

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, GHANA (COMMERCIAL DIVISION) HELD AT ACCRA ON TUESDAY THE 28<sup>TH</sup> JULY, 2020 BEFORE HER LADYSHIP JUSTICE AFI AGBANU KUDOMOR

SUIT NUMBER: CM/BFS/0302/2020

AGRICULTURAL DEVELOPMENT BANK

... PLAINTIFF/  
RESPONDENT

VRS

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

} DEFENDANTS/  
APPLICANTS

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**RULING**

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**MOTION ON NOTICE TO STRIKE OUT/SET ASIDE THE PLAINTIFF'S STATEMENT OF CLAIM**

This is a motion filed on behalf of Defendants Applicants (hereinafter known as Applicants) praying this Court for an Order to strike out or set aside Plaintiff Respondent's (hereinafter known as Respondent) Statement of Claim as irregular.

In the Affidavit in Support of this application deposed to by one Daniel Bimpong, a Law Clerk of Applicants, there are averments to the effect that the nature of this matter together with the reliefs sought by Respondent against Applicants falls within the perimeter of a Mortgage Action.

That paragraphs 4 (a) to (e), 7, 8 and 9 of the Statement of Claim are not in conformity with the Rules of Court and so the said Statement of Claim is irregular and ought to be set aside by the Court.

In the affidavit in opposition filed by Respondent in this matter, deposed to by one Kofi Tweneboa Kodua, there are averments that the instant application is misconstrued, unmaintainable and incompetent having been brought out of time and without leave of the Court.

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.....REGISTRAR  
HIGH COURT  
COMMERCIAL DIVISION, LLC-ACCRA

That this matter is for recovery of debts and not a Mortgage Action and so the said Statement of Claim is regular.

That although Applicants entered Conditional Appearance on 20<sup>th</sup> December, 2019 they failed to file an application to set aside the Writ Summons and Statement of Claim and so the said conditional appearance has crystallized into a regular appearance.

That because of this, Applicants ought to have brought this application out of time with leave of the Court.

That not having done so, this application is frivolous and vexatious and an abuse of the Court process and same ought to be dismissed by the Court.

#### **WRITTEN SUBMISSIONS FILED ON BEHALF OF APPLICANT**

Counsel for Applicant submits that this application has been brought under Order 81 of the High Court Civil Procedure Rules, 2004 (C.I. 47) for the Court to order the striking out or setting aside of Plaintiff's Statement of Claim as irregular for non-compliance with Order 59 Rule 3 of the High Court Civil Procedure Rules, 2004 (C.I. 47).

He submitted that the nature of the reliefs sought by Respondent against Applicant indicates a Moneylenders and Mortgage action which is governed by Order 59 of C.I. 47.

That Respondent's Statement of Claim does not conform to the requirements laid down in Order 59 of C.I. 47 and so prayed the Court to strike out or to set aside the said Statement of Claim.

He referred specifically to Order 59 Rule 3 of C.I. 47 which requires a Statement of Claim in a Moneylender's or Mortgage action to be in a particular form which Respondent in this matter has failed to comply with. That this is irregular and so prayed the Court to grant their application.

That based on the averments in the affidavit in opposition filed pursuant to this application, three issues need to be addressed by the Court which are as follows:



1. Whether or not Respondent's action is a Mortgage Action and if so whether the Statement of Claim conforms with the requirements of the Rules of Court.
2. Whether or not the Court can set aside the said Statement of Claim if there has been a breach of the said rules.
3. Whether or not Applicant has waived its right to bring the instant application upon entering Conditional Appearance but failing to bring the instant application within the statutory period.

He discussed all three issues indicated above and referred to the following cases in support of his submissions.

1. Agricultural Development Bank v Fiifi Quartey, Suit No. BFS/205/2015.
2. Patrick Ankomanyi v Hannah Buckman, Civil Appeal No. J4/43/2013 dated 26<sup>th</sup> February, 2014.
3. Republic v High Court, Koforidua; Ex Parte Asare (Baba Jamal and Others; Interested Parties) [2009] SCGLR 460.
4. Dachel and Company Ltd v Friesland Frico Domo, Civil Appeal No. J4/7/2010 dated 22<sup>nd</sup> June, 2010.
5. Menzgold Ghana Ltd v Bank of Ghana and Securities Exchange Commission, CM/BDC/0655 dated 10<sup>th</sup> January, 2019.
6. Mumuni and Another v Zakaria and Another [1992] 1 GLR 208.

