**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT**
**ACCRA**

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**CORAM: ATUGUBA, JSC (PRESIDING)**
**ANSAH, JSC**
**ADINYIRA (MRS), JSC**
**OWUSU (MS), JSC**
**ARYEETEY, JSC**

**CIVIL APPEAL**
**J4/16/2009**
**17TH FEBRUARY, 2010**

**NII ODAI AYIKU IV ... PLAINTIFF/APPELLANT/APPELLANT**

**VRS**

**THE ATTORNEY-GENERAL ... DEFENDANT/RESPONDENT/RESPONDENT**

**AND**

**WOR-NII BORTELABI BORKETEY LAWEH XIV .. APPLICANT/RESPONDENT/ RESPONDENT**

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**J U D G M E N T**

**OWUSU (MS), JSC:-**

This appeal touches on the Jurisdiction of the High Court with regard to the reliefs claimed by the Plaintiff/Appellant/Appellant on his writ of summons issued on 2nd day of March 2001.

By the writ of summons the plaintiff who described himself in the statement of claim as the "*Mantse*" of Nungua in the Ga Traditional Area, sought the following declarations –

(i) "That E. I. 18" Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (prohibition) Instrument 1983 E. I. 18 is null and void having been based on facts which are untrue."

(ii) That E. I. 18 cannot operate to "*destool*" the plaintiff without judicial process

(iii) That notwithstanding E. I. 18 the plaintiff is the lawfully enstooled Mantse of Nungua and entitled to exercise the functions appertaining to that status."

The original Defendant was the Attorney-General representing the Republic of Ghana.

By a search conducted, it was revealed that even though the Attorney-General was served on 08-03-2001, he failed to enter appearance as at 3rd May 2001. Thereafter, the plaintiff on 07-05-2001 filed an application for Judgment in Default of Appearance.

On 10th May, 2001 the application was heard and granted by Ebiasah J. This is exactly what his Lordship said:

> **"Judgment is hereby entered for the plaintiff/applicant against the defendant for all the reliefs stated on his writ."**

Subsequently, all attempts made by the Attorney-General to have the default Judgment set aside failed. The present Respondent, who described himself as the current chief or Mantse of Nungua came into the matter. He had applied to have the default Judgment entered against the Attorney-General as a nominal defendant set aside. The substance of his application was that as the then chief of Nungua, the default Judgment granted ex-parte by Ebiasah J. constituted a challenge to his authority. That because the Judgment injuriously affected him, he on the authority of LAMPTEY VRS

HAMMOND [1987-88] 1 GLR 327 at 328 had the right to have it set aside.

The application was opposed by the plaintiff in whose favour the default Judgment was granted. This application went before the same High Court presided over by R. Asamoah J. (as he then was) about four years after the default Judgment was entered against the Attorney-General.

Asamoah J. on 26-05-2005, granted the application and set aside Ebiasah J.'s Judgment. For convenience and clarity I deem it necessary to reproduce the ruling of Asamoah J. as follows:

> **"RULING BY COURT: This is an application to set aside a Judgment of this court rendered by Dr. Justice Ebiasah at the High Court here on 10/5/01."**
>
> **The Judgment itself appears to have been entered ex-parte it reads tersely as follows: -**
>
> **"Judgment is hereby entered for the Plaintiff/Applicant for all the reliefs endorsed on his writ. The writ itself had asked for certain reliefs annulling E. I. 18 which deals with Nungua Chieftaincy Affairs. It appears to me the learned Judge did not consider the substance of the claim. The claim deals with an executive Instrument and the question which arises ex facie was whether the High Court had Jurisdiction to declare the same nullity vel non. In my view the High Court had no such Jurisdiction and the learned Judge erred in law by granting a relief which it had no Jurisdiction to give.**
>
> **Besides, the matter palpably raised an issue as to Chieftaincy. It is now trite law that the High Court has no Jurisdiction whatsoever to deal**

**with a cause or matter affecting chieftaincy. The claim had purported to raise matter in relation to who is a chief of Nungua. That being to the learned Judge ought to have declined Jurisdiction.**

**In the light of the above, I shall set aside the said Judgment as a (SIC) null and void. Application granted as prayed. No order as to costs."**

Dissatisfied with the ruling, the plaintiff appealed to the Court of Appeal on the sole ground that:

"**The trial Judge erred in law when he set aside the Judgment of the High Court dated 26 day of May 2005 in suit No. MISC 507/01 on the grounds that the aforesaid Judgment determined a cause or matter affecting Chieftaincy."**

He for that reason asked for a reversal of the ruling of Asamoah J. delivered on 26th day of May 2005.

