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Registrar  
COMMERCIAL DIVISION OF THE  
HIGH COURT, ACCRA

IN THE SUPERIOR COURT OF JUDICATURE  
IN THE HIGH COURT OF JUSTICE  
COMMERCIAL DIVISION  
A.D - 2019

SUIT NO.CM/BFS/0302/2020

AGRICULTURAL DEVELOPMENT BANK  
FINANCIAL CENTRE  
RIDGE-ACCRA.

PLAINTIFF

VRS.

1. KINGDOM PREMIUM FRUITS LIMITED
2. DR. FELIX KWAME. SEMAVOR  
ADRHO HOUSE, SAKAMAN – ACCRA  
*(and on whom Plaintiff shall direct service)*

DEFENDANTS

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PLAINTIFF-RESPONDENT'S WRITTEN SUBMISSION AGAINST DEFENDANTS-  
APPLICANTS' MOTION TO STRIKE OUT/SET ASIDE THE PLAINTIFF'S STATEMENT OF  
CLAIM

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## 1.0. INTRODUCTION

- 1.1. This is Plaintiff-Respondent's legal submission filed with leave of the court to oppose the Defendants-Applicants' prayer to strike out and/or set aside the Plaintiff's Statement of Claim (SOC). The sole reason the Defendants give for their prayer to strike out and/or set aside the SOC is non-compliance with the rules of court. Specifically, that the Plaintiff did not demonstrate in the pleadings the amounts paid so far by the Defendants in respect of the said facilities and any amounts left unpaid as required by Order 59 Rule 3 (h) and (i). The Plaintiff is opposed to the said motion to strike out and in these submissions would invite the court to evaluate and/or determine on all the authorities available, whether the said non-compliance warrants a striking out of the SOC.

## 2.0. BACKGROUND.

- 2.1. The Plaintiff, which is a bank, issued a Writ of Summons and Statement of Claim against the 2 Defendants on the 5<sup>th</sup> of December, 2019. On the 20<sup>th</sup> December, 2019, the Defendants entered a Notice of Conditional Appearance. By a search conducted by the Plaintiff on 31<sup>st</sup> January, 2020 at 10:15 am, the Defendants had

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neither filed a Defense to the suit nor filed any application to set same aside as it is required by the rules of court when a Conditional Appearance is filed.

- 2.2. Meanwhile, in the absence of filing a defense or application to set the pleadings aside, the Defendants rather on the 23<sup>rd</sup> of January, 2020 filed a Notice to Produce Documents for Inspection. Before this was served on the Plaintiff, the Plaintiff on the 5<sup>th</sup> of February, 2020 filed a Notice of Motion to enter judgment in its favour in default of Defendants' defense. Subsequently, the Plaintiff on the 19<sup>th</sup> February, 2020 filed a Notice of Objection to the Production of Documents in accordance with the rules of the Court. Instead of bringing an application to the court for the court to determine whether or not to make an order granting the request for inspection, the Defendants rather, on the 20<sup>th</sup> February, 2020 filed an Affidavit in Opposition to the Plaintiff's prayer for default judgment, and in the said Affidavit in Opposition, deposed to the fact that they have not been able to file their defense because the Plaintiff has failed to release the requested documents for inspection, and that they have a defense to the said action and intend to defend the action to its logical conclusion.
- 2.3. Again, on 26<sup>th</sup> February, 2020, the Defendants again filed a Supplementary Affidavit in Opposition to the Motion for Judgment in Default, and attached as Exhibit 3 Proposed Statement of Defense which they intend to file to the Plaintiff's suit. At this stage, there were virtually two processes pending before the court, one being the way forward with the request to produce documents for inspection and the Plaintiff's motion for Judgment in Default of Defense. On the 3<sup>rd</sup> of March, 2020, the Defendants now file a Motion on Notice to Strike Out/Set aside the Plaintiff's Statement of Claim. On 18<sup>th</sup> March, 2020, the Plaintiff also filed its Affidavit in Opposition to the said motion, to which we now submit our legal case.

