AN EXAMINATION OF THE SCOPE OF THE SUPERVISORY JURISDICTION OF THE HIGH COURT OF GHANA

BY SIMON OKYERE, ESQ.

ABSTRACT

The Constitution of Ghana explicitly provides a wide supervisory jurisdiction to the nation's high court. The rules of court set out the detail procedure for a party to invoke that jurisdiction. The rules do so in a manner which states that the court has the discretion to give any relief it considers to be warranted on the basis of the facts before it. The Supreme Court has given two inconsistent decisions. The first decision upheld the wide unfettered supervisory powers of the high court to the effect that no public agency's judicial authority granted in an Act of Parliament could overcome the high court's supervisory powers. The second decision takes a different position. It holds that an agency's judicial authority on a matter established in an Act of Parliament operates to suspend the entire judicial role of the high court, including its supervisory jurisdiction, until a final decision has been given by the said agency. The latter decision is patently contradictory to the relevant constitutional provision, while the former conforms to it. It is hoped that the Supreme Court will in future revert to its earlier position to reflect the constitutional intendment.

INTRODUCTION

This write-up seeks to examine the scope of the supervisory jurisdiction of the High Court as enacted in the 1992 Constitution of Ghana (hereinafter the "Constitution"), and as expatiated in Order 55 rules 1 and 2 of the High Court (Civil Procedure) Rules, 2004 (hereinafter "CI 47"). In examining the scope, the paper will establish two principal points, namely, (i) that once an application for judicial review is made, the court's supervisory jurisdiction to grant any judicial review remedy or relief, as the facts of the case may dictate, is invoked and (ii) the supervisory jurisdiction of the High Court is a constitutional creation, as such no parliamentary statute which creates an appeal process for resolving disputes on any subject matter, in any public institution, can derogate from it.

LAW AND ANALYSIS

The Constitution provides the supervisory jurisdiction of the High Court as follows:

Article 141; **Supervisory Jurisdiction of The High Court**

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

CI 47 operationalises the supervisory jurisdiction as follows:

Order 55

1. "An application for

a) an order in the nature of mandamus, prohibition, certiorari or quo warranto; or
b) an injunction restraining a person from acting in any public office in which the person is not entitled to act; or
c) any other injunction,

Shall be made by way of an application for judicial review to the High Court.

Orders obtainable by judicial review

2. 1) On the hearing of an application for judicial review the High Court may make any of the following orders as the circumstances may require

a) an order for prohibition, certiorari or mandamus;
b) an order restraining a person from acting in any public office in which that person is not entitled to act;
c) any other injunction;
d) a declaration;
e) payment of damages.

2) In granting an injunction or making a declaration under paragraphs (c) or (d) of sub rule (1) of this rule the Court shall have regard to

a) The matter in respect of which relief may be granted by way of prohibition, certiorari or mandamus;
b) The nature of the persons against whom relief may be granted by way of the order; and
c) Whether in all the circumstances of the particular case it would be just and convenient to grant an injunction or make a declaration on an application for judicial review.

The Constitution is explicit that in exercising its supervisory jurisdiction, the High Court may issue any orders and directions to enforce its supervisory powers. The main orders and directions include mandamus, certiorari, quo warranto, prohibition and habeas corpus.

The supervisory jurisdiction of the High Court confers on the judge the discretion to grant any judicial review relief on condition that the circumstances of the case require same[1]. It follows that regardless of the particular relief the application may be seeking, the court may grant a different relief either in addition or alternative to the one sought by the application, provided the facts in the application warrant the grant of the relief. In granting the order, the court will be acting absolutely within its jurisdiction. It is wrong, in law, for a court to dismiss a judicial review application which seeks, for instance, an order of mandamus on grounds that mandamus is not an appropriate relief. The court, in such a circumstance, ought to grant what it considers to be an appropriate relief and dismiss the prayer for mandamus as inappropriate.

Parliament passes laws which sometimes create appeals or dispute resolution mechanisms within the internal structures of public administrative bodies. These layered appeal procedures must be exhausted by a person aggrieved by a decision of such a body before resorting to the court. A case in point is tax appeals. Tax disputes begin with objections to tax decisions by the Ghana Revenue Authority and may escalate to the Tax Appeal Board whose decision may be further appealed to the High Court[2].

Can a person aggrieved by a decision of an administrative body leapfrog the internal appeal system and file a judicial review application at the High Court? The answer is, in the view of this paper, in the affirmative. First, it is trite that supervisory jurisdiction of the High Court is distinct from its appellate jurisdiction. If the internal appeal system leads to a further appeal to

[1] Order 55 r 2 of C.I 47
[2] Section 1, Revenue Administration (Amendment) Act, 2020 (Act 1029)

the High Court, then it is the appellate jurisdiction of the High Court, in respect of that dispute, that is suspended and not its supervisory jurisdiction. Where the administrative body commits a violation of a statute or a jurisdictional error, an aggrieved party should be able to invoke the supervisory jurisdiction of the court to correct that error, rather than litigating that violation through the internal appeal system.

