IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)

DOTSE JSC

BAFFOE-BONNIE JSC

PWAMANG JSC

PROF. KOTEY JSC

OWUSU (MS.) JSC

AMADU JSC

CIVIL MOTIONS

NO. J7/01/2022

AND J8/2/2022

29TH NOVEMBER, 2022

IN THE CONSOLIDATED SUITS OF

DANIEL OFORI …….. PLAINTIFF/APPELLANT/APPELLANT/RESPONDENT

HOUSE NO. 16

EAST LEGON, ACCRA

VRS

ECOBANK GHANA

LIMITED …….. 1ST DEFENDANT/RESPONDENT

RESPONDENT/APPLICANT

RULING

MAJORITY OPINION

DOTSE JSC:-

On the 29th day of November, 2022, this court by a 4-3 majority decision, Yeboah CJ, Baffoe-Bonnie and Pwamang JJSC dissenting, dismissed the objections raised by the Plaintiff against 1st Defendants review application in Suit No. J8/25/2022.

We now proceed to give reasons for the said decision.

By an order of this court, dated 6th July 2022, two pending applications listed as *Civil Motion No. J7/01/2022 filed by 1st Defendants herein on 26th October 2022 and J8/25/2022* filed by Plaintiff on 12th November 2022 pending before the court were consolidated, as follows:-

Civil Motion No. J7/01/2022

"This application is by the 1st Defendant/Respondent/Respondent/Applicant, hereafter referred to as 1st Defendants, seeking a review of this court's decision dated 13th July 2021."

Civil Motion J8/25/2022

This Application will be referred to as ***"Application to strike out review motion"*** and was filed at the instance of Plaintiff.

FACTS GERMANE TO MOTION NO. J8/25/2022

In order to appreciate and understand the basis of the plaintiffs application to strike out the 1st Defendants application for review of this court's decision dated, 13th July 2021, it is

necessary to give a background of the facts germane to the instant application to strike out.

Under the circumstances, it is perhaps very instructive and important to set out in detail facts which would seem to be germane to motion No. J7/01/2022. That is necessary to give a sound understanding to our decision on 29th November 2022 to overrule the objection raised by the plaintiff to the filing of the review application referred to supra.

In the Ruing of 13th July 2021, this Court coram: *Yeboah CJ, presiding, Dotse, Baffoe-Bonnie, Appau and Pwamang JJSC's*, by a majority of 4 -1, Dotse JSC dissenting, this court dismissed the 1st Defendants application which was headed thus:-

> *"Motion on Notice Invoking this Honourable Court's Inherent Jurisdiction for an Order to re-open the Appeal filed on 7th June 2013, and for Leave to adduce New Evidence"*

This was the application that was dismissed by the majority of 4-1 referred to supra and which is being sought to be reviewed by the instant application.

This application for review has been amplified by a 39 paragraphed affidavit sworn to by Awuraa Abena Asafo-Boakye, Company Secretary and Head of Legal of the 1st Defendant's Bank.

In order to put matters and all the facts in proper perspective, we will set these out in detail as follows:-

1. One William Oppong-Bio, in May 2008, instructed Databank Brokerage Ltd, referred to as *"Databank"* and the 1st Defendant's herein to purchase 14,130,000 shares in Cal Bank Ltd, also referred to as "Calbank" which shares were owned by the Plaintiff and listed and traded on the floor of the Ghana Stock Exchange (GSE).

2. 1st Defendant Bank on 27th May 2008, initiated a trade in the 14, 130,000 of the Calbank shares belonging to the Plaintiff and 2 other persons on whose behalf the Plaintiff held part of the shares on the floor of the G.S.E.
3. For these shares transaction, Oppong-Bio had obtained a loan facility in the sum of GH¢13,300,000 from the 1st Defendant's herein and instructed that these be applied to pay for the 14,130,000 shares to be purchased from the Plaintiff.
4. The Plaintiff then issued the following instructions to the 1st Defendants herein
   (i) To place the sum of GH¢13,762,420 in a call deposit account and
   (ii) Issue two separate banker's drafts in the sum of GH¢7,600,000 payable to the Plaintiff's account with Zenith and SG-SSB Banks respectively, and
   (iii) The balance of GH¢6,162,420 to be invested in a call deposit account.
5. On **30th May 2008**, the Bank of Ghana (BoG) directed the GSE **to suspend the sale transaction to enable it investigate allegations of anti-money laundering surrounding the transactions.**
6. Based on the above directives, Oppong-Bio wrote to the 1st Defendants herein and issued the following instructions:-
   (i) To stop the payment for the 14,130,000 shares to the Plaintiff herein,
   (ii) Recover and cancel the loan facility he had obtained

Flowing from the above, the 1st Defendants carried out Oppong-Bio's request, stopped the payments and cancelled the loan facility.

