IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: ATUGUBA, J.S.C. (PRESIDING)

BAFFOE BONNIE, J.S.C.
AKOTO BAMFO (MRS), J.S.C.
BENIN , J.S.C.
AKAMBA, J.S.C.

CIVIL MOTION

NO.J5/31/2014

5TH NOVEMBER 2014

THE REPUBLIC

VRS.

THE HIGH COURT (FINANCIAL DIV.) ACCRA

EX PARTE: JAMES AWUNI - - - APPLICANT

THE CHIEF EXECUTIVE OFFICER - - - INTERESTED PARTY

FINANCIAL INTELLIGENCE

RULING

BENIN, JSC:-

This is an application for judicial review by way of an order of certiorari brought under Article 132 of the 1992 Constitution and Rule 61(1) of the Supreme Court Rules C.I. 16 as amended by C.I. 24. The applicant seeks the following reliefs from this court:

i. **An order of certiorari to bring up into this Court for purposes of being quashed the order of the High Court (Financial Division) Coram: Her Ladyship Justice Afia Serwa Asare Botwe dated 24th October 2013 confirming the freezing of the Applicant's account and other assets within the jurisdiction.**
ii. **An order of certiorari to bring up into this Court for purposes of being quashed the ruling of the High Court (Financial Division) Coram: Her Ladyship Justice Afia Serwa Asare Botwe dated 7th March 2014 dismissing the preliminary legal objection raised against the admissibility of an FBI report for non-compliance of section 161 of the Evidence Act.**

The grounds for the application are three, namely:

a) **Her Ladyship exceeded her Jurisdiction when she confirmed the freezing of the Applicant's account in an order dated 24th October 2013 without giving the Applicant hearing.**
b) **Her Ladyship exceeded her jurisdiction when she ordered the transfer of the Applicant's funds lodged with Ecobank into the Exhibit account of the Respondent with the Bank of Ghana.**
c) **That Her Ladyship exceeded her jurisdiction when she dismissed the preliminary legal objection raised against the admissibility of an FBI report for non-compliance of section 161 of the Evidence Act.**

Facts of the case

The Applicant operates an account with Ecobank (Ghana) Ltd, hereafter called the Bank. In or around July 2013 an inward remittance of US$10,000.00 was credited to the Applicant's account domiciled at the Kotobaabi branch of the

Bank. The Applicant was duly notified of the remittance by the Bank via a text message. The Applicant could not access the money because his account was frozen by the Chief Executive Officer (CEO) of Financial Intelligence, interested party herein. The High Court confirmed the freezing of the account by an order dated 24th October 2013 upon an application ex parte by the CEO brought under section 47 of the Anti-Money Laundering Act, 2008 (Act 749), hereafter called the Act. The Applicant made an application to the High Court to set aside the order and defreeze the account. In response to the said application the CEO produced what appeared to be a report emanating from the United States Federal Bureau of Investigations (FBI) and purporting to implicate the Applicant in some fraudulent deal resulting in the transfer to his account, the subject-matter of this action. The Applicant complains that he was denied a hearing before the High Court made the order of 24th October 2013. He also complains that the FBI report was accepted by the court in utter disregard of the provisions of section 161 of the Evidence Act. These complaints have precipitated the present application to this court.

We begin with a consideration of the second relief set out above. It has been said time without number that an error of law within jurisdiction must not be the subject of judicial review, it is a proper subject for appeal unless it's an error apparent on the face of the record. Where a judge acts within jurisdiction but refuses to apply the provisions of a statute to the facts of the case before him/her it is not in excess of jurisdiction. Or where a judge overrules a preliminary objection as regards the admissibility or otherwise of a document the judge cannot be said to have acted in excess of jurisdiction. The editors of Black's Law Dictionary 9th Edition at page 645, define 'excess of jurisdiction' to mean:

1. **'when the court has no power to deal with the kind of matter at issue;**
2. **when the court has no power to deal with the particular person concerned; or**
3. **when the judgment or order issued is of a kind that the court has no power to issue'.**

The learned editors also add that a court will be acting in excess of jurisdiction if it departs from 'recognised and established requirements of law, despite apparent adherence to procedural form, the effect of which is a deprivation of one's constitutional right'.

To the above may be added another principle derived from the Australian case of TSIMPINOS V. ALLIANZ (AUST) WORKERS' COMPENSATION (SA) Pty. Ltd. (2004) 88 SASR 311; (2004) 233 LSJS 300 that there is excess of jurisdiction where the court does an act, the doing of which is within its power but then it performs the act in breach of the conditions which authorize the doing of acts of that class or nature.

