IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2013

CORAM: WOOD (MRS) C. J. PRESIDING
DOTSE JSC
YEBOAH JSC
BENIN JSC
AKAMBA JSC

CIVIL MOTION

No.J5/14/2013

10TH APRIL, 2013

REPUBLIC VRS. HIGH COURT, KUMASI
EX PARTE BANK OF GHANA, - APPLICANTS
MR KWESI AMMISAH-ARTHUR
& FRANKLIN BELNYE

REV. ROCHER DE-GRAFT SEFA - INTERESTED PARTIES
ERNEST KWASI NYAME ASIEDU

AND

CIVIL MOTION

No.J5/15/2013

REPUBLIC VRS. HIGH COURT, KUMASI
EXPARTE BANK OF GHANA, - APPLICANTS
MR KWESI AMMISAH-ARTHUR
& FRANKLIN BELNYE

SAMUEL GYAMFI & 693 ORS - INTERESTED PARTIES

RULING

DOTSE,JSC

The applicants have brought before the court two applications for certiorari to quash the judgment in default of appearance given by the High Court in Kumasi, dated 16th July, 2012 and presided over by Boon, J. The facts, statements of case and submissions in both applications are the same, the only difference being the interested parties. For this reason we have decided to give one composite ruling to cover the two applications.

FACTS

The facts grounding the present application are as follows;

The interested parties herein, deposited monies with a company known as Onward Investment Company Ltd, which was operating as a banking institution.

On the 17th day of December 2011, the accounts of the company and its business activities were frozen by the Economic and Organised Crime Office on the instructions of the Bank of Ghana, the 1st Applicants herein. **The reason for the closure was that this entity Onward was operating illegally and without a banking licence from the 1st Applicant.**

Initially, the Interested Parties instituted Suit No PRC 102/2012 against Onward Investment Co. Ltd. before the High Court, Kumasi. The Interested Parties sued Onward Investments because they were attracted to deposit sums of money with the company due to the attractive interest rate that the said company was paying its customers, including the Interested Parties.

After final judgment was obtained by the Interested Parties against Onward Investments, in Suit No. PRC 102/2012, the Interested Parties learnt that the Applicants were holding funds on behalf of Onward Investments.

The Interested Parties, after this judgment promptly applied for an order together with a subpoena that was served on the 2nd and 3rd Applicants herein i.e. the Governor and Head of Banking supervision respectively of the Bank of Ghana and requested from them to explain to the court why monies held by them on behalf of Onward Investments Company should not be used to pay off

the judgment debt. Even though the 2nd and 3rd Applicants did not appear personally, they sent representatives who testified on their behalf.

It seems at this hearing interesting revelations dropped from the mouth of the witness. The revelations were to the effect:

1. That the applicants knew all along that the Onward Company was operating without a valid license.

2. That the 1st Applicants also invested in the said company for well over 6 months to verify the interest rates payable by the company.

3. That the 1st Applicant later withdrew its investments and interest from the company's account before it caused it to be folded up.

Armed with this interesting information, the Interested Parties herein, in two separate suits namely Suit No. C. 12/133/12 intitutled ***Rev. Rocher de Graft Sefa and Another v Bank of Ghana*** and three others claiming an amount of Gh¢4,997.059.00 which is referred in this court as J5/14/13 and Suit No. C12/132/12 intitutled ***Samuel Gyamfi and 693 others v Bank of Ghana, and three others*** claiming an amount of GH7,269,718.38 and referred to in this court as suit No. J5/15/13. It must be noted that the first three defendants in both suits are the 1st, 2nd and 3rd Applicants respectively, and the 4th Defendant being Onward Investments in both suits.

In the pleadings, the Plaintiffs alleged fraud against the first three Defendants and crafted it thus in paragraph 15 of the statement of claim.

> ***"The Plaintiffs shall contend that if the 1st Defendant deliberately permitted and or connived the illegalities if (sic) the 4th Defendant to the extent that the 1st, 2nd & 3rd Defendants did not warn the general public about these illegalities but allowed the 4th Defendant to receive cash deposits from the general public without any warning to the public, then the 1st defendant contributed to the substantial fraud perpetrated on the Plaintiffs and the others. Thus all the defendants were partners in crime and deceit of the public"***

The Plaintiffs particularized the fraud as follows:

(a) Thus, 1st, 2nd & 3rd defendants intentionally indulging/allowing/conniving and refusing to stop the 4th Defendant from engaging in foreign exchange trading or transactions without any licence from the 1st Defendant by operating from Accra, Kumasi, Sunyani and Techiman in the full view of the 1st, 2nd & 3rd Defendants for over 2 years and also allowing some officials from the 1st Defendant to invest in the 4th Defendant was illegal and fraudulent.

(b) The 1st, 2nd & 3rd Defendants admitting in the said Suit No. PRC/102/2012 of the 4th Defendant's lack of operating licence and failing in their (1st, 2nd & 3rd Defendants') duty to stop same or to warn the general public about the 4th Defendant's illegal and fraudulent (sic) for over 2 years amounted to a breach of duty and fraud/illegality.

(c) Thus it was fraudulent on the part of the 1st, 2nd & 3rd Defendants who allowed the 4th Defendant to operate illegally and fraudulently in foreign exchange transactions and also by receiving cash deposits from the general public and the Plaintiffs without warning the general public about same.

