

CT. 4
IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION (C)
ACCRA- A.D 2020

...ed on.....17/06/2020
at.....2, 59 am/pir.
Registra
COMMERCIAL DIVISION OF THE
HIGH COURT ACCRA
SUIT NO.CM/BFS/0302/2020

AGRICULTURAL DEVELOPMENT BANK

PLAINTIFF/RESPONDENT

VRS

1. KINGDOM PREMIUM FRUITS LTD
2. DR. FELIX KWAME SEMAVOR

DEFENDANTS/APPLICANTS

DEFENDANTS/APPLICANTS' WRITTEN SUBMISSION

Respectfully Your Lordship, this is the Written Submissions by Counsel for the Defendant/ Applicant herein in support of the Motion on Notice for an order setting aside or striking out the Plaintiff's Statement of Claim for non-compliance with the rules of court specifically Order 59 Rule 3.

1. INTRODUCTION

My Lord, the Defendants/ Applicants (hereinafter referred to as the Defendants) have brought the instant Application UNDER ORDER 81 RULE 2(1) OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C.I. 47), praying for an order to strike out or set aside the Plaintiff's Statement of Claim as irregular upon failure to comply with the requirements of the Rules of Court.

My Lord, through this submission, it will undoubtedly be shown that this application has merit.

2. FACTS

My Lord, according to the Plaintiff, various loans and other related facilities were granted to the 1st Defendant (its customer) which said facilities were guaranteed by the 2nd Defendant. Below are the said facilities as stated by the Plaintiff in its Statement of Claim:

- i. A Term Loan of one million, five hundred and thirty-two thousand, seven hundred and ninety Ghana Cedis (GHC1,532,790.00) to be repaid over 60 months at no interest. The said facility was disbursed on 11th October, 2013.
- ii. A Term Loan of four million, eight hundred and fifty-three thousand, three hundred and sixty Ghana Cedis, (GHC4,853, 360.00) to be repaid over a period of 60 months at an interest rate of 12.5% per annum, the facility was disbursed on the 11th October, 2013.
- iii. A Finance Lease of eight hundred thousand Ghana Cedis (GHC800,000.00) to be repaid over a period of 60 months at an interest rate of 12.5% per annum. The facility was disbursed on 7th August, 2014.
- iv. A Term Loan of one hundred thousand Ghana Cedis (GHC100,00.00) to be repaid over a period of 18 months of an interest rate of 12.5% per annum. The facility was disbursed on 10th November, 2014.
- v. A Term Loan of four hundred and eighty-three thousand, three hundred and forty-six Ghana Cedis, twelve pesewas (GHC483,346.12), disbursed on 28th August, 2014 at an interest rate of 22.92% per annum.

My Lord, again, according to the Plaintiff, the following were used to as secure the facilities mentioned above:

- a. First ranking fixed and floating charge in favour of ADB over the Borrower's assets.
- b. Unlimited guarantee in favour of the Plaintiff by the 1st Defendant's shareholding directors
- c. Assignment in favour of the Plaintiff over all of the 1st Defendant's export proceeds
- d. Charge over the entire factory building, plant, machinery and equipment belonging to the 1st Defendant
- e. Title to retail bottling line purchased under the lease facility.

The Plaintiff further avers that with the said facilities listed above having expired, and with the 1st Defendant being in default, the 1st Defendant additionally overdrew its accounts by an amount of GHC82,626.11.

The Plaintiff avers that the Defendants have failed, refused and or neglected to make good their indebtedness to the Plaintiff despite several entreaties. Following which the Plaintiff sought the following reliefs from the court:

a. An order for the recovery of the amounts of

- GHC2,104,706.75 being the outstanding balance from Facility 1 with interest at the commercial rate from 22nd November, 2019 till date of final payment
- GHC8,581,878.65 being the outstanding balance from Facility 2 with interest at 12.5% per annum from 22nd November, 2019 till date of final payment
- GHC1,344,110.76 being the outstanding balance from Facility 3 with interest at 12.5% from 22nd November, 2019 till date of final payment
- GHC93,038.11 being the outstanding balance from Facility 4 with interest from 22nd November, 2019 till date of final payment
- GHC1,511,561.88 being the outstanding balance from Facility 5 with interest from 22nd November, 2019 till date of final payment
- GHC82,626.11 being the overdrawn balance with interest at the commercial rate from 22nd November, 2019 till date of final payment

b. Or in the alternative an order for the judicial sale of the following securities