Applying the foregoing principles to this case, the Applicant's contention is that the trial Court should have discountenanced the FBI report since it did not satisfy the provisions of section 161 of the Evidence Decree. Assuming for the sake of argument that the Applicant's position is correct, does that mean the trial judge exceeded her jurisdiction as claimed by the Applicant? Certainly not. The trial Judge might have erred by admitting the report but surely it was not an act in excess of jurisdiction. The second relief sought cannot therefore be granted.

The first relief is founded on two grounds, namely i. a breach of the rules of natural justice, in the sense that the Applicant was not heard before the order was made against him and ii that the trial court Judge exceeded her jurisdiction by ordering a transfer of the Applicant's account with the Bank to be lodged in the exhibits account of the Respondent with the Bank of Ghana.

To address these issues it is pertinent to refer to the relevant provisions of the Act under which the application was made and which empowered the court below to act. Section 47 of the Act which has the heading 'Freezing of transactions or accounts' reads:

1) **The Centre shall not investigate serious offences but where the Chief Executive Officer is of the opinion that it is necessary to freeze a transaction or an account to prevent money laundering, the Chief**

Executive Officer may direct the freezing of a transaction or account of any accountable institution.

2) **The Chief Executive Officer shall apply to a court within seven days after freezing a transaction or account for confirmation of the action taken and the court may confirm the freezing on conditions or direct the de-freezing of the transaction or account.**
3) **Where a transaction or account has been frozen, the person affected shall be notified by the Chief Executive Officer within forty-eight hours of the freezing of the transaction or account and the person affected may seek redress from court.**

A close reading of the above provisions will indicate that the freezing order could be obtained before the person affected was notified. It implies that it could be obtained ex parte. The Chief Executive Officer (CEO) could apply to the court for confirmatory order the very day he freezes a transaction or account. Thereafter he has forty-eight hours within which to notify the person affected by the freezing order. He is not required to notify a person before he goes to court for confirmation. He only commits a violation if he fails to notify a person affected within forty-eight hours of his decision to freeze the transaction or account or of the court's order of confirmation whichever is earlier in time. Thus the trial court will have to satisfy itself that as at the date the CEO filed the application for confirmation it was less than forty-eight hours from the time the transaction or account was frozen by the CEO. If forty-eight hours had lapsed then the court should direct that the application be made on notice to the person affected.

In this case the Applicant complains that the CEO did not notify him even after the confirmation order. The process of notification to an affected person is purely administrative duty imposed by law on the CEO and not on the court. Thus the complaint has no relevance to this application; indeed it is otiose and will be discarded as such. The Applicant's remedy lies elsewhere.

As pointed out above, the application could be made ex parte before the expiry of forty-eight hours from the time the directive to freeze a transaction

or account became effective. In this case the record does not indicate exactly when the directive to the Bank to freeze the account was served on the Bank and exactly when the application to the court below was made. The record only shows the date the court below made the confirmatory order. We would be justified in concluding that time lines were duly observed following the maxim '*omnia praesumuntur rite esseacta.*' Thus lack of notice to the Applicant was not fatal as it was not required at the time the application was made to the court.

The Applicant further complains that the court below exceeded its jurisdiction by ordering the transfer of the Applicant's account to the exhibit account with the Bank of Ghana. According to Counsel the CEO lacks investigative power so he cannot take into its custody any exhibits so called. Moreover section 47 of the Act requires the court to do one of two things, either it freezes a transaction or it freezes an account; it cannot do both. By freezing the Applicant's account the court has deprived him of access to his source of funds even though the complaint relates to a particular transfer or transaction.

Section 47 of the Act clearly distinguishes between a transaction and an account. Going by the definition of 'transaction' contained in section 51 of the Act, it appears very broad in nature and content. It defines it to include 'an act which establishes a right or obligation or gives rise to a contractual or legal relationship between the parties to the contract or legal relationship and any movement of funds by any means with a covered institution'

Section 51 also defines account to mean 'a facility or an arrangement by which a financial institution does any one or more of the following;

a) **Accepts deposits of currency,**
b) **Allows withdrawals of currency or transfers into or out of the account,**
c) **Pays cheques or payment orders drawn on a financial institution or cash dealer by, or collects cheques or payment orders on behalf of, a person.**
d) **Supplies a facility or an arrangement for a safe deposit box.'**

The dis-jointive word 'or' placed between transaction and account all through the subsections of section 47 of the Act should be appreciated by the court as it is central to this interpretation. The CEO must satisfy the court whether it is the entire account of a person that he has put a freeze on or a particular or specific transaction in relation to the account that he seeks to freeze. It is important to observe this distinction lest a court's order should result in unintended and undesirable consequences. In this case the record shows clearly that it is the transfer of the $10,000 into the Applicant's account which was reported as a suspicious transaction. There was no complaint that besides this transfer the Applicant had carried out other suspicious transactions in the operation of his account. Thus the freezing order should have been restricted to this particular transaction only.