The reliefs endorsed on this second writ against the four Defendants are stated as follows:-

a. A declaration that the deliberate and or intentional act of the 1st Defendant, 2nd Defendant and 3rd Defendants (sic) permitting and or indulging the 4th Defendant to operate commercially as a bank concern in the Greater Accra Region, Ashanti Region and Brong Ahafo Region respectively for over 2 years without the requisite Bank of Ghana Banking Licence was not only negligent and or unconscionable but unconstitutional, fraudulent and legally impermissible and as a result have caused substantial miscarriage of justice and civil injuries to the Plaintiffs.

b. A declaration that by the testimony of the representative of the Governor of Bank of Ghana and Head of Banking Supervision (i.e. 2nd & 3rd Defendants) herein on oath in Civil Suit No. RPC 102/2012 admitting and confirming that the Bank of Ghana was aware that the 4th Defendant had no licence from the Bank of Ghana whilst it (4th) Defendant was operating

and also failing to warn the general public from dealing with the 4th Defendant who was operating illegally and fraudulently in foreign transactions/exchange amounted to a breach of article 183 (2) (d) of the 1992 Constitution of Ghana, the Bank of Ghana's Act 2002 (Act 612) and the Banking Act, 2004 (Act 673).

c. A declaration that whatever the 1st, 2nd & 3rd Defendants did, whether deliberately, negligently or by omission or commission by allowing, permitting or indulging the 4th Defendant to illegally and fraudulently operate by receiving cash deposits from the general public including the Plaintiff without any licence so to do amounted to a serious breach of duty in a high voltage of bad faith and irrationality.

d. The recovery of liquidated cash sum of GH¢4,997,059.00 in suit No. C.12/133/12 and Gh¢7,269,718.39 in suit No. C12/132/12 respectively which the Plaintiffs herein in Sunyani and Techiman respectively deposited with the 4th Defendant as a bank concern on grounds of the 1st, 2nd & 3rd Defendants' admission and contribution to the 4th Defendant's commission of fraud against the Plaintiffs herein.

e. A declaration that the 1st, 2nd & 3rd Defendants owe a duty of care to the Plaintiffs to protect them (Plaintiffs) from illegal and fraudulent activities of banks and financial and non financial institutions in the country but the 1st, 2nd & 3rd Defendants with a blameworthy mindset deliberately and unconscionably breached this duty when the 1st, 2nd & 3rd Defendants failed/refused to stop the 4th Defendant's illegalities and fraudulent activities or behaviour by passively allowing the 4th Defendant to engage in on line forex trading/foreign exchange transactions with the Plaintiffs' deposits or cash investments.

f. A declaration that the 1st, 2nd & 3rd Defendants by their conduct and behaviour instrumentally aided, abetted and or contributed to the fraud perpetrated on the Plaintiffs by the 4th Defendant by partnering/indulging and or allowing the 4th Defendant to operate on its illegal and fraudulent activities/commerciality against the Plaintiffs herein who invested with the 4th Defendant as a bank concern.

g. Interest.

All the Defendants failed to enter an appearance to the writ and the Plaintiffs applied for judgment in default of appearance. The High Court Kumasi granted the application on the 16th day of July 2012 in the following terms;

> ***"BY COURT: Motion is granted as it has no merits. Plaintiffs are at liberty to enter final judgment for relief (d) and interlocutory judgment on the other reliefs. Cost calculated at 10% of the amount stated in relief (d) is allowed for the Plaintiffs."***

It must therefore be noted that the default judgment entered by the High Court Kumasi dated 16/7/2012 against the Applicants and another in Suit No. C12/133/12 was for the sum of Gh¢4,997,059 and costs of Gh¢400,000.00 and in Suit No. C12/132/12 was for the sum of Gh¢7,269,718.38 with costs of Gh¢700,000.00 respectively.

Upon being served with the entry of judgment, the first three defendants applied to have the judgment set aside. The court refused the application. Applicants herein then lodged an appeal with the Court of Appeal in Kumasi against the refusal on the 6th of November 2012. Before the Court of Appeal could determine the matter, the Applicants filed this motion for certiorari to quash the orders made by the High Court, Kumasi on the following grounds:

GROUNDS OF CERTIORARI APPLICATION

1. **That the learned judge erred in granting final judgment in default of appearance for the sums of GH4,997,059.00 and Gh¢7,269,718.39 respectively together with costs of GH400,000 and Gh¢700,000.00 respectively against Defendants jointly and severally in that the agreement on which Plaintiffs commenced action was an illegal agreement and unenforceable thus rendering the judgment void**

2. **The learned judge erred when he gave final judgment in the sum of GH4,997,059.00 and Gh¢7,269,718.39 together with costs of GH400,000 and Gh¢700,000.00 against defendants jointly and**

severally in default of appearance in that the Plaintiff's claim was a claim for fraud and the judge was required to hear evidence before giving final judgment. The refusal of the judge to hear evidence before giving final judgment is an error of law on the face of the record and also a void judgment.

GROUNDS OF OPPOSITION

1. Predictably, the interested parties opposed the application. The two main grounds of their opposition is that the application, even if it had any merits at all had been brought woefully out of time, a clear 178 days from when the grounds of the application first arose, instead of the permissible time limit of 90 days as stipulated in Rule 62of the Supreme Court Rules 1996 C. I. 16.

2. Secondly, that the Supreme Court had no jurisdiction to hear the matter, as the trial judge had acted within jurisdiction and the appropriate step open to the applicants was an appeal against the default judgment and not to invoke the supervisory jurisdiction of this Court.

CONDUCT OF APPLICANTS SOLICITORS IN THE HIGH COURT

Before we deal with the arguments proferred for and against the invocation of the supervisory jurisdiction of this court, we consider it worthwhile to deal with the tardiness of the Applicants in filing the requisite court process on time which unfortunately led to the grant of the default judgment against them in the High Court.

In order to establish the lukewarm attitude of the Applicants and or their legal representation to a suit of this magnitude against them in the High Court, it is perhaps necessary at this stage to refer to depositions contained in paragraphs 1, 2, 3 and 4 of the affidavit sworn to by Mrs. Comfort Ahwoi in support of the instant application in suit No. J5/15/2013.