- All of Borrower's assets over which it created fixed and floating charge in favour of the Plaintiff Bank
 - The entire Kingdom Premium Limited (KPF) factory building, plant, machinery and equipment.
 - Retail bottling line purchased under the lease facility
- c. Damages for breach of contract; and costs being costs of and incidental to this suit.

The Defendants as expected, in contesting the instant suit entered Conditional Appearance through their Solicitor after which it proceeded to request¹ the production of some documents for Inspection and for copies to be made. A request which was objected flatly by the Plaintiff who filed a Notice of Objection to the Production of Documents citing that it only becomes dangerous for the requested documents to be produced before the Defendants file its defense, as it could provide us with basis to access the documentary strength of the Plaintiff, and use same to deny liability, thereby twisting the arm of justice.

¹ pursuant to Order 21 Rule 8(1)

The Plaintiff in its failure to furnish the Defendants with the said documents which it had been pleaded in its Statement of Claim for inspection as stated above, rather proceeded to file an Application for Judgment to be entered in Default of Defence against the Defendants. An application which has vehemently been opposed by the Defendants and currently awaiting to be moved pending the outcome of this instant application.

My Lord, due to the refusal of the Plaintiff to produce the said documents, coupled with the fact that the Plaintiff's pleadings do not conform to the requirements of the rules of court in respect of 'Moneylenders and Mortgage' action under which the said claim falls, the Defendants are unable to appropriately respond to the averments made by the Plaintiff, and feels that the Plaintiff is conducting an ambush litigation at the detriment of the Defendants.

My Lord, having noticed that the Plaintiff's pleadings as contained in its Statement of Claim do not conform to the rules of court, the Defendants herein proceeded to file a Motion on Notice for an order to strike out or set aside the Plaintiff's Statement of Claim (the subject matter of this submission); and same has been opposed by the Plaintiff.

On the 3rd June 2020, when parties appeared before this Honourable Court, an order was made, directing both parties to file their Written Submissions in respect of the said Motion.

Consequently, this submissions will address the law regarding the court's power to set aside a proceeding and convince this honorable court that the Plaintiff's Statement of Claim is one that ought to be set aside in the interest of justice.

3. THE APPLICATION:

In the instant Motion before this Court, the our main contention as seen in paragraphs 5, 6 and 7 of our Affidavit in Support of the said Motion is that:

- i. By the Plaintiff's pleadings before this Court, especially its paragraphs 5(i) and (iv) of the Statement of Claim, together with the Reliefs sought in its (Plaintiff's)

alternative relief (paragraph 11(ii)), it is unequivocal that the Plaintiff's Action is one premised on a Mortgage Action, and hence same should conform to the Order 59 Rule 3 of the C.I. 47 which requires a Statement of Claim in a Moneylenders or a Mortgage Action to state or be in a particular form as stated below:

'Every Statement of Claim in a moneylender's or mortgage action shall state:

- (a) the date on which the loan was made;
- (b) the amount actually lent to the borrower;
- (c) the rate per cent per annum of interest charged;
- (d) the date when the contract for repayment was made;
- (e) the fact that a note or memorandum of the contract was made and was signed by the borrower;
- (f) the date when a copy of the note or memorandum of the contract was made and was signed by the borrower;
- (g) the date when a copy of the note or memorandum was delivered or sent to the borrower;
- (h) the amount repaid;
- (i) the amount due but unpaid;
- (j) the date upon which the unpaid sum became due; and
- (k) the amount of interest accrued due and unpaid on the sum'.

It is our case that looking at the Plaintiff's pleadings, especially its paragraphs 4 (a-e), 7, 8 and 9 it is clear that the Plaintiff has not met any of the said requirements as mandated by the Rule referred above.

