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

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

CIVIL APPEAL
NO. J4/20/2009
29TH APRIL, 2010

1. **NII OKAIDJA III**
2. **PERCY OKOE ADDY**
3. **OKOE ARYEE** ... **PLAINTIFFS/RESPONDENTS/ RESPONDENTS**

VRS

1. **NII TETTEY AHINAKWA II (SUBST. BY FRNACIS NII AYIKAI)**
2. **THOMAS OKINE** ---- **DEFENDANTS/APPELLANTS/ APPELLANTS**

J U D G M E N T

GBADEGBE JSC:

This is an appeal from the unanimous decision of the Court of Appeal dated 6th November, 2008 that affirmed the decision of the trial High Court in the matter herein. The circumstances under which the proceedings herein arise before us may be stated thus. The defendants/appellants/appellants to whom I shall hereafter for convenience

refer as the appellants obtained judgment in a cause affecting chieftaincy before the Judicial Committee of the Greater Accra Regional House of Chiefs on 17 February 2003 in a case entitled Nii Tetteh Ahinakwa 11 and Another vs. Nii Ayitey Agbofu 11and Another. Subsequently, they applied for and obtained from the High Court, Accra leave to go into execution of the said judgment. Following the grant of leave to the appellants, it appears that they caused steps to be taken to enforce the writ of possession against the execution debtors in the said action. Following the said execution, the plaintiffs/respondents/ respondents to whom I shall hereafter conveniently refer as the respondents took out the writ of summons herein before the High Court, Accra that sought an order setting aside the writ of possession granted by the High Court Accra on 22 May 2007 and also an order of perpetual injunction restraining the defendants (appellants herein) from interfering with their possession of the Gbese palace. The action proceeded to trial at the end of which the learned trial judge of the High Court granted the reliefs sought by the respondents. The appellants claiming to have been aggrieved by the delivery of the High Court lodged an appeal there from to the Court of Appeal. On the 6 November 2008, the Court of Appeal delivered its judgment in the matter herein by which the appeal of the appellants herein was dismissed. The instant proceedings are as a result of a further appeal lodged by the appellants from the decision of the Court of Appeal.

Before us, the parties have submitted their respective statements of case in compliance with the rules of this court. When the matter came before us for hearing on 12th January 2010, acting under the authority conferred on us by rule 6.8 of the Supreme Court Rules 1996 [CI 16], we raised for the consideration of the parties the question whether the action herein, which was commenced in the trial High Court by the issue of a writ of summons on 2nd August 2006 was competent? The issue raised in our view by the said point touches and concerns a matter of practice and procedure that relates to the remedy of a person whose main complaint is that although he was in possession of the property in respect of which execution was carried out, he was not notified in compliance with Order 43 rule 3(3) of rules of the High Court (Civil Procedure) Rules 2004, CI 47.

The gist of the respondents' case appears to be contained in paragraphs 10-16 of the statement of claim filed in the matter herein. The said paragraphs averred as follows:

"10.On 22nd May 2007, the 1st defendant purporting to act on the basis of the judgment of the Greater Accra Regional House of Chiefs of 17th February, 2003 applied to the High Court, Accra in Suit No. BMISC 185/ 2003 for leave to issue a Writ of Possession to take possession of the Gbese palace.

11.The leave to issue a writ of possession was wrongly granted to 1st Defendant, as 1st Defendant, as the 1st defendant the incumbent Gbese Mantse and is not entitled to possession of said palace on any basis or at all.

12. As at the date of the said application for leave to issue a writ of possession filed by the 1st defendant, the plaintiffs were in actual possession of the Gbese palace and by law were entitled to be notified of the proceeding but no such notice, as required by law, was given to any of the plaintiffs or at all.

13. The defendants purporting to act on the basis of the leave so granted by the High Court in BMISC 185/2003 entered into the palace with their agents and thugs and vandalized the personal properties of the plaintiffs and also the palace.

14. The plaintiffs say the grant of the leave to issue writ of possession to the 1st defendant was wrong in law and indeed the execution of same was illegal.

15. The defendants have refused to vacate the palace and have been entering into the palace and indeed desecrating same.

16. Wherefore, the plaintiffs claim as per the writ of summons."

In view of the fact that the question raised by us for the consideration of the parties may depending on the decision thereon affect the jurisdiction of the trial court to inquire into the matter, I will deal first with the said point before proceeding to consider other issues raised in the appeal herein. In compliance with the order of the court

relating to the competency of the action herein, the parties through their counsel filed their respective response to the point of law contained in the question raised by the panel on 12th January 2010.That of the appellant was filed on 26 February 2010 while that of the respondents was filed on 18 March 2010.

