

CT 4
IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION 4
ACCRA – A.D. 2020

*11-9-2020
1224
J*
SUIT NO: CM/MISC/1033/20

IN THE MATTER OF THE MORTGAGES ACT, 1972 (N.R.C.D. 96)
SECTIONS 15(B) AND 18

-AND-

IN THE MATTER OF AN APPLICATION BY A MORTGAGEE FOR AN ORDER FOR JUDICIAL SALE OF THE MORTGAGE PROPERTIES ONE OF WHICH IS SITUATED ON THE SPINTEX ROAD AND THE OTHER IN THE FREEZONE ENCLAVE ALL IN THE GREATER ACCRA REGION OF THE REPUBLIC OF GHANA

-AND-

IN THE MATTER OF ENFORCEMENT OF MORTGAGES USED AS SECURITY FOR THE FACILITIES TAKEN BY UNITED STEEL COMPANY AS PRINCIPAL DEBTOR FROM FIRST ATLANTIC BANK

FIRST ATLANTIC BANK LIMITED
ATLANTIC PLACE
#1 SEVENTH AVENUE
RIDGE WEST
ACCRA

APPLICANT/RESPONDENT

AND

RABIH MIKATI
TEMA

1ST RESPONDENT

ATLANTIC FOODS LTD
TEMA

2ND RESPONDENT

WORLDWIDE HEALTHCARE LTD

CLAIMANT/APPLICANT

APPLICANT/RESPONDENT'S WRITTEN SUBMISSION ON THE PRELIMINARY POINT OF LAW REGARDING JURISDICTION

1. INTRODUCTION

Respectfully Your Lordship, this is the legal submission by Counsel for First Atlantic Bank (hereinafter referred to as ‘Bank’) in respect of the Preliminary Objection on improper invocation of this court’s Jurisdiction raised in its Affidavit in Opposition. It is noteworthy that the Claimant/Applicant chose to describe the Bank as Applicant/Respondent in its Originating process in this suit when the Bank has not initiated any application in the suit.

My Lord, in this submission, the Bank shall urge the court that a Notice of Claim filed on the 13th August 2020 as Suit No. CM/MISC/1033/2020 is not an originating process that can invoke the jurisdiction of this honourable court in an action so as to found an interlocutory application for an order for access, filed by the Claimant/Applicant on August 21, 2020.

In the case of THE REPUBLIC VRS. THE HIGH COURT (FINANCIAL DIV. 3), ACCRA; EX-PARTE: MS ARCH ADWOA COMPANY LTD [2019] SUPREME COURT the court held that:

“It is a well-known principle of law that where an enactment sets out the procedure for invoking the jurisdiction of a court (or tribunal), the party must comply with it or he will be thrown out of court”.

2. FACTS

Respectfully My Lord, the Bank, on the 7th of July, 2020, in Suit No: CM/MISC/0860/2020, was granted leave by the High Court, Commercial Division, presided over by Justice Jane Akwele Quaye (Mrs.) to seek Police assistance in order to recover possession of a property described in Land Certificate No. TDA.

2200, which was used by one Rabih Mikati to secure a facility granted to United Steel Company Limited. The said order was premised on an Originating Motion by the Bank for a warrant to issue for the Ghana Police Service to aid the Bank in the exercise of its right to possession as a **Lender under the Borrowers and Lenders Act**. The said order was carried out and the Bank entered into possession of the subject property thereby bringing the proceedings under **Suit No: CM/MISC/0860/2020** to an end.

The Claimant/Applicant who claims to have an interest in the property stemming from a Tenancy Agreement it obtained from United Steel Company Ltd commenced a fresh action in another suit numbered **CM/MISC/1033/2020** by way of NOTICE OF CLAIM, a process unknown in our jurisprudence to commence an action.

It is the contention of the Bank that had the Claimant/Applicant been given any such right under the Borrowers and Lenders Act, (which is denied), the appropriate step was not for the Claimant/Applicant commence a fresh suit by way of Notice of Claim.