By a unanimous decision, the Court of Appeal on 31st July 2008, dismissed the appeal.

On 4th August 2008, aggrieved by the Judgment of the Court of Appeal, the plaintiff filed yet another appeal to this Court, this time relying on five grounds for which reasons he is seeking –

(i) "A reversal of the Judgment of the Court of Appeal.

(ii) An order affirming the Judgment of the High Court entering default Judgment in favour of plaintiff/appellant/appellant against the Attorney-General and declaring the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (Prohibition) Instrument 1983 E. I. 18 null and void.

(iii) An order declaring that the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (prohibition) Instrument 1983 did not have the effect of destooling plaintiff/appellant/appellant as chief of Nungua."

Let me now briefly deal with the facts leading to the issuance of the writ of summons. The plaintiff claimed he was the chief (Mantse) of Nungua in the Ga Traditional Council, having been enstooled as such in 1958, to be precise on 25/03/58. However, by an Executive Instrument E. I. already referred to, he was prohibited "***from purporting to exercise the functions of a chief.***" According to him, the reasons for the prohibition as stated in the Instrument were entirely false. These reasons being that:

**(a) "following charges preferred against Nii Odai Ayiku IV Nungua Mantse by the elders of Nungua, Nii Odai Ayiku IV was accordingly destooled by the elders of Nungua on 13th June, 1967.**

**(b) a report of the destoolment of Nii Odai Ayiku IV was duly made to the Ga Traditional Council under the hand of the Ga Mantse to the Government in 1970.**

**(c) it appears to the secretary responsible for chieftaincy matters that it is necessary in the interest of public order to prohibit Nii Odai Ayiku IV from purporting to exercise the functions of Nungua Mantse.**"

Following the publication of E. I. 18 the plaintiff fled the country and went into exile as he alleged he was persistently harassed by cadres of the then Provisional National Defence Council, Government of the day.

He denied he was ever destooled as the "***Mantse***" of Nungua in 1967 as contained in the Instrument, hence the institution of his action against the Attorney-General to challenge the validity of the Executive Instrument.

I now turn to the grounds of appeal as stated in the Notice of Appeal.

Ground 1:

**"The Court of Appeal erred when it held that the High Court was right when it set aside the default Judgment entered in favour of plaintiff/appellant/appellant against the Attorney at the instance of applicant/respondent/respondent."**

Under this head, the plaintiff attacks the conclusion reached by the Court of Appeal that Asamoah J. was right in setting aside the default Judgment entered against the Attorney-General. The Court of Appeal, according to counsel, justified the setting aside under Order 36 rule 18 of the Old High Court (Civil Procedure) Rules L. N. 140[A].

Before the Court of Appeal, the procedure by which the Respondent herein came into the matter was not on appeal. His Lordship Appau J. A. in his Judgment justified the setting aside of the default Judgment for the reasons given by Asamoah J. (as he then was).

In effect the Court of Appeal affirmed the reasons given in the ruling of Asamoah J. (as he then was).

Before the Respondent's application to set aside the default Judgment of Ebiasah J. was heard, a preliminary objection was raised by counsel for the plaintiff then Respondent as to the competency of the application challenging the Applicant's capacity on the ground that he (Applicant) has no locus standi. The objection relating to the Applicant's capacity is a question of law, which goes to the root of the Applicant's status before the High Court and can therefore be raised even in this court.

The Applicant did apply in his own right as a person who was injuriously affected by the default Judgments.

In the case of LAMPTEY VRS HAMMOND [1987- 88] 1 GLR the Court of Appeal held that:

> "There were two well-established modes whereby a person who was a stranger to a judgment which injuriously or adversely affected him could have it set aside. He could either obtain the leave of the defendant in the suit to use his name and then apply to the in defendant's name to have the Judgment set aside, or if for some reason he could not use the name of the defendant**, *he could take out a summons in his own name but then the summons should be served on both the plaintiff and the defendant asking for leave of the court to set aside the Judgment and to be allowed to defend the action on such terms of*** - - - **as the Judge might consider just." - - -**

This is exactly what the Applicant did in the High Court before Asamoah J. (as he then was). See also the case of GBAGO VRS OWUSU [1972]2 GLR 252.