7. By a letter dated **10th September 2008** the Securities and Exchange Commission, hereafter SEC, informed all the parties herein that at the time BoG instructed the suspension of the transactions, the sale of the 14,130,000 shares had not been consummated and therefore the shares remained the property of the plaintiff. The SEC further directed that, the shares which had been registered in the name of Oppong-Bio be reverted to the Plaintiff.

8. The plaintiff rejected this directive and on **3rd December, 2008** issued a writ in the High Court against the 1st Defendants herein alone. **In that suit, the Plaintiff maintained that the shares belonged to Oppong-Bio and the Plaintiff was thus entitled to the purchase price of the shares.** This Writ was subsequently amended by order of the Court at the instance of the Plaintiff herein by which Oppong-Bio, 1st Defendants herein, SEC, GSE were joined as 2nd, 3rd, 4th and 5th Defendants respectively.
9. By this amended writ of summons, the Plaintiff maintained that the shares were the properties of Oppong-Bio and he was therefore entitled to the purchase price. **He therefore among other reliefs claimed that the 14, 130,000 shares are the property of Oppong-Bio**.
10. The Plaintiffs action in the High Court was dismissed and a subsequent appeal to the Court of Appeal was also dismissed whereupon the Plaintiff appealed to this court which **upheld his appeal, on 25th July 2018.**
11. Following a review application by the Plaintiff herein against this court's decision of 25th July 2018 in which he applied for a review of this court's decision in relation to the interest rate and the period from which it should apply, **this court on the 27th February, 2019 granted the said application in the following terms:-**

i. That interest be calculated on the sum of GH¢6,162,240 at 30% from 2nd June 2008 to 25th July 2018, and

ii. Thereafter, at the prevailing rate of interest as at date of judgment on 25th July 2018 up to date of final payment, and

iii. And on GH¢7,600,000 at the prevailing rate as at 25th July 2018 from 2nd June, 2008 up to the date of final payment.

12. **By further decisions of this court dated 17th June 2020 this court ordered that** interest be calculated on the judgment in favour of the Plaintiff as follows:-

(i) Interest on the sum of GH¢6,160,240 at 30% compound from 2nd June 2008 to 25th July 2018

(ii) Thereafter, at the statutory rate of interest prevailing at the time of the main judgment which is 25th July 2018 that is at 13.34% at simple interest till date of final payment.

(iii) And interest on the sum of GH¢7,600,000 at the rate of 13.34% from 2nd June 2008 to date of final payment.

(iv) By Computation, the rate of interest ordered to be paid by this court to the Plaintiff on the amounts are as follows:-

(a) GH¢6,160,240 - Total Interest GH¢84,979,152.42

(b) GH¢7,600,000 - Total Interest GH¢10,616,154.74

(c) Total Interest Payments - GH¢95,595,307.16

13. It is the case of the 1st Defendants that, since by the orders of the High Court and the Court of Appeal, the Plaintiff had been declared as the owner of the shares, it was not necessary for the 1st Defendants to make any enquiries whether he had been exercising any rights of ownership as he had been declared as such by courts of competent jurisdiction.

14. The 1st Defendants alleged that, following the decision of this court on 25th July 2018, they made inquiries from relevant statutory bodies and these disclosed and or confirmed that as at 31st July 2018 Oppong-Bio was not on the Calbank register as a shareholder.

15. The 1st Defendants then engaged the services of First Code Management Services to conduct investigations as to the shareholdings of the plaintiff herein and Oppong-Bio. Per its letter of 13th August, 2018, First Code Management Service informed the 1st Defendants that whilst the Plaintiff held **15, 377,194 shares** in Calbank as of 31st August 2018, Oppong-Bio was not recorded as a shareholder in Calbank.