It appears from a careful examination of the processes filed in the court below and in particular the paragraphs of the respondents' statement of claim earlier on referred to in the course of this delivery that since the complaint of the respondents is based mainly on the allegation that the writ of possession ought not to have issued without notice to them as provided for in Order 43 rule 3 (3) of the High Court Rules, CI 47 the order for leave to go into possession and the execution founded thereon were irregular, and not illegal as was averred to by the respondents in paragraph 11 of the statement of claim filed on their behalf in the trial High Court. This being the case, their remedy was to apply to the court that granted leave to issue the writ of possession in order to have the entire process of execution set aside as provided for in Order 81 of the High Court (Civil Procedure) Rules, CI 47.See: **(1) Davis v Shapely (1830) 1 B & Ad 54; (2) Rossi v Bailey (1868) LR 3 QB 621; (3) Turner v Pulman (1848) 2 Exch 513, 154 ER 594**. That the execution on which this action turns was irregular and not illegal is supported by the learned authors of Halsbury's Laws of England in Volume 17 (4th Edition) where writing on the topic "Irregular Execution" they state at paragraph 459 at page 276 as follows:

"An execution is irregular where any of the requirements of the rules of court has not been complied with, and in such a case the proceedings may be set aside or amended or otherwise dealt with in such manner and upon such terms as the court thinks fit. Such non-compliance must be treated as an irregularity and does not nullify the proceedings or any document, judgment or order therein."

Although the above pronouncement is based on Order 2 rule 1 (1) and (2) of the 1965 applicable rules then in England, the equivalent of the rules of the High Court, which is contained in Order 81 of CI 47 is expressed in substantially the same words and accordingly the provision in our rules must receive the same construction. It being so, it

was not open to the respondents by virtue of the non-compliance with Order 43 rule 3 (3) to issue out a new writ as though the said default had created a separate and new cause of action in them. Although Order 81 of CI 47 confers a wide discretion on the court to rectify irregularities, the non-compliance with which we are concerned in these proceedings being the issue of a writ instead of applying by motion to set aside irregular execution is in its nature so fundamental a defect that in my opinion cannot be rectified under the rule. In any event the power to do so being a matter of discretion for the trial court where as in the proceedings before us, the action went through the various stages of a writ and judgment was pronounced on it, I think it would be stretching the rule too far if one were to come to the view that the irregularity occasioned by the issue of the writ is one that could be rectified in order to have the matter dealt with as though it was commenced by a motion. Perhaps, the position may have been different if the objection to the issue of the writ had been taken at an early stage of the proceedings in the trial court in which case the court may have made an order treating the writ as if it were a motion. See: Re Deadman, Smith v Garland [1971] 2 All ER 101. I add that in the in the case of Re Deadman, the court's power to direct that the action which had been begun by an originating summons be continued as if it had been begun by a writ was derived not only from Order 2 of the 1965 English rules but also Order 28 rule 8(1) .The latter rule provides:

'Where in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.'

In the course of his judgment Stamp J observed as follows:

'The whole point of insisting that certain proceedings, and more particularly proceedings involving or based on an allegation of fraud, shall be begun by writ is to ensure that the procedure consequent on the issue of a writ

involving pleadings, discovery and so on is followed. If I allowed the amendment which is sought on the terms of the action continuing as if it had been commenced by writ, I would accomplish precisely that result.'

In the above case, the application to amend was made to the court under Order 28 of the rules in England which authorizes the court to treat an originating summons as though begun by writ and the opportunity was sought at an early stage in the proceedings to afford the court the opportunity of making supplementary orders to enable the parties actually have the action dealt with as though begun by a writ. In the proceedings herein, there is no application before us by the respondents who are guilty of the non-compliance and it appears to me that it is too late in the day after the court had taken the point regarding the irregularity for the party in default without even seeking leave to amend the irregular process to obtain an order treating the writ as though it were a motion in order to bring the matter within the provisions of Order 81.It is trite learning that an amendment cannot be granted or sought for the purpose of defeating an objection to a process that is pending before the court. I am of the considered view that although this court may in appropriate circumstances exercise its discretion to rectify irregularities, in the instant case to have the writ treated as a motion without the additional orders relating to processes that were filed that ordinarily are not founded on motions is to stretch the effect of the rule too far in favour of the respondents. I think that such a course if pursued by the court would occasion injustice to the other side. In the case of **Weldon** v **Neal** (1887), 19 Q.B. D. 394, the court refused leave to amend on the ground that at the date that it was sought it was prejudicial to the rights of the opposite party. I think that in the case herein to make an order treating the writ as if it were motion would not only be unsolicited but have the effect of prejudicing the other side; for the litigation is at an end and they would have no remedy. Besides, the processes contained in the record of appeal cannot at this stage be amended to conform to the procedure consequent upon the issue of an originating notice of motion as the action herein has already been tried to finality in the High court based on them.

Order 81 of CI 47 that regulates irregularities in the High Court provides as follows:

"1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it.

(2). The Court may, on the ground that there has been such a failure as stated in sub rule (1), and on such terms as to costs or otherwise as it considers just

(a) set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or

(b) exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just.

2. (1) An application may be made by motion to set aside for irregularity any proceedings, any step taken in the proceedings or any judgment or order in it, and the grounds of it shall be stated in the notice of the application.

(2) No application to set aside any proceeding for irregularity shall be allowed unless it is made within a reasonable time and the party applying has not taken any fresh step after knowledge of the irregularity."

