

CT 4

Filed on 29-09-2020

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

2:30

Jul

**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**

**APPLICANT/RESPONDENT**

**AND**

**RABIH MIKATI**

**1<sup>ST</sup> RESPONDENT**

**ATLANTIC FOODS LTD**

**2<sup>ND</sup> RESPONDENT**

**WORLDWIDE HEALTHCARE LTD**

**CLAIMANT/APPLICANT**

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**SUPPLEMENTARY WRITTEN SUBMISSIONS ON THE PRELIMINARY  
POINT OF LAW REGARDING JURISDICTION FILED BY FIRST  
ATLANTIC BANK IN RESPONSE TO CLAIMANT/APPLICANT'S  
WRITTEN SUBMISSION**

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## **1. INTRODUCTION**

Respectfully Your Lordship, this is a supplementary written submission in response to Claimant/Applicant's Written Submissions filed on September 16, 2020. Your Lordship, this reply is being filed per leave granted by this honourable Court on September 22, 2020.

By the Written Submissions filed on the 16<sup>th</sup> of September 2020, there have been a misrepresentation of some facts leading to certain issues which call for addressing and same would be considered in this reply.

My Lord, there are three (3) suits involved in the Motion for which the preliminary objection has been raised. They are:

1. Suit No. **CM/MISC/0860/2020** relating to the Originating Motion for the Order of Possession;
2. Suit No. **CM/MISC/1008/2020** relating to the Originating Motion for Judicial Sale; and
3. Suit No. **CM/MISC/1033/2020** commenced by Notice of Dispute on which the Motion for Access and Setting Aside Order of Possession has been filed.

The crux of the preliminary objection is that an interlocutory motion to set aside the Order obtained in Suit CM/MISC/0860/2020 relating to the Originating Motion for the Order of Possession can only be brought in that suit but not by another suit, Suit No CM/MISC/1033/2020 commenced by Notice of Dispute, an Originating process unknown to the law on which the Motion for Access and Setting Aside Order of Possession has been filed.



The substantive motion is yet to be moved in view of the fact that a preliminary objection has been raised to it. Consequently, until the preliminary objection on jurisdiction has been determined, no issue raised by the substantive application is due for consideration.

For the arguments on the preliminary objection relating to jurisdiction, the issues that arise from the Written Submissions of the Claimant/Applicant are as follows:

- i. Whether the title of the suit was the same as the suit that gave the possession order so as to suggest that the Claimant had used the appropriate suit number to present its processes for filing.
- ii. Whether on the face of the Record, there is evidence that it was the Registrar who deleted the suit number used by the Claimant.
- iii. Whether an error of the Registry only permits an opportunity for re-filing or grants jurisdiction when same has not been properly invoked
- iv. Whether or not the court has the power to determine substantive matters at the stage of preliminary objection relating to jurisdiction.

In the ensuing paragraphs, the issues stated above would be resolved with recourse to statutes as well as relevant legal authorities and decided cases.

## **2. APPRAISAL OF THE ISSUES**

### **2.1. WHETHER THE TITLE OF THE SUIT WAS THE SAME AS THE SUIT THAT GAVE THE POSSESSION ORDER SO AS TO SUGGEST THAT THE CLAIMANT HAD USED THE APPROPRIATE SUIT NUMBER TO PRESENT ITS PROCESSES FOR FILING.**

My Lord, the simple answer to this issue is No!

Firstly, the Claimant herein from its Written Submission, states in the first paragraph of page 4 that in exercise of its rights, it initially filed its Notice of Claim using the same suit number CM/MISC/1008/2020, which by the way is the suit number for the Originating Motion for an Order for Judicial Sale of Mortgage Property under the Mortgages **Act, 1972 (NRCD 96) Sections 15 (b) and 18**, which is pending before the Court but not the Suit No CM/MISC/0860/2020 for the suit that granted the Possession Order. Indeed, the Claimant has evidenced the said suit that gave the Possession Order as Exhibit 2, which has a different title and different suit number thus belying the Claimant's assertion that it had used the appropriate suit number to assert its claim and to set aside the Order.

It is respectfully submitted that the Claimant cannot blame the Registrar for its own mistake.

