**IN THE CIRCUIT COURT '1' HELD AT ADENTAN BEFORE HIS HONOUR ISAAC ADDO ON FRIDAY, 5TH MAY, 2023**

**SUIT NO. C2/021/2023**

**RED WING SHOES CO. INC** **PLAINTIFF/RESPONDENT**

**VRS**

**ENERGEM LIMITED** **DEFENDANT/APPLICANT**

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PARTIES ABSENT

TONY HENRY ARTHUR, ESQ. HOLDING THE BRIEF OF STEPHEN BATSE, ESQ. FOR THE DEFENDANT/APPLICANT PRESENT

BENJAMIN ATO AFFUL, ESQ. WITH DANIEL FIADOR, ESQ. FOR THE PLAINTIFF/RESPONDENT PRESENT

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**RULING ON MOTION ON NOTICE TO SET ASIDE DEFAULT JUDGEMENT PURSUANT TO ORDER 10 RULE 8 OF C.I. 47**

The Plaintiff Company (hereinafter called the 'Respondent') commenced this action by issuing a Writ of Summons accompanied with a Statement of Claim at the Registry of this Court on the 3rd November, 2022 seeking the following reliefs against the Defendant (hereinafter called the 'Applicant'):

i. An order directed at the Defendant for the payment of forty thousand, one hundred and twenty-seven United States Dollars, ten cents US§40,127.10 being the outstanding amount of money the Defendant owes the Plaintiff for goods supplied to the Defendant in 2020.
ii. Interest on the said amount of forty thousand, one hundred and twenty-seven United States Dollars, ten cents US§40,127.10 at the prevailing commercial rate from July, 2020 till the date of final payment.

iii. Cost including legal fees.

In compliance with the rules of court, the Respondent filed a Motion Ex Parte for Judgement in Default of Appearance on the 25th November, 2022. On the 5th December, 2022, this Court differently constituted granted the application and accordingly entered judgement in favour of the Respondent on the reliefs endorsed on the Writ of Summons. The Respondent commenced the execution processes, filed the Entry of Judgement on the 30th December, 2022 and duly served same on the Applicant. The Respondent filed a Motion Ex Parte for Garnishee Order Nisi on the 19th January, 2023 and this was granted by this Court differently constituted. On the 6th February, 2023, the Garnishee appeared in Court and was examined. Thereafter, this Court differently constituted made an order for Garnishee Order Absolute attaching the bank account of the Applicant in satisfaction of the judgement debt.

This instant ruling is in respect of a Motion on Notice to Set Aside the Default Judgement obtained in this Court. The grounds upon which this instant application is premised are catalogued in the supporting affidavit accompanying the motion paper. The relevant parts are contained in paragraphs 6–10 of the affidavit in support. For the avoidance of doubt, I reproduce them below:

"*6. That the Defendant/Applicant Managing Director was outside the jurisdiction to receive medical care.*

*7. That as a result of the unavailability, the Defendant/Applicant through its head could not possibly arrange a meeting to engage its solicitors to file any processes and at the time as required.*

*8. That on the 9th January, 2023, the Defendant was served with Entry of Judgement by the Plaintiff/Respondent.*

*9. That the Defendant/Applicant has a valid defence to the suit. Attached and Marked as EXHIBIT A is a draft Statement of Defence.*
*That the delay/default of the Defendant/Applicant to file Appearance was inadvertent and was not as a result of lack of interest to defend, bad faith, or out of disrespect for this Honourable Court*."

In open Court, the Applicant's counsel submitted that it is against the rules of natural justice to prevent the Applicant from defending itself in this suit because it had a reasonable defence and that time does not run in setting aside default judgements. Cited the case of *Ghana Commercial Bank vrs Tabury* [1977] 1 GLR 329.

The Respondent opposed to the application and relied on all the depositions contained in the Affidavit in Opposition to the motion. The Respondent's counsel submitted that an application to set aside default judgement must be prompt and disclose a defence to the claim. Cited the case of *Agyemang vrs Ghana Railways & Ports Authority*, Court of Appeal, 31 March 1969, unreported; digested in (1969) C.C. 60. Counsel submitted that on the issue of defence, the Applicant has admitted clearly the debt owed. Also cited *Botchway vrs Daniels* [1991] 2 GLR 262.