Secondly, the High Court's supervisory jurisdiction is distinct and separate from its general jurisdiction.

Article 140(1) of the Constitution, 1992 set outs the general jurisdiction of the High Court thus:

> "*The high court shall,* ***subject to the provisions of this constitution****, have jurisdiction in all matters and in particular, in civil and criminal matters and such original,* ***appellate and other jurisdiction as may be conferred on it by this constitution or any other law***". [Emphasis added]

From the language used it is apparent that the framers of the constitution intended that the general jurisdiction could be expanded by other laws such as an Act of Parliament, subject to limitations imposed by the constitution itself. It follows that an Act of Parliament which creates internal dispute resolution procedure in a public institution can confer a final appellate jurisdiction on the High Court.

If it does, the appellate jurisdiction so conferred, exclusively affects the general jurisdiction of the court. In essence, such an Act will suspend only the general jurisdiction of the court in respect of the dispute it covers until the internal procedure has been exhausted. This means that an aggrieved party, subject to that process, cannot sidestep or leapfrog same to issue a writ (writ of summons and statement of claim) or file an interlocutory appeal or general application at the high court until he has exhausted the internal process.

Such legislative arrangement is in conformity with the letter and spirit of Article 140(1) of the Constitution. It is in this context that the principle that when an Act of Parliament or an enactment provides a mode of resolving a dispute or doing an act, it is only that mode that must be adopted[3] finds relevance in relation to the High Court's jurisdiction.

It is apparent from the reading of both Articles 140(1) and 141 that while the Constitution allows derogation from the general jurisdiction of the High Court, it does not admit same for its supervisory jurisdiction. Restrictions of the court's jurisdiction in an Act of Parliament are inapplicable to the court's supervisory powers under Article 141 of the Constitution.

It follows that the High Court may exercise its supervisory jurisdiction in respect of egregious interlocutory or final procedural errors of an administrative or quasi-judicial body, or a lower court regardless of the evidence of an alternative process or remedy.

The Supreme Court in ***Republic v Court of Appeal; ex parte Lands Commission (Vanderpuye Orgle Estates Ltd, Interested Party)***[4] endorsed this position and held that a statutory alternative remedy cannot bar an application for mandamus. The court opined in holding 3 thus:

---

[3] Boyefio v NTHC Properties [1996-97] SCGLR, 531
[4] [1999-2001] 1 GLR @ 77-79

"(3) Although generally the existence of an alternative remedy against a refusal to carry out a public duty had been regarded as an impediment to an application for an order of mandamus, the courts exercised a wide discretion in determining whether a statutory alternative remedy was to be construed as a bar to an application for mandamus. The major consideration was whether on the facts and in particular the issue raised for determination, mandamus would be more convenient, beneficial and effectual than the statutory remedy.

(ii) Bamford-Addo and Charles Hayfron-Benjamin JJSC. Under Article 125(3) of the Constitution, 1992, final judicial power had been vested in the judiciary, and not an administrative body such as the appellant, which had the right and power to make a decision on land disposition so as to deprive a bona fide purchaser of his title to land. Accordingly, the appellant would not be permitted to usurp the functions of the judiciary in contravention of Article 125(3) of the Constitution, 1992. Furthermore, since the appellant's erroneous interpretation of the effect of the judgment of the National House of Chiefs had occasioned an injustice to the respondents, mandamus would lie to compel the appellant to correct the error and restore exhibit A to the records.

(iii) Per Charles Hayfron-Benjamin, even where there was an alternative process, it was not an inflexible rule that the statutory procedure so laid down had to be followed. In the instant case, since the appellant did not comply with the provisions of Act 123 by furnishing the respondent with a written refusal, which was a condition precedent for an appeal under Act 123, the respondent could not have invoked the appeal process granted under Act 123. The High Court therefore rightly exercised its discretion in granting the mandamus against the appellant.

(iv) Per Acquah JSC., a statutory duty should be performed without unreasonable delay. Thus, if any such delay occurred, mandamus might be employed to enforce the performance of such duty. In the instant case even though the appellant had in its letter to the respondent threatened to revoke its concurrence to and expunge exhibit A from the property records, it had not written to inform the respondents whether they had carried out its expressed intention or retracted it. In the light of the unreasonable delay by the appellant to deal with the problem they had created, it was imperative for the respondent to resort to mandamus to compel it to perform its public duty since it was the most effective and beneficial remedy to determine both the validity of the appellant's contention and to achieve the restoration of the concurrence in question.