His application was rightly entertained by Asamoah J. (as he then was). In his affidavit, the Applicant had averred that the default judgment was a nullity because reliefs (ii) and (iii) as endorsed on the writ related to a cause or matter affecting chieftaincy and the High Court has no Jurisdiction to pronounce on them.

As such there was no time limit within which the party affected by the void Judgment could apply to have it set aside. See the celebrated case of MOSI VRS BAGYINA [1963] 1 GLR 337 at 338.

The rest of the Appellant's submission under this ground dwelt on whether or not the Applicant was the chief or Mantse or Nungua. It is intriguing that even before this court, counsel is canvassing these matters for which the default Judgment was set aside as having been given without Jurisdiction.

This ground of appeal is devoid of any merit and therefore fails.

Ground 2 that:

> **"The Court of Appeal erred when it held that by contending and adducing evidence before the High Court that he is chief of Nungua applicant/respondent/respondent was calling upon the High Court to determine a cause or matter affecting chieftaincy rather than the validity or otherwise of the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) prohibition Instrument 1983 E. I. 18."**

Under this ground, counsel for the Appellant quoted copiously His Lordship's Judgment and the conclusion arrived at by him that the validity of E. I. could only be determined by first of all determining whether the Appellant had been destooled.

I am unable to appreciate counsel's whole submission on the attack of His Lordship Appau. By the Appellant's relief I, he sought a declaration that E. I. 18 is null and void because same was based on facts, which are untrue.

These untrue facts he set out in his statement of claim as already set out earlier on in the Judgment. He contended that the facts were untrue because he was never destooled as chief or Mantse of Nungua.

Even if E. I. 18 had not touched on "***a cause or matter affecting chieftaincy***" as defined under the then chieftaincy Act of 1971 (Act 370), did the High Court have Jurisdiction to pronounce on the validity of E. I. 18? This question will be answered in the course of the Judgment.

In his submission, counsel conceded that the Appellant's reliefs (ii) and (iii) related to "***a cause or matter affecting chieftaincy***" but argued that E. I. 18 could not be pronounced upon by any Chieftaincy Tribunal. Why then was the relief sought alongside reliefs (ii) and (iii) over which the High Court has no Jurisdiction?

His Lordship committed no error when he concluded that at the end of the day when one considers the reliefs sought in their entirety before the High Court, one can only come to the inescapable conclusion that the reliefs dealt with "***a cause or matter affecting chieftaincy***" and therefore the High Court had no Jurisdiction to have entertained it.

In his book "***the Law of Chieftaincy in Ghana***", the learned author, Brobbey J.S.C. put it this way, "***if evidence on how the party was nominated, elected, selected, enstooled or enskinned, deposed or abdicated has to be adduced before the issue raised in the case can be determined, then the case is almost certainly a cause or matter affecting chieftaincy."***

This ground of appeal also finds no favour with the court.

Ground 3 that:

> **"The Court of Appeal erred when it held that applicant/respondent/respondent had adduced sufficient evidence to prove that he is chief of Nungua."**

Counsel has asked the court to use the submissions in respect of grounds (1) and (2) to support this ground. He went on to add that the Respondent did not provide any evidence of the kind required by the law as prima facie evidence that he was ever enstooled as chief of Nungua. It is for this reason that he described as indefensible Appau J. A.'s conclusion that: –

> **"The records before us indicate that in the absence of appellant, someone else was purportedly installed as the chief of Nungua. That person was later replaced by respondent in this appeal in 1999."**

The application before Asamoah J (as he then was) was determined upon affidavit evidence. These facts were deposed to in the Applicant's affidavit in support of his application and E. I. 18 which he sought to challenge had prohibited the Appellant from acting as Mantse of Nungua because he had been destooled by the elders of Nungua on the 13th of June 1967. His Lordship Appau J. A. therefore did not fall into any error when he arrived at his conclusion and this ground also is devoid of any merit.

