**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE COURT OF APPEAL**

**ACCRA**

**CORAM: BARBARA ACKAH-YENSU (JSC) PRESIDING**

**AMMA GAISIE JA**

**RICHARD ADJEI-FRIMPONG JA**

**SUIT NO. H1/01/2022**

**DATE: 26TH JANUARY, 2023**

**TSUIM TAWIAH FAMILY ..... ..... PLAINTIFF/APPELLANT**

**VS.**

**FRANK ETWI KARIKARI ..... ..... DEFENDANT/RESPONDENT**

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**J U D G M E N T**

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**RICHARD ADJEI-FRIMPONG JA:**

This appeal turns on a procedural issue not of any wide compass. It has been brought to challenge the decision of the trial High Court to set aside its own judgment previously given in favour of the plaintiff/appellant (herein plaintiff). This was on the basis that the defendant/respondent (herein defendant) was not duly served with the writ and the

statement of claim, a position the plaintiff disputes. The trial judge however accepted the defendant's case resulting in this appeal.

The plaintiff's writ filed against the defendant was for Declaration of title, recovery of possession, Damages for trespass, Perpetual injunction and Costs. Following a failed attempt at serving the defendant, the plaintiff filed an *ex parte* application for an order of substituted service. The mode of service proposed in the affidavit in support was as follows:

a. *Copies posted on the structure on the disputed land situate at Odokor Tsuim also known as Odorkor-been-to, plot No. 128*

b. *Copy posted on the Notice Board of this Honourable Court.*

The order was granted in the terms prayed. A copy of the order was attached to the defendant's affidavit in support of the motion to set aside interlocutory judgment as Exhibit FEK2. [Page 68 ROA] The bailiff who effected the posting later filed an affidavit of posting to that effect. [Page 10. ROA]

With no appearance and defence filed at all, the plaintiff subsequently filed an application for interlocutory judgment in default of defence deposing to the fact that the defendant who had been duly served had failed to file defence. The said motion was also served by substituted service and by the same mode.

On the return date, the trial judge, apparently on satisfaction that service was duly effected by substituted service, proceeded to grant the application. He also ordered, rightly in our view, that since the reliefs sought included a declaration of title of the disputed land, the court will adjourn to enable the plaintiff prove title.

In due course, evidence was taken. The plaintiff testified through an attorney and tendered documents material to prove his claim. On 7th May 2021, the trial court delivered judgment in favour of the plaintiff not before a closing address had been filed at the close of evidence. The plaintiff filed an entry of judgment to commence the process of execution. All these matters were not a subject of any argumentation.

According to the defendant, he was in town when his tenants informed him that bailiffs from the court had come to attach his late father's property in execution of court order. He caused a search to be conducted at the registry of the court the result of which disclosed that judgment had been obtained against him in an action. Not having been served with any process in the action, he filed the subject application before the trial court which granted same and set aside the judgment of 7th May 2021. It is the grant of the application which the plaintiff is dissatisfied with, hence the instant appeal on the following grounds:

i. *The trial judge erred in law when he allowed an unknown lawyer on record to argue a motion to set aside interlocutory judgment when he ought to have known that the said lawyer Mr. Reginald Nii-Bi Ayi Bonte has no legal capacity to represent defendant/respondent in the suit.*

ii. *The ruling is against the weight of evidence.*

iii. *The trial judge erred in law when he set aside a final judgment by a motion to set aside interlocutory judgment.*

We state for the record that, the plaintiff's written submission in this court was filed on 1st September 2022 and served on the defendant on 7th September 2022. No written submission was however filed by the defendant. The effect of the defendant's default in terms of Rule 20 subrule 4, was that the defendant did not wish to contest the appeal

leaving this court to make a determination on the basis of the written submission of the plaintiff only. The said rule provides:

> *"4. A party on whom an appellant's written submission is served shall, if that party wishes to contest that appeal file the written submission in answer to the appellant's written submission within twenty-one days of the service or within the time that the court may on terms direct"*

On our examination of the entirety of the record including the plaintiff's written submission the issue of primacy is whether the decision of the trial court to set aside the judgment was supportable by the facts and law. For this determination, we shall merge the second and third grounds of appeal and resolve them at a go. We shall however determine the first ground of appeal foremost.

The point of substance of the first ground of appeal is that, the Lawyer Mr. Reginald Nii-Bi Ayi Bonte, who filed the motion to set aside the judgment ought to have filed a notice of appointment of Solicitor to show his capacity to act on behalf of the defendant. With no such process on record, it is argued, the Lawyer had no legal capacity to represent the defendant in the action.