### **3.0. THE PLAINTIFF'S GROUNDS FOR OPPOSING THE DEFENDANTS' MOTION TO STRIKE OUT OR TO SET ASIDE THE PLAINTIFF'S STATEMENT OF CLAIM.**

- 3.1. The Plaintiff will hereby raise three (3) Preliminary Legal Objections to the competency of the Defendants' motion, as follows:

#### **A. THE GROUNDS UNDER WHICH A PARTY COULD PRAY THE COURT TO STRIKE OUT PLEADINGS DOES NOT INCLUDE NON-COMPLIANCE WITH THE RULES OF COURT AS RELIED UPON BY THE DEFENDANTS**

- I. Order 11 rule 18 (1) of C.I 47 stipulates  
Striking out pleadings  
18. (1) The Court may at any stage of the proceedings order any pleadings or anything in any pleadings to be struck out on the grounds that
  - (a) it discloses no reasonable cause of action or defense; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass, or delay the fair trial of the action; or
  - (d) it is otherwise an abuse of the process of the court,and may order the action to be stayed or dismissed or judgment to be entered accordingly.
- II. Per the grounds above advanced, non-compliance with the rules of court is not one of the grounds upon which a party could pray the court to strike out or set aside pleadings before a court.
- III. *On this ground alone, the Defendants' motion is bad, incompetent and ought to be thrown out.*
- IV. *Assuming without admitting that non-compliance with the rules of court were one of the grounds upon which the SOC could be struck out, we humbly submit per the following authorities that non-compliance with the rules of court does not operate to nullify proceedings of court.*
- V. The Learned author, S. Kwami Tetteh, in his Civil Procedure, a practical approach; had this to say at page 1094, "**Litigation would be frustrated if each default under the Rules should have the effect of nullifying the proceedings. A party who makes a slip in filing a process would have the process thrown out of court only to start all over again, regardless of the fact that the slip is minor and inconsequential. Starting afresh, when the defective process can be amended would be a waste of time and money. No useful purpose would be served in such pursuit of technicalities. Amending a defective proceeding saves time, cost and convenience..."**

VI. A statement of the Supreme Court in the case of **Mosi vrs. Bagyina [1963] 1 GLR 337**, which has been subsequently modified by other decisions of the Supreme Court is still relevant as far as it relates to the importance of then Order 70 and now Order 81. The Supreme Court stated as follows:

***“...Order 70 applies to only mere irregularities. We must confess that we are not happy with the adjective “mere” used in qualifying procedural irregularities. What is irregular is irregular and provided the irregularity infringes any rule of court, then Order 70 can be invoked. After all Order 70 deals with non-compliance with the rules and if there is no rule to comply with, it follows that order 70 cannot apply. ....***

VII. The essence of the above quotation is that Order 81 was formulated knowing that there would always be non-compliance with the rules of court in one way or another and such non-compliance would need to be cured. In subsequent decisions by the Supreme Court in the matter of Dachel & Co. Ltd vrs. Friesland Frico Domo, Suit No. J4/7/2010 and decided on 22<sup>nd</sup> June, 2011, the apex court per Adinyira (Mrs) JSC stated among others that (and we find it relevant to quote copiously from the said case, as it makes references to several other cases that are of relevance to the instant subject matter :

***“Unfortunately, in spite of the clear language of Order 70 of L.N 140A the Courts have been drawn into making distinction between irregular and void processes. Accordingly, Apaloo JA (as he then was) in the case of Omame v Opoku [1973] 2 GLR 66 at page 71 of the law report in considering the effect of failing to take summons of directions admonished that:***

***“The Court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of Order 71 when justice can be done as a matter of discretion.”***

We note that Order 81 of the High Court (Civil Procedure) Rules, 2004 (C.I 47) and the extinct Order 70 of LN140A both provide in clear terms that non-compliance with the rules of procedure shall not render any proceedings void but be regarded as a mere irregularity which might be allowed, amended or set aside on terms at the discretion of the court upon an application brought within a reasonable time and the person applying has not taken a fresh step after becoming aware of the irregularity. See *the Republic v. High Court, Accra, ex parte Allgate Co. Ltd. (Amalgated Bank)*

*Interested Party* [2007-2008] SCGLR1041 for a detailed discussions on these two rules.

This Court has since then taken a radical attitude to arguments claiming nullity in respect of procedural lapses. In *Boakye v. Tutuyehene* [2007-2008] SCGLR 970 and *Ankumah v City Investment Co. Ltd.* [2007-2008] SCGLR 1065; failure to take summons for direction under Order 30 r.1 was held to be mere irregularity and not vitiating the proceedings.

