for its registration under Order 71 rule 2 of the High Court (Civil Procedure) Rules, 2004, CI 47. Following the registration of the judgment and after unsuccessfully seeking to have the order that authorized the registration set aside, the applicant applied to the High Court for an order of stay of execution. In the body of the motion paper, the applicant sought from the High Court, Accra "an order for stay of execution of the order granting leave to register the foreign judgment". The application was determined against it on 13 October 2010. In the ruling of the High Court that is exhibited to the processes herein as GC 6, the learned judge of the High Court directed that the judgment debt be paid into court within thirty days from the date of the order. The applicant repeated its application for stay of execution to the Court of Appeal, which application was dismissed on 7 December

2010.It repays to say that in the application to the Court of Appeal, the applicant sought the same relief as that which was demanded from the High Court previously. In their ruling refusing the application, the learned justices of the Court of Appeal ordered the applicant to pay 50% of the judgment debt into court within sixty days from the making of the order.

The applicant appealed from the ruling of the Court of Appeal to this court.I observe that contrary to the requirements of section 82 (7) of the Courts Act, 1993 (Act 459), and Order 71 rule 2, of CI 47 the judgment debt was from the processes filed expressed in the pound sterling instead of its cedi equivalent at the date of the judgment. I think this was a serious lapse on the part of the High Court in the order of 16 October 2006 granting leave to have the foreign judgment registered, an error that was unfortunately repeated by the two lower courts in their subsequent determination of the applications for stay of execution in the matter. Regrettably, both courts below appear not to have adverted their minds to the requirements of the rule that conferred jurisdiction on them in the matter and it is hoped that in the future in the exercise of their jurisdiction judges would take into account the question whether or not the orders that they are invited to make are authorized by law in order to give effect to the legitimate expectations of society and thereby advance the rule of law. In my thinking, however, the irregularity in the denomination of the amount owed under the foreign judgment is not fatal as it can be corrected to comply with the applicable statutory provisions by converting the judgment debt into cedis at the date on which the judgment was pronounced.

I now turn my attention to the application before us. From the processes filed, the appeal to this court dated 24 December 2010 seeks an order allowing in favour of the appellant (applicant herein) an order of stay of execution of the order of the Court of Appeal by which it was ordered to pay fifty per cent of the judgment debt into court within sixty days. On 8 November 2011, when the matter came before us in open court, the parties argued the application fully and raised for our consideration interesting points of law that touch and concern the practice and procedure regarding the enforcement of foreign judgments as well as orders that might be made in a matter proceeding to execution when the execution-judgment- debtor is in liquidation. Also argued by the parties was the question whether the notice of appeal of 21 April 2010 was filed within the statutory period of twenty one days. At

the hearing, we were of the view that the resolution of those points of law would be of considerable value to our procedural law, and accordingly we made an order that the arguments be submitted to us in print before we delivered our ruling in the matter. The parties having made an accession to the order, I now proceed to deliver my ruling in the matter.

Having regard to the consequences that flow from the determination of the question of the competency of the notice of appeal by which the applicant was enabled to apply for stay of execution to the High Court and the Court of Appeal, I think I must deal first with it as in my opinion it raises a fundamental question that goes to jurisdiction. The question that comes up for consideration is whether at the date that the repeat application for stay of execution was heard and determined by the Court of Appeal, there was an effective and or competent notice of appeal on which the proceedings for stay of execution could have been founded. The issue that is thereby raised regarding the notice of appeal being one that affects jurisdiction, must be inquired into before the other points of law that were argued by the parties. And should the objection to the said notice of appeal be sustained, it would render unnecessary any consideration of the other points of law that were argued by the parties before us.Since the application to the Court of Appeal whose refusal has resulted in the instant application was a repeat application, I should commence with an examination of the date at which the application for stay of execution was heard by the High Court. It is trite learning that since the repeat application before the Court of Appeal was founded on the prior exercise of jurisdiction by the High Court, if it lacked the jurisdiction to hear the application then by analogy the Court of Appeal was equally without jurisdiction.

I have carefully examined the processes in the matter herein which are in relation to notice of appeal dated 21 April, 2010, which is in evidence in these proceedings as exhibit GC 4. The said notice of appeal of 21 April, 2010 is expressed unambiguously to be in respect of two different rulings of the court dated 16 October 2006 and 12 March, 2010. The orders that were intended by the composite notice of appeal to be corrected by the Court of Appeal are the orders of 16 March 2006 by which leave was granted to the respondent herein to register the foreign judgment and that of 12 March, 2010 by which the High Court refused to set aside the registration of the foreign judgment under Order 71 of CI 47. Although the notice of appeal

filed by the applicant was in relation to two separate and distinct orders contrary to the settled practice that allows appeals to be filed in respect of single orders and or judgments or rulings and therefore irregular, in considering the issues raised in the matter herein and out of the desire to do substantial justice to the parties, I shall deal with the notice as though it was filed in respect only of the latter of the two rulings namely that of 12 March 2010.