It is again our case that referencing the said paragraph 4(a-e) of the Plaintiff's Statement of Claim, the Plaintiff who claims that the Defendants owe it so much, failed woefully to even give the littlest details as to when each of the loans was made, interest rate applicable (as seen in Plaintiff's paragraph 4(a)); the date when the contract for repayments was made, and any amount paid so far (as stated in its paragraph 8 of the Statement of Claim).

It is again pertinent to point out to this Honorable Court that in the said paragraph 8 of the Statement of Claim, the Plaintiff who is claiming that aside from facility 1 which no payment was made, the Defendants failed with respect to the other facilities (Facility 2 -5) to meet the 48 monthly repayment instalments; failed to

demonstrate in its pleadings the amounts paid so far by the Defendants in respect of the said facilities; and also to plead any amounts left unpaid as required per the said Order 59 Rule 3 (h) and (i).

- ii. My Lord it is again our contention that as the Plaintiff has exhibited gross irregularity by not following the rules of this Honourable Court it is pertinent that the said pleadings as contained in its Statement of Claim be set aside accordingly, to avoid any injustice to the Defendants who according to the Plaintiff to be liable for the repayment of various facilities without the requisite particulars backing the said claim in accordance with the Rules of this Court.
- iii. My Lord, it is again the Defendant's case that should the Plaintiff be allowed to wallow in this irregularity, same will prejudice the fair trial of the case. it is therefore our prayers that the Court exercises its power under the rules of court to set aside the Statement of Claim for being irregular.

The Plaintiff who is opposed to our Application is arguing as follows:

- i. In paragraph 4 of its Affidavit in Opposition that contrary to the view taken by the us, that the action is a mortgage action, its action is one for the recovery of debts as shown in paragraph 11(i) (a-f) of its Statement of Claim.
- ii. In paragraph 6 that per their relief 11 (ii) a-c of the Statement of Claim, which calls for the Judicial Sale of 2nd Defendant's assets as listed in their paragraph 5 of the Statement of Claim, same is one of an alternative relief which is being sought and hence not applicable.
- iii. That the failure of the Defendant to put in an application to set aside the Writ of Summons and Statement of Claim upon entering Conditional Appearance has resulted in the crystallization of the Conditional Appearance into a regular Appearance and as such the Defendant's application has been brought out of time and without leave of court.
- iv. That the application is frivolous, vexatious and an abuse of the court process and should be dismissed indicating that the grounds required for striking out of pleadings as stated in the rules of court have not been met.

4. ISSUES TO BE RESOLVED ARISING OUT OF THE APPLICATION

Considering the case of both parties as demonstrated in the above paragraph, the issues that commend themselves for resolution are as follows:

- i. Whether or not the Plaintiff's action is one of a Mortgaged Action as stated by the Rules of Court and if so whether the Statement of Claim is compliant with the Rules of Court.
- ii. If there has been a breach of the Rules of Court, then whether or the court can exercise the power to set aside the Statement of Claim if it is found to be irregular.
- iii. Whether or not the Defendant has waived its right to bring the application for an order setting aside the Statement of Claim upon the entry of Appearance.

5. APPRAISAL OF ISSUES

5.1. WHETHER OR NOT THE PLAINTIFF'S ACTION IS ONE OF A MORTGAGED ACTION AS STATED BY THE RULES OF COURT AND IF SO WHETHER THE STATEMENT OF CLAIM IS COMPLIANT WITH THE RULES OF COURT.

My Lord, the rules of court provides the procedure in which a mortgage action ought to be instituted in the High Court. Under **Order 59 Rule 1(2) of C.I. 47** a mortgage action "*means an action in which there is a claim by the Plaintiff for any of the following reliefs:*

- a) *Payment of moneys secured by a mortgage or charge*
- b) *Sale of the mortgage property*
- c) *Appointment of a receiver*
- d) *Delivery of possession to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person who is or is alleged to be in possession of the property*
- e) *Release of the property from security*
- f) *Delivery of possession by the mortgagee."*

My Lord, in the instant case, as seen throughout the Plaintiff's pleadings, it is clear that the monies sought to be recovered by the Plaintiff are monies secured by

various securities with some being a First ranking Fixed and Floating Charge over 1st Defendant's Assets; and a Charge over the entire 1st Defendant's factory Building (as stated in paragraph 5(i) and (iv) of the Statement of Claim).