16. By a further search conducted by the 1st Defendants from the Central Securities Depository Ghana Ltd. "CSDGL" it was confirmed that the Plaintiff indeed as at 13th August 2018 held **15,377,194 shares** in Calbank in his name. The increased number of shares included bonus shares issued in the name of the Plaintiff over the period.
17. After attempts by the 1st Defendants to inquire from NTHC the Registrars of Calbank to confirm the exact amount of Calbank's shares that the Plaintiff owned failed, the 1st Defendants applied directly to Calbank through their lawyers.
18. It was at this stage, as per Calbank's letter dated 4th Janaury 2021 which officially confirmed the following facts for the first time as follows:-
    (i) That at all material times, the shares had remained in the name of the Plaintiff.
    (ii) The letter also revealed for the first time that the **Plaintiff also received both dividend and Bonus shares between 2008 and 2019.**
    (iii) This therefore meant that even before the commencement of the suit by the plaintiff in the High Court against the 1st Defendant and the others, he had been receiving dividends and bonus shares as the owner of the said shares contrary to his assertions all along during the High Court and the Court of Appeal trials.
    (iv) The only time the Plaintiff did not receive the dividend warrants in respect of his own shares was after the judgment of this court dated 25th July 2018, but continued to receive the shares held in trust for Esther Frimpong and Stephen Danso all of which formed part of the shares for which he had sued the 1st Defendants. These the Plaintiff received on 6th June 2019 and 8th July 2020, well after the judgment of 25th July 2018.
19. The above facts were thus brought to the attention of the **1st Defendants only in January 2021 because** the Respondent had all the time pretended and made 1st

Defendants to believe that the shares had belonged solely to Oppong Bio prior to the commencement of the Suit in the High Court to the delivery of the judgment in the Supreme Court on 25th July 2018.

20. It is trite knowledge that, the 1st Defendants proceeded to this court with an Application for leave to re-open their appeal and admit new evidence. However, this court by a majority decision rendered on the 13th July 2021 dismissed the 1st Defendant's application, hence this Review application of that Ruling.

MOTION NO. J8/25/2022 TO STRIKE OUT 1ST DEFENDANT'S REVIEW APPLICATION FILED ON 12TH NOVEMBER 2021 BY PLAINTIFF

This application was filed at the instance of the Plaintiff seeking to strike out these processes

(i) Motion on Notice for review and supporting affidavit filed pursuant to leave granted on 19th October 2021.

(ii) 1st Defendants statement of case in support of application for review filed pursuant to leave of the court dated 19th October 2021, filed on 26th October 2021 and 27th October 2021 respectively.

GROUNDS

i. Breach of the Rules of the court, and

ii. The order of the court dated 19th October 2021 which granted the 1st Defendants Leave to file the application.

AFFIDAVIT IN SUPPORT

In a 21 paragraphed affidavit, sworn to by the Plaintiff, Daniel Ofori the salient points contained in support are the following:-

1. That the order of the court was for the 1st Defendants to file their application within one week, and failure to comply therewith without a waiver is a breach of the court order and in flagrant disregard of the Rules of Court.
2. That the motion paper on notice for review was filed without an accompanying statement of case contrary to the Rules of court.
3. That unless this court considers that the said non compliance should be waived, the said conduct constitutes a bar to the further prosecution of the application.
4. That the attitude of the 1st Defendants is replete with their incessant conduct in filing a multiplicity of applications without due regard to their own admissions and Rules of Court.
5. Based on the above, Plaintiff concluded that the 1st Defendants are undeserving of any more indulgence from this court.

1ST DEFENDANTS POSITION ON THIS APPLICATION TO STRIKE OUT THEIR REVIEW APPLICATION

In an eleven paragraphed affidavit, sworn to by one Edem Nuhoho , who described himself as one of the lawyers in the firm handling the 1st Defendants case explained their position thus:-

1. He conceded that this court granted their clients the 1st Defendants leave to file the review application within one week.
2. According to the deponent, their firm completed work on the processes on 26th October 2021 and handed them over to their unnamed office clerk for filing.
3. According to the deponent, the unnamed clerk informed him that he duly filed the processes, to wit the Motion for Review and he was requested to come back later with the hearing date inserted on the motion paper by the Registrar.
4. Later in the office, he discovered that the Statement of case was not attached to the Motion Paper for filing as required by the Rules of Court.

5. Since the Registry of the Court had closed for work on the said 26th October 2021, he returned to the court to file same on the next day, 27th October 2021.
6. **The deponent further deposed that the legal team for the 1st Defendants were waiting to draw the court's attention to this anomaly and then implore this court to exercise its discretion by granting a waiver in their favour for this anomaly.**
7. The 1st Defendants therefore prayed this court to strike out the Motion to strike out their application for review and admit the processes filed on 26th and 27th October 2021 respectively for hearing.

OBSERVATIONS

1. In the first place, in our experience in this court, we are aware that generally, dates may or may not be inserted in the filed copies of motions. Sometimes "*Dates to be given later*" might be inserted, even though fixed dates may be given in some instances. In the former cases, hearing notices may be served to indicate the hearing dates.
2. We are also of the candid view that, learned counsel for the 1st Defendants may not have completed work on the entire processes and thought that by sending one set of the processes to the Registry for filing, perhaps by the time the clerk returned, he could have finished and then return with the other processes for filing.
3. We are further of the view that, Learned Counsel entrusted with handling their client's case must devote their utmost attention and be diligent with their work such that timelines contained in procedural rules or as in this case order of and by the court are complied with.