" I, Comfort Ahwoi (Mrs) of No. 2 Moses Foh Amoaning Street, East Legon, Accra make oath and say as follows:

1. That I am the deponent herein and a Senior Manager in 1st Applicant Bank, and I have the consent and authority of 2nd and 3rd Applicants to swear to this affidavit in support of this motion which facts unless otherwise stated are within my personal knowledge.

2. That by a writ of summons dated the 29th day of June, 2011 Plaintiff sought for some reliefs against Applicants together with 4th Defendant therein including relief (c) which was for " A Declaration that whatever the 1st , 2nd and 3rd Defendants did, whether deliberately, negligently or by omission or commission by allowing, permitting or indulging the 4th Defendant to illegally and fraudulently operate by receiving cash deposits from the general public including the Plaintiff without any Licence so to do amounted to a serious breach of duty in high voltage of bad faith and irrationality". (d) The recovery of the judgment debt of GH¢7,269,718.38 from the 1st. 2nd & 3rd Defendant which was obtained in favour of the Plaintiff against the 4th Defendant in suit Nos RPC102/2012 and HRC/24/12A being the quantum of cash deposits with the 4th Defendant inclusive of cost and interest on the account of the 1st, 2nd and 3rd Defendant admission and contribution to the 4th Defendant's commission of fraud against the Plaintiffs". Attached hereto as exhibit BOG 1 and counsel informs me that at the hearing he would seek leave to refer extensively to the writ of summons and statement of claim.

3. **That 1st Applicant sent the Writ of Summons together with the Statement of Claim to our external solicitors on the 4th day of July 2012. Unfortunately the solicitor handling the matter was involved in an accident on the 5th day of July, 2012 and as a result our solicitors delayed in filing in appearance and therefore entered appearance on the 17th day of July, 2012. Our Solicitors further applied by motion for a transfer of the suit to Accra on the grounds that Kumasi was not the proper place in that 1st**

Applicant has its headquarters in Accra whilst 2nd and 3rd Applicants are also resident in Accra.

4. That unknown to us, the interested parties had filed an exparte application for judgment in default of appearance and the High Court presided over by Mr. Jacob Boon granted final judgment for relief (d) quoted above in paragraph 2 and also interlocutory judgment for the other reliefs endorsed on exhibit BOG1 i.e. the Writ of Summons and Statement of Claim. The interested parties subsequently served us with an entry of judgment which was subsequently amended. Attached hereto as BOG2 is a copy of the amended entry of judgment. "

It must be noted that, the said depositions were repeated verbatim in suit No. JS/14/2013 save for the amount of GH¢4,997,059.00.

The cumulative effect of the depositions in the preceding paragraphs indicates quite clearly the following facts:

1. That the deponent is a Senior Staff of the 1st Applicants and has their authority to swear to the affidavit.

2. An admission by the 1st Applicants, that the interested parties herein, served their writs of summons against the Applicants claiming inter alia reliefs for recovery of a judgment debt of GH¢7,269,718.38 and Gh¢4,997,059.00 respectively.

3. That the 1st Applicants, instructed their external Solicitors on the 4th day of July, 2012 to handle the suit on their behalf. It is instructive at this stage to note that the writ itself was issued on the 29th June, 2012 and the external Solicitor was instructed barely five days after the filing of the writ of summons.

4. That the external Solicitor of the 1st Applicant was involved in an accident on 5th July 2012 and could therefore not enter appearance to the writ of summons until the interested parties obtained default judgment on 16th July 2012.

5. That the entry of appearance by the external Solicitors of the 1st Applicants to the writ on 17th July 2012 was therefore entered after the grant of default judgment to the interested parties.
6. That the external Solicitors of the 1st Applicants applied by motion for a transfer of the suit to Accra on the grounds that Accra was the convenient forum.

The above facts are to us mind blowing. This is because, we cannot understand how and why, the Central Bank, i.e. the 1st Applicants, having apprized themselves of the reliefs being claimed against them by the interested parties handled the case the way , they did.

Granting that they duly instructed their external Solicitors on 4/7/2012 only for the Solicitor to be involved in an accident on the 5/7/2012, the fact still remains that, the inability of one individual to enter appearance per se cannot, and should not have prevented and deprived the corporate office of the said external Solicitors from entering appearance.

Due to the gargantuan nature of the claims against the Applicants, one would have expected a much more diligent and fast approach towards the handling of the suit. We would be very much surprised, if the external Solicitors of the 1st Applicants is a one man chambers such that with his incapacitation, work in his office automatically came to a halt. Even if that is the situation, we expect the legal department of the applicants to have entered appearance in the meantime to ensure that the timelines provided under the rules of procedure are complied with.

We have taken time to delve into this matter because we are of the considered opinion that the time has indeed come for this court to comment on the manner in which legal representation of state and para-statal interests are handled in our law courts. The quality of legal representation of these institutions leaves much to be desired.

Professionals of whatever type engaged by those to whom their services are required, need to offer dedicated, committed and competent services to those

who engage them. There is a saying that to whom much is given, much is expected. To have the privilege of being appointed as external Solicitors of the 1st Applicants is no mean responsibility but one that has to be discharged with diligence and competence.

Whilst we have not been happy with the quality of legal service that was rendered the 1st Applicants in the High Court which unfortunately led to the default judgment being granted against them, we note with appreciation the sentiments which were expressed by the Court of Appeal in the case of ***Agyeman v Ghana Railway and Ports Authority, Takoradi, (1969) CC 60***, where the court in expressing its disgust in the conduct of a Solicitor in the Public Service whose conduct led to the grant of default judgment against a public entity, commented thus:

> "*We would like to make the point that lawyers engaged in the Public Service and who are called upon to represent public institutions in law suits have the responsibility to ensure that public funds are not improperly expended through their default, and that they must exhibit the same degree of diligence as is required of a private practitioner. There cannot be one standard of professional conduct for the lawyer in the public service and another for the lawyer in private practice.*"

Even though we have not been made aware of the identity of the external Solicitors of the 1st Applicants whose involvement in an accident prevented him from entering appearance on time, we believe that whether it is a private practitioner or someone in a public institution, the same high degree or standard of professional conduct is required for all lawyers in their professional conduct. Let us now revert to the substance and merits of the instant application.