Again, in addition to the fact that the monies sought to be recovered are secured by a Charge, the Plaintiff is again seeking to exercise a remedy of Judicial Sale against these securities. A remedy available to mortgagees in the case of a mortgage transaction pursuant to SECTION 18 (A) THE MORTGAGES DECREE, 1972 N.R.C.D 96 by seeking an order for Judicial Sale of all the 1st Defendant's assets over which the charge was created and also its Factory Building. Under the said Section 8, the law allows, upon failure of a performance of an act secured by the mortgage for the mortgagee to apply to the court for an order for Judicial Sale of a mortgaged property. Section 1 (1) describes a Mortgage as a contract charging immovable property as security for the due payment of a debt and any interest accruing thereon.

The above demonstration goes to show that indeed the action before this Honourable Court is one that falls within the ambit of a mortgage action and that the Plaintiff intends to sell all the property charged by way of mortgage. That be the case, then the requirements for bringing a mortgage actions would be applicable in the instant case and needs to be followed by the Plaintiff.

My Lord, in the case of AGRICULTURAL DEVELOPMENT BANK VS. FIFI QUARTEY, SUIT NO. BFS/205/2015, dated 4th February, 2016, Kyei Baffour J (as he then was); refused an application for judgment in default of appearance brought ex parte for the reason that the matter was a mortgage action which required leave of court as well as notice to the Defendant. The Learned Justice described the said application as incompetent, as it sinned against the rules. In the said case the Plaintiff had given out loans and as security for the loans, there was a charge of immovable property. The Plaintiff sought to deny the fact that it was a mortgage action but the court intimated that as the action was seeking to recover monies secured by a charge, it was a mortgage action and so same ought to have fully complied with Order 59 of C.I. 47.

The Court iterated as follows:

"This is an action for payment of monies secure by a mortgage property at Sakumono or in the alternative order for the sale of the mortgage property. The action is within the four corners of (a) and (b) of the Rule 1 of Order 59 quoted supra. It is therefore not correct for counsel to suggest that the claim is not a mortgage action."

It appears therefore, that it is immaterial that the order for judicial sale is an alternative relief, once the pleadings show that the action is seeking to recover monies secured by some security, it would be deemed as a mortgage action.

My Lord, having established that the said action before the court is one of a Mortgage Action, the next issue to be determined is whether the Plaintiff's mortgage action is in compliance with the requirement of the Rules of Court per Order 59 Rule 3.

In a mortgage action, the rules of court require that certain 'particulars' be pleaded in the Statement of claim. **Order 59 rule 3** provides that "*every statement of claim in a moneylender's or mortgage action shall state*

- a) *The date on which the loan was made*
- b) *The amount actually lent to the borrower*
- c) *The rate per cent per annum of interest charged*
- d) *The date when the contract for repayment was made*
- e) *The fact that a note or memorandum of the contract was made and was signed by the borrower*
- f) *The amount repaid*
- g) *The amount due but unpaid*
- h) *The date upon which the unpaid sum became due; and*
- i) *The amount of interest accrued due and unpaid on the sum."*

A careful perusal of the Statement of Claim under attack would show that the said Statement of Claim does not reveal all the 'particulars' as listed above. Mainly, the Statement of Claim does not indicate whether or not a note or memorandum of the contract was made and was signed by the borrower. Moreover, it is unclear from the said Statement of Claim, when the said loan was made, although it gives a purported disbursement date (which by the way is not the 'date when the loan

was made'). The absence of the date on which the loan was made makes it quite difficult for the Defendants to ascertain whether they had entered into any such agreement. It is therefore our case that the absence of the 'particulars' referred, renders the pleadings non-compliant with the rules of court.

