IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE COMMERCIAL DIVISION B, SUNYANI HELD ON THE 15TH OF DECEMBER, 2023 BEFORE HER LADYSHIP, JUSTICE MAVIS AKUA ANDOH (MRS).

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SUIT NO C12/016/2022

WAPCO OIL CO PER THE MANAGER ***PLAINTIFF/ RESPONDENT***

Vrs

C&Y COMPANY PER THE MANAGER ***DEFENDANT/ APPELLANT***

YANKY & 1 OTHER

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PARTIES: ***ABSENT.***

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JUDGMENT

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INTRODUCTION

The Defendant/Appellant, (hereinafter referred to as Appellant) filed a Notice of Appeal in this Court on 14th June 2021 against the Ruling of His Worship Joseph Twumasi, of the District Court Atebubu, delivered on the 8th of June 2021.

BACKGROUND/FACTS

The facts of the case that went before the Court of first instance and which have snowballed into this instant appeal are that the Plaintiff/Respondent (hereinafter called Respondent) instituted an action against the Appellant and one other person at the District Court, Atebubu on the 26th of February 2021 and claimed jointly and severally against them for the recovery of cash, in the sum of Thirty-One Thousand, Four Hundred and Twenty Seven Ghana Cedis (GH¢31,427.00), being the amount of fuel the Respondent sold to the Appellant, for which the 2nd Defendant in the case stood as surety, but the Appellant had for the past 9 months, preceding the institution of the action, neglected to pay the debt owed despite repeated demands on him by the Respondent to pay including interest on the said amount at the acceptable current bank rate.

Judgment was entered against the Appellant on the 8th of June 2021 and when the Appellant applied to have the said ruling of the District Magistrate set aside, the Court dismissed the application. It is that ruling dismissing his application to set aside the said Ruling that the Appellant has appealed against, claiming amongst others that, the Appellant was not given a fair hearing because certain procedural errors were committed by the Respondent which were overlooked by the Magistrate.

It is against this background that the Appellant, feeling disgruntled and aggrieved with the ruling delivered by the trial Magistrate mounted this instant appeal by filing a Notice of Appeal on the 14th of June 2021 setting down the following grounds of appeal for the consideration of this Court.

GROUNDS OF APPEAL

1. That the Court erred when it held that the provisions of Section 291 (6) of the Companies Act 2019, Act 992 seemingly overrode Sections 291(1) to (5) of the said Companies Act, Act 992.

2. The Court erred by interpreting the provisions of Section 291 of the Companies Act, 2019 (Act 992) in a manner which defeats the purpose of the Act in giving parties who have been sued, notice of the action against them by properly serving the said parties.
3. The Court erred by not properly construing the provisions of Section 291 of the

   Companies Act, 2019 (Act 992) and its legal effect on stare decisis.

4. The Court erred in law by not setting aside the alleged service of the Writ on the Defendant /Applicant /Appellant Company because the Plaintiff/ Respondent/ Respondent acted contrary to the orders of the Court.

5. The Orders of the Court made in relation to the alleged service of the Writ on the Defendant /Applicant /Appellant Company were incapable of being complied with because the tenor of the said order gave the distinct impression that the Defendant Applicant /Appellant was a natural person rather than a corporate entity.

6. The Ruling is against the weight of the evidence.

RELIEF SOUGHT

By way of relief, the Appellant is seeking an order setting aside the entire ruling of the District Court, Atebubu delivered by His Worship Joseph Twumasi on 8th June 2021,

which dismissed the application of the appellant, praying this Court to set aside the Writ of Summons and Statement of Claim together with all processes and or orders consequent thereon, for noncompliance with mandatory statutory provisions.

POSITION OF THE LAW

It is apposite to mention that, an appeal is by way of rehearing as has generally been stated by the Supreme Court in a long line of several respected cases such as;

1. ***Gregory V Tandoh (2010) SCGLR @97***
2. ***Evelyn Asiedu Offei V Yaw Asamoah [2018] 122 GMJ @186.***
3. ***Daniel Ofori V Ecobank Ltd & others [2019] 138 GMJ @ page1.***

In the case of Evelyn Asiedu Ofei V Yaw Asamaoh mentioned supra, the Defendant's omnibus ground of appeal that, the judgment was against the weight of evidence adduced at the trial, opened the way for the Supreme Court to exercise its power of rehearing the case.