Respectfully My Lord, the Claimant in their submission refers to the case of FRIMPONG AND ANOTHER VS. NYARKO [1998-99] SCGLR 734 AT 751 quoting the court to say that:

*"I concede that this false NHC filing stamp was the handiwork of the officials of the house and generally the law does not permit the court to penalize a party in a situation arising from the misconduct over which the party has no control..."*

My Lord, the quotation above did not lead to the acceptance of the process but it was the penalization of the party that was withheld.

Respectfully, the bare facts of the said Frimpong Case which was one of fraud would reveal that this case does not support the Claimant's case at all. The Frimpong case dealt with a fraudulent notice of appeal, which arose through the fact that there were two stamps on the Notice of Appeal, the first stamp was from the Registry of the Court of Appeal and the second was from the Registry of the National House of



Chiefs. The law as we know it is that a notice of appeal must be filed in the court below, although in this case it appeared that the notice of appeal from the decision of National House of Chiefs was filed at the Court of Appeal instead of the National House of Chiefs. However somehow Counsel for the Appellant obtained the stamp of the registry for the National House of Chiefs 40 minutes after he had obtained the stamp from the Court of Appeal which was unlikely since the two courts were 200 miles apart. When the Supreme Court noticed this, it invited the Registrar of the National House of Chiefs to explain this anomaly. The Registrar denied any knowledge of how the stamp got onto the notice of appeal, leaving fraud as the only reasonable explanation.

My Lord, in any event the court held that since the Notice of Appeal itself being out of time was a nullity, no issue of penalizing the appellants arose. The Frimpong case held that:

*"Secondly, although a party is generally not to be penalised for the misconduct of a court official, it is also established that where the misconduct of a court official is founded on or arises from the error, mistake or improper conduct of that party, the said party cannot take advantage of that misconduct."*

It appears that the Claimant whose mistake has been established is asking the court to blame the registrar for it and ignore an improper procedure because it had no control over it. My Lord, can take judicial notice of the fact that even when we pointed out its error to it in our affidavit that had just been served on the Claimant, it was ready to go ahead with its Motion.

It is respectfully submitted that the improper invocation of the jurisdiction of this honourable court will not stand. Let the Claimant walk away without cost but its fresh suit must terminate here.

**2.2. WHETHER OR NOT ON THE FACE OF THE RECORD IT WAS THE REGISTRAR WHO DELETED THE SUIT NUMBER USED BY THE CLAIMANT**

My Lord, the Claimant in its submissions alleges that it filed its Notice of Claim in suit no CM/MISC/1008/2020 and at the point of filing at the Registry, it was intimated to it that an Interpleader is a fresh action and needed to be given a fresh suit number.

My Lord, it would be observed that nothing on the face of the record shows that it was the registrar that insisted on giving a different suit number to the Notice of Claim. These are averments which have been made cursorily by the Claimant in its submissions without reference to any evidence on the record.

There being no palpable evidence on record to show that the Registry deleted the correct suit number used by the Claimant, the Applicant submits that inference can be drawn from the fact that the Claimant's own submissions concede that it was Suit No CM/MISC/1008/2020 that it originally wrote on the process, but not Suit No. CM/MISC/0860/2020 that had given the Possession Order, which the Claimant is seeking to set aside and to assert its interest in the property related thereto.

It is submitted that the Claimant had made its own error. As to how he sought to correct it, its story that it was the Registrar rather than its own lawyers remains unproved. What is glaringly established is that a new Suit number, being **CM/MISC/1033/20** has been issued thus commencing a fresh action by a wrong procedure.



**2.3. WHETHER AN ERROR OF THE REGISTRY ONLY PERMITS AN OPPORTUNITY FOR RE-FILING OR GRANTS JURISDICTION WHEN SAME HAS NOT BEEN PROPERLY INVOKED**

My Lord, it is not in doubt that in Ghana, the courts' jurisdiction is conferred by the Constitution and by statute. This implies that the court does not derive its jurisdiction from any other source. Hence a party cannot claim that a jurisdiction which has not been properly invoked can be remedied by the Registry of the Court. Indeed, even parties to a suit cannot consent to grant jurisdiction to the court when no such jurisdiction exists. In the case of **NII ADAMAH-THOMPSON AND OTHERS; EX PARTE AHINAKWAH II (SUBSTITUTED BY AYIKAI [2012] 1 SCGLR 379** the court intimated parties and/or their lawyers cannot by consent or acquiescence confer jurisdiction upon a court where the court otherwise does not have such jurisdiction.