Having demonstrated that the Statement of Claim is in clear contravention of the rules of court, it is our humble prayer that the court by virtue of its power to set aside under the rules of court, can set aside the Statement of Claim as being irregular.

5.2. IF THERE HAS BEEN A BREACH OF THE RULES OF COURT, THEN WHETHER THE COURT CAN EXERCISE THE POWER TO SET ASIDE THE STATEMENT OF CLAIM IF IT IS FOUND TO BE IRREGULAR

My Lord, as clearly shown above in paragraph 5.1 supra, it is not without doubt that the Plaintiff per its pleadings have indeed breached the Rules as required under Order 59 Rule 3 of the Civil Procedure Rules.

As there has been a Breach, it is the our case that the Court can undoubtedly exercise its power to set aside the said Statement of Claim which flouts the rules of court thereby making it (the Statement of Claim) defective.

Non-compliance to Rules of Procedure

Respectfully my Lord, it is our stance that these rules of court have been put in place to guide the court, as well as parties and their lawyers in the conduct of proceedings. Indeed, ORDER 1 RULE 1 (2) OF THE HIGH COURT RULES provides for the Rules to be interpreted and applied so as to achieve speedy and effective justice and ensure as far as possible that **all matters in dispute** between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided.

My Lord, it is not for nothing that these rules were put in place, and it is for this reasons that we ask that the Plaintiff's failure or non-compliance of Order 58 Rule

3 should not go unchecked. And that it is incumbent on all parties to revere the rules of court and accord it the sanctity that it deserves.

ORDER 81 RULE 1 OF C.I. 47 provides as follows:

- 1) *"Where in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has by reason of anything done or left undone, been a failure to comply with requirements of these Rules, whether in respect of time, pace, manner, form or content or in any other respect the failure shall be treated as an irregularity and shall not nullify the proceedings any step taken in the proceedings, or any document, judgment or order in it."*
- 2) *The Court, may on the ground that there has been such a failure as stated in sub-rule (1) and on such terms as to costs or otherwise as it considers just*
 - a) *Set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or*

My Lord, it is undisputed that a mere irregularity will not render a proceeding a nullity. However, as is stated in the rules of court referenced above, where there has been a failure to comply with the rules of court, the Court may on that premise set aside the part of the proceeding, document, step, etc. in which the failure occurred.

My Lord, it would be observed from the provisions pointed out above that the court does not countenance non-compliance with the rules, even if the said non-compliance does not result in a nullity. Thus, the court can exercise its mandate to ensure full compliance with the law by making an order, either to set aside or to compel the party to amend the said proceeding.

In the case of **PATRICK ANKOMAYI V HANNAH BUCKMAN, Civil Appeal No. J4/43/2013 dated 26th February 2014**, the Supreme Court stated that "the rules of Court are not ornamental pieces. They are meant to be complied with".

My Lord, it is important to note that even though the courts have on a number of occasions highlighted that non-compliance with the rules does not amount to a nullity, it is important to recognize that these same courts have as much as possible advocated for reverence to be given to the Rules of Court.

In the case of **REPUBLIC V HIGH COURT, KOFORIDUA; EX PARTE ASARE (BABA JAMAL AND OTHERS INTERESTED PARTIES) [2009] SCGLR 460**, the Court stated I believe as follows:

"I believe that the time is ripe for Courts of Law to frown upon and condemn any attempt whatsoever directed at circumventing laid down procedures as established by law. These species of conduct have the effect of destroying the fabric of the Constitutional and legal structures of society"

It may be surmised from the various propositions made by the Courts that the fact that a non-compliance with the rule does not nullify the proceedings does not imply that parties can wallow in those irregularities. This is because, it has been shown that the court can set aside such irregularity or even exercise its authority to order an amendment of such proceedings and bring it in line with the rules of court.

Power to Set Aside

Having dealt with the non-compliance and its effects on proceedings, it is imperative to turn our attention at this stage to the power of the court to set aside proceedings or other processes, whether documents, steps, orders of the court, etc., which do not comply with the rules of court.