The Supreme Court speaking through Apau JSC as he then was stated the law on rehearing thus;

"The authorities are legion that an appeal is by way of rehearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court was against the weight of evidence. In such a case, it is the duty of the appellate Court to analyse the entire record of appeal, and take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that,

on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence on record...".

This Court therefore, in exercise of its appellate jurisdiction particularly where the omnibus ground of appeal has also been alleged in the Notice of appeal, is required to rehear the appeal by comprehensively reviewing the whole case by analyzing the entire record of Appeal, taking into consideration all the documentary evidence adduced at the trial before the trial Judge arrived at the decision, so as to come to a conclusion that the judgment was amply and reasonably supported by the evidence on record. Subsequently, after a proper evaluation, this appellate Court will be in a position to either affirm or reject the decision of the Magistrate.

It is apposite to mention also that, where an Appellant alleges that the judgment of a Court cannot be supported by the weight of the evidence adduced on record, the Appellant is alleging that, there are certain pieces of evidence on record which the trial Judge should have taken cognizance of, in arriving at its decision but failed to do so.

To put it more aptly, the appellant herein is saying that there are pieces of evidence on record that the trial court ought to have taken cognizance of, in arriving at its decision, but did not do so and this had occasioned a substantial miscarriage of justice to him, as such, the appellate Court is under an obligation to go through the entire record of Appeal before it, to satisfy itself that a party's case was more probable than not.

Aligning myself with this position of the law on rehearing the case, this Court as an appellate Court, is duty bound to rehear this appeal to satisfy itself that, on the

preponderance of probabilities, the conclusions of the Magistrate are reasonable and supported by the evidence or not.

ISSUES FOR DETERMINATION

After perusing the whole of the Notice of Appeal and considering the Record of Appeal, as well as perusing the written submissions of both Counsel for the parties wherein they expounded their arguments for the grant of the appeal or otherwise, the only issue for the determination of the Court shall be set down as follows;

1. Whether or not indeed the appellant was given a hearing before the Ruling was delivered?

WRITTEN SUBMISSIONS

Both Counsel filed their written submissions on 14th June 2022 and 22nd July 2022 respectively which assisted this Court greatly in this judgment.

ISSUE 1

Whether or not the appellant was given a hearing?

The fundamental issue confronting this Court is the determination of the sole issue of whether the Appellant was given a fair hearing before the trial Magistrate court came out with its decision. It is trite knowledge that the issue of fair hearing goes to jurisdiction of any matter and can be raised at any time, as a court does not have the jurisdiction to make a pronouncement against a person who has not been heard in a matter and so this issue

of whether or not the appellant was given a hearing will have to be determined first to know whether the appeal was rightly launched.

The gravamen of the submissions of Counsel for the Appellant is that, the Appellant was never served with the writ of summons notifying him of the pendency of the case nor the date for the hearing of the matter when the case was slated for hearing. Further, neither was the appellant duly notified by serving the processes on him by substituted service to even notify him of the day for the hearing of the matter, thereby breaching the rules of natural justice as the Appellant was not given an opportunity to be heard.

After carefully perusing the record of proceedings, the chronology of events, the proceedings that happened before the trial Magistrate gave his ruling in Respondent's favour and the law, the questions begging for answers are:

i. Was the appellant indeed personally served with the Writ of Summons and Statement of Claim issued out of the Registry of the trial Court on the 26th of February 2021?

ii. And also, was the service of the processes by substituted service duly effected in accordance with law?

Answers to these questions will go a long way in helping this Court to know whether or not the Appellant is right in appealing against the ruling of the District court which refused to set aside its ruling and also whether the Court breached the audi alteram partem rule?

My starting point in determining this issue will be by referring to what the District Court

Civil Procedure Rules 2009 C.I 59 say on service of documents. Under the heading ***SERVICE OF PROCESS*** under Order 4 of C.I 59 supra, Rule 2 specifically provides that;

(1) a writ or document intended for service shall be served on a party within the time and in the manner specified by these rules or directed by the court.

(2) Subject to subrule 7 where service of a notice, summons order or other document is required the service may be made by a bailiff or other officer of the court at a reasonable time on any day.

(5) Unless the court considers it just and expedient to direct otherwise, service shall be personal with the document to be served being delivered to the person to be served.