I think that the above sufficiently disposes of the question regarding the competency of the writ of summons herein in view of the nature of grievance on which it was based; the said question receiving a negative response, the effect of which is that the action herein was improperly constituted by the issue of a writ. In my opinion the defect occasioned in proceeding by writ instead of motion though based on a rule of procedure is so fundamental that the proceedings subsequent thereto were improperly constituted with the result that there is no discretion in the Court but to set aside the entire action

.In the English case of White v **Weston** [1968] 2 All ER 842, a writ was posted to an address at which at the relevant time was neither the residence nor place of business of the defendant. As a result, he did not have notice of the proceedings but unfortunately the case was proceeded with and judgment entered against him. When subsequently he had notice of the proceedings, he applied to set it aside, and the county court judge allowed the application .On appeal, the Court of Appeal said the defect was so fundamental as to entitle him ex debito justitiae to have the judgment set aside without terms being imposed. I think that this and several other cases show that even though the defect may be procedural when it is of a fundamental nature the proceedings based thereon must be set aside. If the Court were to treat the irregularity in the proceedings before us as though the action were begun by motion the result is that since our pronouncements are binding on all other courts in the jurisdiction it would have the effect of sanctioning a practice that is clearly without authority and serve no useful purpose than undermining public confidence in the administration of justice. I think it is in accord with the rule of law that parties who appear before us and those yet to appear have a reasonable expectation that their cases would be proceeded with in accordance with the Rules of Court. In coming to this view of the matter I am not disregarding the decision of this court in the case of Republic v High Court, Accra Ex parte Allgate Co Ltd (Amalgamated Bank Ltd) [2007-2008] SCGLR 1041 wherein Dr. Date –Bah JSC made a pronouncement on Order 81 of the High Court (Civil Procedure) Rules, CI 47 as follows:

" To summarise then, where there has been non-compliance with any of the rules contained in the High Court (Civil Procedure) Rules, 2004 (CI 47), such non-compliance is to be regarded as an irregularity that does not result in a nullity, unless the non-compliance is also a breach of the Constitution or of statute other than the rules of court or the rules of natural justice or otherwise goes to jurisdiction."

In my view, where the rules of court prescribe a particular mode of seeking relief then a failure to initiate the proceedings for relief in accordance with the prescribed mode is not only an irregularity but raises an issue that goes to jurisdiction and therefore the position that I have taken in this matter is consistent with the above

pronouncement. To hold otherwise would mean that every default of a rule of procedure is merely an irregularity that ought to be waived by the court, and have the effect of categorizing all procedural defects as irregularities and those based on statute as fundamental. Such an approach is not justified within the intendment of Order 81; for it is when the matter subsequently comes before the court for its decision that the court may consider all the circumstances including the nature of the default; the stage of the proceedings and other relevant factors in determining whether to set aside the proceedings or amend or deal with the "proceedings generally as it considers just." I end my consideration of this aspect of the case with the following pronouncement of Atuguba JSC in **Oppong** v **Attorney**-**General** [2000] SCGLR 275 at 280:

"…….where the step by a party to proceedings before this court is fundamentally wrong, such error is not within the purview of the rule and cannot be waived. One cannot waive a nullity."

Although this was said in reference to the rules of this court, in my opinion there is no reason in principle why non-compliance with our rules should attract different attributes from those of the High Court. I do not think that we can treat certain defects in steps by parties to this court as fundamentally wrong and therefore incurable but say regarding non-compliance with the rules of the High Court that they are all curable and accordingly any interpretation of the rules that has the said effect does not commend itself to me and must be rejected.

Further to this, the respondents in their supplementary statement of case filed on 18 March 2010 in response to the point raised by the court at the hearing of the appeal on 12th January, 2010 appear to have conceded to this when they said in the last paragraph of page 1 of the process filed on 18 march 2010 that they "sought to intervene and brought a motion to set aside the grant of leave…….". In my thinking the mere fact that their application 'to intervene' was refused by the High Court on 20th July 2007 does not operate to create a separate cause of action in them to justify the issue of a writ as they purported to do on 20th August 2007. In any event the rules of court provide adequate relief for the said default and therefore it was not competent for them to have journeyed outside the scope of remedy that is statutorily available to them from

the court that granted leave for the writ of possession to issue .The question whether or not to set aside the proceedings and or steps taken under the irregular order is a matter of discretion for the trial court and not a matter properly cognizable by a court of coordinate jurisdiction in a separate action. The respondents in my opinion did not by so doing only seek to circumvent the clear provisions of Order 81 but may be said to have engaged in a conduct that is contrary to Order 1 rule 2 of the High Court (Civil Procedure) Rules, which provides as follows:

" These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided."

Perhaps, they should have appealed against the decision of the High Court that refused to set aside the execution instead of proceeding to issue a fresh action.

Then there is the point that touches the substance of the respondents' action in terms of the subject matter. A close examination of the writ discloses that the issues raised concern the right as between the contending parties which of them should have possession of Gbese stool property and is therefore a cause or matter affecting chieftaincy and for that matter outside the jurisdiction of the High Court.