#### **WRITTEN SUBMISSIONS FILED ON BEHALF OF RESPONDENT**

Counsel for Respondent raised three (3) preliminary legal objections to the competency of the instant application which are:

1. The grounds upon which a Party could pray the Court to strike out pleadings does not include non-compliance with the Rules of Court as Applicant has relied upon.

2. The instant application has been brought out of time.
3. Applicants have lost the right to challenge the regularity or otherwise of Respondent's Statement of Claim by virtue of fresh steps taken in the matter.

She relied on Order 11 Rule 18 of C.I. 47 to submit that a Court can at any stage of the proceedings Order the pleadings or anything in the pleadings to be struck out if it discloses no cause of action or defence, is scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial or it is an abuse of the Court process.

That the reason for the instant application (non-compliance with the rules) not being one of the grounds stated above, this application is incompetent and ought to be dismissed. That supposing without admitting that non-compliance with the Rules is one of the grounds for the said pleading to be struck out, it does not operate to nullify proceedings of Court.

She also discussed the difference between non-compliance with the Rules which maybe mere technicalities that do not vitiate proceedings and non-service of processes where service is required which is fundamental and goes to jurisdiction which would result in a nullity.

She submitted that the rules require that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and the Applicant should not have taken any fresh step after knowledge of the said irregularity. That because Applicant failed to make the instant application within the statutory period of Fourteen (14) days after Entry of Appearance, the instant application ought to be dismissed.

That Applicants have also taken several steps after becoming aware of the irregularity by filing for a notice to produce documents for inspection and a motion to file defence out of time. That they are therefore deemed to have waived that right to challenge the regularity or otherwise of the Statement of Claim. She prayed the Court to dismiss the instant application.

She referred to the following cases in support of her submission:

1. *Mosi v Bagyina* [1963] 1 GLR 337
2. *Omane v Opoku* [1973] 2 GLR 66



3. Republic v High Court, Accra; Ex Parte Allgate Co. Ltd (Amalgamated Bank; Interested Party) [2007-2008] SCGLR 1041.
4. Boakye v Tutuyehene [2007 – 2008] SCGLR 970
5. Ankumah v City Investment Co. Ltd [2007-2008] SCGLR 1065
6. Republic v High Court, Koforidua, Ex parte Ansah-Otu [2009] SCGLR 141
7. Republic v High Court, Koforidua, Ex parte Asare dated 15<sup>th</sup> July, 2009.

#### **THE PRELIMINARY LEGAL OBJECTIONS RAISED BY COUNSEL FOR RESPONDENT TO THE INSTANT APPLICATION**

1. **The grounds upon which a Party could pray the Court to strike out pleadings does not include non-compliance with the Rules of Court as Applicant has relied upon.**

Counsel for Respondent seemed to be under the impression that the instant application was brought under Order 11 Rule 18 (1) of CI 47 which with due respect to her is not so.

The instant application has rather been brought under **Order 81 Rule 1 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47)** provides as follows:

##### **1. Non-compliance with rules not to render proceedings void**

*"1) Where in the beginning or purporting to begin any proceedings or at any stage 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*

*b) Exercise its powers under these rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just. ”*

The above provision permits a Court to set aside irregular processes filed which ought not to nullify the Court’s proceedings. In other words, non-compliance with the Rules does not render proceedings void under certain circumstances.

**2. Applicants have lost the right to challenge the regularity or otherwise of Respondent’s Statement of Claim by virtue of fresh steps taken in the matter.**

**Order 81 Rule 2 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) states as follows:**

***“2. Setting aside for irregularity***

*(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 further steps after knowledge of the irregularity.”*

Applicants after being served with the Writ Summons and Statement of Claim entered conditional appearance and filed a notice to Respondent to produce certain documents for inspection on 23<sup>rd</sup> January, 2020.

On 5<sup>th</sup> February 2020, the Respondent filed a motion on notice for judgment in default of defence. On 20<sup>th</sup> February 2020, Applicants filed an affidavit opposing same and attached a proposed statement of defence. This application is still pending.

Applicants later filed the instant application on 3<sup>rd</sup> March, 2020 which this Court deemed necessary to hear first.