Ground 4 that:

> **"The court of Appeal erred in law when it held that the Judgment of the High Court entering default judgment in favour of plaintiff/appellant/appellant for the reliefs endorsed on his writ of summons amounted to determining a cause or matter affecting chieftaincy."**

Again counsel concedes that the arguments canvassed in support of this ground appear to have been made on the first two grounds. He relied on the case of In re Osu stool; AKO NORTEI II (MANKRADO OF OSU) VRS NORTEY OWUO II (Intervener) and REPUBLIC VRS NATIONAL HOUSE OF CHIEFS; EX-PARTE AKROFA KRUKOKO II (Enimil VI Interested party) [2007-8] SCGLR

Having held that the reasons underpinning the passage of E. I. 18 related to "a cause or matter affecting chieftaincy I do not find the above cases of any help to the Appellant. The main issue before the High Court was "a cause or matter affecting chieftaincy but not merely an auxillary issue.

On the reliefs sought, a genuine "***cause or matter affecting chieftaincy***" was patent.

In his Lordship Appau J. A.'s Judgment, he had criticized Ebiasah J.'s default Judgment saying that the reliefs that the Appellant sought in the High Court were not classified under the claims in which default or final Judgment could be entered upon application. Action like that, not specially provided for under the rules, if a party served with the writ does not appear within the time limited for appearance, the plaintiff may file an affidavit of service and the action may proceed as if such party had appeared.

Counsel under ground 4 asks what it means to say that the action may proceed as if the party who failed to file appearance to the writ of summons had appeared. He posed the following questions which he answered. Does it mean that the Plaintiff

should proceed to file a reply (to what?). Take out issues for trial (based on what rival contentions and proceed to trial by calling evidence to establish the plaintiff's claim?
With all due respect to counsel, it is not procedurally impossible indeed ridiculous for the plaintiff to proceed as if such a party had appeared. The plaintiff cannot file a reply when no appearance has been entered and for that matter, a defence filed. Neither can summons for Directions be taken when no issues are joined.
All that "***proceed as if such a party had appeared***" means is that the case is set down for hearing. The plaintiff must lead evidence in proof of his claim.

Where a plaintiff claims a declaration of title, he still has to lead evidence in proof of his title notwithstanding failure on the part of the defendant to enter appearance.
In the instant case, the trial court had no Jurisdiction in the first place and should have therefore thrown out the writ.
This ground of appeal like those that had gone before it also fails.
The last ground of appeal i.e. ground 5 states that:

> **"The Court of Appeal erred when it held that the High Court was not the proper forum for determining the validity or otherwise of the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (Prohibition) Instrument 1983 E. I. 18.**

It is submission of counsel that on the reliefs sought no issue was raised which necessitated a resort to the Supreme Court for invocation of the court's original exclusive Jurisdiction under Article 130 of the Constitution. He argued therefore that the Appellant was before the High court to invoke the court's power of Judicial Review for purposed of declaring E.I. 18 invalid because it was made in violation of Act 370, the then chieftaincy Act of 1971. That the relief 1 sought on the writ did not question the Constitutionality or otherwise of E. I. 18. He therefore did not raise any issues relating to the Transitional provisions of the 1992 Constitution.
He however argues that the provisions of section 34(3) and 34(4) of the Transitional Provisions do not serve as magic wand. That the person who relies on them must establish that they enure to his benefit. These provisions, counsel continued cannot be invoked to save an act, which was invalid at the time the said act was committed.

Counsel for the Respondent's first answer to the submissions of the Appellant's counsel is that the action initiated by the Appellant was not one for Judicial Review. The Appellant had endorsed his claim on a writ of summons accompanied by statement of claim.

He referred to Order 55 which deals with Applications for Judicial Review and the mode of making the application. He submitted that plaintiff by his conduct had not gone to the High Court to seek Judicial review.

He submitted that the High Court in the exercise of its function in application for Judicial review, lacked Jurisdiction to strike down any Legislation of the P. N. D. C. If the case of the Plaintiff/Appellant/Appellant before the High Court was that E. I. 18 was made in excess of powers conferred on the secretary responsible for Chieftaincy Affairs, then under Article 130(2) of the Constitution, it is the Supreme Court that the plaintiff should have gone to but not the High Court.