For these reasons, the appeal is allowed. The result is that the judgment of the Court of Appeal is set aside and in place thereof we substitute an order setting aside the writ of summons herein.

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

ATUGUBA, J.S.C:-

I have had the benefit of reading before hand the crisp judgment of my learned and respected brother Gbadegbe JSC and it is only after a close scrutiny thereof that I am emboldened to chart, with the greatest respect, a different course. Since the facts have been neatly stated by him I need not restate them except where necessary.

The sole issue is whether the action in this case was competently begun by writ of summons. The respondents have argued at length that since the leave to issue the writ of possession was fundamentally in breach of O.43 r.3(2) and (3) the same is a nullity and the procedure for impeaching proceedings that are a nullity includes a writ of summons. O.43 r.3(2 and (3) is as follows:

"3(2) A writ of possession to enforce a judgment or order for the recovery of possession of immovable property shall not be issued without leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 56 applies.

(3) *The leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable the person to apply to the Court for any relief* to which the person may be entitled."

They say they were in actual possession at all material times and yet they were not notified of the said proceedings for leave to issue the writ of possession.

In so far as the respondents cling to the distinction between irregularity and nullity to justify the issuance of their writ the same is misconceived. That distinction has been statutorily abolished by O.81 of the High Court (Civil Procedure Rules, 2004) which is as follows:

"**Effect of Non-compliance with Rules**

1. Non-compliance with rules not to render proceedings void

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form *or content* or in any other respect, *the failure shall not be treated as an irregularity* and *shall not nullify the proceedings*, any step taken in the proceedings, or any document, judgment or order in it.

(2) The Court may, on the grounds that there has been such a failure as stated in subrule (1), and on such terms as to costs or otherwise as it considers just

(a) set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or

(b) exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just.

2. Setting aside for irregularity

(1) An application may be made by motion to set aside for irregularity any proceedings, any step taken in the proceedings or any document, judgment or order in it, and the grounds of it shall be stated in the notice of the application.

(2) No application to set aside any proceeding for irregularity shall be allowed unless it is made within a reasonable time and the party applying has not taken any further steps after knowledge of the irregularity."

It is already been held by this court that the word "not" first occurring in r.1 is a drafting slip and was unintended.

O.81 is virtually a reproduction of O.2 rr.1 and 2 of the 1964 English Rules of the Supreme Court which fell to be construed in *Singh v. Atombrook Ltd* (1989)1 All ER 385 C.A. The facts of that case as set out in the headnote thereof are as follows:

> "By a writ issued on 4 June 1987 the plaintiff, Mrs Santosh Kumari Singh, suing as administratix of the estate of her deceased husband Mr Ranjit Singh, claimed against 'Sterling Travel (a firm)' as defendant the return of money paid by Mr Singh to Sterling Travel Ltd for three airline tickets which, following Mr Singh's death, the plaintiff retuned to Sterling Travel, which agreed to arrange for a refund of a price of the tickets. In default of any appearance by Sterling Travel the plaintiff obtained a default judgment on 21 July 1987. On 25 November 1987 the defendant, Atombrook Ltd (trading as Sterling Travel), applied to have the default judgment set aside for irregularity, because of the misnomer of the defendant in the writ on the grounds that the defendant should have been named as 'Atombrook Ltd trading as Sterling Travel', and the failure to serve the writ on Atombrook Ltd at its registered office. On 22 December 1987 Mr District Registrar Bailey-Cox set aside the default judgment on condition that the defendant pay into court the full sum claimed by the plaintiff. On appeal by the defendant, Hutchison J, sitting in the High Court at Winchester on 29 January 1988, affirmed the registrar's order, and also directed that the writ be amended to name the defendant as Atombrook Ltd trading as Sterling Travel. The defendant appealed, seeking to have the orders of the district registrar and Hutchison J set aside and the default judgment of 21 July 1987 set aside unconditionally."

On these facts, at 388 Kerr L.J held as follows:

"To see the issues which arise I must refer to a number of provisions of the Rules of the Supreme Court. Order 2, r1(1) and (2) is as follows:

> '(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, *the failure shall be treated as an irregularity and shall not nullify the proceedings*, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document , judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made *and to make such order (if any) dealing with the proceedings generally as it thinks fit*.'

The first two paragraphs of the notes to that rule in The Supreme Court Practice 1988 vol 1, para 2/1/1 are in the following terms:

> 'Effect of rule – The predecessor of this rule (O.59 of R.S.C. 1875; O.70, r.1. of R.S.C 1883) sought to provide that non-compliance with any of the rules should not of itself render any proceedings void unless the Court should so direct, but that they might be set aside wholly or in part as irregular or amended on such terms as the Court might think fit. Nevertheless the decisions under the rule preserved a distinction between a non-compliance such as rendered the proceedings a nullity (in which case the Court had no discretion but to treat them as a nullity and set them aside) and a non-compliance which merely rendered the proceedings irregular (in which case they remained valid and the Court had a discretion what order to make in the circumstances). It was held,

indeed, that the Order did not apply to the former class of case but only the latter.