In view of the fact that, this Application to strike out the Review Motion for non compliance with the Rules of Court has to be determined before the substantive Review is taken, the said motion No. J8/25/2022 will be determined first.

MOTION NO. J8/25/2022

On the 18th of July 2022, learned Counsel for the Plaintiff, Thaddeus Sory filed a 33 paged Statement of case pursuant to orders of this court dated 6th July 2022 in respect to the review application filed by the 1st Defendants and the application to strike out the review application filed by the Plaintiff.

From the statement of case filed by the Plaintiff, it is clear that the main point of substance being urged upon the court to strike out the review application is the fact that the review application was filed without due regard to the order for leave granted pursuant to Rule 60 of C. I. 16 to 1st Defendants to file the processes within one week. From what has transpired, it is an undeniable fact that, whilst the review application was filed on the last day of the leave, i.e. 26th October 2021, the Statement of case was filed on 27th October 2021 a day after the order had lapsed.

Learned counsel for the plaintiff rightly in our view referred to Rule 56 (1) of the Supreme Court Rules C. I. 16, which states as follows:-

Procedure for bringing application for review

> *56 (1) "The application for review* ***shall*** *be made by motion supported by an affidavit* ***and accompanied by a statement of the applicant's case"****. Emphasis*

As stated earlier, the 1st Defendant has not and cannot deny the fact that it did not file all the required processes within timelines prescribed by the order granting leave.

WHAT THEN IS THE EFFECT OF THIS NON-COMPLIANCE

Rule 79 of C. I. 16 provides as follows:-

> *"Where a party to any proceedings before the court fails to comply with any provision of these Rules or with the terms of any order or direction given or with any rule of practice of procedure directed or determined by the court, the failure to comply* ***shall be a bar to***

further prosecution of the proceedings, unless the court considers that the non-compliance should be waived." Emphasis supplied

This application by the plaintiff to strike out the 1st Defendants review application was filed on 12th November 2021. Before then, the 1st Defendants had not taken any steps to apply for waiver for the said non-compliance and indeed by their explanation, none whatsoever was contemplated.

We are however of the view that, in appropriate circumstances, waiver of the said non-compliance may be granted either upon application or where the justice of the case demands that it should be granted. In such circumstances, the court suo motu may grant the waiver upon terms or without terms.

CONDUCT OF COUNSEL FOR 1ST DEFENDANTS

We condemn in no uncertain terms the conduct of the learned counsel for the 1st Defendants.

This is because, considering the seriousness with which the 1st Defendants have relentlessly pursued this case and the vehemence with which the application for leave to bring an application for review was opposed and argued, one would have expected that the documents to be filed would have been ready at the leave stage save for a few additions to be added after leave was granted.

Our candid view is that, courts of law are generally reluctant to punish litigants for procedural breaches especially if these are likely to result in substantial injustice to the parties.

In this case, we observe that the motion paper for review by the 1st Defendant is dated 25th October 2021 but filed on the 26th of October 2021. The affidavit in support which was

signed and sworn to by the Deponent, a very senior staff of the 1st Defendant Bank indicated that it was sworn on the 26th October 2021.

The only process left to be filed is the statement of case. This process, as all who care to know, are prepared by learned counsel, and is signed by them for and on behalf of their clients with no input whatsoever from them. In this instant, it is common knowledge that 1st Defendants are being represented by Kizito Beyuo one of the hardworking and outstanding Senior Lawyers like that of the Plaintiff.

It therefore beats our imagination why learned counsel for the 1st Defendant acted in our view, without any urgency and expedition in this regard.

In the instant case, it is clear from the rendition of the facts that the 1st Defendants as a party appear not to have been given expeditious attention that such applications require by their Lawyers. Ordinarily, having applied for leave which was granted, the normal practice is that, all relevant processes should have been ready for filing before the grant of leave. It was therefore completely out of tune and definitely incomprehensible for learned Counsel for the 1st Defendants to have been tardy as happened in this case.

However, should we as a court, visit this *"misconduct"* or tardiness of the lawyers of the 1st Defendants on their clients?