I say at once that from the nature of the said order that it was interlocutory and that it was incompetent for an appeal there from to be lodged beyond the period of twenty one days that is expressly provided for in rule 9(1) a of CI 19, the Court of Appeal Rules.In my thinking, to be good, the notice of appeal ought to have been filed twenty one days from its making in compliance with rule 9 (1) aof CI 19. On the contrary, learned counsel for the applicant contended that since by section 81 of the Court's Act, 1993(Act 459) and Order 71 of CI 47 the judgment that is authorized to be registered must be final, the order of 12 March 2010 that sustained the previous one for its registration was final in nature. The said submission is rejected as processes in aid of execution or enforcement of judgments are always interlocutory. I am unable to yield to the argument regarding the classification of processes of execution particularly those made under reciprocal agreements between nations for the enforcement of foreign judgments in Ghana that in their nature only enable a judgment creditor such as the respondent herein to reap of the fruits of the judgment that they are final; the attribute of finality only attaching to judgments and or orders that completely dispose of the cause of action before a court. In my opinion the order of the High Court dated 12 March 2010 was interlocutory and I am supported in this regard by the decision of this court in the case of the **Republic v the High Court (Fast Track Division); Ex parte StateHousing Co Ltd** [2009] SCGLR 185, wherein the learned Chief Justice, Wood CJ pronounced as follows:

> "…**an order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declaration of right already given in the final judgment are to worked out, is termed interlocutory."**

In coming to this view of the matter, I am not disregarding the decision of the Missouri Court of Appeals in the case of **Acclaim Systems Inc. v Conrad A. Lokhuto** dated 18 March 2008 which was pressed on us by learned counsel for the applicant as a persuasive authority in support of his contention that the ruling of the High Court that refused to set aside the registration of the foreign judgment is final and not interlocutory. I have had the opportunity of carefully reading the said judgment of Glenn A. Norton J, which in my view does not really assist the case of the applicant.The classification in that judgment of a ruling that sustains or sets aside an order of registration of a judgment as final turns upon the specific provisions contained in the rules in the United States and in particular the **Uniform Enforcement of ForeignJudgments Law.**See sections 511.760. 1(7) and 511.760.1(11)

Having determined that the order that sustained the registration of the judgment by the High Court was interlocutory, I think that on 21 April 2010 when the applicant purported to lodge its appeal, it was out of time regarding the 21 days provided for in rule 9(1)a of CI 19, the Court of Appeal Rules. Since the notice of appeal was filed out of time, there was no competent appeal pending from the order on which an application for stay could legitimately have been founded See**: Captain M. Robert Tidana v TheChief of Defence Staff and Another**, an unreported judgment of the Supreme Court in Suit No J7/4/2011 dated 27 July 2011. Accordingly neither the High court nor the Court of Appeal had jurisdiction to entertain the applications for stay of execution, the refusal by the Court of Appeal being the subject matter of the instant application. It being so, the processes based thereon including the ruling of the Court of Appeal dated 7 December 2010, the subject matter of the appeal to this court were improperly constituted resulting in the absence of jurisdiction in the Court of Appeal. This being the position, I am unable to consider the application herein on the merits.

Although the conclusion I have reached on the competency of the notice of appeal of 21 April 2010 is sufficient to dispose of the instant application, there is the point regarding the order of the Court of Appeal being a nullity as it was made in defiance of the mandatory provisions of section 17 of the Bodies Corporate (Official Liquidations) Act, 1963 (Act180). The substance of the point is to the effect that since the applicant-company was in the process of liquidation pursuant to a special resolution of the company dated 15 October 2009 no proceeding except

that by a secured creditor can be commenced or proceeded with and that consequently the order of the Court of Appeal made at the hearing of the application for stay whose refusal is the subject matter of an appeal to this court was null and void. That order may have been made in violation of section 17 of Act 180 but we must only take notice of the point turning on its infraction if the appeal on which the application for stay of execution to the Court of Appeal was competent. I do not accept the proposition that where an order of a superior court has been made in violation of a statutory provision then once that comes to the notice of a court the said order can be vacated even though the court which takes cognizance of the invalidity of the order is without jurisdiction in the matter. It has been reiterated by our courts several times that appeals are creatures of statute and when the time frame provided for initiating them has run out, an appellate court cannot merely because of the invalidity of the order assume jurisdiction in the matter so as to undo the order. I do not speak of other means of redress available to a party other than an appeal such as the supervisory jurisdiction of this court which could have been resorted to for the purpose of avoiding the order of the Court of Appeal. Once the application before us is predicated upon an appeal process that was filed out of time, we have no discretion in the matter than to declare that we are without jurisdiction as the jurisdiction of the Court of Appeal in the application for stay of execution on which the proceedings herein turn was improperly invoked. In my opinion, the time frame for appealing like the statute of limitation is not concerned with merits. Once the axe falls, it falls and leaves the court with no discretion in the matter.