As a result of the decision of the Court of Appeal in *Re Pritchard decd*. ([1963]) 1 All ER 873, [1963] Ch 502) the present rule was by R.S.C. 1964 substituted for rr. 1 and 2 of the previous O.2 and under it the above distinction between nullity and mere irregularity disappears (see *Harkness v. Bell's Asbestos & Engineering Ltd* ([1966]) 3 All ER 843 at 845, [1967]2 QB 729 at 735)) at any rate in regard to "a failure to comply with the requirements of these rules", *though it may still be that there are other failures to comply with statutory requirements or other improprieties so serious as to render the proceedings in which they occur, and any order made therein, a nullity...*

I must then quote Ord 2, r 2:

'(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(3) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion. *It will be noted that under Ord. 2, r 2(1) the grant of an application to set aside for irregularity is only permissible if it is made 'within a reasonable time'."(e.s)*

It must be confessed that the judicial mind being largely conservative, judges of high authority here and in England still hold the view that despite the provisions of O.2 of the 1964 English Rules of the Supreme Court and O.81 of C.1.47, certain procedural lapses are such that they cannot be saved by those provisions. Thus in the celebrated case of *Singh v. Atombrook*, supra, at 391-392 Kerr L.J said:

"I should add that, among other cases, we were referred to the decision of this court in *White v Weston* [1968]2 All ER 8422, [1968]2 QB 647. Russell and Sachs LJJ held that *a judgment should be set aside unconditionally* ***ex debito justitiae*** *without referring to the new rule because it was a plain case of the defendant being totally unaware of the proceedings from the beginning to the end of the history*. Both Russell and Sachs LJJ thought that one did not get much assistance from considering whether a judgment is to be described as having been obtained irregularly or whether it was a nullity. In a passage with which Sachs LJ agreed ([1968] 2 All ER 842 at 848, [1968]2 QB 647 at 662), Russell LJ said ([1968] 2 All ER 842, [1968]2 QB 647 at 650:"

> 'I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as "irregular" or "a nullity". *The defect is in my judgment so fundamental as to entitle the defendant as of right,* ***ex debito justitiae****, to have the judgment avoided and set aside*.'

In my view *there can be no question of the present case involving any defect of a fundamental nature, let alone one as fundamental as in White v Weston*."(e.s)

Likewise at 394 Sir John Megaw said:

> "*I do not propose to go into the submission that, in spite of the way in which Ord. 2, r.1 is now framed, there still remain failures, which presumably mean failures in compliance with some part of the Rules of the Supreme Court, which will render proceedings nullities*. The two 'failures' which appear to me to be of possible significance, as set out in the skeleton argument of counsel for the defendant, are first, the bringing of proceedings against a non-existent party and, second, the failure to comply with a statutory requirement. He also sets out a third, with which I do not think it is necessary to deal.
>
> *If indeed there were in this case nullities in the sense of rendering the proceedings invalid, whether by virtue of proceedings having been brought against a non-existent party, or by virtue of failure to comply with a statutory requirement, then, while the judge would properly have set aside the judgment*

at the instance of the defendant, he would not have been entitled to make such setting aside conditional. But the judge did not regard the irregularities as being other than irregularities coming within Ord. 2, r.1"(e.s)

Again in *Bernstein v. Jackson* (1982) 2 All ER 806 C. A the facts of the case as stated in the headnote are as follows:

"In May 1977 the plaintiffs, who were resident in South Africa, obtained judgment there for R6,000 against the first defendant, who was also resident in South Africa. The judgment remained unsatisfied but the first defendant agreed with the plaintiffs to transfer £3,000 deposited with a building society in England to South Africa in part satisfaction of the judgment debt. However, that money was never transferred to South Africa. On 7 December 1977 the plaintiffs issued a writ in England against the first defendant to enforce the agreement, and joined the building society as second defendant. *As the first defendant was still resident in South Africa the plaintiffs were given leave to serve notice of the writ on her out of the jurisdiction, but it proved impossible to do so*. The second defendant entered an appearance to the action. *Time for service of the writ expired on 6 December 1978 but the plaintiff did not apply under RSC Ord. 6, r 8 to renew the writ*. On 28 January 1981 a district registrar, *without renewing the writ, gave the plaintiffs leave to serve notice of the writ on the first defendant by substituted service* by means of posting a copy of the notice to the first defendant at the second defendant's address. The first defendant or her solicitors received notice of the writ but she failed to acknowledge service of it or to enter an appearance to the action. *On 22 May 1981 the plaintiffs signed judgment against her in default of appearance for damages to be assessed*. On 13 July the *first defendant issued a summons applying to set aside the order for substituted service and the judgment in default.* The judge held that, *although the order for substituted service was irregular because the failure to renew the writ had rendered it invalid for service, he had jurisdiction under RSC Ord. 2, r 1 to cure the irregularity*, and in the exercise of his discretion under that rule he