SUBMISSION OF COUNSEL

Learned counsel for the Applicants, Samuel Codjoe anchored his submissions with the following arguments to amplify those in his statement of case.

1. Learned counsel argued that, even though the learned High Court Judge had jurisdiction in the case initially, he went out of jurisdiction when he granted a final judgment in respect of relief (D) which according to learned counsel deals with fraud and referred the court to order 10 r(1) and (6) of the High Court, (Civil Procedure) Rules, 2004 C.I. 47.

Learned Counsel also referred to the following cases to buttress his submission.

1. **In Re-Appenteng (Decd); Republic v High Court, Accra; Ex-parte Appenteng & Another [2005-2006] SCGLR 18** and

2. **Republic v High Court, (Fast Track Division) Accra - Ex-parte Electoral Commission – Mettle Nunoo and others Interested Parties – [2005-2006] SCGLR 514 at 544**

Learned counsel for the Applicants therefore submitted that, being a judgment in respect of which fraud was pleaded, the leaned judge erred in granting a default judgment without the fraud being proved.

2. The arguments of learned counsel for the applicants on the objection raised by the interested parties that the certiorari application has been brought out of time has been very robust and ingenious. In this regard, the shield of learned counsel has been to rely on the unreported majority decision of this court in Civil Motion No. J8/1/2011 dated 20/12/2011 intitutled ***Intelsat Global Sales & Marketing Limited*** *Plaintiff/Respondent/Respondent v* ***Network Computer System Ltd. Defendant/Appellant/Applicant***

It is the contention of learned counsel for the applicants that, being a void judgment because the judgment was not properly obtained, time does not run, in the sense that it is a nullity.

Learned counsel concluded by arguing that, under section 4 of the Banking Act 2004 (Act 673) anyone who operates or carries on the business of Banking without a licence engages in an illegal conduct and is liable to be prosecuted. He therefore submitted that this court has a duty to enforce statute by referring to

the case of ***Republic v High Court, Ex-parte National Lotteries Authority, [2009] SCGLR 390 at 402*** counsel finally submitted that being a void judgment, order 81 of C. I. 47 cannot apply. Other cases referred to by Learned Counsel for the applicants are:

1. ***Mosi v Bagyina [1963] 1 GLR 337 S.C***

2. ***Republic v High Court, Cape-Coast, Ex-parte Ghana Cocoa Marketing Board (Apotoi III – Interested Party) [2009] SCGLR 603 holding 4***

3. ***Republic v High Court, (Fast Track Division) Accra, Ex-parte Speedline Stevedoring Co. Ltd. (Dolphyne Interested Party) [2007-2008] SCGLR 102***

4. ***Nungua Chieftaincy Affairs In re Odai Ayiku v A.G. (Borketey Laweh XIV) [2010] SCGLR 413***

5. ***Ayikai v Okaidja II [2011] 1 SCGLR 205, at 218***

On his part, learned counsel for the interested parties, Mr. Hanson Kodua rested his arguments on the following:

1. That the instant application has been brought in flagrant violation of Rule 62 of C.I. 16 which stipulates that applications of this nature ought to be brought within 90 days except by leave of the court. Learned Counsel referred to the unreported case of this court, dated 25/4/2012 CM. No. J5/8/2012 intitutled ***Republic v High Court, Accra, Ex-parte Ghana Medical Association, (Chris Ackumey – Interested Party)***

2. Secondly, learned counsel submitted that, the issue of the fraud having already been decided and adjudicated upon in an earlier suit between the parties, the matter had become a liquidated sum and that, the trial judge was therefore competent to have granted the default judgment. He concluded by stating that the Interested Parties were not enforcing an

illegal contract, and that the learned trial Judge acted within his jurisdiction.

WHAT THEN ARE THE LEGAL ISSUES INVOLVED?

SUPERVISORY JURISDICTION OF THE SUPREME COURT

The law is now well settled that in order for the Supreme Court to exercise its supervisory jurisdiction, the superior court must have made an error patent on the face of the record. The Court expressed it in these terms in the case **of Republic v High Court Accra, ex parte Commissioner on Human Rights and Administrative Justice (Addo interested party) [2003-2004]SCGLR312**

"The court would restate the law governing exercise of judicial review as follows: Where the High Court (or for that matter the Court of Appeal has made a non-jurisdictional error of law, which was not patent on the face of the record…, the pleadings, if any, and the adjudication but not the evidence nor the reasons, unless the tribunal chose to incorporate them, the avenue for redress open to an aggrieved party was an appeal, not judicial review. ***Therefore, certiorari would not lie to quash errors of law which were not patent on the face of the record and which had been made by a superior court judge who was properly seised of the matter before him or her****. In that regard, an error of law made by the High Court judge or the Court of Appeal, would not be regarded as taking the judge outside the court's jurisdiction, unless the court had acted ultra vires the constitution or an express statutory restriction validly imposed on it …* ***Policy requires that some errors of law by the High Court and Court of Appeal Judges should only be appealable and not subject to judicial review.*** *Otherwise judicial review would supplant the system of appeals, which has been carefully laid down in the 1992 Constitution and the Courts Act, Act 459 as amended… We believe there to be a sound policy reason for keeping*

narrow the category of errors by the Superior Courts that can be made subject to judicial review". Emphasis supplied

The above view has been supported in a long line of respected judicial authorities, see for example the case ***of Republic v Court of Appeal , ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612,*** where our respected sister Wood JSC (as she then was) put the principle so eloquently when she spoke on behalf of the court thus:

> **"The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then that the error (s) of law as alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter."Aminor, trifling, inconsequential or unimportant error which does not go to the core or root of the decision complained of, or stated differently, on which the decision does not turn would not attract the courts supervisory jurisdiction". Emphasis supplied.**

See also the case of ***Republic v High Court, Ex-parte Industrialization Fund for Developing Countries and Anr. [2003-2004] SCGLR 348*** where the Supreme Court held that certiorari was a discretionary remedy which would be issued to correct a wrong or clear an error of law on the face of the record of the court.