Straightaway, we find no merit in this contention. In the first place, here was a defendant seeking to set aside a judgment on the ground that he was not served with the originating process in the action. He had not entered an appearance and therefore not submitted to the jurisdiction of the court. If the application succeeded, he would have to be served properly, whereupon an appearance would be entered. It is the entry of appearance which would indicate whether the defendant was acting in person or by a lawyer. In effect, the authority of the lawyer to act for the party is established in the notice of appearance and not the motion to set aside the judgment. What, one may ask,

if after obtaining the order setting aside the judgment, the defendant entered appearance in person and conducted the matter *pro se*? In our view notice of appointment of solicitor was not a necessary process at that stage.

In any event, failing to file a notice of appointment of Solicitor was an irregularity in terms of Order 81 rule (1) subrule (1). **See REPUBLIC VRS OBENEY (2001-2002)2 GLR 206**. The plaintiff reserved the right to raise a challenge against the motion before the trial court. In accordance with Order 81 rule (1) sub-rule (2), the court would have then decided to deal with the matter as it considered just. The plaintiff however filed an affidavit in opposition to the motion and contested same on merit. By that, the plaintiff waived the irregularity in terms of Order 81 rule (2) which provides:

*"2. (1) An application may be made by motion to set aside for irregularity any proceedings, any step taken in any 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 to set aside has not taken any fresh step after the knowledge of the irregularity."*

It has been decided that a step taken, with the knowledge of an irregularity, either with a view to defending the case on merits or to obtain an advantage such as security for costs will waive irregularities in the institution or service of proceedings, since they could only usefully be taken on the basis that the proceedings were valid. **BOYLE VRS SACKER (1889)39 CH.D. 249; FRY VRS MORE (1889)23 QBD 395.**

In the case of **CLERK VRS CLERK (1976)1 GLR 123**, where the appellant's complaint was that the respondents having been granted leave to file an amendment failed to file the amended process within time, this court dismissed the complaint. In the words of Francois JA shortly expressed:

> *"As to the second limb of her complaint relating to the tardiness in filing a notice of amendment, the record shows that the appellant participated fully in the hearing below. She made no pretence of invoking Order 28, 2. 7 or 4 to disallow the amendment when the period limited has lapsed. We think it is too late in the day to complain."*

We approach the plaintiff's complaint in this appeal the same way. Having participated fully in the application to set aside the judgment of the trial court, his complaint is a latecomer before us. The ground of appeal is therefore bereft of merit and is dismissed.

The form in which the defendant's application was brought has also been challenged in this appeal. Not only was the application before the trial court headed: *"MOTION ON NOTICE TO SET ASIDE INTERLOCUTORY JUDGMENT"*, the motion itself and the affidavit prayed for an order to set aside the interlocutory judgment of the trial court.

The plaintiff's contention is that the judgment in question was a final not an interlocutory judgment. The trial judge therefore erred when he set aside a final judgment on an application to set aside an interlocutory judgment.

At first blush, this appears something beyond a mere technical argument. This is because at the very least the kind of judgment has implication on the time limit to bring an application to set it aside. For instance, under Order 36 of the High Court (Civil Procedure) Rules, C.I 47 (as amended), a judgment given against a party who fails to

attend at the trial may be set aside upon application made within fourteen days after the trial.

In this jurisdiction the position now appears settled in the determination of whether a judgment, order or decision is interlocutory or final. It is interlocutory where it does not dispose of the rights of the parties finally and completely and is final where it does. See **OPOKU & ORS VRS AXES CO LTD. (2011)1 SCGLR 50** where the Supreme Court settle on the *nature of the order approach* instead of the *nature of the application approach* of determining whether an order was interlocutory or final.

From the incontrovertible facts of this case, the trial judge on the defendant's default, proceeded to hear the matter on merits. The plaintiff gave evidence on oath and tendered documents in support of his case. At the close of evidence, address was filed before judgment was delivered. On considering the judgment delivered on 7th May 2021, there can be no doubt that it was a judgment that determined the rights of the parties completely and finally. This is regardless of the fact that the defendant was not in attendance. On these facts, we think that the judgment delivered by the trial court was final not interlocutory.