made an order that in effect treated the writ as having been validly renewed and the order for substituted service validly made. However, the judge then went on to hold that, *even though service of notice of the writ had thus been validly effected on the first defendant, she should nevertheless be given leave to defend the action* on condition that she filed a memorandum of appearance or acknowledge service of the notice of the writ within 14 days of judgment. *The judge also set aside the judgment in default of 22 May*. The first defendant appealed, contending (i) that *the failure to renew the writ meant that it was not valid for service after 6 December 1978 and that, even if there had been an application to renew the writ, the judge could not have extended its validity beyond 5 December 1979 under Ord. 6, r 8 (ie for more than 12 months from 6 December 1978) and the writ was therefore not valid for service on 21 January 1981 when the order for substituted service was made, and (ii) that the irregularity caused by the writ's invalidity for service could not be cured under Ord 2, r 1*. The first defendant further contended that the judge ought instead to have set aside the order for substituted service and given the first defendant unconditional leave to defend because, by making the leave to defend conditional on entering a memorandum of appearance, the judge was obliging her to waive the irregularity in procedure which she could otherwise have relied on. The plaintiffs contended (i) that, even if, as they conceded, a writ which had not been renewed under Ord. 6.r 8 was not valid for service, notice of the writ could still be validly served, and (ii) *alternatively that the failure to renew the writ was an irregularity that could be cured under Ord. 2, r 1*."

Upon these facts, at p.812 Dunn L.J (Slade L.J concurring), said:

"While I completely understand the reason why the judge made the order in the way in which he did and while I have a certain amount of sympathy for the plaintiffs, I have come to the clear conclusion that counsel for the first defendant was right in the submissions that he made. *I do not think that the judge could have extended the writ under Ord. 6, r 8 and, that being the case, I think that*

there is great force in the submission that Ord. 6, r 8 provides a compendious code for extension and renewal of writs, and that it is not the type of irregularity which it was envisaged could be dealt with by the provisions of Ord. 2, r 1. But, assuming that it could, in my view this was such a fundamental defect in the proceedings that the judge should not have exercised his discretion to make an order under Ord. 2, r 1. Accordingly, I would allow the appeal and set aside the writ under the provisions of Ord 2, r 1(2) and also the order for substituted service on the ground of the plaintiffs failure to comply with the requirements of Ord. 6, r 8(2)."

Similarly in *Republic v High Court, Accra; Ex parte Allgate Co. Ltd (Amalgamated Bank Ltd Interested Party)*[2007-2008] SC GLR 1041 at 1054 Dr. Date-Bah JSC after his characteristic masterly analysis of O.81 of C.I.47 concluded thus:

"To summarise then, where there has been non-compliance with any of the rules contained in the High Court (Civil Procedure) Rules, 2004 (CI 47), such non-compliance is to be regarded as an irregularity that does not result in nullity, unless the non-compliance is also a breach of the Constitution or of a statute other than the rules of court *or the rules of natural justice or otherwise goes to jurisdiction."*

Again in *Republic v. High Court (Fast Track Division) Accra; Ex parte State Housing Co Ltd* to be reported in [2009]SC GLR 177 at 184 my humble self, delivering the ruling of this court said:

"Since exhibit M is positive that no direction was given by the court that the applicant, ie the judgment debtor, should not be served with the garnishee proceedings and yet the applicant was not served with them, it follows that an essential prerequisite to the entertainment of those proceedings had not been complied with and the same was not only an error of law but one of jurisdictional character: see *Republic v District Magistrate, Accra; Ex parte Adio* [1972] 2 GLR

125, CA. In V*asquez v Quarshie* [1968] GLR 62 at 65, Amissah JA bluntly said: "*A court making a decision in a case where a party does not appear because he has not been notified is doing an act which is a nullity on the ground of absence of jurisdiction."* (The emphasis is ours). See also *Republic v High Court, Bolgatanga; Ex parte Hawa Yakubu* [2001-2002] SC GLR 53 and *Dawson v Preston* (1955)l WLR 1219"

See also In re Kumi (Dec'd); *Kumi v. Nartey* (2007-2008) SC GLR 623.

With hindsight I should have added an observation which I at the time did not deem necessary to make, that, that position was only stated because in the judicial process a fundamental infraction of an important rule of procedure would almost inevitably even as a matter of discretion, lead to the setting aside of the proceedings in question, and so the distinction between nullity and irregularity in that situation would be practically academic. See *Bernstein v. Jackson*, supra.

I concede however that O.81 cannot save certain types of proceedings, e.g. a writ issued against a non-existent party, such as a dead man or a dissolved company (unless of course otherwise statutorily provided). See *Dawson (Bradford) Ltd v. Dove* (1971) 2 WLR 1 and *International Bulk Shipping and Services Ltd v President of India* (1996) 1 All ELR 1017 *C.A*. Even there such nullities are not properly attributable to the rules of procedure but to substantive law concerning who is a person in law. See *Bilson v Apaloo* (1981) GLR 24 S.C.

It is trite law that it does not require what is impossible. Except such rare cases and serious non compliance with statutes other than C.147, O.81 can, unlike the old O.70 of LN 140A, given the amplitude of its language, extending from form to "*content"*, validate even fundamental defects (subject of course to the court's discretion to set them aside).