On the issue of promptness, the Respondent's counsel argued that it had taken four (4) months before this instant application was filed. That if the Applicant was minded, it should have responded long time.

This application is grounded on Order 10 rule 8 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) and it reads:

**"The Court may, on such terms as It thinks fit, set aside or vary any judgment entered in pursuance of this Order".**

This Court therefore has a discretion pursuant to Order 10 rule 8 of C.I. 47 to set aside the judgment it entered on the 5th December, 2022 in favour of the Applicant if it finds same just to do so. In other words, it is based on the duty to do justice. What is meant by the duty to do justice is ably stated by the distinguished Taylor J (as he then was) in *Bonsu & Another VS. Bonsu* [1971] 1 GLR 242 when he held that the true legal notions of justice have been circumscribed by the demands of the law in that the court's administer justice according to three and only three yardsticks: statute, case law and well-defined rules of practice.

I have carefully read the motion paper and the supporting affidavit as well as the affidavit in opposition and all the annexures. I have also listened to the submissions made by counsel for both sides and below are my reasons for arriving at the decision that follows.

Different approaches are given by the Court in exercising its discretionary power to set aside a judgment depending on whether the judgment was regularly or irregularly obtained. If the judgment is regular, the defendant must show by his affidavit that he has a defence on the merits of the case. Thus, Huddleston B stated in *Farden V. Richter* (1889) 23Q, B.D. 124 at 129 thus:

***"At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason."***

What amounts to a meritorious defence is stated by the English Court of Appeal in the case of Alpine Bulk Transport Co. Inc. V. Saudi Eagle Shipping Co. Inc., The Saudi Eagle (1986) 2 Lloyd's Rep. 221 C.A. thus:

(a) It is not sufficient to show merely "arguable" defence that would justify leave to defend; it must both have "a real prospect of success" and "carry some degree of conviction". Thus, the court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside.

In the case of a judgment which is irregularly obtained, the defendant does not need to disclose the nature of his defence in his affidavit although it is prudent to do so for such a judgment, the defendant is entitled ex debito justitiae to have it set side or vary it so as to correct the irregularity. But to correct an irregularity the defendant has to act timeously and must not have taken a fresh step upon discovering the irregularity.

In the instant application, I will first consider whether the default judgment was regularly or irregularly obtained so as to put in context the applicable law for setting it aside or otherwise.

From the facts as narrated from the inception of this ruling, the Respondent duly followed the procedures provided in Order 10 rule 1 of C.I. 47 to apply for judgment in default of Appearance. Order 10 rule 1 of C.I. 47 provides as follows:

"1. (1) where the plaintiff's claim against a defendant is for a liquidated demand only, and the defendant fails to file appearance, the plaintiff may, after the time limited for appearance, apply, to enter final judgment against the defendant for a sum not exceeding that claimed by the writ and for costs, and proceed with the action against other defendants, if any.

(2) A claim shall not be prevented from being treated for the purposes of this rule as a claim for a liquidated demand, by reason only that part of the claim is for interest accruing after the date of the writ at an unspecified rate, but any such rate shall be calculated from the date of the writ to the date of entering judgment or final payment at the prevailing commercial bank rate."

By the rules of court, the Applicant had up to eight (8) days to enter Appearance, and fourteen (14) days after the time limited for appearance to file his defence. Since the Applicant was served with the Writ of Summons and Statement of Claim and the Applicant failing to enter appearance, the Respondent was thus entitled to apply for final judgment in default of appearance pursuant to Order 10 rule 1 of C.I. 47 for its liquidated claims endorsed on the Writ of Summons. The Applicant accordingly applied for Judgement in Default of Appearance, and same was granted. So, the default judgment obtained by the Respondent on the 5th December, 2022 from the facts and the procedure was thus regularly obtained.