In *The Republic v. High Court, Accra, Ex parte Allgate Co. Ltd. (Amalgated Bank) Interested Party* **supra**, the defendant/applicant was short-served by one day with the hearing of an application for summary judgment but failed to appear for the hearing. The High Court, Accra, went on and granted the summary judgment. In an application by the defendant/applicant for an order of certiorari to quash the ruling on the ground of non-compliance with the mandatory provision of Order 14 r 2(3) of C.I. 47, which requires the defendant to be served with notice for four clear days before the hearing of the application for summary judgment; this Court in dismissing the application held, per Dr. Date-Bah JSC at page 1053 that:

“... [N]on service of a process where service of same is required, in my view goes to jurisdiction. Non-service implies that *audi alteram partem*; the rule of natural justice is breached. This is fundamental and goes to jurisdiction. **Thus the reason why, even after the coming into effect of Order 81 of our Rules, non-service of a process results in nullity is not because of non-compliance with a rule of procedure, but rather because it is an infringement of a fundamental principle of natural justice, as recognized by common law.** Similarly, breach of the principle of *nemo index causae suae* would result in a nullity. In contrast, short service need not be treated as fundamental enough to go to jurisdiction...It should thus be regarded as an irregularity that may serve as a ground for setting aside the proceedings following it, but it does not make those proceedings null and void.”[Emphasis mine]

In *The Republic v. High Court, Koforidua, Ex parte Ansah-Otu* [2009]SCGLR 141, the High Court in breach of Order 25 r. 9(1) and (2) failed to order the successful party to give an undertaking to damages in a contested application for interim injunction before granting the application. In an application for the order of certiorari to quash the decision of the High Court, this Court held that even though the trial judge erred by not complying with the mandatory rule of procedure as specified under Order 25 r 9(1) and (2) of C.I.47, before making the order, the non-compliance was a mere irregularity that was curable under Order 81.

Counsel for the Defendant referred us to authorities such as *Seyire v. Anemana* [1971] 2 GLR 3C.A 2; *MacFoy v. United Africa Co. Ltd.* [1962] AC 152 PC; *Lokko v. Lokko* (1991) 2 GLR 184 CA and *Mosi v Bagyina* [1963] 1 GLR 133 SC, where the courts drew a distinction between fundamental error and mere irregularity and

invited us to hold that breach of Order 2 r.4 was a fundamental error that could not be saved by Order 70 r.1

We do not find the reasoning in those decisions persuasive as the distinction between void and voidable proceedings cannot be maintained on account of the plain and ordinary meaning of the said Order. In any event this Court is not bound to follow the decision of any other court except its own and may even depart from its own previous decision. Article 129(2) of the 1992 Constitution.

We are of the view that to determine the effect of non-compliance one has to examine the provision of the same LN140A /C.I 47 and not indulge in any theories of what acts or omissions can be described as null and void or mere irregularity. This Court has had the occasion to comment in *Boakye v. Iutuyehene, supra* that the application of the so called Mosi Bagyina principle has been eroded by time and therefore otiose. Dr Seth Twum JSC at page 979 to 980 of the law report stated that:

"The application of the so-called Mosi Bagyina principle (as stated in *Mosi V. Bagyina [1963] 1GLR337 SC*) by the court was seriously flawed. Fortunately, Order 30 does not exist in its pristine form in the new High Court (Civil Procedure) Rules, 2004 (C.I 47). **Further, the new Order 81 has made it clear that perhaps apart from lack of jurisdiction in its true and strict sense, any other wrong step taken in any legal suit should not have the effect of nullifying the judgment or the proceedings.** This means the principle stated in *Mosi V. Bagyina [1963] 1 GLR 337 SC* has been rendered otiose." (our emphasis)

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.

However we wish to stress that the language in Order 70 of LN140A or for that matter Order 81 of C.I.47 cannot be interpreted to overcome or waive a High Court's actual lack of jurisdiction. *Ex parte Allgate Co. Ltd supra*. So where for example the whole subject-matter of the action affect an immovable property situate outside the jurisdiction of Ghana, then non-compliance of Order 2 r4 now Order 8 of C I 47 cannot be waived to cure the deficiency in jurisdiction. The subject matter of the action begun by the writ issued by the plaintiff for compensation for the termination of an agency agreement executed by her in Ghana on behalf of the defendant is manifestly within the jurisdiction of the court. Accordingly we hold that the non-compliance of Order2 r.4 of LN140A in this case was a mere irregularity which did not derail the jurisdiction of the court.