Learned Counsel for Respondent submits that Applicants after being served with the writ took fresh steps of filing a notice to Respondent to produce certain document for inspection as well as filing an Affidavit in Opposition to the application for Judgment in Default of Defence and attached a proposed Statement of Defence. That because of these steps taken, Applicants have



lost the right to challenge the regularity of the Statement of Claim and so the instant application ought to be thrown out.

The Courts have held that in Order for a Court to declare that a Party has taken a fresh step that amounts to a waiver; the said step must have gone into the merits of the case.

This Court finds support for this principle in the case of *Menzgold Ghana Limited V Bank Of Ghana & Anor*, Suit No: CM/BDC/0655/18 dated 10<sup>th</sup> January 19, in which her ladyship Akua S. Amoah in respect of a fresh step amounting to a waiver held 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 thrown out."*

In the case of *Mumuni & Anor V Zakaria & Anor* [1992] 1 GLR 208, the Court held that Plaintiff by filing a reply which answered Defendant's Statement of Defence which Plaintiff was seeking to set aside was a fresh step amounting to a waiver.

These cases support the principle that for the fresh step taken to amount to a waiver, it must be considered as a fulcrum of the matter at hand; going into the merits of the case.

In the matter before this Court, the proposed Statement of Defence attached to Applicant's affidavit in opposition to the application for Judgment in Default of Defence is technically not before this Court and so cannot be deemed as a Statement of Defence.

Applicants therefore have not filed any defence pursuant to being served with Respondent's Writ.

The notice to Respondent to produce certain documents for inspection which was filed on 23<sup>rd</sup> January, 2020 can also not be deemed by this Court as a fresh step amounting to a waiver.

### **3. Applicants have failed to bring the instant application within a reasonable time.**

From the circumstances of the matter at hand, this Court is of the opinion that this application has been brought within a reasonable time.

This is because after being served with the Writ, Applicants filed a notice calling on Respondents to produce certain documents for inspection; to which Respondents filed an affidavit in opposition which the Court is yet to pronounce on. It looks like Respondent's seeming reluctance to produce the said documents that somehow stalled proceedings.

The Court is of the opinion that the instant application is regular because all the preliminary objections raised by Counsel for Respondent as to its propriety as discussed above are overruled.

### **THE LAW GOVERNING THE INSTANT APPLICATION**

**Order 59 Rule 1 (2) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47)** defines a mortgage action as follows:

*"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) ...."*

The reliefs sought by Respondent in the matter before this Court include monies to be recovered from Applicants which were secured by first ranking fixed and floating charges over 1<sup>st</sup> Applicant's assets, a charge over the entirety of 1<sup>st</sup> Applicant's factory building (in line with **Order 59 Rule 1 (2) (a)**) which are regarded as securities. Another relief sought is the judicial sale of the aforementioned securities (**Order 59 Rule 1 (2) (b)**).

Respondent is seeking to exercise a remedy of judicial sale of the assets over which the charges were created (Securities) which is a remedy available to Mortgagees in Mortgage transactions pursuant to **Section 18 (1) of the Mortgages Decree, 1972 (NRCD 96)**.

The said Section reads as follows:

#### ***"18. Judicial sale***

*(1) on the failure of performance of an act secured by the mortgage, the mortgagee may apply to the Court for an order for the judicial sale of the mortgaged property, and on being satisfied as to the existence of the grounds for the application, the Court shall on the conditions that it considers just and equitable, grant an order for the judicial sale of all or part of the mortgaged property."*



In the instant matter, Respondent alleges that it provided several loan facilities to Applicants which were secured with the said charges over the latter's assets. That Applicants defaulted in repaying the said loans; the reason for the claim for judicial sale of the said secured assets.

His Lordship Kyei Baffour, J (as he then was) applied this principle in the case of **Agricultural Development Bank v Fiifi Quartey, Suit No. BFS/205/2015, dated 4<sup>th</sup> February, 2016**. In the said case, Plaintiff had given out loans to Defendant with a charge on an immovable property as Security for the loan. Plaintiff sought to deny that the action was Mortgage action. The learned Judge held that because Plaintiff's action against Defendant was to recover monies secured by a charge, it was a Mortgage Action.

Based on the discussions above, this Court is of the opinion that this matter before it is a mortgage action.

In mortgage actions, the rules require that the Statement of Claim be particularized in a specific manner.