It was made clear by the Supreme Court that, in case of an error not apparent on the face of the record, **the avenue for redress is by way of an appeal**. The court, per **Bamford Addo JSC emphasized the fact that when a High Court, acts within it's jurisdiction, it's decision which is erroneous is normally corrected by appeal whether the error is one of fact or law.**

Even though learned counsel for the applicants has referred to a number of decided cases, it is clear most of them are not applicable to the circumstances of this case.

For example, in the ***Republic v Fast Track High Court, Accra, Ex-parte Electoral Commission, (Mettle-Nunoo case)*** Prof. Ocran JSC of blessed memory, put the matter succinctly as follows:-

> ***"Certiorari lies not only to review and quash a decision taken in the absence of initial jurisdiction, but also in the exercise of excess jurisdiction as when a court initially clothed with jurisdiction, embarks upon a path unwarranted or uncalled for in the disposition of the specific matter before it."***

The Supreme ***Court In Re Appenteng*** expressed similar sentiments per Prof. Ocran JSC that the powers of the Supreme Court when its supervisory jurisdiction is invoked are wide under article 132 of the Constitution 1992 ***and may instead of specific orders, issue directives as a means of enforcing its supervisory jurisdiction.*** In that regard, the court held that the High Court had jurisdiction under the Public Trustee Ordinance, 1952 to appoint the Public Trustee to manage the estate or trust.

Applying these principles to the circumstances of this case, it is an undeniable fact that the two suits were properly placed before the High Court. In other words the High Court had jurisdiction to hear and determine them.

Secondly, it must be noted that the High Court Judge also had jurisdiction to entertain an application for the default judgment. This is because, the rules of court as provided for in Order 10, rule 1 (1) of the High Court (Civil Procedure Rules)2004 C. I. 47 provide that upon service of a writ of summons on a defendant, if that defendant fails to file appearance the plaintiff may enter final judgment in liquidated amounts as is the case here.

It is therefore quite clear that in all respects, the learned trial judge acted within his jurisdiction when he adjudicated upon the motion that was brought before him for judgment in default of appearance.

At that stage of the proceedings, it appears that, once the court has jurisdiction, then it has the capacity to either determine the case wrongly or rightly, in other words, the Judge can be right or wrong in the decision he gives on the motion for judgment in default.

What is the role of a trial judge when an application for default judgment is brought before him? In essence, such applications are not contested and are in general granted except where there are manifest and clear obvious cases of error apparent and patently clear on the face of the application as regulated by the appropriate rules of procedure.

Looking at the record before the trial court which is before this court, can it be said in line with the respected judicial decisions referred to supra that the judge either lacked jurisdiction or exceeded jurisdiction or that there was something very wrong with the application? we do not think so.

The search report indicated that, the applicants were served with the writs of summons on 3rd July, 2012 and the application for default judgment was granted by the court on 16th July 2012. It was only on the 18th July 2012 that the Applicants filed an application to set aside the default judgment. The Applicants were clearly in default.

It is thus clear that the learned trial judge acted within the limits of his jurisdiction when he granted the orders complained of. The complaint of the applicants is therefore non-jurisdictional.

This court, in the ***Republic v High Court, Ex-parte G.M.A, (Chris Ackumey*** case,) already referred to supra, laid down the grounds upon which this court proceeds to exercise its supervisory jurisdiction thus:

1. Want or excess of jurisdiction
2. Where there is an error of law on the face of the record
3. Failure to comply with the rules of natural justice, and
4. The Wednesbury principle

There is no doubt that the High Court Kumasi was endowed with jurisdiction when it made those orders. Assuming the court made an error in granting the relief D for the liquidated sum without taking evidence, could that be described as an error patent on the face of the record? Certainly not. The path open for the aggrieved party was to have appealed against the decision. In fact they did appeal against the decision as evidenced by Exhibit IGIT 2. It is therefore an

abuse of the process of the court for them to have filed this application in the Supreme Court to have the orders made by the court quashed.

In dismissing the certiorari applications, we take note of the fact that the applicants have not succeeded in making a strong case to invoke the supervisory jurisdiction of the court. This court has in the cases referred to supra set out in great detail the parameters within which the supervisory jurisdiction of this court will be invoked.

Despite those clear directives, Solicitors and or parties continue to inundate this court with myriad of cases which does not meet the standards set by this court.

In the instant case, a perusal of the endorsement on the writs of summons and the statements of claim filed by the Interested Parties in support of their cases before the High Court indicated that it was not a clear cut case for the invocation of this courts supervisory jurisdiction.

For example, the issue of illegality of the contract required evidence and not one which was patent on the record. Secondly, the issue of fraud if carefully considered would have revealed that it was made conditional with the use of the word "if".

This meant therefore that the Interested Parties had made the issue of the fraud conditional on some events. Fortunately, from the pleadings, those events had been adjudged in a prior suit before the court. To some extent therefore there is some legitimacy in the claims of the Interested parties that the amounts claimed were for liquidated amounts which had been duly stated. If the applicants had filed their Defence, their version of the facts would have been stated.