Subsequent to the filing of the Notice of Claim, the Claimant/Applicant herein filed an Application premised on the said Notice of Claim, for Stay of Execution and an order setting aside a supposed Writ of Possession on 14th August 2020. Before the hearing of the said Motion For Stay of Execution, the Bank herein raised the point of short service and indicated its intention to file an Affidavit in Opposition when parties appeared before the court on the 19th of August, 2020, the return date for the said Motion. On the said date, the Claimant/Applicant herein made an oral application to the court to order the Bank to grant the Claimant Access to the premises to remove their movables as well as some pharmaceutical products. The oral application was strongly opposed by the Applicant on the

ground that the Claimant ought to apply to the court formally for the said access. Citing reasons as the possibility of some of the pharmaceutical products of the Claimant going bad, the Court made an interim order granting the Claimant an order for access for a period of five (5) days within the hours of 9am to 4pm for the purpose of removing those items of the Claimant/Applicant.

My Lord, after the grant of the said access by the interim order, the Claimant/Applicant herein filed and served yet another application titled “Application for an Order for Access” also premised on the same Notice of Claim and in this same instant suit numbered CM/MISC/1033/2020, which application was vehemently opposed by the Bank herein on grounds of:

1. Absence of title of the landlord of the Claimant/Respondent in the subject property;
2. Absence of any such right of the Claimant/Respondent under the Borrowers and Lenders Act;
3. Abuse of process; and
4. A preliminary objection to the jurisdiction of the court on the basis that its jurisdiction had not been properly invoked by the Originating process in this suit.

It is based on the preliminary objection that the court ordered both parties to file their written submissions.

3. ISSUES

My Lord, considering the Preliminary Point of Law raised by the Applicant, the main issue that begs resolution is:

- 3.1.Whether or not the Claimant/Applicant (even if not a trespasser) can properly invoke the jurisdiction of this Court by initiating an Action by a Notice of Claim; and

3.2.Whether or not the improper invocation of jurisdiction makes the determination of the issue of jurisdiction the only matter to be determined at this stage in the instant action thus making the Application for Access founded on a wrong Originating process a secondary and non-consequential matter.

4. APPRAISAL OF THE ISSUES

4.1. WHETHER OR NOT THE CLAIMANT/APPLICANT (EVEN IF NOT A TRESPASSER) CAN PROPERLY INVOKE THE JURISDICTION OF THIS COURT BY INITIATING AN ACTION BY A NOTICE OF CLAIM

My Lord, before a court goes ahead to hear a matter, it must satisfy itself that it has substantive jurisdiction as well as procedural jurisdiction in the matter. The absence of any one of these jurisdictions strips the court of the jurisdiction to determine the matter. In the case of WILMOT V. WILMOT [1981] GLR 521 at 524, Twumasi J (as he then was) described jurisdiction as follows:

"In its conceptual sense, the jurisdiction of every court has two major connotations of varying degrees of importance: Firstly, there is the jurisdiction of a court to try well-defined causes and matters. This is the court's substantive jurisdiction. Secondly, there is the jurisdiction with regard to venue. This is procedural jurisdiction."

My Lord, the above demonstrates that a court may be clothed with substantive jurisdiction, but procedural issues may hamper the exercise of such substantive jurisdiction. This has also been affirmed in the Court of Appeal case of PATIENCE ARTHUR VS. MOSES ARTHUR [2016] CIVIL APPEAL NO. H1/147/2016 (DATE 24TH NOVEMBER 2016) in which Tanko J.A. (as he then was) stated as follows:

"I am in agreement with the submission of counsel for the Appellant that, the Respondent, having failed to comply with the mandatory provision of Order 43 rule 13, particularly on the issuance of a Writ of Assistance, per the contents of Form 18K of the schedule to the rules of the High Court, the jurisdiction of the Lower Court in the application for variation and content of execution has been wrongly invoked. Consequently, the Court below had no jurisdiction to hear the application. In our view, the procedural jurisdiction of the Lower Court being one of a fundamental nature, we hold that the Learned Trial Judge erred in refusing to uphold the preliminary objection raised by the Appellant."

My Lord, the HIGH COURT CIVIL PROCEDURE RULES, 2004 (CI 47), provides the modes of commencing an action, hence invoking the jurisdiction of the High Court in determining a cause of action which has accrued. There are specifically three modes for commencing an action under the rules. These are:

- i. By Writ
- ii. By Petition
- iii. By Originating Notice of motion

According to ORDER 2 RULE 2 OF C.I. 47, all civil proceedings shall be commenced by a Writ of Summons, subject to any existing enactment to the contrary. As the rules require, every Writ of Summons must have an endorsement of the nature of the claim, as well as the relief or remedy sought. The endorsement must disclose in brief the cause of action, for which the Plaintiff has instituted the action.