The above decision is consistent with the principle that the supervisory jurisdiction of the court cannot be fettered by any other law, and regardless of the existence of an alternative remedy or process, a party may invoke the supervisory jurisdiction of the court for judicial review.

In the second case[5], the Supreme Court merged the two jurisdictions (general and supervisory) and held, assertively, that both were suspended until the internal dispute mechanism of an administrative body has been exhausted. At page 17 of the judgement, the court held as follows:

[5] Republic v High Court, Financial & Economic Division: Ex Parte Afia African Village Ltd Civil Motion No. J5/08/2022

In this case, not to sound repetitive, the applicant did not exhaust the procedure under Act 951 as amended which we have earlier clearly stated to enable the interested party who had made a tax decision to perform his public duty. Instead of the applicant filing an objection under section 41 of Act 951 and appeal against the decision on the objection thereafter, if aggrieved, file an appeal to the Tax Appeal Board under section 44 of Act 951 as amended by Act 1029 and if she was still dissatisfied, file an appeal to the High Court under Order 54 of C.I. 47, she chose to file mandamus. It is noteworthy that the applicant ignored all the necessary procedures and wrongly and prematurely invoked the jurisdiction of the High Court for mandamus under Order 55 of C.I. 47.

The High Court Judge rightly dismissed the application for mandamus on procedural grounds. Therefore, we find no error of law on the face of the record in so far as the application was properly dismissed.

In conclusion, since the condition precedent to the invocation of the High Court's jurisdiction had not yet arisen in view of sections 41, 41, 44 of Act 951 as amended by Act 1029 and the High Court Judge having dismissed the application for mandamus on that ground, the application to invoke this court's supervisory jurisdiction to wit: - certiorari to quash the Ruling of the High Court dated the 2nd day of November, 2021 is hereby dismissed. [Emphasis added]

If the constitution intended to make the supervisory jurisdiction of the High Court part of its general jurisdiction, or subservient to an Act of Parliament, it would have stated so expressly. The fact that the framers of the constitution crafted the two jurisdictions separately, with different languages and purposes speaks volumes. The **Afia case**, to the extent that it sought to suspend the supervisory jurisdiction of the High Court and make same subject to the internal dispute resolution process of an administrative body which was created by an Act of Parliament, a lower law, is, respectfully, inconsistent with the letter and spirit of Article 141 of the Constitution.

The purpose of the supervisory jurisdiction of the High Court is to correct patent errors of law or abuse of power by administrative bodies, quasi-judicial bodies, and lower courts and ensure that their processes are fair and consistent with the rule of law. Once those bodies make the erroneous procedural errors, or abuse their powers the High Court has the jurisdiction to correct them. Tying the hands of the court and restricting it from intervening until the decision body has been given the exhaustive opportunity to remedy itself runs counter to the very purpose of the supervisory powers of the court. If the powers cannot be exercised when needed Article 141 will be rendered otiose.

Lord Hailsham could not have stated the purpose of judicial review better in the following words:

the first observation I wish to make is by way of criticism of some remarks of Lord Denning MR which seem to me to be capable of an erroneous construction of the purpose and the remedy by way of judicial review under RSC Ord 53. This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, ***is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the***

bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.[6] [Emphasis added]

What will be the relevance of the remedy of prohibition, for instance, if an applicant cannot obtain same to avert a process that is tainted with bias or potential bias?

The Constitution, which is the supreme law of Ghana, does not create any qualification, exception or condition in its bestowal of the supervisory jurisdiction on the High Court. It captures the High Court's supervisory jurisdiction in imperative terms, and confers wide discretionary powers in terms of the orders and directions the court could issue to enforce the supervisory powers.

Needless to say, the Constitution asserts its supremacy thus:
"*This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void and of no effect*.[7]"

The Supreme Court has, on several occasions, affirmed the supremacy of this fundamental law. Sowah JSC (as he then was), with a proselytizing zeal, reiterated the concept of the supremacy of the constitution in the following language:
"**No person can make lawful what the constitution says is unlawful. No person can make unlawful what the constitution says is lawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid**."[8]

CONCLUSION

Any statute which creates an internal appeal system in a public agency cannot expressly or otherwise abridge, derogate from, or nibble at the supervisory powers of the High Court under Article 141 of the Constitution. Any provision or interpretation of a provision in a statute which contradicts this may be deemed unconstitutional, invalid, void and of no effect. It is hoped that the Supreme Court will, in the near future, reconsider and modify the holding in the **Afia case**, on the suspension of the high court's jurisdiction pending the exhaustion of statutory internal procedure, to exclude the supervisory jurisdiction of the court. This exception will bring the principle in alignment with the disparate letter and spirit of both Articles 140(1) and 141 of the Constitution of the Republic.

[6] Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155, House of Lord
[7] Article 1(2) of the Constitution of the Republic of Ghana, 1992
[8] Tuffuor v Attorney-General [1980] GLR 637 @656