We do not think so. The position has been made very clear in the decision ***(Iron Mongers) Ltd & Others [1962] 2 WLR 673 CA*** attributed to Lord Denning in the case of ***Doyle v Olby*** where he stated thus *"we never allow a client to suffer for the mistake of his counsel if we can possibly help it."*

In this instance, what must be noted is that, it is not a disability that has been attributed to 1st defendants Lawyers but one of inability to file a process on time as required in respect of a pleading. In this instance, it might be useful to refer to the dictum of Atuguba JSC in the ***Standard Bank Offshore Trust Ltd. (substituted) by Dominion Corporate***

Trustees Ltd v National Investment Bank and 2 others Review Motion J7/15/20 dated 14th March 2018 where the distinguished Judge relied on the decision in the case of ***Republic v Ga Traditional Council, and Anr. Ex-parte Damanley, [1980] GLR, 609 at 622***, where he reiterated the view thus:-

> *"It is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…**I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party."***

In the case of ***Amosa (No. 1) v Korboe (No.1) [2015-2016] 2 SCGLR 1516 at 1535***, the Supreme Court in a majority decision held that the client should be punished alongside his Lawyer because despite the disabilities which attached to his Lawyer of which he was aware, he nonetheless opted to maintain him. This is how the court per the majority stated the matter.

> *"In that respect, the writ of summons filed by Justin Pwavra Teriwajah for the respondent herein initiating the suit in the High Court is accordingly struck out as having been filed without authority or licence.*
>
> ***In this particular instance I have formed the opinion that the respondent with full knowledge of the disabilities that attach to his lawyer decided to cling to him nonetheless. He appears to me to be the architect of this whole drama.*** *I would accordingly mulct him and his lawyer in very punitive cost." Emphasis*

Since the facts in the instant case are decidedly different from the ***Amosa v Korboe*** case supra, it is only fair that the inaction of 1st Defendants Lawyers should not be visited on them.

POINTS RAISED BY PLAINTIFF

The Plaintiff has raised a number of issues such as:-

1. **That this court is bound by its previous decisions – not to re-open the case**
   Learned Counsel refers to the following unreported decisions of this court in support of their case.

- ***Standard Bank offshore Trust Co. Ltd (substituted) by Dominion Corporate Trustees Ltd v National Investment Bank and 2 Others Review Motion J7/15/20 dated 14th March 2018, referred to supra.***
- ***Republic v High Court (Criminal Division) Accra, Ex-parte Stephen Kwabena Opuni, Suit No. J7/20/21 dated 26th October 2021***

Cases such as the following have also been relied on by learned Counsel for the Plaintiff ***Agyekum & Alhassan v Amadu Baba & Another, Agyekum & Alhassan v Amadu Baba & Another (No.2), [2007] 1 SCGLR 386, Mahama Ayariga v Attorney-General*** unreported decision dated 29th March 2022, Suit No. J1/13/2022 to support the contention that they constitute binding authorities on this court not to review the decision of the ordinary bench complained of because of failure to meet the timelines agreed upon.

As was pointed out by learned counsel for the 1st Defendants, the reliance on the above cases has been taken out of contest. For example, the facts in the Agyekum and Alhassan cases are completely different and not applicable to the instant case. **In that case, the Plaintiffs filed their statement of case in support of a review application almost three years after the review has been filed.** When confronted, they sought to justify same on the grounds that they did not obtain the judgment of the ordinary bench in time. **The timelines in this case is one day.**

All the cases referred to and relied upon by the plaintiff must be understood in the context in which the court explained its exercise of discretion under Rule 79 of C.I. 16. This court

explained the rationale in ***Republic v High Court, Kumasi, Ex-pare Atumfuwa [2000] SCGLR 72***, at page 89 thus:-

> "Rule 79 of C.I. 16 does not employ the words *"void", "voidable", "nullity", "irregularity" or "defective*". **Thus in each case of non-compliance of whatever degree and nature, the decision to waive or not to waive lies with the court.** And since this is more an exercise of the court's discretion, the court would naturally take into consideration the **circumstances surrounding the inability to comply with the particular rule in question, the nature of the non-compliance and other relevant factors necessary to enable a fair and judicious exercise of that discretion**. **And of course, once this is an exercise of discretion, each non-compliance would be decided in accordance with its own peculiar circumstances thus, the fact that in a particular situation the court refused to waive the non compliance does not mean that in another situation based on different circumstances, the court should refuse to waive the non-compliance. Otherwise, it ceases to be an exercise of discretion."** Emphasis

We have observed a very disturbing practice on the part of learned counsel for the Plaintiff. This lies in the reference to decided cases and the principles of law decided therein, and their application to the facts of the present case, without any attempt whatsoever to draw any nexus between the facts therein and herein. That is not how principles in judicial decisions are applied.

In most of the cases, the facts of the cases are completely at variance and not applicable to the facts of the instant case. For instance, it is quite clear that in the ***Agyekum & Alhassan v Amadu Baba & Anr*** cases supra, the default was over a three year period. The decision of the court in that case not to exercise the court's discretion in favour of the defaulting party therein should be understood in those clear circumstances.