### *Setting aside for irregularity*

**The rules require that no application to set aside any proceedings 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. (our emphasis)**

The Court of Appeal held that counsel received service of the writ in Ghana and fully participated in the proceedings till judgment and so the defendant can be said to have waived its objection to the jurisdiction of the court.

The defendant submits that the above findings were wrong as the writ was served on the defendant in Holland and the brief referred to counsel by defendant's solicitors in England. Counsel claimed he only realised the breach after he received the record of appeal. We are taken aback by this statement as the address for service of the writ was that of Holland where the defendant was served. In the circumstances it is reasonable to expect that the first and primary duty of any astute lawyer who received a brief from a client domiciled abroad was to ascertain and be satisfied that the rules regarding service out of the jurisdiction has been complied with before taking any further step aside from entering appearance. Such information could easily be obtained by simply filing a search in the High Court registry. We regret to say that Counsel was indolent and failed to exercise due diligence in the matter.

We do not think Counsel's failure to discover the non-compliance in time should render the whole proceedings, in which the defendant actively participated and pursued a counterclaim, a nullity. We consider the objection at this time trifling and highly unreasonable, more so, as the subject matter of the action began by the writ falls within the jurisdiction of the court.

Under the then Order 70 of LN140A, as under Order 81 of C. I. 47 this Court has discretion to either set aside the proceedings or make any orders as it deems fit. Looking at the circumstances of this case we see no evidence of disadvantage occasioned by the irregularity, or erosion of natural justice. Accordingly we do not think it is fit and just to set aside these whole proceedings for a mere irregularity.

For these reasons the appeal fails on this ground.

VIII. Again, the Supreme Court in the case of **Republic v High Court, Koforidua ex parte Asare dated 15<sup>th</sup> July, 2009**<sup>1</sup>, drew a

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<sup>1</sup> Also in the Court of Appeal case of Heward-Mills v Heward-Mills [1992] 1 GLR 153 where the actions were instituted in violation of the procedure laid down by statute, as against non-compliance with the rules of court.

distinction between the effect of a process which does not comply with the rules of court and one which is a nullity and held among others:

***"Henceforth, "irregularity would relate to any defect occurring under the Rules while nullity would relate to defects occurring outside the Rules, as at common law or under statute."***

- IX. From the above authorities, it has been long established that non-compliance with the rules of court constitute an irregularity and does not nullify a process; while non-compliance with statutory law or common law constitutes a nullity which is incurable and bad.
- X. With the greatest respect, the ratio decidendi set out by the Supreme Court in the cases referred above to the effect that non-compliance with the rules of court does not nullify a proceeding has not been changed in any subsequent cases of the Supreme Court. The Defendants' attempt at quoting Obiter Dicta by Justices of the Supreme Court in other cases and presenting them as a variation of the decision on irregularity is disingenuous and such quotations must be treated with the censure and opprobrium they deserve.
- XI. For the avoidance of doubt, we would quote the provisions of Order 81 of the Rules of Court, i.e C.I 47

**Non-compliance with Rules not to render proceedings void**

1(1) Where, in 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 the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not 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.

- XII. Order 81 Rule (2) (a) permit a striking out and (2) (b) permits the court to allow amendments as appropriate.

## **B. THE DEFENDANTS' MOTION TO STRIKE OUT PLAINTIFF'S PLEADINGS HAS BEEN BROUGHT OUT OF TIME.**

- I. This is the 2<sup>nd</sup> preliminary legal objection the Plaintiff has regarding the Defendants' motion to strike out the SOC. Per Order 2 Rule 6 of C.I 47, "Every writ shall be filed together with a statement of claim as provided for in Order 11 and no writ shall be issued unless a statement of claim is filed with it." It stands to reason that the Defendant's prayer to strike out the Statement of Claim is equally a prayer to strike out the Writ of Summons. Per Order 9 Rule 8 of C.I 47, such an application brought to strike out must be brought before Entry of Appearance or 14 days after filing Appearance.
- II. Order 9 Rule 7 (1) and (2) deal with Conditional Appearance. The rules state without equivocation that when you enter conditional appearance, it would at all material times be treated as a non-conditional Appearance, unless within 14 days, the Defendant applies to the court to set aside the writ. This stands to reason that 14 days after entering Appearance, whether conditional or unconditional, a defendant has to file a defense if there is no motion pending to strike out, and at that time, the right and/or privilege to file an application to set aside the writ extinguishes.
- III. The Defendants filed Conditional Appearance on 20<sup>th</sup> February, 2019 and brought their Application to strike out on 3<sup>rd</sup> March, 2020. This is way out of time and as a result of the unreasonable delay, they lost the opportunity to challenge the Writ or Statement of Claim filed therewith.
- IV. Per Order 81 Rule 2, the Rules of Court have this to state:

### **Striking out for irregularity**

2 (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 proceedings for irregularity shall be allowed **unless made within a reasonable time and the party**

**applying has not taken any fresh step after the knowledge of the irregularity.” (our emphasis).**

- V. From the Provisions of the foregoing, time is of the essence in bringing an application to set aside pleadings. And when brought out of time, loses its essence and competence.
- VI. Further, their lordships in the case of Dachel & Co. Ltd vrs. Friesland Frico Domo, Suit No. J4/7/2010 and decided on 22<sup>nd</sup> June, 2011, supra stressed the issue of timeliness in the bringing of an application to set aside for irregularity under Order 81 Rule 2(2). It is the case of the Plaintiff that the Defendants did not act timeously and have thus lost the opportunity to challenge the regularity or otherwise of the SOC.

### **C. THE DEFENDANTS HAVE LOST THE RIGHT TO CHALLENGE THE REGULARITY OR OTHERWISE OF THE PLAINTIFF’S STATEMENT OF CLAIM BY VIRTUE OF FRESH STEPS TAKEN IN THE MATTER**

- I. As it has been observed from Order 81 Rule 2 (2), if a party seeking to set aside an irregularity takes any fresh step, he denies himself the opportunity to bring the said application.
- II. From the chronology of events listed above in paragraphs 2.1, 2.2 and 2.3, the Defendants have taken so many steps after becoming aware of the irregularity. They have thus lost the opportunity to challenge the irregularity, if any. They did not just file for Notice for Inspection of Documents, but went ahead to file a Proposed Statement of Defense, challenging the action on its merit. The said proposed defence was an exhibit to an Affidavit in Opposition filed in response to the Plaintiff’s Application for Default Judgment. If the Defendants were minded to

bring an application to strike out under the rules, they should rather have gone straight ahead to do that instead of filing processes upon processes challenging the Plaintiff's case on merits. The several steps taken are not mere steps but are weighty enough to deprive the Defendants the privilege to contest the regularity or otherwise of the Plaintiff's action.

- III. In the case of Mumuni and Anor. Vrs. Zakaria and Anor [1992] GLR 208 – 213, the High court held that to constitute a waiver of one's right to challenge a process, that party must have taken a step which is necessary or useful if the objection had actually been waived. Therefore, the court held, among others that "...Certainly, filing a defense out of time is an irregularity only since the other party can readily waive it and allow the case to proceed as usual. ...In this case after they had been served with the statement of defense, the Plaintiff filed a reply. By paragraph (1) of the reply the plaintiff stated in clear terms that the statement of defense as filed was void since it sinned against an express order of the court. One would ordinarily consider this to be an objection of the defense 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 to a statement of defense 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

plaintiffs' affidavit in a large measure. And these are fresh steps as was held in Boyle v Sacker (1888) 39 Ch.D. 249, C.A. ...."

- IV. In the above case and also the Case of Boyle v Sacker, responding to pleadings on substance and/or filing an affidavit in opposition, which is not just to raise an objection to an irregularity identified but rather responding to a matter on substance have both been held as fresh steps.
- V. Looking at the processes filed so far by the Defendants, they filed a Notice to Produce Documents for Inspection. That is a fresh step. Documents are requested for to assist a party either to prepare for the trial or to assist in the filing of pleadings. Again, they also filed an Affidavit in Opposition to the Plaintiff's motion for default judgment. In their own Affidavit in opposition to Plaintiff's application for Default judgment, they pleaded that they had not been able to file their defense because the Plaintiff had delayed or failed to release the requested documents to them. Then again they filed another supplementary affidavit in opposition to the Plaintiff's application for Default Judgment. To the supplementary affidavit, they attached a Proposed Statement of Defense. In this Statement of Defense, they responded on substance to the issues raised in the SOC. In the proposed defense filed, the Defendants never raised any issue with the competency of the SOC filed. That is a waiver of their right to contest it.