Per the language of ORDER 2 RULE 2 cited supra, a writ of summons may only be dispensed with where an enactment or the rules provide that some other means or mode be adopted in initiating the action - LARYEA VRS. MACVROOM [1991] 1 GLR 190.,

My Lord, it is submitted that no enactment has provided for the commencement of action asserting one's interest in a property by a Notice of Claim though Notice of Claim may be filed in an existing action where a property has been taken or intended to be taken in execution. The Claimant/Applicant relied on Order 44 r 12. The rule provides as follows:

Claims by other persons

'12. (1) A person who makes a claim to or in respect of a property taken or intended to be taken in execution under process of the Court, or to the proceeds or value of any such property, shall give notice of the claim to the Registrar and shall include in the notice a statement of the person's address for service.

(2) On receipt of claim made under subrule (1), the Registrar shall forthwith give notice of it to the execution creditor who shall within four days after receiving the notice, give notice to the Registrar informing the Registrar whether the execution creditor admits or disputes the claim.

(3) Where

(a) the Registrar receives a notice from an execution creditor under subrule (2) disputing a claim, or the execution creditor fails to give the required notice within the period mentioned in that subrule; and

(b) the claim made under subrule (1) is not withdrawn, the Registrar may apply to the Court for relief.

(4) An application for relief by the Registrar under this rule shall be made ex-parte to the Court seeking an order that the claimant and the execution creditor shall appear before the Court on a date specified in the order for the issue between them to be determined.'

The Notice of Claim in the instant suit was not filed by a third party in an existing suit, which is **Suit No: CM/MISC/0860/2020** in which the property of the Claimant/Applicant is taken or being taken but commenced a fresh action in another suit numbered **CM/MISC/1033/2020**.

The closest Order for such an action to be commenced under C.I. 47 is Order 48 for Interpleader Relief, which provides for only two instances and dictates in Rule 2(1) that such relief must be sought by Motion. The rule does not state that affidavit in support is dispensed with. By Order 19 r 4 every Motion must be accompanied by Affidavit. It reads:

Affidavit in support of motion

4. Every application shall be supported by affidavit deposed to by the applicant or some person duly authorised by the applicant and stating the facts on which the applicant relies, unless any of these Rules provides that an affidavit shall not be used or unless the application is grounded entirely on matters of law or procedure which shall be stated in the motion paper.

It is respectfully submitted that a claim of tenancy from an entity, which is not the owner of the subject property is neither a matter of law or procedure and therefore the rule ought to have been followed. In the case of THE REPUBLIC VRS HIGH COURT, KOFORIDUA; EX PARTE KOFI ASANTE, BABA JAMAL (INTERESTED PARTIES), [2009] SCGLR 460, the Supreme Court quashed the decision of the High Court which was premised on a wrong mode of commencement on the ground that it did not have jurisdiction to entertain same. The Court stated as follows:

"It is therefore untenable that the learned High Court Judge did not see anything wrong with the improper procedure that was adopted before him in what seemed clearly to be an election dispute and therefore a petition and

not a writ of summons should have been used. I hold therefore that the High Court lacked jurisdiction to hear and determine the premature suit commenced by a writ of summons by the 1st Interested Parties in suit No. E 2/19/09 dated 22/12/2008 against the 2nd Interested Party and the Applicant who applied and was later joined to the suit. Wrongful assumption of jurisdiction is a ground for Certiorari.”

Respectfully my Lord, Order 48 Rule 1 states that “A person may **apply** to the Court for relief”.

By ORDER 19 RULE 1(2) OF C.I. 47:

“Proceedings by which an application is to be made to the Court or a Judge of the Court under any enactment shall be initiated by motion and where an enactment provides that an application shall be made by some other means, an application by motion shall be deemed to satisfy the provision of the enactment as to the making of the application”

My Lord, in the case of THE REPUBLIC VS. HIGH COURT, WINNEBA; EX PARTE UTAG (CIVIL MOTION NO. J5/65/2017), the court reiterated the fact that an originating motion is resorted to, where an enactment specifically provides for the procedure by **application** to seek redress in the court.