The Appellant cannot be heard now to say that he went to the High Court to seek the court's power of granting Judicial review. The writ and the statement of claim speak for themselves.

The High Court even in its supervisory Jurisdiction cannot strike down legislation unlike the Supreme Court which has Jurisdiction to strike down statutes or acts as being inconsistent with the Constitution in the exercise of its Original Jurisdiction under Article 130 (b) of the Constitution.

In the instant case, the Appellant before the High Court sought a declaration that E. I. 18 was null and void because the reasons for which it was passed were false.

Counsel then turned to the Transitional Provisions of the Constitution. He submitted that acts of P. N. D. C. are insulated from questions/proceeding by virtue of section 34 of the Transitional provisions.

The question here is in view of section 34(3) of the Transitional Provisions, was the plaintiff's action vis-à-vis relief 1, maintainable in any court? The section reads as follows:

> **"For the avoidance of doubt, it is declared that no executive, legislative or Judicial action taken or purported to have been taken by Provisional National Defence Council or the Armed Forces**

> **Revolutionary Council, or a member of the Provisional National Defence Council or by any person appointed by the Provisional National Defence Council or the Armed Forces Revolutionary Council in the name of either the Provisional National Defence Council or the Armed Forces Revolutionary Council shall be questioned in any proceedings whatsoever, and accordingly, it shall not be lawful for any court or other tribunal to make any order or grant any remedy or relief in respect of any such act"**

Indeed to ensure that the courts are barred completely from entertaining any proceedings in respect of any such act, sub-section 4 states that –

> **"The provisions of subsection(3) of this section shall have effect notwithstanding that any such action as is referred to in that subsection was not taken in accordance with any procedure prescribed by law."**

Under Article 299 of the Constitution

> **"The transitional provisions specified in the first schedule to this constitution shall have effect notwithstanding anything to the contrary in this constitution."**

With these provisions, the Supreme Court which is the Highest Court of the land has even been denied Jurisdiction in any proceedings in respect of any executive, legislative or judicial action taken or purported to have been taken by the P. N. D. C.

The Supreme Court in various cases has had the occasion to pronounce on the Transitional Provisions.

In the case of KWAKYE VRS. ATTORNEY GENERAL [1981] GLR 944, the plaintiff issued a writ to invoke the original Jurisdiction of the Supreme Court seeking a declaration that he was never tried, convicted or sentences and that the purported sentence of 25 years imprisonment imposed upon him was an infringement of his fundamental human rights inconsistent with chapter 6 of the 1979 Constitution and therefore void and of no legal effect.

The Attorney-General raised objection to have the plaintiff's action dismissed on the ground that the facts pleaded by the plaintiff himself that the AFRC took or at least purported to have taken Judicial action against him forbade the court from entertaining the action or granting the plaintiff any remedy in view of section 15 (2) and (3) of the Transitional provisions of the 1979 Constitution the words of which were in similar terms like section 34(3) and (4) of the 1992 Constitution.

The court held (per Apaloo C. J.) that

> **"That being so, section 15(2) of the transitional provisions, ousts any Judicial organ from Jurisdiction to "make any order or grant any remedy or relief in respect of such act. It follows that the declaration sought by the plaintiff cannot lawfully be granted" - - -**

Per Archer J. S. C.

> **"In my view, section 15(2) does not say that a person aggrieved by any executive, legislative or Judicial action taken by the A. F. R. C. shall not file any papers in court. It does not say that the court should not look at the papers. It does not say that the registrar should not look at the papers. It does not say that the court should not accept the papers. It does not say that the court should not hear counsel. The true meaning of section 15(2) appears to be that whenever the court is satisfied that the A. F. R. C. took or purported to take an executive, legislative or Judicial action, then that court shall not question the validity, the correctness, the fairness or the justice or that decision or action. Simply, the court should not interfere. The court should leave alone the decision or action as taken by the A. F. R. C. That is what the section means.**

Again in the case of FATTAL VRS MINISTER FOR INTERNAL AFFAIRS [1981] GLR 104 when an attempt was made to challenge a Decree passed by the then S. M. C. D. government, the court stayed its hands off the action and ruled as follows:

