IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE JSC (PRESIDING)

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

CIVIL MOTION

NO. J5/82/2022

1ST FEBRUARY, 2023

THE REPUBLIC

VRS

HIGH COURT (COMMERCIAL DIVISION), ACCRA

EX PARTE: YVONNE AMPONSAH BROBBEY …… APPLICANT

AND

GLADYS NKRUMAH ……. INTERESTED PARTY

RULING

KULENDI JSC:-

INTRODUCTION

The Applicant invokes our supervisory jurisdiction for an order of certiorari to quash the ruling of the High Court (Commercial Division), dated 7th June, 2022. The said ruling

entailed the dismissal of a preliminary legal objection to the High Court's jurisdiction to entertain an application for an order to punish the Applicant for intermeddling pursuant to Order 66 of the High Court Civil Procedure Rules, 2004 (C.I. 47).

BACKGROUND

On the 19th of May, 2022, the Interested Party herein filed a motion on notice under Order 66 Rule 3 of C.I. 47 praying for an order to punish the Applicant herein for intermeddling in the estate of one Richard Nkrumah (deceased), the father of the Applicant who died intestate on 31st October 2019.

The Applicant caused her solicitors to file a Notice of Preliminary Legal Objection on 2nd June, 2022 contending that: intermeddling under Order 66 of C.I. 47 being a criminal offence cannot be prosecuted by private citizens via motion in civil proceedings; that the Rules of Court Committee acted in excess of its jurisdiction by purporting to create a criminal offence under Order 66 Rule 4 of C.I. 47; and that the High Court lacked jurisdiction to entertain an application to punish for intermeddling in the manner prayed by the Interested Party.

After hearing both sides, the Trial Court, by a ruling dated 7th June, 2022, dismissed the preliminary legal objection and found that an action to punish for intermeddling may be commenced by civil proceedings and therefore, it had the jurisdiction to hear the Interested Party's application. It is against this ruling that the Applicant has brought the instant motion invoking our supervisory jurisdiction.

GROUNDS FOR APPLICATION

The grounds of this application as stated on the face of the motion paper are as follows:

i. Error Patent on the Face of the Record.

The High Court (Commercial Division 2) Accra, committed an error of law patent on the face of the record when it held that intermeddling proceedings can be commenced by civil proceedings in the form of Originating Notice of Motion under the High Court (Civil Procedure) Rules 2004 (C.I. 47) notwithstanding the provisions of Article 88(3) of the 1992 Constitution and the provisions of Part III of the Criminal Procedure Act 1960 (Act 30);

ii. Lack of Jurisdiction.

The High Court (Commercial Division 2) Accra wrongfully assumed jurisdiction when it dismissed the Applicant's preliminary objection to the Court's jurisdiction to determine an application for intermeddling.

ARGUMENTS OF THE APPLICANT

The Applicant, in an affidavit in support of the instant motion argues that the finding of the High Court that prosecution of the offence of intermeddling may be commenced by civil proceedings constitutes an error patent on the face of the record, which goes to the jurisdiction of the High Court.

Further, the Applicant contended that with the notable exception of contempt, which is quasi-criminal in nature and can be initiated by civil proceedings, all criminal offences can only be initiated at the instance of the Attorney-General or anyone acting under his or her authority.

It was further argued that an action may only be commenced by an originating notice of motion if there is an express statutory provision mandating same. Consequently, in the absence of such an express enabling statutory provision, the commencement of intermeddling proceedings by means of an originating notice of motion is wrong in law.

The Applicant finally contends that by holding that an intermeddling action may be commenced by an originating notice of motion, the High Court has assumed jurisdiction that it does not possess and such a wrongful assumption of jurisdiction warrants the exercise of this Court's supervisory jurisdiction to quash the decision of the High Court.