In the instant case, it should be noted that, whilst the Motion for Review and the affidavit were filed within time, it was only the Statement of case that was filed a day later. The timelines in the instant case are different from the referred cases.

Secondly, the reference to the Mahama Ayariga case is also out of place because on the facts, whilst the Plaintiffs Lawyers therein with full knowledge of the objection to their late filing, failed to take the necessary steps to regularize their position, in the instant case that is not the case. In the instant case, learned counsel for the 1st Defendants conceded the point and gave some explanation though not convincing.

It will be very convenient for all Lawyers, to ensure that the facts in the cases they refer to in support of principles of law they rely on to argue their cases are applicable not only on points of principle, but more importantly on the facts of the case.

It is sad to observe that reliance and reference to decided cases of the Supreme Court without any attempt to establish this nexus with the case in point is a futile and an inapplicable exercise that will not yield any positive response from the court.

The referral to the ***Saviour Church of Ghana*** and the ***Ex-parte Stephen Kwabena Opuni*** cases for example were quoted out of context. It is therefore our wish that henceforth Lawyers will take note and ensure that cases they rely on to argue principles of law are really applicable and on point.

What should be noted is that, there is therefore no "one size fits all" legal principle and reference which has universal application as the plaintiff seeks to contend. The facts of this case are substantially unique, different and peculiar from the facts of the cases referred to by learned counsel for the plaintiff.

ON THE 1ST DEFENDANT'S CONDUCT

In this instance learned counsel for the Plaintiff complains that the 1st Defendants conduct in not complying with the terms of the grant of leave to file the review application is fatal. Whilst agreeing in substance with the submissions of learned counsel, our point of departure is that once the review motion and affidavit had been filed within time, the conduct of learned counsel for the 1st Defendant should not be visited on the client.

As Lord Denning said in the case ***of Doyle v Olby*** supra.

> *"We never allow a client to suffer for the mistake of his* ***counsel if we can possibly help it."*** *Emphasis*

In this instance, it has adequately been demonstrated that the said mistake which is tardiness can be helped to ensure that there is no failure of justice.

There have been several judicial decisions that, depending upon the circumstances of the case, it is not proper to visit the ills of counsel on the client.

The issue whether the failure of a Lawyer to file an appropriate process or comply with the rules of procedure within the ambit of the rules or within time should be visited on the client have been adequately dealt with supra.

On the totality of the evidence and new learning that has gained judicial support in this court, we are of the considered view that even though learned Counsel for the 1st Defendants erred in their conduct, the said act should not and is not one of those acts that can be visited on their clients, the 1st Defendants. This is so because of the peculiar facts of this case. Out of abundance of caution, all the arguments supra on the need not to visit the ills of a lawyer on the client are deemed as incorporated and embodied herein.

The above are the reasons which we considered and approved in our decision to dismiss the Plaintiff's application in *Suit No. J8/25/2022* to dismiss the 1st Defendant's review application in *Suit No. J7/1/2022.*

We accordingly proceed to consider the merits of this review application.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

DISSENTIN OPINION

PWAMANG JSC:-

My Lords, on 13th July, 2021 this court dismissed an application by the 1st defendant/respondent/applicant/respondent (the respondent), that prayed the court to

re-open an appeal in which it had on 25th July, 2018 given final judgment. The respondent did not exercise its right under article 133(1) of the Constitution, 1992 and rule 55 of the Supreme Court Rules, 1996 (C.I.16) to apply for a review of the ruling of 13th July, 2021 within one month. Nonetheless, it applied thereafter for extension of time and on 19th October, 2021 the court extended the time on condition that the application for review shall be filed within one week. On the last day of the one week, the respondent filed only a motion paper and a supporting affidavit praying for review. These two processes were plainly incomplete as they were not accompanied by a statement of case as required by Rule 56(1) of C.I.16 which is as follows;

56. Procedure for bringing application for review

(1) The application for review shall be by motion supported by an affidavit and accompanied by a statement of the applicant's case, clearly setting out and fully arguing all relevant grounds on which the applicant relies.

Then the next day, when the one week ordered by the court had expired, the respondent, without reference to the court, filed a statement of case in support of the application for review, purporting that it was pursuant to the time extended by the court on 19th October, 2021.

When these processes were served on the plaintiff/appellant/respondent/applicant, (the applicant), he filed the instant application for an order to strike out the motion for review on the grounds that the filing of a motion and affidavit alone within the time ordered by the court violated the rules and order of the court and as such the respondent was barred by the provisions of rule 79 of C.I.16 from prosecuting its motion for review. Rule 79 of C.I.16 provides as follows;

79. Waiver of non-compliance

Where a party to any proceedings before the Court fails to comply with any provision of these Rules or with the terms of any order or ,direction given or with any rule of practice or procedure directed or determined by the Court, the failure to comply shall be a bar to further prosecution of proceedings unless the Court considers that the non-compliance should be waived.