> **"Although S. M. C. D. 172 might appear unjust, unreasonable and even autocratic yet it was not within the province of the Supreme Court to strike it down merely because it was an unjust or unreasonable law.**

> **The time when courts of law could embark on such an exercise were over when the S. M. C. D. 172 was enacted there was no Constitution holding the legislative power in leash and no court could have declared S. M. C. D. invalid, null and void - - - The court had not within its environment nuances of supremacy, sovereignty or omnipotence. It could not redress injustices perpetuated by military regimes in the past under Decrees regularly enacted by them" - - -**

Coming home under the 1992 Constitution, the Supreme Court once again had the occasion to touch on section 34 (3) of the Transitional provision as enshrined therein.

My distinguished sister Bamford-Addo J. S. C. (as she then was) said in the case of ELLIS VRS ATTORNEY GENERAL [2002] SC GLR 24 that:

> **"By virtue of section 34(3) (supra); PNDCL 294 cannot be questioned by this court; nor can any remedy or relief be granted in respect of any such challenge to the unconstitutionality of the said law, notwithstanding section 36(2) of the transitional provisions. The binding and superior effect of section 34(4) is made apparent by the unambiguous provisions in article 299 of the Constitution itself. In consequence thereof, the preliminary objection of the defendant should be upheld. This court has no Jurisdiction to go into the present case or grant any consequential remedy" - - -**

Let me add that the law was passed rather at an abnormal time so far as good governance is concerned and no body could challenge it at the time. The indemnity provision in the transitional provisions is to make it sure and certain that when time returned to normal i.e. under a properly elected government in a Constitutional regime, the law could still not be challenged.

In ELLIS case, the plaintiff like the Appellant (plaintiff before Ebiasah J.) sought a declaration that P. N. D. D. L. 294 Hermang Lands (Acquisition and Compensation) law, 1992 is null and void under the Constitution.

The Supreme Court unanimously dismissed the action having upheld a preliminary objection that the action was not maintainable in view of the transitional provisions.

Ebiasah J. should have known from the reliefs sought especially relief 1 that he has no Jurisdiction in the matter and thrown the writ out of court.

It is not only the High Court which did not have Jurisdiction to entertain the action but indeed ***no court and I repeat no court*** could have pronounced on E. I. 18. This is why I find myself unable to go with Piesare J. A. that Ebiasah J. should have referred the claim to the Supreme Court under Article 130 (2) for determination.

In the instant case, not even the Supreme Court could have made any order or grant any remedy or relief in respect of E. I. 18.

The Appellant's action was not maintainable and Ebiasah J. should have treated it as such.

Asamoah J. (as he then was) was perfectly right in setting aside the default Judgment and the Court of Appeal committed no error when it affirmed it.

I do not find any merit in the whole appeal and do wonder how this action has travelled to this court. The appeal will therefore be dismissed and same is hereby dismissed.

**R. C. OWUSU (MS)**
**JUSTICE OF THE SUPREME COURT**

**ANSAH, JSC:**

I agree that the appeal be dismissed. However, I add my own words to the judgment just read as follows, as the facts leading to this appeal and the grounds of appeal have been succinctly dealt with by my sister Rose Owusu JSC. I will therefore not repeat them in my delivery.

It was clear grounds (ii), (iii) and (iv) of appeal read already essentially dealt with one main issue, namely, that the High Court dealt with a cause or matter affecting chieftaincy which it did not have jurisdiction to do. In fact Appau JA, who wrote the leading judgment, made capital of that point and gave reasons why he came to that conclusion to dismiss the appeal before the court.

It required no authority to be cited in support of the proposition that the High Court, Regional Tribunal, Circuit Courts and District Courts lacked jurisdiction to try a cause or matter affecting chieftaincy; see sections 57 and 117 of the Courts Act 1993 Act 459 (as amended), and Section 66 of the Chieftaincy Act 1972, Act 370 as defining what amounts to a cause or matter affecting chieftaincy as "cause or matter affecting chieftaincy" means any cause matter question or dispute relating to any of the following-

(a) nomination, election, selection, installation or deposition of a person as a chief or the claim of a person to be nominated elected selected installed as a chief;

(b) the destoolment or abdication of any chief ;…."