It is clear the trial court exceeded her power, authority or discretion, as the case may be, under the Act when she ordered the entire account of the Applicant to be frozen instead of limiting herself to the $10, 000 deposited in the account in suspicious circumstances, according to the CEO. In other words the complaint related to a transaction in the account and not the entire account operated by the Applicant.

The final limb of the argument is that the court exceeded its jurisdiction by ordering the money to be lodged into an exhibit account with the Bank of Ghana, instead of either leaving it in the Applicant's account at the Bank which had been frozen anyway or with the court, thereby exposing the money to the manipulations of the CEO. Section 47(2) of the Act enables the court to confirm a freezing order upon conditions. Such conditions would include especially, secure placement for the transaction or account. It is entirely a matter for the court's discretionary power to decide what reasonable terms and/or conditions to impose in granting the order. In the instant case it is observed that it was a freezing order to enable investigations to be carried out. The provision imposes a duty on the court to ensure that the transaction or account which is the subject-matter of the investigation is well secured and beyond the reach of the suspect pending the investigations. And if the court believes keeping the account with the exhibit account with the

Bank of Ghana would best achieve the object so be it. The CEO would not be able to manipulate the account in any way without a further order from the court. The argument therefore does not hold water.

Thus our conclusion is that the order should have been limited to the $10,000 transaction and not the entire account. To the extent that the trial court froze the entire account of the Applicant it went beyond what was required of her and thus exceeded her power or authority or discretion. Thus we would vary the order to read: that $10,000 lodged into Applicant's account numbered 043301442815801 domiciled at Kotobaabi branch of Ecobank Ghana Ltd be frozen and same lodged in the Respondent's exhibit account with Bank of Ghana pending investigations into the source of the funds. Subject to the above variation the application should be dismissed.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

ATUGUBA , JSC:-

I have had the benefit of reading beforehand the brilliant Ruling of my able brother Benin J.S.C. who has treated this matter with admirable and intricate judicial calculus.

However, before receiving his draft ruling I had formed a view of this matter which I think it would not be superfluous to express. It is trite law that access to court is a constitutional fundamental human right which must be jealously guarded in the construction of statutes. Section 47(1) and (3) of the Anti –Money Laundering Act, 2008 (Act 749) seek on the

one hand to satisfy the need for expeditious action to stem money laundering activities without, on the other hand undue impairment of the right of access to the courts. Hence section 47 (1) enables the Chief Executive Officer *suo motu* "to direct the freezing of a transaction or account of any accountable institution". Having thus secured the transaction or account against Piratical access, sub section (3) is designed thereafter to preserve the right of the party affected by the freeze, to access to the courts. A statute must always be construed *ut res magis valeat quam pereat*. That being so I choose to think that the true intendment of the legislature cannot be to enable the Chief Executive Officer, the interested party herein, whether *sub* the *moratorium temporis* of 2 days under sub section (3) or of 7 days under sub section 2, to subvert the right of the party affected by the said freeze to access to the courts. If the Interested Party can go to court on the same day of his freezing directive so also can he, the same day, notify the party affected by his freezing order of his application to court; but if he cannot on that same day notify the affected party of his resort to court then in view of the securement of the suspicious money by reason of the freeze he must observe the Roman adage, *festina lente* and the legal maxim *cessante ratione legis cessat lex ipsa*, so as not to subvert the affected party's right to access to court which is sought to be safeguarded after the said freeze under s.47(1) by dint of the provisions of s.47 (2) and (3). Surely if the Interested Party is required to reach the affected party within 2 days under sub section (3) then must he the more reach him pursuant to the 7 day period under sub section 2 with his application to court for confirmation of

his freezing order. I use the expression "pursuant" in relation to sub section 2 because the Interested Party could file his application on the 7th day and its reaching the affected party depends on the service of the same on him.

However, subject to the variation made by Benin J.S.C. thereto, I concur in the dismissal of the application in respect of the order dated 24/10/2013 on the ground of extreme delay in applying for the discretionary remedy of certiorari. The applicant brought this application on 19/5/2014 in respect of an order dated 24/10/2013 aforesaid. Even if the applicant had no actual notice of the order he had constructive notice thereof.

As regards the order dated 7/3/2014 I agree with my brother Benin J.S.C. that there has been no excess of jurisdiction. Even if one were to consider error of law on the face of the record no such error is revealed on the face of the terse Ruling of Afia Serwa Asare J. I agree therefore that certiorari cannot lie against this latter order.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) J . B. AKAMBA

JUSTICE OF THE SUPREME COURT

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