#### **4.0. LEGAL AUTHORITIES RELIED UPON BY THE DEFENDANTS AND WHETHER OR NOT SUCH CASES SUPPORT THE DEFENDANTS' CASE.**

- 4.1. The Plaintiff has posited in some of the above paragraphs and will proceed to prove that some of the quotations made by the Defendants in their written submission as supporting their application to strike out are simply obiter dicta employed to create the impression that non-compliance with the rules of court warrant a striking out or that rules of court must at all times be complied with.
- 4.2. In the case of Patrick Ankomayi vrs. Buckman, Civil Appeal No. J4/43/2013 decided on 26<sup>th</sup> February, 2014, the Supreme Court was hearing an appeal which had been brought against a 2 to 1 decision of the Court of Appeal, affirming the decision of the High Court. In the said decision the trial judge held:
  - a. "That in his lifetime, the late Kojo Amoah told the plaintiffs and his family that upon his death, house no. B445/21 North Kaneshie should be given to the plaintiffs.
  - b. As a result, ordered that the defendants should immediately take steps to vest the property in the plaintiffs (These were upheld by the Court of Appeal).
- 4.3. The issues that arose from the pleadings were i) whether the plaintiffs were customarily adopted and therefore children of the deceased and b) whether or not Kojo Amoah made a declaration in his lifetime that the Kaneshie Property be settled upon the plaintiffs on account of their mother's substantial contribution towards its acquisition.
- 4.4. With respect, the above were the issues the Supreme Court was faced with and had nothing to do with non-compliance with the rules. It suffices however to mention that her ladyship Akoto-Bamfo (Mrs) JSC made a sad observation about the sloppy manner counsel for the Appellant had crafted the Statement of Case of the Appellant and had this to say:

“ Before embarking upon an analysis of the statements and the evidence, we wish to comment briefly on the sloppy manner in which

the statement of case of the appellant was crafted... Learned counsel complied with none of these rules; he only filed a 2 paged statement and asked the court to adopt the decision of Akamba J A as he then was. This is most unsatisfactory particularly emanating from the Chambers of a very senior member of the Bar. Senior members of the Bar owe a duty to the profession to nurture junior members in the best practices of the Bar. Rules of court are not ornamental pieces. They are meant to be complied with..."

In essence, the court was only making an observation about the way a senior member of the bar had filed a Statement of Case for his client which did not fully comply with Rule 15 sub rules (6)(10 & 11) of C.I 16.

- 4.5. The most important question to ask is **DID THE SUPREME COURT STRIKE OUT AND/OR SET ASIDE THE APPEAL BECAUSE OF THE NON-COMPLIANCE WITH C.I 16? THE ANSWER IS NO.** It suffices to state that even though the apex court found unsatisfactory the way counsel had handled the matter, not complying fully with the dictates of Rule 15 (6)(10, 11) of C.I 16, the court still proceeded to sit on the matter and to hear it on its merits and gave a decision thereto. The process was neither struck out nor counsel called to amend and/or correct same.
- 4.6. This goes to strengthen the Plaintiff's case that non-compliance with the rules should not warrant a striking out of a process.
- 4.7. In the case of Menzgold Ghana Ltd vrs. Bank of Ghana and Securities and Exchange Commission, Suit No. CM/BDC/0655/18, the Defendants duly relied on and quoted from this case, but the quotation rather supports the case of the Plaintiff. In their said quotation, the court emphasized the point that an Affidavit in Opposition will not constitute a fresh step so long as it is filed to challenge the competency of an earlier process. We have discovered, and the records would show that the Affidavit in Oppositions filed by the Defendants were not to challenge the competency of the

Plaintiff's SOC but rather to solicit for sympathy from the court on the reasons they have for delaying the filing of their Defense. That Affidavit in Opposition also constituted a fresh step. It is worth requiring the court 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 proceedings thrown out."*** (our emphasis).

- 4.8. The case of Menzgold supra goes to support the authorities in Boyle vrs Sacker supra and Mumuni & Anor vrs. Zakaria & Anor. also supra; that if the step taken is solely to challenge the competency of a process, without addressing issues on merit, then that could not be a fresh step and a waiver of one's right to contest the validity of a process. In the instant case, the Defendants' actions rather constitute fresh steps and have thus waived their right of contest.
- 4.9. Also, the case of Republic vrs. High Court Koforidua, ex parte Asare (Baba Jamal and Ors, interested Parties) [2009] SCGLR 460, the court also admonished a compliance with the rules of court and did not alter its earlier decision that non-compliance renders a proceeding null or void.