My Lord, ORDER 81 RULE 2 OF THE C.I. 47 provides as follows:

- 1) *"An application may be made by motion to set aside for irregularity any proceedings, any step taken in the proceedings or any document, judgment or order in it, and the grounds of it shall be stated in the notice of the application."*
- 2) *"No application to set aside any proceeding for irregularity shall be allowed unless it is made within a reasonable time and the party applying has not taken any fresh step after knowledge of the irregularity."*

In the case of **DACHEL AND COMPANY LIMITED VRS FRIESLAND FRICO**

DOMO, Civil Appeal No J4/7/2010, dated 22nd June, 2011, the Supreme Court, speaking through Adinyira JSC, stated as follows:

"In summary, non-compliance with the rules of procedure or any existing practice is a mere irregularity that does not automatically render proceedings following the non-compliance void. A party who becomes aware of the non-compliance is at liberty to bring an application to the Court and have the proceedings set aside."

It would be observed from the language of the proposition above that, any irregularity would not void the proceedings automatically. It takes the action of the party affected by such irregularity to make an application to the court and for the court to exercise its mandate to have the said irregular proceeding set aside. It may be surmised therefore that the court has the power to **set aside an irregular proceeding** but only upon the request or application of the other party, which in this case has been done.

Furthermore, the power of the court to set aside irregular proceedings may be exercised at any time when its jurisdiction has been invoked to do so. The language of Order 81 is quite clear when it purports that at the beginning or at any time when it comes to the knowledge of the party applying that such a failure to comply with the rules of court has occurred, then the court's power may be triggered to set the said proceeding aside.

My Lord, the only challenge to such an application is when some steps have been taken by the party attempting to invoke the power of the court. Thus, by taking such step, it has been held and indeed stipulated in the rules of court to amount to a waiver of that right.

My Lord, despite this fetter that may be placed on the right of a party to apply to have a proceeding set aside for being irregular, the courts have held that for such a step to amount to a waiver, it must have been on the merits of the case.

So, in the case of MENZGOLD GHANA LIMITED VRS BANK OF GHANA AND SECURITIES EXCHANGE COMMISSION, CM/BDC/0655/18 dated 10th January, 2019, the erudite judge stated as follows:

"To my mind, the filing of an affidavit in opposition per se will not amount to having taken a fresh step within the meaning of Order 81 Rule 2(2), if the essence of the said affidavit is to have the offending proceeding thrown out."

Again, in the case of MUMUNI AND ANOTHER VRS ZAKARIA AND ANOTHER [1992] 1 GLR 208, Benin J (as he then was), had this to say on waiver:

"Certainly, filing a defence out of time is an irregularity only since the other party can readily waive it and allow the case to proceed as usual. And to me, to constitute a waiver under the rule quoted above, it must be shown that the party alleged to have waived his objection has take some step which is only necessary or useful if the objection has actually been waived. In this case, after they had been served with the Statement of Defence, the plaintiffs filed a reply. By paragraph (1) of the reply, the plaintiffs stated in clear terms that the statement of defence filed was void since it sinned against an express order of the court. One would ordinarily consider this as an objection to the defence as filed. But then in subsequent paragraphs the plaintiffs went on to reply directly in substance to the averments contained in the defence, and even went on to allege for the first time, in the pleadings, fraud against the defendants and also estoppel by admission against the defendants. The reply as it stands is a complete answer to the defence and is intended as such, notwithstanding paragraph (1) thereof. The reply to a statement of defence being an important and useful part of the pleadings, is a fresh step within the meaning of Order 70 r 2 of L.N. 140A, and I so hold. Besides, when the defendants put in the application to have the judgment in default vacated, inter alia, the plaintiffs filed an affidavit in opposition and counsel argued the matters raised on merits relying on the plaintiff's affidavit in a large measure. And these are fresh steps as was held in Boyle v. Sacker (1888) 39 Ch.D. 249, C.A. I therefore conclude that the statement of defence of 13th October, 1989 is valid and so I allow the application that the defendants defend the action in the light of the defence filed."