ARGUMENTS OF THE INTERESTED PARTY

The Interested Party on her part, filed an affidavit in opposition to this application contending, essentially, that the High Court has jurisdiction to entertain the proceedings by an originating motion seeking a finding of guilt and punishment by imprisonment, a fine or both for intermeddling.

The Interested Party further argues that even if it is the case that the High Court lacked the jurisdiction to entertain the proceedings by way of an originating notice of motion, this resulting complaint is better suited for redress through an Appeal and not by way of an invocation of this Court's supervisory jurisdiction.

LAW AND ANALYSIS

The supervisory jurisdiction of this Court is provided for in **Article 132 of the 1992 Constitution** which states as follows:

> *"The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may, in the exercise of that supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power."*

Generally, this Court's supervisory jurisdiction may be invoked where a person alleges that there has been: a breach of the principles of natural justice; error of law apparent on the face of the record; or excess or want of jurisdiction.

The above grounds have been enunciated in a plethora of decisions of this Court. Among others, the venerable president of this panel, Dotse JSC in the case of **Republic v High Court, Kumasi: Ex-parte Bank of Ghana & Ors (Gyamfi & Others – Interested Parties) [2013-14] 1 SCGLR 477** set out the grounds for certiorari as follows:

> "*It is 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 beach of rules of natural justice; or to correct a clear error of law apparent on the face of the record.*"

See also the cases of :

British Airways v. Attorney-General [1996-1997] SCGLR 547; Republic v Court of Appeal, ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612; Republic v High Court (Fast Track Division) Accra, Ex-parte Electoral Commission (Mettle Nunoo & others – Interested Parties) [2005-2006] SCGLR 514; Republic v High Court, Koforidua; Ex Parte Ansah-Otu & Another (Koans Building Solutions Ltd; Interested Party) [2009] SCGLR 141], Republic v High Court, Accra Ex parte; and Ghana Medical Association (Chris Arcmann-Akummey-Interested Party) [2012] 2 GLR 768.

We must emphasize that it is not every error of law by the High Court or the Court of Appeal which may warrant, justify and/or necessitate the exercise of the supervisory jurisdiction of this Court, given that these are in themselves, superior courts of judicature. The error complained of must be one that is obvious, patent or palpable on the face of the record and which goes to jurisdiction and/or renders the decision or proceedings a nullity. Our view of the degree of error that may make a decision or proceedings amenable to our supervisory jurisdiction was ably articulated by this Court in the case of ***Republic v Court of Appeal, ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612*** in the following terms:

"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."

In what appears to be a response to a proposal by Twum JSC in **Republic v. High Court, Accra ex Parte Industrialization Fund for Developing Countries (2003-2004) SCGLR 348 at page 356** "to this Court for a re-statement of the law governing the exercise of its supervisory jurisdiction over the superior courts of judicature" this Court in the case of **Republic v. High Court (Accra) Ex Parte CHRAJ (Addo Interested Party) 2003-2004 SCGLR 312 at page 345-346** expressed these principles in the following terms;

"...where the High Court (or for that matter the Court of Appeal) makes a non-jurisdictional error of law which is not patent on the face of the record (within the meaning already discussed), the avenue for redress open to an aggrieved party is an appeal, not judicial review. In this regard, an error of law made by the High Court or the Court of Appeal is not to be regarded as taking the judge outside the court's jurisdiction, unless the court has acted ultra vires the Constitution or an express statutory restriction validly imposed on it..."

We must reiterate the learning that the jurisdiction of a Court is one which is properly conferred and circumscribed by law. Therefore, no Court has the power, by judicial fiat, to assume jurisdiction that is not properly conferred or extend its jurisdiction beyond the scope or remit granted it by law. The arrogation to itself of jurisdiction which is not conferred by law constitutes an error patent on the face of the record and which goes to jurisdiction. Needless to say, the purported exercise of same will not only occasion a want of jurisdiction but also a nullity.