## **5.0. THE PLAINTIFF'S CASE**

5.1. The Plaintiff came to court praying the following:

i. An order for the recovery of the amounts of :

- a. GHS 2,104,706.75 being outstanding balance from Facility 1 with interest at the commercial rate from 22<sup>nd</sup> November, 2019 till date of final payment.
- b. GHS 8,581,878.65 being outstanding balance from Facility 2 with interest at 12.5% per annum from 22<sup>nd</sup> November, 2019 till date of final payment

- c. GHS 1,344,110.76 being outstanding balance from Facility 3 with interest at 12.5 % from 22<sup>nd</sup> November, 2019 till date of final payment
- d. GHS 93, 038.11 being outstanding balance from Facility 4 with interest from 22<sup>nd</sup> November, 2019 till date of final payment
- e. GHS 1,511, 561.88 being outstanding balance from Facility 5 with interest from 22<sup>nd</sup> November, 2019 till date of final payment
- f. GHS 82,626.11 being the overdrawn balance with interest at the commercial rate from 22<sup>nd</sup> November, 2019 till date of final payment

Or in the alternative,

ii. An order for the judicial sale of the following securities:

- a. All of Borrower's assets over which it created fixed and floating charge in favour of the Plaintiff-Bank.
- b. The entire Kingdom Premium Fruit Limited (KPF) factory building, plant, machinery and equipment.
- c. Retail bottling line purchased under the lease facility.

iii. Damages for breach of contract; and costs: being costs of and incidental to this suit.

5.2. The Plaintiff's claim is within the region of am amount of GHS 15 Million or more. The Plaintiff itemized all the transactions entered into with the Defendants and the securities provided. The Plaintiff also stated the times the facilities expired and by the reliefs sought, listed what amounts of money remain due and unpaid. These constitute sufficient pleadings. Besides, these are not the ultimate evidence the court would rely upon to give its judgment. The court will conduct a hearing and take evidence, documentary or otherwise. It is the burden of the Plaintiff to prove its case by a preponderance of the probabilities and if it fails, it fails.

5.3. Knowing the huge amount of monies involved, the Plaintiff is desirous of fully proving the Defendants' liabilities in court by all the evidence it intends to provide and also by the pleadings already before the court.

5.4. It is the case of the Plaintiff that the Defendants are only out there to frustrate the processes and keep with them public funds meant to be paid back with interests. Their attempts are just abuse of the processes of this court and their application ought to be thrown out with punitive costs to allow for the matter to proceed so that

the Plaintiff can retrieve its monies back and continue to be in business in these trying times for institutions in the banking industry.

## 6.0. CONCLUSION

- 6.1. The Plaintiff has raised 3 preliminary legal objections to the competency of the Defendants' application to strike out as follows:
  - i. That non-compliance with the rules is not a ground upon which pleadings could be struck out (that assuming without admitting that it is, Order 81 and all the legal authorities above relied upon would cure any irregularity.)
  - ii. That the Application to strike out has been brought out of time
  - iii. That the Defendants have taken several fresh steps to waive their right to contest the regularity or otherwise of the SOC.
- 6.2. The Plaintiff has also relied on several authorities, including Defendants' cases relied upon to suggest that they did not act timeously, they have taken several fresh steps and that non-compliance with the rules are insufficient to nullify the SOC filed.
- 6.3. Humbly submitted.

AGRICULTURAL DEVELOPMENT BANK LTD.  
MONITORING AND RECOVERIES DIVISION

.....  
HEAD, LEGAL SUPPORT UNIT

VIDA AGYEKUM ACHEAMPONG, ESQ  
SOLICITOR FOR THE PLAINTIFF  
NO. OF SOLICITOR'S LICENSE: GAR 00815/20

THE REGISTRAR  
HIGH COURT, COMMERCIAL DIVISION  
ACCRA

AND FOR SERVICE ON THE ABOVE NAMED DEFENDANTS OR THEIR SOLICITOR,  
WALLACE BRUCE-CATHLINE, ESQ. OF MINKAH-PREMOH & CO. AKOSOMBO CHAMBERS,  
NO. 3 EMMAUSE 2<sup>ND</sup> CLOSE, LABONE, ACCRA