The applicant deposes in the affidavit in support that though rule 79 permits the court to waive non-compliance the respondent did not invoke the jurisdiction of the court praying for a waiver so the court could not exercise any discretion of waiver in this matter. He further states that the respondent admits the multiplicity of applications it filed since delivery of judgment in the substantive appeal but it is continuing in that conduct.

The respondent concedes that it acted in violation of the applicable rule and the terms of the order of the court made on 19th October, 2021. In an affidavit in opposition by Mr Edem Nuhoho, a lawyer in the law firm representing the respondent he states partly as follows;

5. On 26 October 2021, we completed the Motion for Review and handed it over to our office clerk for filing.

6. Our clerk entrusted with the filing informs me and I verily believe same to be true that he submitted the Motion for Review for filing on 26 October 2021 and it was duly filed on that day. He was however asked to return subsequently to collect our office copy of the Motion for Review after the inserting by the Registrar of the date on which the Motion for Review will be heard by this court.

7. Our clerk informs me that it was only after he returned to the office from court that day that he discovered that the statement of Case had inadvertently not been attached to the Motion for Review for filing.

8. Since the registry of the court was closed at the time, he could not return to the court to file it that same day. He therefore caused it to be filed on 27 October 2021.

9. As explained above, the omission to file the Statement of Case at the same time as the Motion for Review was out of inadvertence and not in a willful disregard of this court's order or its rules.

10. At the hearing of the Motion of Review, counsel for the Respondent would have drawn the court's attention to the anomaly and implored this court to exercise it discretion to waive the failure of the Respondent to submit for filing the Respondent's Statement of Case at the same time it submitted the motion for Review on 26 October 2021 and accept the Respondent's Statement of Case filed on 27 October 2021 especially when the omission was not the doing of the Respondent.

11. Wherefore, I swear to this affidavit, on behalf of the Respondent, in opposition to the Applicant's motion to strike out both the Respondent's Motion for Review and the Statement of Case filed on 26 October 2021 and 27 October 2021 respectively.

The answer of the applicant is that the non-compliance in this case is fundamental and makes the processes filed incapable of invoking the review jurisdiction of the court so the power to exercise a discretion of waiver does not arise. In the alternative, the applicant contends that the respondent was not candid as to the reason for its failure to comply with the rule and order so the court ought not to exercise discretion to waive the non-compliance in its favour.

My Lords, from the processes filed and the arguments urged on us by the parties, the two issues for determination here are; (i) has the review jurisdiction of the court been validly invoked? And, (ii) if the jurisdiction has been validly invoked, is this an appropriate case for the court to exercise discretion and waive the non-compliance?

Non-compliance with the procedure rules and orders made by the court in the course of proceedings can have either one of two types of legal consequences. The non-compliance may either render a process incompetent and proceedings a nullity or make them only irregular, depending on the nature of the legal principle that underpins the rule in question. For instance, a procedure rule that requires service of a hearing notice before proceedings are embarked on is premised on the Natural Justice principle of *audi alterem partem*. That principle is held to be so fundamental in our system of law that where a breach of a rule of procedure or order of a court amounts to a breach of that principle, then the legal consequence of the breach is that the proceedings are a nullity. See **Vasquez v Quarshie [1968] GLR 62** and **In re Kumi (Decd); Kumi v Nartey [2007-2008] SCGLR 623**. Therefore, notwithstanding the liberal language of Rule 79, it is not correct to assert that all non-compliance under C.I.16 and any order made by the court, no matter the terms of the order, is capable of being waived by the court. Acquah, JSC (as he then was) explained the dichotomy in the Supreme Court procedure rules in the unanimous judgment of the Supreme Court in the case of **Frimpong v Nyarko [1998-1999] SCGLR 734 at 747,** when he said concerning the power of waiver of non-compliance under rule 79 as follows;

"Again where the error is fundamental or goes to the jurisdiction of the court, thereby exposing the court's incompetence or lack of jurisdiction in the matter in which the said error was committed, the court is incompetent to correct or waive such an error. A court of law has no authority to grant itself jurisdiction in matters where the relevant statute does not confer such power."