**Order 59 Rule 3 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47)** provides as follows:

*"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 percent 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"*

After carefully reading through the statement of defence, some of the averments therein do not contain some of the requirements spelt out in **Order 59 Rule (3)**.

For example; Facility 1 does not have requirements (a), (d), (e), (i), etc.

Facility 2 does not have (a), (d), (e), (f), (i), etc.

Facilities 3, 4 and 5 all have some of the requirements listed above missing.

The absence of these requirements has resulted in a breach of the rules of Court specifically **Order 59 Rule 3**; therefore rendering the Statement of Claim attached to the Writ irregular.

The said breach of the rules does not however nullify the whole proceedings as stated in **Order 81 Rule 1 of CI 47**.

The Court hereby under **Order 81 Rule 1 (2) (a) of the High Court Civil Procedure Rules, 2004 (C.I. 47)** exercises its discretion to set aside the Statement of Claim attached to the Writ of Summons; which in essence is a grant of the instant application.

This application which is to set aside the Plaintiff Respondent's Statement of Claim is hereby granted. There will be no order as to costs.

(SGD)

**AFI AGBANU KUDOMOR J.**

**(JUSTICE OF THE HIGH COURT)**

**COUNSEL**

1. GEORGETTE AKPENE OKINE FOR VIDA AGYEKUM-ACHEAMPONG FOR THE PLAINTIFF/RESPONDENT-PRESENT
2. NANA AMA STEPHENS FOR WALLACE BRUCE- CATHLINE FOR THE DEFENDANTS/APPLICANTS-PRESENT

**LIST OF CASES**

1. AGRICULTURAL DEVELOPMENT BANK VRS. FIIFI QUARTEY, SUIT NO. BFS/205/2015.
2. PATRICK ANKOMANYI VRS. HANNAH BUCKMAN, CIVIL APPEAL NO. J4/43/2013 DATED 26<sup>TH</sup> FEBRUARY, 2014.
3. REPUBLIC VRS. HIGH COURT, KOFORIDUA; EX PARTE ASARE (BABA JAMAL AND OTHERS; INTERESTED PARTIES) [2009] SCGLR 460.



4. DACHEL AND COMPANY LIMITED VRS. FRIESLAND FRICO DOMO, CIVIL APPEAL NO. J4/7/2010 DATED 22<sup>ND</sup> JUNE, 2010.
5. MOSI VRS. BAGYINA [1963] 1 GLR 337.
6. OMANE VRS. OPOKU [1973] 2 GLR 66.
7. REPUBLIC VRS. HIGH COURT, ACCRA; EX PARTE ALLGATE CO. LIMITED (AMALGAMATED BANK; INTERESTED PARTY) [2007-2008] SCGLR 1041.
8. BOAKYE VRS. TUTUYEHENE [2007 – 2008] SCGLR 970.
9. ANKUMAH VRS. CITY INVESTMENT CO. LTD [2007-2008] SCGLR 1065.
10. REPUBLIC VRS. HIGH COURT, KOFORIDUA, EX PARTE ANSAH-OTU [2009] SCGLR 141.
11. MENZGOLD GHANA LIMITED VRS. BANK OF GHANA & ANOR, SUIT NO: CM/BDC/0655/18 DATED 10<sup>TH</sup> JANUARY, 2019.
12. MUMUNI & ANOR. VRS. ZAKARIA & ANOR [1992] 1 GLR 208.
13. AGRICULTURAL DEVELOPMENT BANK VRS. FIIFI QUARTEY, SUIT NO. BFS/205/2015, DATED 4<sup>TH</sup> FEBRUARY, 2016.

#### **STATED LAW**

1. ORDER 59 RULE 3 OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C.I. 47).
2. ORDER 11 RULE 18 OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C.I. 47).
3. ORDER 81 RULE 1 OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C.I. 47).
4. ORDER 81 RULE 2 OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C.I. 47).
5. ORDER 59 RULE 1 (2) OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C.I. 47).
6. SECTION 18 (1) OF THE MORTGAGES DECREE, 1972 (NRCD 96).

7. ORDER 81 RULE 1 (2) (A) OF THE HIGH COURT CIVIL PROCEDURE RULES, 2004 (C.I. 47).

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.....REGISTRAR  
HIGH COURT  
COMMERCIAL DIVISION, LLC-ACCRA