Further to this, I observe that while the special resolution of the company that authorized its winding up was made on 15 October 2009, the applicant-company did not make this crucial fact known to the High court in the course of the hearing of the application for stay of execution. In my view this omission prevented the court from taking into account the provisions of section 17 of Act 180 that arises from a mixed question of fact and law. Not having made this fact known to the High Court, I am in a difficulty whether the application to the Court of Appeal being a repeat one could have been founded on facts which though in existence at the time the application was first made to the High Court were never placed before the court. The position would have been different if the point on which section 17 of Act 180 turns is purely legal as was said by this court in the case of **A-G v Faroe Atlantic Co Ltd**

[2005-2006] SCGLR 271 and in particular holding 8 at page 279. I think that a repeat application though made subsequent in point of time to that of the trial court may include facts which have arisen since the making of the previous application but cannot competently contain facts which were in existence at that time but were not in evidence as to do so would be inviting the appellate court-the Court of Appeal in this case, to consider a case quite different from that before the trial court. We cannot allow parties to improve their cases by introducing new evidence on appeal except in exceptional circumstances provided for by the rules of court. To do otherwise would undermine the authority of lower courts and would hurt the integrity of the judicial process. In my view, the applicant armed with the crucial fact of winding up should have gone back to the trial court to have the previous order set aside. In my thinking the effect of the winding up being that no "action or civil proceedings against the company, other than proceedings by a secured creditor for the realization of the security of that secured creditor…." shall "be proceeded with except by leave of the High Court and subject to such terms as that court may impose", is that the court is obliged to grant a stay at the behest of the execution-judgment-debtor or to refuse leave at the instance of the execution-judgment-creditor. See: (1) **Re London and Devon BiscuitCo** (1871) LR 12 Eq. 190 ;(2**) Croshaw v Lyndhurst Ship Co** [1897] 2 Ch. 154. I am of the opinion that section 17 of the **Bodies Corporate (Official Liquidations) Act** has the effect of a stay of execution. I also think that the effect of section 17 of the Act is similar to what pertains under section 226 of the Companies Act of England. See: Halsbury's Laws of England, Volume 7 paragraphs 1359 – 1360 of the Fourth Edition. It is only when the jurisdiction of the trial High Court on the issue had been invoked and refused that the Court of Appeal could properly have those facts in the evidence before it in the nature of a repeat application as the fact of the company being in liquidation arose earlier than the presentation of the application for stay of execution to the High Court. Writing on the subject, the learned authors of Halsbury's Laws of England, Volume 17 of the Fourth Edition at paragraph 456 say thus:

"**Stay without an Order. Certain circumstances have the effect of a stay, thus an order for winding up a company operates as a stay of execution on judgments against the company, whilst there is also a statutory discretion given to the court to stay execution as soon as a winding up petition is presented."**

Before us in these proceedings is a process filed by the respondent exhibited as GC11 filed on 13 August 2011 under section 17 of Act 180 that seeks leave from the High Court to proceed with the execution process. I think that this application enables the court to exercise the discretion conferred on it under section 17 of Act 180 to grant or refuse the leave and or stay proceedings in the matter.

In my view, when a party does not place all the facts available at the time an application is made to the court then it should not be competent for that party in a repeat application such as that which was before the Court of Appeal for stay of execution to be enabled to raise it for the first time and thereby create the impression that the trial court acted in breach of a mandatory statutory provision, the effect of which is that its order was a nullity. I think that would not only be going too far but undermining the role of trial judges. Before putting this delivery to a rest, I wish to say that we cannot under the authority of **Mosi v Bagyina** [1963] 1 GLR 637 in the course of exercising our appellate jurisdiction make pronouncements on the merits regarding the validity of an order in respect of which an appeal was filed out of time. What we can do is that when the fact of the invalidity is brought to our attention in competent proceedings such as judicial review and or in the case of a fresh action as was done by Abban J (as he then was) in the case of **Okomfo Afuah v Sarbah** [1974] 1 GLR 147 refuse to give validity to it and set it aside on the grounds of the absence of jurisdiction.In the Okomfo Afuah case (supra), the learned trial judge did not only refuse to consider a decision made by a local court previously without jurisdiction as constituting res judicata but also set the judgment aside. I do not think that this case is an authority for us to ignore time frames laid down for law for the initiation of appeals. Besides, it being a judgment of the High Court is of persuasive effect only. The appellate jurisdiction does not give us scope to consider factual matters that were not made available to lower courts.

For the above reasons, I proceed to dismiss the application for stay of execution.

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

AKOTO-BAMFO(MRS),JSC

I have had the Privilege of reading beforehand the well reasoned opinion of my respected brothers Gbadegbe and Atuguba JJSC.

I am however in agreement with the conclusion of my brother Atuguba and would accordingly grant the application.

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

COUNSEL:

KEN BROOKMAN AMISSAH FOR THE APPLICANT.
ACE ANKOMAH (WITH HIM GLORIA COFIE) FOR THE RESPONDENT.