This court therefore wishes to sound a serious note of caution to all those who intend to invoke the supervisory jurisdiction of this court to ensure that they not only comply with the provisions of article 132 of the Constitution but also the guidelines stated in the ***Ex-parte CHARAJ*** and ***Ex-parte Tsatsu Tsikata cases***, referred to supra in this judgment.

We will like to conclude this aspect of the Ruling by reiterating the caution of our worthy and respected brother Dr. Date-Bah JSC in the case of the ***Republic v High Court (Commercial Division) Accra Ex-parte the Trust Bank Ltd.***

(Ampoma Photo Lab Ltd & three others –Interested Parties) 2009 SCGLR 164 at 166 as follows:

> *"In my view, the combined effect of two authorities, namely* ***Ex-parte CHRAJ, [2003-2004] SCGLR 312*** *and Ex****-parte Tsatsu Tsikata [2005-2006] SCGLR 612*** *results in a statement of law which is desirable and should be re-affirmed.* ***This court should endeavour not to backslide into excessive supervisory intervention over the High Court in relation to its errors of law. Appeals are better suited for resolving errors of law.*** *Even where a High Court makes a non-jurisdictional error which is patent on the face of the record, it will not be a ground for the exercise of the supervisory jurisdiction of this court unless the error is fundamental. Only fundamental non-jurisdictional error can find the exercise of this court's supervisory jurisdiction."*

Based on the above statement of the law which we endorse, it is our hope and expectation that legal practitioners will take a guide from it and comply. This will reduce the frequent use of the invocation of the supervisory jurisdiction of this court in cases which are clearly unwarranted. The supervisory jurisdiction should not be used to supplant appeals which are better suited to deal with cases which are not very clear cut for the supervisory jurisdiction of this court.

NULLITY OF THE DEFAULT JUDGMENTS

Learned Counsel for the Interested parties argued that the application was filed out of time. Rule 62 of C.I 16 provides

> *"An application to invoke the supervisory jurisdiction of the Court shall be filed within 90 days of the date when the grounds of the application first arose unless the time is extended by the Court."*

As Counsel for the interested parties argued, the applicant was served with the orders of the High Court on the 18th of July, 2012. This was when the grounds for the application first arose. The applicant however waited till the 16th of January 2013 before bringing the present application. This is clearly well over the ninety days as stipulated by the Supreme Court Rules.

However, learned Counsel for the applicant argues that since the orders were a nullity, time does not run. With all respect to Counsel, the present application is

not concerned with the merits of the case. As stated in the case of **Republic v High Court, Sekondi; ex parte Ampong[2011] 2 SCGLR 716,**

> ***"It was well settled that certiorari was not concerned with the merits of the decision; it was rather a discretionary remedy which would be granted on grounds of excess or want of jurisdiction and/or some breach of rules of natural justice; or to correct a clear error of law apparent on the face of the record. The error of law must be so grave as to amount to the wrong assumption of jurisdiction; and it must be so obvious as to make the decision a nullity. Where the error of law or fact was not apparent on the face of the record, the applicant's remedy would lie in an appeal..."***

This court has stated times without number that where an applicant is clearly out of time, without an extension granted by the court, any process filed out of time is a nullity and no jurisdiction is conferred on any appellate court or adjudicating body, unless the contrary is shown.

The Court is resolute that the provisions of the rules of the Supreme Court must be complied with otherwise it lacks the jurisdiction to entertain the application. Where these rules are not complied with but applications are granted nonetheless, it has the tendency to undermine the integrity of the judicial process. See **Doku v Presbyterian Church of Ghana [2005-2006] SCGLR 700.**

It is quite clear and manifest that the instant application invoking this courts supervisory jurisdiction has been filed out of time from the date when the grounds for the application first arose which can be reckoned from the date the applicants became aware of the orders made by the High Court, Kumasi on the 16th day of July 2012. From the records available, this date is 18th July 2012.

The applicants filed this application before this court on 16th January 2013 and this puts the applicants completely out of time reference rule 62 of the Supreme Court Rules, 1996 C. I. 16 already referred to supra which stipulates a 90 day period within which such applications can be filed without leave of the court.

See the cases of ***Republic v High Court Fast Track Division Accra, Ex-parte State Housing C. Ltd. No. 2 (Koranten-Amoako- Interested Party) 2009 SCGLR 185*** and also ***Republic v High Court, Kumasi, Ex-parte Mobil***

Oil (Ghana Ltd) Hagan, Interested Party [2005-2006] SCGLR 312 which all deal with acceptable and permissible time limits within which the supervisory jurisdiction of this court can be invoked without leave. The computation of this time is done from the date the grounds for the application first arose.

The Applicants herein have not denied that they are out of time before this court. They however raise a very fundamental issue which if sustained has the effect of nullifying the entire process before the High Court, Kumasi. This is to the effect that since the High Court Judge granted the default judgment in respect to the claim founded on fraud without proof, the entire proceedings therein are a nullity and must be set aside by certiorari since time does not run against void judgments.

Learned Counsel for the Applicants has anchored the thrust of his arguments on the ***Ex-parte Speedline Stevedoring Co. Ltd., (Dolphyne case)*** and the recent unreported judgment of this court in the Intelsat case, already referred to supra. We will set out the facts in the **Intelsat case** in some detail and this will put in proper perspective and context whether the reliance on this case to nullify the entire proceedings before the High Court Kumasi on 16th July, 2012 is justified.