The much bemoaned late Professor Tawiah Modibo Ocran JSC, considered what constituted a cause or matter affecting chieftaincy in *In Re Oguaa Paramount Stool; Garbrah & Others v Central Regional House of Chiefs & Haizel [2005-2006] SCGLR 193* and said at page 214 that:

**"It appears from the language of the Chieftaincy Act, 1971, that the litmus test for determining whether an issue is a cause or matter affecting chieftaincy is the existence of a question or dispute or contested matter, or a cause in the sense of a justiciable controversy with respect to any of the matters listed therein and not literally in respect of every matter bearing on chieftaincy.**

**I hold that in the instant complaint even though relating to a chief and bearing upon the formalities for the public acknowledgment of a chief, does not constitute a cause or matter affecting chieftaincy within the meaning of section 66 of Act 370 because it did not raise an actual**

**challenge to the nomination, election, appointment and installation of a person as a chief, or his/her destoolment or the right of participation in such decision-making or ceremony."**

Sophia Akuffo JSC, also said at page 200 of the report that the meaning of a cause or matter affecting chieftaincy is well known and has been clearly defined in section 117 of the Courts Act 1971 (Act 370). These definitions cannot by any stretch of the imagination be extended to include the administrative act of removing a name from the National Register of Chiefs. The learned Justice of the Supreme Court usefully added that case law on the issue is also well settled, and it is clear that the mere fact that a matter concerns a chief, or collaterally concerns his recorded status as a chief does not of itself qualify it as a cause or matter affecting chieftaincy.

This court has held *ad nauseam* that where the issue is a mere auxiliary to the main issue, this court would not decline jurisdiction for it is not a cause or matter affecting chieftaincy: see *In Re Osu Stool; Ako Nortei II (Mankralo of Osu) v Nortey Owuo III (intervener) [2005-2006] SCGLR 628-633* where Atuguba JSC, the President of this court, said in characteristic forthrightness that:

"The mere incidence of an issue relating to Chieftaincy in the ordinary courts does not constitute it as a cause or matter affecting Chieftaincy. Whether it is so or not depends on whether on the facts of the particular case, a genuine cause or matter affecting Chieftaincy has arisen"

The learned judge drove the point home in his opinion in *Republic v High Court, Koforidua [2009] 22 M.L.R.G. 1* that:

"It is not every matter that involves a chief that constitutes a cause or matter affecting chieftaincy, see *In re Osu Stool Ako Nortei II (Mankralo of Osu) v Nortey Owuo III (Intervener) (2007) 11 MLRG 1; [2005-2006] SCGLR 628"*

When the issue of jurisdiction of the High Court in a cause or matter affecting chieftaincy arose in *Anin v Ababio [1973] 1 GLR 509*, it was held that jurisdiction was determined by the plaintiff's demand and not by a defendant's answer and the court must apply the test of what was the real issue between the parties, and not only look at the wording of the plaint. The reliefs put in by the plaintiff as per his endorsement on the writ of summons, the issues settled for trial, the evidence led in support of the claims are worthy of consideration in finding and determining whether or not a real or genuine cause or matter affecting chieftaincy has arisen. These must be juxtaposed the meaning statutorily provided for in the definition section of the enactment, quoted above. It is when the events concur with the definition that it can safely be said a cause or matter affecting chieftaincy has arisen. If the cause arose as merely ancillary to the issue or claim, or was collateral to it, or arose tangentially, or on the periphery of the real or genuine claim, then that was not a cause or matter affecting chieftaincy and the judicial omnipotence of the High Court to hear all matters under Article 140 of the 1992 Constitution is not curtailed. I must state I affirm the decision in *Anin v Ababio (supra)* and the question to ask at this stage then was what were the claims put before the High Court? These have been set out in extenso above. Appau JA said they amounted to a cause or matter affecting chieftaincy.

These were his reasons why he took the view that the suit was a cause or matter affecting chieftaincy and as such the High Court should have declined jurisdiction to hear it as it was precluded by law from hearing it.

Considering the third relief before the court, it is not difficult to see the justification in concluding it was a cause or matter affecting chieftaincy that was put before the court.