The above however, to our minds, is the farthest the argument can take the plaintiff. This is because in applying to set aside the judgment, the defendant's case was that he was not served with the writ and statement of claim that originated the action. If that was the case, then it is immaterial that the judgment was interlocutory or final. The defendant's plaint would call for an examination of the substance of the grounds of the application and not the form the application was made. That is to say, the real issue that should confront the trial court would be whether the claim that service was not effected

on the defendant was made out or not. If it was, then the judgment would suffer an order of the trial court to set it aside.

It is axiomatic that service, especially of an originating process is a critical requirement of every judicial process. Its primary purpose is to notify the adversary of what is sought against him so that he may be able to resist it. A step in a proceeding, without notice to the adversary constitutes a breach of the *audi alteram partem rule* of natural justice. Where service of a process is required, failure to serve is a fundamental vice and the person affected by the order but was not served with the process is entitled *ex debito justiciae* to have the order set aside. The decision or order so obtained is a nullity. **OBIOMONURE VRS ERINOSHO (1966)1 ALL NLR 250.**

**In R VRS APPEAL COMMITTEE OF LONDON QUARTER SESSIONS, EX PARTE ROSSI (1956)1 ALL ER 670 at 674**, the English Court of Appeal delivered the point thus:

> *"It is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been careful to see that the defendant is fully apprised of the proceedings before it makes any order against him."*

In **VASQUEZ VRS QUASHIE (1968) GLR 62 at 63**, a statement which has been approved by the Supreme Court in **REP. VRS HIGH COURT (FAST TRACK DIVISION) ACCRA, EX PARTE STATE HOUSING CO.LTD (2009) SCGLR 177** goes:

> *"A court making a decision in a case where a party did not appear because he had not been notified would be doing an act which is a nullity on the*

*ground of absence of jurisdiction."* See also **AMOAKOH VRS HANSEN (1987-88)2 GLR 26; BRAKOWAA VRS AWUAKYEWAA (1961)1 GLR 164.**

Delivering his ruling in which he set aside the judgment earlier entered in favour of the plaintiff, the learned trial judge observed:

> *"This court is aware that that all processes involved in the suit were served on the defendant/applicant herein by substituted service. Exhibit FEK1 attached to the motion to set aside the interlocutory judgment obtained by the plaintiff/ respondent a search conducted indicated that the processes were served on the defendant by posting same on the High Court notice board and on the disputed property at Odorkor. The defendant/applicant disputed this claim and contended that the processes except the entry of judgment that came to their notice the writ of summons and all other processes were either posted at a place called BEEN-TO or some wrong premises which is not in any way related to the disputed property. The defendant applicant contended that they have a defence to the action and that the suit was held [sic] on their blind side."*

For the foregoing, the learned judge held:

> *"… that it would be against the rule of audi alteram partem if the defendant has defence to the action and yet was not brought on board because the processes were posted at a wrong place and the defendant/applicant is kept in the dark. BEEN-TO is not the property in contention and therefore the processes posted there negate all activities carried out by the court which end product is the interlocutory* judgment on our hands. I will proceed to set it aside and

allow the defendant/applicant to come on board and contest for the suit to be determined between the parties on merit."

The plaintiff disputes the finding of the trial judge that the processes were posted at wrong places. It is his case that from the defendant's own search (Exhibit FEK1), the processes were posted on the notice board of the High Court and on the disputed property as ordered by the court. Reference is also made to the plaintiff's Exhibit A which shows the digital address of the disputed property and what appear to be traces of the posted documents on a wall.

Also challenged is the trial judge's observation that the posting was done on the property popularly known as *"BEEN-TO"*. The explanation is that the property known as *BEEN-TO* which is bounded to the west of the disputed property is a building complex so popular in the community that the whole area has become known as *BEEN-TO*, but that was not where the processes were posted.

Now, on the plaintiff's writ of summons, the defendant's address is captured as:

*"FRANK ETWI KARIKARI*

*PLOT NO. 128*

*ODORKOR-TSUIM a.k.a Been-To, Accra"*

It is not in dispute that Plot No. 128 stated above is the property in dispute between the parties. It is also noted that the "Been-To" as captured in the address is another name for Odorkor-Tsuim. That is in obvious consonance with the plaintiff's explanation that the whole area is also called "Been-To" for the reason given. The defendant's Exhibit FEK3 shows the picture of the Been-To storey building with a boldly written signage *"BEEN-TO COMPLEX"*. From the picture, this is a huge commercial property with

shops and some offices. It is therefore clear that the *"BEEN TO"* though a building also describes the area and is different from the property in dispute which is Plot No.128 with a digital address *46 TSENKU ST GA-556-5589.*

In the affidavit of non-service which prompted the plaintiff's *ex parte* application for substituted service, the bailiff swore:

> *"…ALL THREE ATTEMPTS TO SERVE THE DEFENDANT PROVED FUTILE AT ODOKOR IN ACCRA (PLOT NO.128)"*

It means that the attempt to serve the defendant was at the disputed plot not at the popular *BEEN-TO* building. The order of substituted service directed copies to be posted "*on the structure on the disputed land situate at Odokor Tsuim also known as Odorkor-been-to, plot No. 128"* and on the "*Notice Board of this Honourable Court*".