My Lord, the rules of court do not recognize a mode of commencement of action by NOTICE OF CLAIM. The courts have consistently reiterated the fact that where the rules of court have prescribed a particular procedure for beginning an action, it is that mode that ought to be followed in order to invoke the court’s jurisdiction. So, in the case of ZAINABU NASKE BAKO-ALHASSAN VS ATTORNEY-GENERAL; CIVIL APPPEAL NO. J1/22/2012 (DATED 24TH APRIL 2013), the Supreme Court posited that:

"However, whenever a law or rule of procedure stipulates the commencement of an action by writ, or petition, motion or by any specific process, it is by that process alone that the action is to be commenced."

My Lord, in the case of WOLLEY v NSIAH [2003-2005] 1 GLR 69 COURT OF APPEAL, ACC the court speaking through Kanyoke JA stated as follows:

"It seems to me that learned counsel for the appellant has got his parameters wrong. I think there is a difference between a cause of action and the proper procedure to be adopted to come before the court to ventilate that cause of action. Where an enactment sets out a procedure for invoking the jurisdiction of the court, the person or party who wishes to come before the court to ventilate that cause of action must comply with the procedure or he will be thrown out of the court. Similarly, in every aspect of the law, there are legal processes which a person must adopt to come before the court whether or not he has a genuine cause of action. All that I am saying is that where the lawmaker has set the procedure a person must follow to come before a court or where legal processes have set out procedures by which person must come before the court, any person who seeks to come before the court to pursue a cause of action must follow that procedure laid down in the enactment or by the legal process"

My Lord, having referred you to the army of authorities supra, the crux of the Bank's preliminary objection to the present application before you is premised on the fact that by virtue of the Notice of Claim which was filed by the Claimant/Applicant which could not properly invoke this Court's jurisdiction, the whole suit ought to be dismissed in limine and the Application for Access filed therein cannot be entertained by the Court as something cannot be put on nothing – MACFOY V UNITED AFRICA CO. LTD [1961] 3 ALL E.R. 1169. In this case the erudite Judge, Lord Denning M.R. stated as follows:

"If an act is void then it is in law a nullity. It is not only bad but incurably bad. It is automatically null and void without much ado... And every proceeding which is founded on it is also incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse."

The above proposition by Lord Denning has often been cited with much approval by the Superior Courts. Such fundamental errors creating nullities cannot be cured by Order 81. In the case of OPANIN AGYARKWA VS. JAMES FOLAGIN AND OTHERS, CIVIL APPEAL NO J4/58/2019 (DATED 11TH MARCH, 2020), the Court speaking through Kotey J.S.C stated thus:

"This Court has affirmed this position in a long line of cases including Republic v. High Court, Accra; Ex parte Atumfuwa Kwadwo Bi & Anor [2000] SCGLR 72; Oppong v. Attorney-General [2000] SCGLR 275;.....In Oppong v Attorney-General Atuguba JSC stated at page 280 that;

'Where the step by a party to proceedings before a court is fundamentally wrong; such error is not within the purview of the rule and cannot be waived. One cannot waive a nullity'".

It is respectfully submitted that where it is found that the court's jurisdiction was not properly been invoked, all proceedings on that jurisdiction will be deemed a nullity per the case of REPUBLIC V HIGH COURT, ACCRA; EX PARTE FREDERICK SALIM HANAWI; CIVIL MOTION. NO J5/1/2014.

4.2. WHETHER OR NOT THE IMPROPER INVOCATION OF JURISDICTION MAKES THE DETERMINATION OF THE ISSUE OF JURISDICTION THE ONLY MATTER TO BE DETERMINED AT THIS STAGE IN THE INSTANT ACTION THUS MAKING THE APPLICATION FOR ACCESS FOUNDED ON A WRONG

ORIGINATING PROCESS A SECONDARY AND NON-COSEQUENTIAL MATTER.

My Lord, a look at the Application for Access will show that the Claimant/Applicant does not have any authority of the Rabih Mikathi the mortgagor, to be on the subject land for it to even mount a claim on it where the tenancy it relies on stems from a grant by United Steel Company. But, this issue shall not be addressed at this stage. The law on jurisdictional objection is clear that such a point of law when raised ought to be addressed as the sole issue. Being a point of law, the court cannot mix the hearing of the case with a point of law on jurisdiction. This position of the law was confirmed in the case of EBUSUAPANIN YAW STEPHENS V KWASI APPAH (2010) 27 MLRG 12 @ 26.