The next issue therefore is whether the Applicant has a reasonable defence to contest this case to its logical conclusion.

I will first deal with whether the Applicant by its Affidavit in support has shown that it has a probable defence to the Respondent's claims. Attached to the Affidavit in support of the motion is a Draft Statement of Defence. The

Applicant's defence is contained at paragraphs 6 and 7 of the Draft Statement of Defence. I reproduce the said paragraphs below:

"*6. In further denial to paragraph 5 of the Statement of Claim, the Defendant avers the goods were being sold until the aftermath of COVID 19 pandemic caused some of the companies in the oil industry who had placed orders for the products from the Defendant to fold up while others abandoned business and left town due to huge waybills of their expatriates at a time business was a downturn.*

*7. That the Defendant was thus left with no option than to pursue some of these companies* for various sums of money owed it from the supplies made to them."

Gleaning from the above, it can be seen that the Applicant is raising a defence of frustration of contract. The doctrine of frustration of contracts as stated by Viscount Simonds in *Tsakiroglou and Co. vrs Noblee Thorl* GMBH [1961] 2 ALLER 179 must be applied within narrow limits. It is not to be lightly invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains, unless the supervening event is an illegality. In the case of *Davis Contractors vrs Fareham UDC* [1956] 696, the plaintiff agreed to build 78 houses in eight months at a fixed price. Due to bad weather and labour shortage, the work took 22 months and cost more than anticipated. The builders argued that the weather and labour shortages were unforeseen and therefore had frustrated the contract. The Court held that the fact that unforeseen events made a contract more onerous than was anticipated did not frustrate it.

The mere increase in expense or loss of profit is not a ground for frustration. This Court is of the view that the Applicant has no reasonable defence to the action.

The next issue to deal with is whether the Applicant has deliberately ignored the proceedings and if so its effect in the exercise of this court discretion in setting aside or otherwise of the default judgment.

As I have narrated earlier in this ruling, the Respondent followed due process and obtained the Default Judgement. The Respondent also rightly triggered the civil execution processes leading to the attachment of the bank account of the Applicant. Since 7th November, 2022 that the Writ of Summons and Statement of Claim were served on the Applicant, it ignored these processes. The Applicant did not also support its application with any medical report indicating his ill health and receiving medical attention outside the country. The Applicant was duly served with all the court processes and orders and cannot complain of a breach of the rules of natural justice as counsel submitted. A defaulting defendant takes the blame for failing to appear in Court to defend an action against him. In the case of *Republic vrs v. High Court* (*Fast Track Division*), *Accra*; *Ex Parte State Housing Co. Ltd* (No. 2) (*Koranten-Amoako Interested Party*) [2009] SCGLR 185, the venerable Chief Justice Wood CJ observed that if a party like the Defendant herein, who has been served with notices to appear in court to be heard, fails to attend court, he cannot later turn around and accuse the court of a breach of natural justice. See also *Republic vrs High Court*, (*Human Rights Division*), *Accra, Ex parte Josephine Akita* (*Mancell-Egala & Attorney General Interested Parties*) [2010] SCGLR 374 @ 384 per Brobbey JSC; *Republic vrs Court of Appeal, Accra, Ex Parte East Dadekotopon Development Trust, Civil Motion No. J5/39/2015, dated 30th July 2015* and *Baiden vrs Solomon* [1963] GLR 488 at page 495.

This Court finds that the Applicant woke up from its slumber on the 10th March, 2023 when it realized that its bank account had been attached by way of an order

of Garnishee Order Absolute made on the 6th February, 2023. From the facts as stated above, the Applicant has shown gross disrespect for the processes and orders of this Court. The Applicant deliberately disregarded or ignored the proceedings in this instant case and acted as and when it pleased it. This Court is unable to exercise its discretion in its favour. In the circumstances, I hereby dismiss the application.

I award cost of GH¢5,000.00 against the Applicant.

**SGD. ISAAC ADDO**
**CIRCUIT JUDGE**
**5TH MAY, 2023**