My Lord, Mumuni v Zakaria seems to be a notorious authority relied on by many respondents in opposition to applications to set aside under Order 81. However, a

careful perusal of the case would show that to amount to a 'fresh step', the step supposedly taken must be so **important** and must be considered as a fulcrum of the matter at hand. It would be realised that the court rightly held that the filing of a Reply, which answered the other party's statement of defence, which the plaintiff was seeking to set aside was a fresh step.

Thus, it appears from the cases relied on above that not every step taken by a party would be deemed as a fresh step within the meaning of Order 81. And that for same to be relevant as a fresh step, the said step ought to have sought to go into the merits of the case. Which in this case, the Defendants have no such document (i.e. Statement of Defence) which seeks to go into the merits of the case before the Court.

Under this issue, it is therefore our submission that with such a fundamental breach having occurred and having demonstrated to this court that it has the power to set aside the said Pleadings as contained in the Statement of Claim, it is our case that same power ought to be exercised.

5.3. WHETHER OR NOT THE DEFENDANTS HAVE WAIVED THEIR RIGHTS TO BRING THE APPLICATION FOR AN ORDER TO SET ASIDE STATEMENT OF CLAIM UPON THE ENTRY OF APPEARANCE

My Lord, respectfully, the situations that give rise to a waiver to bring an application to set aside have been succinctly laid out supra. It is, however, important that we outline the circumstance of the present matter and demonstrate to the court why the assertion by the Plaintiff that the Defendants have waived their rights to bring this application cannot be correct.

My Lord, the Plaintiff in its paragraph 9 of the Affidavit in Opposition argues that as the Defendant entered a Conditional Appearance, the said appearance has crystalized into a regular appearance and hence we the Defendants cannot bring this application as same is out of Time and without the leave of Court.

It is our argument that the position taken by the Plaintiff is absolutely flawed. My Lord it appears the Plaintiff is confusing this application to that of an application brought under Order 9 Rule 8 which is to set aside the WRIT. Which clearly is not what our application proposes to achieve; which is to set aside the Statement of Claim and not the WRIT.

My Lord, per the facts of the instant matter, it is our case that the Defendants have not taken any step which should be deemed as a fresh step to constitute a waiver. It is important to emphasise that upon being served with the Writ of Summons, the Defendants entered conditional appearance and subsequently filed a notice to produce certain documents for inspection and an Affidavit in opposition to Plaintiff's Motion for Judgment in Default; all of which were not an answer to the Plaintiff's claims. It was rather a collateral to the main claim.

Furthermore, It is pertinent to state that an important document such as A Statement of Defence has still not been filed to warrant an argument that a fresh step has been taken by the Defendants². An affidavit in opposition to the Plaintiff's Motion for Judgment in Default of Defence was filed. However, same does not provide answers to the Plaintiff's claims on their merits.

It is also undisputed that per the rules of court, an application to set aside under Order 81 can be brought at any time, as long as no fresh step has been taken. As we have already demonstrated to this honourable court that the steps taken by the Defendant in the instant case cannot be deemed as a fresh step within the meaning ascribed to it in Order 81 rule 2, it is our view that contrary to Plaintiff's assertion, the Defendant is well within the time to bring the present application, which application ought to be granted in full compliance with the rules.

² Mumuni v Zakaria

6. CONCLUSION

My Lord, it is obvious that a Statement of Claim purporting to lay the claims for a mortgage action ought to comply with Order 59 of the C.I. 47. Therefore, as the Statement of Claim in the present action does not fulfil the particulars of pleadings required of such an action, it is our humble prayer that this honourable court exercise its powers under Order 81 to set aside the said Statement of Claim.

We pray accordingly.

DATED IN ACCRA THIS 17TH DAY OF JUNE 2020

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**THE REGISTRAR
HIGH COURT
COMMERCIAL DIVISION
ACCRA**

**AND FOR SERVICE ON THE PLAINTIFF/RESPONDENT OR ITS SOLICITOR,
VIDA AGYEKUM ACHEAMPONG ESQ., MONITORING & RECOVERIES
DIVISION, AGRICULTURAL DEVELOPMENT BANK**