In REPUBLIC V HIGH COURT ACCRA, EX-PARTE ADJEI (1984/86) 2 GLR 107, Taylor JSC held that:

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case."

In the case of SUMAILA BIELBIEL V ADAMU DARAMANI, WRIT NO. J1/2/10, DATED 4TH JULY 2011, the Supreme Court through Gbadegbe JSC had this to say on the jurisdiction question:

"We are called upon in this ruling to determine the jurisdictional question. It is settled that when the question of jurisdiction is raised before any court the court must proceed to determine it before proceeding to inquire into the claim and any other matter before it including pleas that may result in the disposal

of the action without it being heard on the merits. ...So fundamental is the plea of the absence of jurisdiction that once it is raised the court is DISABLED from exercising its jurisdiction in the matter except to pronounce on whether it has jurisdiction in the matter.” (emphasis mine)

My Lord, one would expect that with an Order having been granted to the Bank by the Court in Suit No. CM/MISC/0860/2020, the Claimant/Applicant claiming to be beneficial owners of the said property, would have filed their Notice of Claim in the said suit instead of commencing a fresh suit by way of an Originating Motion, citing Order 44 rule 12 of C.I. 47 and Sections 15 (b) and 18 of the Mortgages Act 1972 (N.R.C.D 96).

My Lord, the Claimant/Applicant having done this, it is the Bank’s submission that this Court notwithstanding the substantive jurisdiction in respect of interests in land the court’s jurisdiction has not been properly invoked as the mode of commencement of a fresh suit as in Suit No CM/MISC/1033/20 is not recognised under any of the known modes of commencement prescribed by law.

The Supreme Court in PATRICK ANKOMAYI v HANNAH BUCKMAN Civil Appeal No. J4/43/2013, 26th February 2016, said ‘*The rules of court are not ornamental pieces. They are meant to be complied with.*’

It is trite that where a procedure adopted by a party is fundamentally flawed, all subsequent proceedings are also null and void. This was pronounced in the case of REV. ROCHER DE-GRAFT SEFA & ORS VS BANK OF GHANA, CIVIL APPEAL NO. J4/51/2014 the Supreme Court stated as follows:

“..*At law, the said declaratory reliefs which were proceeded with by the learned trial judge without jurisdiction.....are still pending and creates a compelling*

reason that leaves us with no discretion in the matter but to annul the said award in order to preserve the procedural integrity of the court.”

It may be surmised from the line of cases referred to supra that the court would usually not countenance proceedings, which are premised on processes, which are fundamentally wrong and would usually set such proceedings aside.

In the instant case, the Bank’s contention is that all processes namely the Application for Stay of Execution and an Order setting aside Writ of Possession, as well as the Application for an Order for Access ought to fall with the striking out of this suit on grounds of improper invocation of jurisdiction. The reason being that those processes are rooted on a Notice of Claim to commence an action, an originating process that was not appropriately initiated in accordance with the rules of court.

For this reason, the Applicant’s prayer to this honourable court is that the Notice of Claim filed in Suit No. CM/MISC/1033/20 and all processes founded on it, by the authorities referred to above, ought to be set aside as being of no effect.

5. PRAYER AND CONCLUSION

My Lords, with the facts catalogued above and the legal arguments raised in support of our objection, it is our prayer that this Honourable Court declines jurisdiction to determine the Application on the basis that its jurisdiction has not been properly invoked.

We pray accordingly.

DATED AT AKOSOMBO CHAMBER IN ACCRA THIS 11TH DAY OF SEPTEMBER 2020.

MINKAH PREMO & CO.
Box 14951, Accra- Akosombo House
No. 3 Emmause 2nd Close
Labone — Accra
Tel:233-302-781625,781627,767114
Fax: 233-302-781624

.....
SOLICITOR FOR THE APPLICANT/RESPONDENT
JUSTICE KUSI-MINKAH PREMO
LICENCE NO: GAR 01474/20

AND FOR SERVICE ON THE ABOVE-NAMED CLAIMANT/APPLICANT OR ITS LAWYER, **MAAME AMA HANY, FAIBILLE AND FAIBILLE, CONSTANCE CHAMBERS, NO. F142/8, NORTH LABONE, ACCRA**