In his book, **A Practical Guide To Civil Procedure in Ghana,** the eminent Judge**,** late Justice Marful Sau, JSC as he then was, at page 32 of his book wrote; "a writ of summons is to be served by a court Bailiff or private process server licensed by the Chief Justice. It is important that a Writ of Summons is served appropriately in accordance with the rules on service. The general position of the law is that a Court has no jurisdiction to proceed against a party who has not been served, as was held in the case of ***Barclays Bank of Ghana Ltd v Ghana Cables Co Ltd [1998-99] SCGLR 1"***.

It was further written in the said book under reference that, a Writ is to be served personally on every defendant named in the Writ unless the rules provide otherwise.

See also E.D Kom's Book, Civil Procedure, 3rd edition @ page 30 for a longer list of the processes that ought to be served personally on defendants.

This is what the position of the law is regarding personal service of processes.

Per the records, and juxtaposing same against the dictates of Order 4 rules 1 and 5 of C.I 59, was the Writ of summons served on the party within the manner specified by the rules and was it served personally on the defendant, the appellant herein? If not, were the processes which were to have been served personally on him, but had to be served on him by substituted service effectively done? Did the trial Magistrate ensure that all procedures had been duly fulfilled by the process server before delivering his ruling?

These questions will be addressed subsequently in this Judgment.
Counsel for the Appellant submitted that the Respondent issued a Writ of Summons on 26th February 2021 at about 3.25 pm against the Appellant herein, but the attached hearing notice did not give the return date for the hearing of the matter. A critical look at the Writ of Summons and the hearing notice does in fact show that, though there was a Writ issued and a hearing notice issued as well, there was indeed no hearing date on the processes indicating when the named defendants were to appear in court.

Again, on the said hearing notice issued out of the Registry of the District Court, Atebubu on 26th February 2021, the hearing notice was issued to be served on Yanky and Tei Napoleon. The Bailiff had indicated that, on the 1st of March 2021 the notice was served upon defendant without indicating which of the two named defendants was served personally by him.

The question I pose is, which of the two defendants named on the hearing notice was the hearing notice served on? Is it the 1st defendant or the 2nd defendant who was served or notified of the next court date? Again, if there was no return date on the said hearing notice, the question is, obviously how would a person served with such a process know when to appear in Court?

Counsel for the Appellant, in his written submissions, stated that an ex parte application was filed by the Respondent on 19th March 2021 at 11.55 am and the return date was given as Friday the 19th of March 2021 for the ex-parte application to be moved at 9.00 am. The filing time and the time for moving the said application were at variance.

Counsel again submitted that the said application was moved that very same day that it was filed at 11. 55am when the time had been stated on the face of the motion paper that the motion was to be moved at 9.00 am day for an order for substituted service and same was granted by the court, necessitating the question that, what was that process for, if the intended recipient had been served personally? One very obvious procedural error was the fact that, the ex-parte application was filed on 19th March 2021 at 11.35am but the court was to be moved by the applicant at 9.00 am.

Counsel for the appellant again made another significant submission for the Court's consideration which is that, on page 3 of the record of proceedings was attached an affidavit of non-service wherein the Bailiff, one Abdul Kafaru, stated that on the 26th day of February 2021, he was entrusted with a Writ of Summons and hearing notice for the service on the within named and significantly, the Bailiff had stated that, in spite of the Writ being filed at 3.55pm on the 26th of February 2021, he indicated that he attempted service on 2nd and 3rd March, 2021 and he went ahead to indicate that, ***"he could not effect service because the defendant is travelling"***.

This affidavit of non-service Counsel opined, was not attached to the application for substituted service filed by the Respondent to inform the Magistrate on his decision whether to grant the application for substituted service or not, but yet the Magistrate went ahead to give his ruling granting the application for substituted service.

Again, in his written submissions, Counsel for the Appellant noted that, there was no duration for when the substituted service was to be in place, whether for 10 days or 14 days and when next the appellant was to appear in court. A cursory look at the **"order for substitution"** (sic) so headed by the court as appeared in the Record of Appeal, did not give any indication as to when the case had been adjourned to, to notify the appellant.