We wish to state without equivocation that every Court has the jurisdiction to determine whether it has jurisdiction in any matter or proceedings. This is to say that in the teeth of an objection, preliminary or at any stage in the proceedings, whether formal or oral, to the jurisdiction of a Court in any matter or proceedings, the Court has an inherent jurisdiction to make a determination on the question of whether or not it has jurisdiction. This is what is described in the law of arbitration as competence-competence. However, the nature of the error which may result from such a determination of a question of jurisdiction may render the decision amenable to the supervisory jurisdiction of the High Court or this Court. As opined *supra*, if the error is patent and goes to jurisdiction, occasions or will result in a nullity, such a decision, without more, will be amenable to the supervisory jurisdiction of the appropriate higher court.

The plaint of the Applicant is one which if upheld, ultimately goes to jurisdiction. The Applicant's position is that, the intermeddling proceedings could not be commenced by civil motion and that Order 66 rule 3 of C.I. 47, which purported to create the offence of intermeddling, cannot legitimately and properly vest jurisdiction in the High Court to entertain such proceedings, let alone by an originating notice of motion.

For a better appreciation of the issues under consideration, we wish to emphasize that the High Court Civil Procedure Rules, 2004 (C.I. 47) was promulgated by the Rules of Court Committee pursuant to Article 33(2) and 157(2) of the Constitution. This is evident from the preamble of C.I. 47 which reads as follows:

> *"IN exercise of the powers conferred on the Rules of Court Committee by clause (4) of article 33 and clause (2) of article 157 of the Constitution these Rules are made this 1st day of June, 2004."*

These rules were thus promulgated pursuant to a mandate prescribed by the Constitution and that is why CI 47 is a constitutional instrument. That being the case, the work of the Rules of

Court Committee must be one which operates within the strict confines of the enabling provisions of the Constitution.

The enabling provisions of the Constitution state as follows:

Article 33(4):

> "*The Rules of Court Committee may make rules of court with respect to the practice and procedure of the Superior Courts for the purposes of this article*."

Article 157(2):

> "*The Rules of Court Committee shall, by constitutional instrument, make rules and regulations for regulating the practice and procedure of all courts in Ghana*."

From the clear reading of the above enabling provisions of the Constitution, the mandate of the Rules of Court Committee as exercised by them in the promulgation of C.I. 47 is limited to the making of rules to regulate the practice and procedures of the Court. Such rules made must strictly be confined to the remit of rules of practice and procedure as against substantive legislation that vests jurisdiction in courts.

The power to make rules of practice and procedure conferred on the Rules of Court Committee must be distinguished from the power to enact substantive legislation. In the case of **MORNAH v. ATTORNEY-GENERAL (2013) SCGLR (Special Edition) 502,** this Court, speaking through BENIN JSC, concerning the confines and limitations of the authority of the Rules of Court Committee, said as follows: "***The operative words herein are 'practice and procedure'. This means no more than the rules that prescribe what steps to follow in order to have a right or duty judicially enforced. This is in contradistinction to the law that defines the specific rights or duties themselves… Thus when the Rules of Court Committee was charged with the responsibility of enacting rules to regulate the conduct of the practice and procedure in a Presidential election petition it meant the substantive laws were different from***

what the Committee was empowered to do. The Committee was not empowered to amend the substantive law/s without express authorization."

Similarly in a judgment of this Court dated 13th April 2022 in Writ No. J1/11/2022 entitled **Michael Ankomah-Nimfah v. James Gyakye Quayson & 2 Others**, which I had the privilege of writing, this Court noted as follows:

> *"We must emphasise that the Rules of Court, be they High Court Rules, Court of Appeal Rules, or the Supreme Court Rules do not confer substantive jurisdiction. They only provide rules and regulations for regulating practice and procedure in Court. They are not to be accorded the status of jurisdiction-conferring enactments…*