My Lord it would thus not be out of place to state that an error of the Registry cannot grant jurisdiction to a court, especially in a situation where the said jurisdiction has not even been properly invoked, as in the instant case. The best remedy for a party who has been affected by an error of the Registry is for the person to refile the said process, so affected.

My Lord, in the instant case, the Claimant is praying the court not to penalize it for the alleged error of the Registry but strangely, it goes ahead urging the Court to assume jurisdiction and grant its Motion regardless of the fact that the Motion has not only been moved but also did not properly invoke the court's jurisdiction.

**2.4. WHETHER OR NOT THE COURT HAS THE POWER TO DETERMINE SUBSTANTIVE MATTERS AT THE STAGE OF PRELIMINARY OBJECTION RELATING TO JURISDICTION**

My Lord, it is trite that preliminary objections are important in the expeditious disposal of matters. Thus, the main objective for raising a preliminary objection is to purposely preclude the hearing of a matter substantively on the merits until the objection has been disposed of.

In the case of WINDWORTH HOLDINGS V. DUPAUL WOOD TREATMENT COMPANY LIMITED, CIVIL APPEAL NO. J4/66/2018, [23/01/2019], GBADGBE JSC opined that when any point of law is raised, it stands in the way of the substantive matter until it is disposed of. Where an objection based on technicality stands in the way of a party's application or the relief he seeks and the court has no discretion in the matter because of the position of the law or rules governing the situation, the objection may be upheld.

My Lord, the law imposes an obligation on the court to rule upon a preliminary objection once it is raised. It is not open to the court simply to ignore the objection. This was made known in the case of REPUBLIC V HIGH COURT, ACCRA; EX PARTE FREDERICK SALIM HANAWI (Civil Motion No. j5/01/2014)

In that case, there was an application by the interested parties to set aside a judgment which was given early in favour of the Applicants. The interested parties did not file an affidavit in opposition of the application to set aside the judgment. However, the interested parties also filed motion objecting to among other things the jurisdiction of the court to give the prior orders. A date was set for the ruling on the preliminary issues but instead, the application of the applicants was granted setting aside the order that was given early on. The interested parties then brought an application to the Supreme Court for certiorari to quash the order of the high court. The Learned Justice, Akamba JSC relying on the dictum of Romer L.J. in the case of Everett v



**Ribbands (1952) 2 All ER 818** pointed out that the court after hearing the preliminary objection was obliged to render a ruling thereon failing which any further steps taken by it opens the court to error and is amenable to the supervisory intervention of this court. Objections on points of law are a necessary step in the trial process". He scolded the High Court that "the failure to pronounce on the legal objection as well as the refusal to the parties the opportunity to be heard on the application to set aside the orders of 14<sup>th</sup> January 2013 are, to say the least, fatal oversights on the part of the court amounting to a denial of justice and thus detrimental to the parties one way or the other".

Indeed, it has been held in a number of cases that there cannot be a hearing on the merits of a case if it is disposed of on a point of law relating to limitation, lack of jurisdiction or lack of capacity. In the case of **EBUSUA PANYIN YAW STEPHENS VS. KWASI APPOH [2010] 27 MLRG 12 AT 26**, it was iterated that "*if an action succeeds on a plea of statute of limitation, lack of jurisdiction or lack of locus standi, the trial court and for that matter an appellate court should not proceed to determine the merits of the case, irrespective of the evidence.*" Therefore, no matter how overwhelming the evidence available for a case is, the court cannot delve into the merits of the case until a determination of the preliminary objection and where the preliminary objection is successful, the merits become immaterial.

My Lord, in the instant case, it would be observed that the Claimant in its submissions has gone beyond addressing the issues relating to the preliminary objection raised by the Bank, and strayed to the merits of the case. It is therefore the Bank's submission based on the relevant authorities cited supra, the court ought not to indulge the Claimant in jumping over the preliminary objection to delve into issues arising out of the substantive motion at this stage of the case, as doing so will open up the court for judicial review.

## **8. PRAYER AND CONCLUSION**

My Lords, with the legal arguments raised in response to the Claimant's Submissions, it is our prayer that this Honourable Court dismisses the Claimant's Application with heavy costs.

We pray accordingly.

DATED AT AKOSOMBO CHAMBER IN ACCRA THIS 29<sup>th</sup> DAY OF SEPTEMBER 2020.

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**SOLICITOR FOR THE APPLICANT/RESPONDENT  
JUSTICE KUSI-MINKAH PREM O  
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