Counsel for the appellant stated that the bailiff had indicated these dates of 2nd and 3rd March 2021as when he had made attempts to serve the Respondent and these dates point to dates in futuro which had not come to pass as he submitted his proof of service dated

26th February 2021to include the 2nd and 3rd of March 2023 which had not been birthed. The Bailiff also failed to indicate which of the two defendants the service of the process had been attempted

From these submissions, it is not difficult for the Court to come to the conclusion that, there were serious procedural lapses in the service of the processes and the hearing notice served on the appellant which was glossed over by the trial Magistrate and yet he ruled against the appellant which greatly worked against the Appellant because he was not aware of any court date for him to be in court to be given a hearing, thus breaching the ***audi alteram partem*** rule.

Again, on the issue of service of the order by substituted service, the question I ask is, was the mode of service per the application directed to the right places where the order was to be served?

It is trite knowledge that, the jurisdiction of a Court would not have been invoked to go on with the hearing of a matter if a party in a suit has not been duly notified.

It is apposite to also mention that, it is the objective of the law that, in the best interest of justice, disputes that come before the courts as far as possible, ought not to be decided on the basis of default by one party to comply with rules of procedure, but on their merits.

In the case of ***Quamyne V Afeyesi [1984-86] 2 GLR 430 @ 435*** the Court of Appeal approved of the following statement by Lord Atkin in Evans v Bartiam 1937 AC 473 @ 480 ***"The principle obviously is that unless and until the Court has pronounced a judgment on the merit or by consent, it is to have power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure".***

This Court is of the opinion that, where a judgment or an order is void either because it was given or made without jurisdiction or because it is not warranted by any law or rule or procedure, the party affected is entitled ex debito justitiae to have it set aside and the court or a Judge is under a legal obligation to set it aside either suo motu or on the application of the party affected.

The effect of the fundamental error occasioned by the non-service of the Writ of Summons and Statement of Claim personally on the defendants is such that, the entire proceedings culminating into the ruling awarded in favour of the Respondent is null and void. Having made this finding that the ruling delivered by the Magistrate was null and void, it would not be necessary to consider the other grounds of appeal as the foundation upon which the Magistrate delivered his ruling was built on nothing. Hence the ruling and all orders made thereon must crumble. ***See Mosi v Bagyina [1963]1 GLR 337-348***

CONCLUSION

Without mincing words, it is the clear thinking of this Court that, ***once the provision which could have validated the ruling had not been done*** by not having complied with the dictates of Order 4 r 1,2 and 5 of C.I 59, which stipulates that, service of Writ of Summons and Statement of Claim is to be served personally on the defendants in the prescribed mode by the rules of court and the various authorities cited, and the defendants particularly the Appellant not having appeared to have participated in the proceedings before the trial Magistrate gave his ruling, the ruling of the Magistrate ***so delivered or granted or awarded on*** 18th June 2021 as well as execution process commenced thereafter are null and ***void***. The ruling given on the 18th of June 2021 is ***accordingly SET ASIDE*** ex debito justitiae.

Accordingly, the appeal to set aside the ruling of the Magistrate delivered on 18th June 2021 succeeds.

Having set aside the ruling delivered on 18th June 2021, the Respondent is hereby ordered to serve the Writ of Summons on the Appellant personally for the matter to be heard on its merits. Consequently, the execution process which has commenced is hereby vacated.

Cost of GH¢5,000.00 is awarded in favour of the Appellant against the Respondent.

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MAVIS AKUA ANDOH (MRS)

JUSTICE OF THE HIGH COURT

COMMERCIAL DIVISION B

SUNYANI.

COUNSEL:

KWABENA POKU - MENSAH COUNSEL FOR THE DEFENDANT /APPELLANT PRESENT.

NO LEGAL REPRESENTATION FOR THE PLAINTIFF/RESPONDENT.

AUTHORITIES

1. *GREGORY V TANDOH (2010) SCGLR @97*
2. *EVELYN ASIEDU OFFEI V YAW ASAMOAH [2018] 122 GMJ @186.*
3. *DANIEL OFORI V ECOBANK LTD & OTHERS [2019] 138 GMJ @ PAGE1*
4. *BARCLAYS BANK OF GHANA LTD V GHANA CABLES CO LTD [1998-99] SCGLR 1"*
5. *QUAMYNE V AFEYESI [1984-86] 2 GLR 430 @ 435*
6. *MOSI V BAGYINA [1963]1 GLR 337-348*