In the affidavit of posting by the bailiff dated 7th August 2019, the writ of summons and statement of claim were posted on the notice of board of the Land Court and *"THE STRUCTURE ON THE DIPSUTED LAND SITUATE AND BEING AT ODORKOR".* Nowhere in the affidavit is *BEEN-TO* mentioned.

Apart from the affidavit of posting of the writ and statement of claim, there were two other affidavits of posting, one for the motion on notice for judgment in default of defence and the other for hearing notice. Both affidavits show that the postings were effected on the structure on the disputed property and not on the *BEEN-TO* building.

From our scrutiny of the documentary evidence, we do not find the source of the trial judge's evidence that the postings were effected on the *BEEN-TO* property. From what we gather, the trial judge got the facts about the posting of the processes wrong. The

defendant's own search result (Exhibit FEK1) indicates that service was effected on the disputed property as ordered by the court.

In effect, the trial judge's finding that the processes were posted at wrong places was not supported by the documentary evidence before him. Contrariwise, we find that the posting was effected on the disputed property in accordance with the order of the court. The service was therefore proper and effective to found the proceedings that resulted in the final judgment.

We are mindful that this being an appeal against the exercise of a trial court's discretion, we cannot interfere with the position taken unless it is shown that the trial court exercised the discretion on the basis of wrong or inadequate materials or that it acted under a misapprehension of fact in that it had either given weight to irrelevant or unproved matters or omitted to take relevant matters into account. See **ADU (PER ATTORNEY) AKONNOR VRS GAHANA REVENUE AUTHORITY (112013-2014 2 SCGLR 1176, BALLMOOS VRS MENSAH (1984-86)1 GLR 725**.

Examining the ruling of the trial judge, we appraise that his decision to set aside the judgment was chiefly driven by his finding that the postings were effected on the BEEN-TO building, a place he describes as wrongful. Given that this was not the case, we find sound factual and legal basis to interfere with the exercise of the discretion.

Additionally, we note that the judgment of the trial court delivered on 7th May 2021 after the plaintiff had given evidence and filed address touched on the true merits of the matter. Among other matters, the trial judge was satisfied that the plaintiff had proved his title to the land in dispute based on the oral and documentary evidence adduced before him.

In our considered view, in setting aside such a judgment, the trial judge ought to have asked himself whether the defendant had demonstrated by an affidavit or otherwise before him that there was a defence to prosecute if the matter was re-opened. For, a well-known principle that guides a judge in the exercise of his discretion to set aside a judgment given in default was that a party praying for the exercise of such discretion must disclose either by affidavit or otherwise that he had a reasonable defence to the claim and that it would be in the circumstances unjust to have his case unadjudicated upon. See **AGYEMANG VRS GHANA RAILWAY & PORTS AUTHORITY 31ST March 1969 C.A (1969) CC 60; BOTCHWAY VRS DANIELS (1991)2 GLR 262.**

From the record, we do not find any such demonstration before the trial judge. For this reason also, we find the exercise of the discretion in favour of the defendant objectionable.

In the final analysis, we think the appeal ought to succeed and we so hold. We set aside the ruling of the trial court dated 7th June 2022 which set aside the judgment of the same court given on 7th May 2021. Costs of GH¢10,000.00 for Appellant.

**SGD**

**.....**

**JUSTICE RICHARD ADJEI-FRIMPONG**

**(JUSTICE OF THE COURT OF APPEAL)**

**SGD**

**I AGREE .....**

**JUSTICE BARBARA ACKAH-YENSU**

**(JUSTICE OF THE SUPREME COURT)**

**SGD**

**I ALSO AGREE .....**

**JUSTICE AMMA GAISIE**

**(JUSTICE OF THE COURT OF APPEAL)**

**COUNSEL:**

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**REGINALD NII-BI AYIBONTE FOR DEFENDANT/RESPONDENT**