It follows therefore that the true and acceptable construction of O.81 of C.1.47 is that it was meant to overrule the distinction between procedural breaches which resulted in

nullity and those resulting in mere irregularity under O.70 r.1 of the old High Court Civil Procedure Rules, L.N. 140A. Therefore it is ***non pars curiae*** to still construe the new rule as if it were the same as the old rule. The construction of O.70 r.1 of L.N. 140A will still be relevant to r.79 of the Rules of this court in C.1.16 of 1996 because they are in similar terms. Indeed r.79 of C.1.16 is even more conservative than O.70 r.1 of L.N. 140A. It provides:

> "**Waiver of non-compliance**
>
> Where a party to the proceedings before the Court fails to comply with a provision of these Rules or with the terms of an order or a direction given or with a rule of practice or procedure directed or determined by the Court, *the failure to comply is a bar to further prosecution of the proceedings* unless the Court considers that the non-compliance should be waived."

Thus, unless the court allows a waiver of a breach of the provisions of C.1.16 such breach "*is a bar* to further prosecution of the proceedings". On the other hand, as stated by Lord Denning M.R in *Harkness v. Bell's Asbestos & Engineering Ltd* (1967) 2 QB 729 at 735-736 C.A with regard to Ord. 2 r.1 of the English Rules:

> "*This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible... for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." That could not be said in 1963;* see *Re Pritchard (decd*) ([1963]1 All ER 873 at 879, [1963] Ch 502 at 518); *but it can be in 1966. The new rule does it*."

Again Lord Denning M.R (Browne L.J concurring) in *Westiminster City Council v Chapman* (1975) WLR 1112 C.A at 1116, held with regard to Ord.26 r 3(2) of the county Court Rules thus:

"*In the High Court rules [Rules of the Supreme Court] there is now a special Ord. 2, r.1, on the matter. It was passed deliberately so as to ensure that a failure to comply with the rule is not fatal.* It says that:

> "Where ... there has ... been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings, or any document, judgment or order therein."

That rule applies also to the county court. It is brought in by section 103 of the County Courts Act 1959"(e.s)

Furthermore, commenting on this same rule Halsbury's Laws of England (4th ed, 1980), Vol 37, para 36 at page 35 states thus:

> "*This is one of the most beneficent rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules,* and in both the positive and negative forms*, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity*. Under the former rule, which it replaced, a distinction was drawn between a non-compliance which rendered the proceedings a nullity, in which case the court had no discretion and no jurisdiction to do otherwise than set the proceedings aside, and a non-compliance which merely rendered the proceedings irregular in which case the court had a discretion to amend the defective proceedings as it thought fit."

More particularly, in *Boakye v Tutuyehene* (2007-2008) SC GLR 970 at 980 this court unanimously held per Dr. Twum JSC as follows:

> "*the new Order 81 has made it clear that perhaps apart from lack of jurisdiction in its true and strict sense, any other wrong step taken in any legal suit should not have the effect of nullifying the judgment or the proceedings*. This means

that *the principle stated in Mosi v Bagyina* (1963) 1 GLR 337, SC *has been rendered otiose."*

Most freshly in *Republic v High Court, Koforidu; Ex parte Ansah-Otu & Another* (2009) SC GLR 141 this court held as stated in holding (2) of the headnote thus:

> "The error of Law complained of by the applicants in support of the application for certiorari *was not as to the wrong assumption of jurisdiction* because the granting of an order of injunction was manifestly within the jurisdiction of the court; *the error complained of was non-compliance with the mandatory rules of court in not ensuring that the party who succeeded in obtaining the order in his favour in the teeth of opposition by the losing side, was made to give an undertaking to pay damages in the event of losing the suit eventually*. Even though the trial judge had erred in not complying with the mandatory terms of the rule of procedure as specified in Order 25, r 9(1) and (2), which error of law was also apparent on the face of the record, the error did not go to the jurisdiction of the court in the sense that it did not emanate from a wrongful assumption of jurisdiction or in violation of a constitutional provision; nor was it a nullity by any standard. It was a mere irregularity curable under Order 81, rr1 and 2 of the new High Court (Civil Procedure) Rules 1997 (CI 47)"

See also *Harries v. Crawfurd* (1919)AC 717 at 730 per Lord Birkenhead L.C and at 736-737 per Viscount Finlay.

I have no doubt that this is the legal position Acquah JSC (as he then was) tried to achieve judicially rather than legislatively when in *Republic v High Court, Kumasi; Exparte Atumfuwa and Another* (2000) SC GLR 72 he held as stated in the headnote thus:

> "*Per Acquah JSC. I am aware that on an identical provision in Order 70, r 1 of the High Court Rules,* a number of decided cases had established that where the non-compliance goes to the root of the action as opposed to a mere irregularity, such non-compliance renders the proceedings void and cannot be validated: see, for example, Taylor JSC in *Amoakoh v Hansen* [1987-88] 2 GLR 26 at p 37...

But the point here is that, the decision that a particular non-compliance goes to the root of the action and thereby renders the proceedings a nullity, is that of the court and not the party to the action. And the court arrives at such a decision after considering all the relevant facts, statutory rules and the surrounding circumstances, and when it is so satisfied, declares the same void.