It was in *Republic v High Court, Denu; Ex Parte Avadali IV [1993-94] 1GLR 56, SC*, that a High Court assumed jurisdiction to determine an action for the declaration that the respondent was a 'hlotator' of the Anyigbe clan and therefore qualified to manage lands and properties of the clan. The trial judge was of the view that the claim as it stood was for a declaration of title to land and not a cause or matter affecting chieftaincy. In an application for an order of certiorari to quash his decision to assume

jurisdiction to hear the suit, this court held that '*hlotator*' is of a chiefly status so an action for one to be declared as such was in effect for one to be declared a chief and was a cause or matter affecting chieftaincy pure and simple.

In the present appeal, claim (iii) endorsed on the writ of summons seeking a declaration that notwithstanding EI 18 purporting to prohibit Nii Odai Ayiku IV the plaintiff, from acting as the chief of Nungua, he was in fact the lawfully enstooled chief. That ipso facto raised a question relating to his having been nominated, elected, selected, installed as a chief; in other words a cause or matter affecting chieftaincy, something section 57 of the Courts Act, 1993, Act 459, prohibited the Court of Appeal, High Court, Regional Tribunal, Circuit Court and Community Tribunal from doing.

When the claims were put before him the trial judge should have been provoked into first of all probing the question as to what the real nature of what had been put before him was and more importantly whether or not he had the requisite jurisdiction to hear it. He should have been astute enough to bring his judicial mind to bear on this, for if he had, he would have discovered that what had been put before him was truly fruits of the forbidden judicial tree and rejected it outright, even suo motu, by declining jurisdiction.

I am in entire agreement with Wood CJ when she said in her dissenting judgment in *Republic v High Court, Koforidua* (supra) at page 24 that:

> "A court's duty at all times is to be on the alert and unmask such clever undertakings or camouflages so that cases may be assigned to their proper forum."

To be fair to Ebiasah J, he might have been enticed into granting the relief *en block* because the defendants who ought to have assisted him to find his way out failed to so assist him when they failed to take the first step by entering any appearance or put in any defense to the claims or at all. That in any case did not relieve him from performing his judicial function under the circumstances.

Appau JA, in my opinion came to the right conclusion when he held that what was before the High Court was a cause or matter affecting chieftaincy and should not have been entertained by the court under the law.

Concurring with Appau JA in dismissing the appeal, Piesare JA stated his reason that by virtue of the provisions of article 130 1(b) of the Constitution 1992, the High Court lacked jurisdiction to hear and determine issues pertaining to the validity or otherwise of the enactment in E.I. 18 which function lay in the exclusive jurisdiction of the Supreme Court.

But the query was could Piesare JA be very right in his holding?

I agree with the opinion delivered by my respected and esteemed sister Rose Owusu JSC, which I had the benefit of reading beforehand, more particularly on the effect of the Transitional provisions of the Constitution, 1992, completely ousting the jurisdiction of the courts and tribunals in questioning the validity of laws made by certain governments. When the suit was put before the High Court, Ebiasah J the trial judge, should have been careful about his competence to deal with it and making any order or grant any remedy or relief in respect of the legislative action taken in the form of E.I. 18 and not been enticed or allowed himself to be enticed by the fact that no appearance had been entered to the writ and defendant was in clear default of the rules of procedure, to grant *all the reliefs* on the writ of summons as he did. It was made *ultra vires* the powers of the High Court and was a clear error of law. The Court of Appeal was right in affirming Asamoah J in setting aside the default judgment entered in favor of the plaintiff. I agree with Piesare JA in his opinion to dismiss the appeal, except to say he should have set his eyes more on the transitional provisions of the Constitution and applied them to the facts of the case.

In the result, I also affirm the judgment of the Court of Appeal and dismiss the appeal.

**J. ANSAH**
**JUSTICE OF THE SUPREME COURT**

**ATUGUBA, JSC:**

I agree that the appeal be dismissed.

**W. A. ATUGUBA**
**JUSTICE OF THE SUPREME COURT**

**ADINYIRA (MRS), JSC:**

I also agree that the appeal be dismissed.

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

**ARYEETEY, JSC:**

I also agree that the appeal be dismissed.

**B. T. ARYEETEY**
**JUSTICE OF THE SUPREME COURT**

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**J. AYIKOI OTOO FOR THE APPLICANT/RESPONDENT/RESPONDENT.**