Also in the **Michael Ankomah-Nimfah** case *supra*, this Court cited with approval its ruling dated 28th April, 2020 in **Suit No.: JS/131/2019 entitled Ogyeadom Obranu Kwesi Atta VI vrs. Ghana Telecommunications Co. Ltd & Another Civil Motion No. 18/131/2019,** wherein this Court held that:

> *"It is also settled law that jurisdiction is conferred by the Constitution or substantive enactments and that rules of court contained in subsidiary legislation only regulate the exercise of existing jurisdiction but do not confer jurisdiction and so cannot take it away or diminish or enlarge it."*

Finally, suffice it to say that this Court again opined in its judgment dated 4th June, 2015 Suit No. J5/06/2015 entitled **The Republic v. High Court (Commercial Division) Tamale ex parte Dakpem Zobogunaa Henry Kaleem**, as follows:

> *"From even a cursory reading of Article 140(1) and (4) it is clear that the jurisdiction of the High Court is conferred upon it only by the Constitution or any other law, which is meant a law duly enacted by Parliament, as distinct from the rules of practice and procedure enacted by the Rules of Court Committee. By a combined reading of Articles 140(2) and 157(2) of the Constitution, the Rules of Court Committee is required to formulate rules to guide the High Court, among*

other courts, in the exercise of its jurisdiction conferred by the Constitution or an Act of Parliament. Article 157(2) provides that:

The Rules of Court Committee shall, by constitutional instrument, make rules and regulations for regulating the practice and procedure of all courts in Ghana.

Since the coming into force of the 1992 Constitution, Parliament has passed some substantive laws granting different types of jurisdiction to various courts in the country. For our present purposes we will recall sections 15 to 21 of Act 459 setting out different types of jurisdiction that the High Court could exercise. Sections 15 and 16 do reiterate Articles 140 and 141 of the Constitution respectively. Sections 17 to 20 of Act 459 have granted jurisdiction to the High Court over piracy matters, infants, persons of unsound mind and maritime matters respectively. And section 21 deals with the High Court's jurisdiction in appeals from the lower courts… There have been numerous authorities, both local and foreign, which have decided that jurisdiction of a court could only be granted by substantive legislation, and not by a body charged with the duty to make rules to regulate the conduct of cases before the courts."

Also see the cases of **Safeway Plc v. Tate (2001) 4 All ER 193 and Malgar Ltd. v. R. E. Leach Engineering Ltd. (2000) TLR 109 Ch. D;**

Applying the above principles *mutatis mutandis*, it must be pointed out that it is contrary to law for the Rules of Court Committee to arrogate to itself the power to enact laws that purport to confer substantive jurisdiction in the High Court under the guise of civil procedure rules.

Any rule promulgated pursuant to articles 157(2) and 33(4) of the Constitution that goes beyond the scope of rules of practice or procedure would be contrary to the enabling provisions and therefore *ultra vires* the Constitution. Jurisdiction may only be vested in the court by substantive statutes or the Constitution.

The language of Order 66 (3) of C.I 47 is one, which on the face of it, creates a criminal offence and prescribes punishment. The said order states as follows:

Order 66 Rule 3 of C.I. 47

> *"Where any person, other than the person named as executor in a will or appointed by Court to administer the estate of a deceased person, takes possession of and administers or otherwise deals with the property of a deceased person, the person shall be subject to the same obligations and liabilities as an executor or administrator and shall in addition be* ***guilty of the offence of intermeddling*** *and* ***liable on summary conviction to a fine not exceeding 500 penalty units or twice the value of the*** *estate intermeddled with or* ***to imprisonment for a term not exceeding 2 years or to both."***

The said order purports to impose obligations and liabilities of an executor or administrator on the intermeddler, which is civil, on one hand and on the other hand creates the offence of intermeddling and prescribes punishment of imprisonment which is criminal. Criminal offences and the jurisdiction to try or enter into an enquiry of the same may only be created by substantive legislation and/or the Constitution. Consequently, having held that the Rules of Court Committee cannot enact substantive legislation which criminal offences and vests jurisdiction, we are of the considered view that Order 66 (3) of C.I. 47 cannot constitute a valid basis for the conduct of an enquiry into an offence of intermeddling and therefore occasions a nullity.