The Supreme Court in the ***Ex-parte Speedline Stevedoring Co. Ltd., (Dolphyne, Interested Party)*** case, already referred to, stated quite as follows:

> *"Even if, as contended by Counsel for the interested party, the order for certiorari issued by the Supreme Court on 8th May 2001 in the previous proceedings involving the parties, was founded on an application brought out of time, the same is not thereby vitiated as a nullity.* ***This is because time limits cannot apply to cases or judgments or orders which are a nullity****. The principle has been developed to the stage that no matter by what means an invalid order of a court comes to the notice of a superior Court, the same has to be set aside.* ***Consequently, even if a superior court had no jurisdiction to entertain an appeal because the requisite leave was not obtained, once the court concludes that the court below gave the decision without jurisdiction, it is bound ex-debito justitiae to***

vacate it, no matter how and in what stage or form the appeal has come to the Court." Emphasis supplied.

From the above, it is clear the court relied on cases such as ***Mosi v Bagyina*** already referred to and ***Karletse-Panin v Nuro [1979] GLR 194 C.*** A, just to mention a few.

We have also looked at other respected judicial authorities referred to like the following:

1. **In re Nungua Chieftaincy Affairs, already referred to supra**
2. **Ayikai v Okaidja III also already referred to supra, and**
3. **Republic v High Court , (Fast Track Division) Accra Ex-parte National Lottery Authority, (Ghana Lotto Operators Association and others Interested Parties) [2009] SCGLR 390** just to mention a few.

FACTS IN THE INTELSAT CASE

For a proper understanding of the facts of the case, we will quote them as stated in the minority judgment of our respected brother Gbadegbe JSC

*"We have before us at the instance of the applicant herein, a motion on notice for stay of execution of a foreign judgment in respect of which the High Court, Accra had on the 16 October 2006 granted an order for its registration under Order 71 rule 2 of the High Court (Civil Procedure) Rules, 2004, CI 47. Following the registration of the judgment and after unsuccessfully seeking to have the order that authorized the registration set aside, the applicant applied to the High Court for an order of stay of execution. In the body of the motion paper, the applicant sought from the High Court, Accra "**an order for stay of execution of the order granting leave to register the foreign judgment".** The application was determined against it on 13 October 2010. In the ruling of the High*

Court that is exhibited to the processes herein as GC 6, the learned judge of the High Court directed that the judgment debt be paid into court within thirty days from the date of the order. ***The applicant repeated its application for stay of execution to the Court of Appeal, which application was dismissed on 7 December 2010. It repays to say that in the application to the Court of Appeal, the applicant sought the same relief as that which was demanded from the High Court previously****. In their ruling refusing the application, the learned justices of the Court of Appeal ordered the applicant to pay 50% of the judgment debt into court within sixty days from the making of the order.*

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

Based on the above, it was contended that **the order of the Court of Appeal was a nullity as it was made in defiance of the mandatory provisions of section 17 of the Bodies Corporate (Official Liquation) Act, 1963 (Act 180).** The substance of the objection is to the effect that since the applicant company **was in the process of liquidation pursuant to a special resolution of the company dated 15th October 2009 no proceeding except that by a secured creditor can be commenced or proceeded with and that consequently the order of the Court of Appeal made at the**

hearing of the application for Stay of Execution whose refusal to this court by way of an appeal was null and void. It should be noted that this was an appeal in which case, the entire record of proceedings from the trial court was before the Supreme Court.

Atuguba JSC , in his majority decision in the Intelsat case supra, after reviewing a lot of authorities and based on the facts referred to above held in part as follows:

> ***"There is therefore no doubt that the order for the registration and enforcement of the foreign judgment is a proceeding which should not be continued once it became clear at the Court of Appeal level that the defendant company was in liquidation.*** *The Court of Appeal by granting a conditional stay of execution of the registered judgment clearly meant that in default the judgment creditor could go ahead with the process of execution. That would be contrary to S. 17 of Act 180 aforesaid.*

Concluding the majority decision, which was concurred in by Adinyira (Mrs) and Akoto Bamfo (Mrs) JJSC, Atuguba JSC stated thus:-

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

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

Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties) 2009 SCGLR 390. *At 397 I said:*

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

At 402 Date-Bah JSC also stoutly said:

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

But this was the effect of the order granted by the learned judge. *The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders*. The end of the judicial oath set out in the Second Schedule of the 1992 Constitution is as follows: **"I will *at all times uphold*, preserve, protect and defend the Constitution and *laws of the Republic of Ghana.*" This oath is *surely inconsistent with any judicial order that permits the infringement of an Act of Parliament.*"** (e.s)

WHAT THEN ARE THE DIFFERENCES IF ANY BETWEEN THE INTELSAT CASE AND THE INSTANT ONE?

1. The originating process in the Intelsat case to this court was an appeal, whilst the instant one is an application invoking the supervisory jurisdiction

of the court by way of certiorari. Whilst this case is an application based only on the records made available to the court and relevant for the purpose, the Intelsat case was one based on an appeal against the stay of Execution orders made by the Court of Appeal. Being an appeal, the court had the benefit of the entire proceedings from the trial High Court to this court. The court was thus better placed in the Intelsat case to determine exactly the correct parameters of the issue of nullity as opposed to the difficulty faced by us in this instant application.

2. Secondly, a statute, i.e. Act 180 section 17 thereof which specifically provided that the proceedings involving the registration and enforcement of a foreign judgment should be discontinued once it became clear that the company in issue was under liquidation.

3. Thirdly, from the judgment in the Intelsat case, it is clear the issue of the company in liquidation was not in doubt.

In view of the above, we are of the considered view that the invitation by learned counsel for the applicants, to this court to accept hook, line and sinker the effect and operation of the majority decision in the Intelsat case is rejected as unattractive. After a review of all the decided cases with the facts of this case, we are of the considered view that the issue of nullity has not been well made out.

4. From the records available, it is certain that the Interested Parties mounted several suits and or applications which culminated in the default judgment granted against the applicants on the 16th July 2012. From those records, incomplete as they are, the interested parties contended that the issue of fraud has been determined in an earlier suit and therefore there was no breach of the procedural requirements of order of the High Court, (Civil Procedure) Rules, 2004, C.I. 47 which required proof whenever fraud was alleged.