In my view, rule 79 of CI 16 avoids the use of the words "void", "voidable", "nullity", "irregularity" or "defective" and rather uses the word "non-compliance" in order to enable the court do more substantial justice to each case having regard to its peculiar circumstances. Thus in the instant case, the applicants' submission that they are seeking an order for review because this court erred in granting leave for a freshly sworn affidavit to be filed in place of the unsworn affidavit was void and of no legal effect, is not justified by any rule in CI 16... *What CI 16 does is to give power to the court under rule 79, in respect of any defect or non-compliance of a matter within its jurisdiction, to decide whether to terminate the proceedings because of that defect or to waive it. CI 16 does not, under rule 79, forbid particular types of non-compliance from being waived*... Since *rule 79 does not draw a distinction between void and voidable non-compliance,* but rather gives the court power to waive or not to waive any non-compliance within its jurisdiction, it would be erroneous for the applicants ... to contend that the unsworn affidavit was a defect which the court has no power to grant leave to rectify"

That bold attempt failed because of the substantial similarity between O.70 of L.N. 140 A and r.79 of C.I.16.

One golden pod that stands to be preserved from the position that all breaches of the procedural Rules under C.1.47 are irregularities and not nullities, is that, as stated in O.81 r.2(2), delay and fresh steps can bar an application to impeach them, which could hardly be possible were they to sound in nullities.

This golden pod has yielded dividends. Thus in the epic case of *Bugden v Ministry of Defence* (1972)1 All ERI C.A Lord Deming M.R (Stephenson L.J concurring) held that an extension of the validity of a writ by a Master, while dealing with an application for the issue of concurrent writs, even though no application had been made for such extension, is a curable irregularity. Again in *Oyston v Blaker* (1996) 2 All ER 106 C.A it was held that an application for leave to issue a writ under the Limitation Act 1980 and RSC Ords. 2, r.1(2) and 32 r.9 had to be on notice but that the grant of such leave ex parte, on the facts of the case, would only be set aside as an irregularity, notwithstanding that such a breach is fundamental.

The reasoning of the court is captured in the headnote thereof as follows:

> "On an application for leave under s 32A of the Limitation Act 1980 to extend the three-year limitation period for defamation actions prescribed by s 4A of the Act, a judge has a wide discretion to do what is just in all the circumstances, subject only to the court's overriding duty to exercise that discretion in a manner consistent with the legislative purpose of the section. Moreover, *it is an irregularity for a plaintiff to seek and obtain such leave ex parte, since RSC Ord 32, r 9(3), which requires such application to be made by originating summons heard on notice, is clear and mandatory in form*. Any leave wrongly *obtained ex parte is liable to be set aside under Ord 2, r 1(2), and in exercising his discretion under that rule, a judge may, in addition to considering the question of prejudice, properly have regard to the gravity of the irregularity, the staleness of the claim, the strength of the case, the conduct of the parties and their advisers, any question of abuse of process, and any delay and the reasons therefore, in deciding whether the order granting leave should be set aside* (see p 114 e,p 115 ac, p 116 b to g and p 119 f to p 120 b, post)" (e.s)

For all these reasons I hold that the resort to a writ of summons in this case to impeach the writ of possession is an irregularity and not a nullity and since the appellants took

fresh steps in the proceedings in a full scale action and trial they cannot now complain of it and this court also ought to treat this matter accordingly.

It is true that it has been confessed at this final appellate stage that the first appellant had applied unsuccessfully by motion against the writ of possession but since that application was dismissed not on its merits, but on the technical ground that he was a stranger, no res judicata arises. In any event the 2nd and 3rd appellants were not parties to that application.

But if the old distinction between irregularity and nullity is still clung to, then the non service of the application for the writ of Possession being a fundamental error, the grant of the same is a nullity and the parties could resort to a writ of summons to vacate the same and the constitution of the court is irrelevant. In any event since the nullity has come to our notice by whatever process we ought to vacate the same. All this is now trite law.

As to the chieftaincy aspect of the case, the respondents based their writ in many respects on matters affecting chieftaincy but they also pleaded baldly that they were in actual possession and that satisfies O.43 r.3. In any case the chieftaincy averments in the pleadings can be cured by the doctrine of severability.

I therefore regret to remain ***vox clamantis in deserto*** and dismiss this appeal.

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

AKUFFO (MS), JSC:-

I had the benefit to read beforehand the opinions of my brothers Atuguba and Gbadegbe JJ.S.C. I support the conclusion reached by Gbadegbe JSC that the appeal be allowed.

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

ADINYIRA (MRS), JSC:-

I had the benefit to read beforehand the opinions of my brothers Atuguba and Gbadegbe JJ.S.C. I support the conclusion reached by Gbadegbe JSC that the appeal be allowed.

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

AKOTO-BAMFO (MRS), JSC:-

I had the benefit to read beforehand the opinions of my brothers Atuguba and Gbadegbe JJ.S.C. I support the conclusion reached by Gbadegbe JSC that the appeal be allowed.

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

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