However, we note that section 17 of Intestate Succession Law, 1985 (P.N.D.C.L. 111), which preceded C.I. 47, has created the offence of intermeddling in the following words:

> *"Section 17*
>
> ***A person who before the distribution of the estate of a deceased person whether testate or intestate***
>
> *(a) unlawfully ejects a surviving spouse or child from the matrimonial home contrary to section 16A,*
>
> *(b) unlawfully deprives the entitled person of the use of*

(i) a part of the property of the entitled person,

(ii) a property shared by the entitled person with the deceased to which this Act applies, or

(iii) removes, destroys or otherwise unlawfully interferes with the property of the deceased person,

commits an offence and is liable on summary conviction to a minimum fine of two and a half penalty units and not exceeding two hundred and fifty penalty units or to a term of imprisonment not exceeding one year, *and the Court or tribunal shall make any other orders that it considers necessary for the re-instatement of or reimbursement to the person thus ejected or deprived."*

In a proper sense, section 17 of PNDCL 111 ought to be deemed as the offence creating law in matters of intermeddling.

The default procedure for the trial of the offence under section 17 of PNDCL 111 would therefore be the procedure prescribed under section 1(2) of Act 30 which states as follows:

"An offence under any other enactment shall, subject to that enactment, be enquired into, tried and dealt with in accordance with this Act."

Furthermore, article 88(3) of the Constitution is clear about who may institute criminal proceedings. **Article 88(3)** reads;

"(3) The Attorney-General shall be responsible for the initiation and conduct of ***all prosecutions of criminal offences****"*

Therefore it is not open to anyone, other than the Attorney General or a person acting lawfully under the Attorney General's instructions, to initiate criminal prosecutions.

In a judgment of this Court dated 3rd December, 2015 in Suit No. J1/4/2015 entitled: **Mensah vrs Attorney General and Another**, the venerable Gbadegbe JSC noted that:

> *"We are in great difficulty in the face of the clear provisions of article 2 (4) and (5) of the constitution, the purpose for which our jurisdiction was invoked in respect of an allegation, proof of which constitutes a crime. In any event, even if we had jurisdiction to inquire into the allegation of a high crime, it cannot be tried together with our interpretive function which is purely civil. That aside,* ***the mode for the initiation of criminal proceedings is at the instance of the Attorney-General and not a private person*** *as we have before us in the matter herein."*

From the unambiguous text of Article 88(3), it is apparent that only the Attorney General may initiate prosecutions for the offence of intermeddling. The Rules of Court Committee could not have been legitimately added to the list of persons with prosecutorial powers to initiate and conduct criminal prosecutions.

From the foregoing, we have no hesitation to conclude that in its current terms, Order 66 Rule 3 of CI 47, being a creature borne out of the constitutionally circumscribed powers granted the Rules of Court Committee, is incompetent to create a novel offence of intermeddling and the sanctions attached thereto.

Any previous decisions of other courts inconsistent with these statements of the law are in obvious error and are to that extent overruled.

In the circumstances, the ruling of the High Court (Commercial Division), Accra wherein it held that it had jurisdiction to entertain, and enter into an enquiry of an alleged offence of intermeddling pursuant to Order 66 rule 3 of C.I 47 is a clear, obvious and patent error of law, in the context of the express indication of the Constitutional basis of C.I 47 in its preamble. The said error goes to jurisdiction and the resultant proceedings will occasion a

nullity. Consequently, this application warrants the exercise of our supervisory jurisdiction as prayed. Accordingly, let the said ruling of the High Court, (Commercial Division) dated 7th June, 2022, be brought up to this Court for the purpose of being quashed and same is hereby quashed.

There shall be no order as to cost.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

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