Finally, it should also be noted that, because we do not have the entire record and proceedings of all the cases and applications related to this application before us, it is very difficult, if not impossible for this court to understand the

breach if any of the regulatory functions of the applicants in ensuring that operations of companies like Onward Investment Ltd. are controlled in accordance with the Banking Act.

For example, members of the public who are lured to transact business with any company describing itself as a financial institution, publicly with print and electronic advertisement can assume that there is regularity with the activities of the business entity unless the contrary is shown.

CONCLUSION

In conclusion, we are of the considered opinion that the nullity complained of in this case is not conclusive as will enable this court to nullify the judgments of the court dated 16th July, 2012 in suit Nos. C12/132/12 and C12/133/12 respectively.

Before we conclude this Ruling, we would like to refer to the opinion of Wood JSC (as she then was) in the case of ***Republic v High court, (Fast Track Division) Accra, Ex-parte Electoral Commission (Mettle Nunoo & Others – Interested Parties [2005-2006] SCGLR 514***, particularly at 537-538.

In that case Wood JSc (as she then was) in reacting to arguments on the propriety of the application for the exercise of supervisory jurisdiction under article 132 of the Constitution stated thus:

> *"In **British Airways v Attorney-General [1996-97] SCGLR 547**, we observed that our constitutional mandate under article 132, is not limited to the issuing of the traditional or conventional writs of certiorari, mandamus, prohibitions etc. under Articles 132 and 161. Our learned Sister Bamford-Addo JSC, explained in the case British Airways (at pages 552-553) **..."provide that apart from the prerogative writs, other orders and directions can be made in the exercise of this court's supervisory jurisdiction over all courts inappropriate cases."***

At page 554 of the report, Bamford Addo JSC adopted with clear approach, the following dictum of Charles Hayfron Benjamin JSC in ***Republic v High Court,***

Sekondi, Ex-parte Slippi Mensah, Supreme Court, 24th May, 1994, unreported namely:

> ***"Thus, the distinction made in Ex-parte Yiadom I (supra) (Republic v High Court, Registrar, Kumasi, Ex-parte Yiadom 1, Supreme Court, 24th March 1986, digested in [1984-86] GLRD 132 and [1984-86] 2 GLR 606) has gained constitutional acceptance. The purpose of the constitutional provision is to enable the Supreme Court and the High Court to control the actions of all other courts in matters not necessarily involving the issuance of prerogative writs and to issue such orders and give such directions as will ensure fairness and the expeditious disposal of cases."***

Wood JSC, (as she then was) continued thus:

> ***"These orders and directions are issued in the Supreme interest of justice, to prevent illegalities, failure of justice, ensure fairness and facilitate the expeditious disposal of cases."***

In the instant application, one thing that is very clear is that there is a pending appeal at the Court of Appeal. Despite the pendency of this appeal which can over turn the fortunes of the Interested Parties, there appears to be some indecent haste on the part of the Interested Parties to execute the said judgments.

In view of the rationale in the observations made by Wood JSC (as she then was) in her majority opinion in the Ex-parte Electoral Commission case, there is abundant judicial authority for the proposition that this court can in appropriate circumstances give directions in cases such as the instant one in order to ensure that justice, equity and fairness prevails. See also article 132 of the Constitution. This court indeed has wide powers when it exercises its supervisory jurisdiction.

This is particularly so when we consider that the Supreme Court has in its decision in the **Republic v High Court, Cape Coast, Ex-parte Ghana Cocoa Board, - Apotoi III – Interested Party** already referred to, stated in clear terms as follows:

"*So long as the separate requirements of an appeal and of an application for the exercise of the supervisory jurisdiction have been complied with,* ***a party should be able to avail himself or herself with either avenue of redress at the same time.*** *The Supreme Court would therefore depart from any previous cases which had decided otherwise pursuant to article 129 (3) of the 1992 Constitution".*

By the above decision, the Supreme Court put to rest any lingering doubts as to whether a party or applicant can avail himself of the remedies of an appeal and of the supervisory jurisdiction of the Court at the same time.

With this conclusive decision of the Supreme Court, we are of the view that, once the substantive appeal by the applicants against the High Court refusal to set aside the default judgment is pending, it is prudent for this court to make the following orders.

As a result, despite the fact that these applications are dismissed as untenable, this court on the principle of ensuring fairness and justice hereby grants a Stay of Execution of all processes aimed at executing the judgments of the High Court, Kumasi namely Suit Nos. C. 12/132/12 and C12/133/12 respectively dated 16th July 2012 until the final determination of the appeal currently pending before the Court of Appeal.

We hereby direct the Applicants herein, to take such steps that are reasonably necessary such as settlement of the record of their appeal against the decision of the High Court to the Court of Appeal, fulfillment of the conditions imposed therein and generally ensure that the appeal record is ready for transmission to the Court of Appeal within a reasonable period of three (3) months to ensure a speedy determination of the rights of the parties.

For the avoidance of doubts, the Registrar, High Court Kumasi, and the Registrars' of the Court of Appeal, Kumasi, Accra and Cape Coast and office of Judicial Secretary respectively are to be apprized of the orders

of this court granted in this ruling to ensure that there is absolute compliance accordingly.

Save for the above directions, the applications are dismissed.

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

(SG**D) G. T. WOOD (MRS)**
CHIEF JUSTICE

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

(SGD) A. B. AKAMBA
JUSTICE OF THE SUPREME COURT

COUNSEL

SAMUEL CODJOE ESQ. FOR THE APPLICANTS.

HANSEN KWADWO KODUAH ESQ.(WITH HIM MRS SUMMERS DARKO FELIX DATSOMOR) FOR THE RESPONDENTS.