A similar distinction was made by Atuguba, JSC in his concurring opinion in the unanimous decision of the court in **Oppong v Attorney-General [2000] SCGLR 273 at 280** in relation to rule 79 of C.I.16. He said as follows;

"The scope of this rule [79] was extensively considered in Republic v High Court, Kumasi; Ex parte Atumfuwa…[2000] SCGLR 72 ante. There, I said at length that, where the step by a party to proceedings before this court is fundamentally wrong, such error is not within the purview of the rule and cannot be waived. One cannot waive a nullity."

I have taken due account of the split decision of the seven member bench of the court in **Republic v High Court, Kumasi; Ex parte Atumfuwa [2000] SCGLR 72** where the majority (Acquah, JSC, with Aikins, Adjabeng, and Sophia Akuffo, JJSC concurring) appeared to imply that every non-compliance can be waived. That decision, in my humble opinion, was overbroad and Acquah, JSC who wrote for the majority did not advert to what he himself said earlier on behalf of the whole bench in the unanimous decision in **Frimpong v Nyarko (supra)**. In my view, Ex parte Atumfuwa was decided *per in curiam* and, to the extent that it implied that every non-compliance can be waived, is not good law. In any event, when the court had the opportunity in **Oppong v Attorney-General (supra)** it quickly corrected itself. In the case of **Republic v High Court, Accra; Ex parte Allgate Co Ltd (Amalgamated Bank Ltd Interested Party) [2007-2008] SCGLR 1041,** in writing the unanimous decision of the Supreme Court, Dr Date-Bah, JSC adopted the reasoning in Frimpong v Nyarko and Atuguba, JSC's dictum in Oppong v Attorney-General that not all non-compliance can be waived and applied it in interpreting Or 81 of the High Court (Civil Procedure) Rules, 2004 (C.I.47) on non-compliance.

Procedural steps that are required to be complied with in relation to originating processes invoking any particular head of jurisdiction of a court are usually construed as fundamental and non-compliance with those steps would usually invalidate the invocation of the jurisdiction. See **Republic v Nana Kru Perko II; Ex parte Erzoah [2001-2002] 2 GLR 460.** In **Oppong v Attorney-General (supra)**, the plaintiff filed only a writ in the Supreme Court but failed to file an accompanying statement of case within 14 days as required by rule 46(1) of C.I.16. After the expiry of the time for filing a statement of

case the plaintiff refilled the writ, this time, with an accompanying statement of case and a verifying affidavit. The fourth defendant brought an application to the court to strike out the writ on grounds that the first writ without a statement of case did not competently invoke the jurisdiction of the Supreme Court so the subsequent processes filed out of time were void. The court, unanimously, granted the motion to strike out the writ. At page 279 Bamford-Addo, JSC who authored the lead ruling stated as follows;

"In the circumstances of this case, the plaintiff, ***having made no application to the court for extension of time to file a statement of his case****, the defendants are perfectly entitled to apply to have the writ of the plaintiff struck out for non-compliance with rule 45(1) of C.I.16. The writ is accordingly struck out." (Emphasis supplied).*

The points made by the court in this decision were, that a party could not sit in his house and file a statement of case out of time without first applying to the court for it to extend the time. Such statement of case was incompetent. The court then took the view that in the absence of a competent accompanying statement of case, the writ was invalid and struck it out.

In **Agyekum & Alhassan v Amadu Baba [2003-2004] SCGLR 60** the Supreme Court discussed non-compliance with the procedure rules on invoking the review jurisdiction of court but in a context slightly different from the case at hand. The opening statement of the ruling delivered in that case on behalf of the court by Acquah. JSC at page 62 of the report is as follows;

"The issue for determination in this ruling is whether or not a party's statement of case filed woefully out of time, can be permitted to be amended, especially where the defaulting party has not asked for leave to rectify the default."

At page 63 of the report the ruling continued as follows;

"…the plaintiff and the co-plaintiff filed a motion on 2 July, 1998 for a review of the Supreme Court's judgment. It is in respect of this review application that the plaintiff and the co-plaintiff now seek leave to amend their statement of case."

Continuing on the same page it was stated in the ruling thus;

"The defendants-respondents resist the application on two grounds; first, that there is, in law, no statement of case by the applicants to be amended; and secondly, the Supreme Court Rules, 1996 (C.I.16), governing review applications, do not have provision permitting amendment of a party's statement of case… And since there is no properly filed statement of case, this court should not exercise its discretion in favour of the applicants."

The court then decided as follows;

"We are, indeed, satisfied that the defence to the preliminary objection is untenable and wholly misconceived. The preliminary objection therefore succeeds, and we refuse the plaintiff and co-plaintiff's application to amend their statement of case. Since the review application is incompetent, we have no option but to strike same out. In the end the application for review is struck out."

My Lords, though in the course of the ruling the court discussed whether the case was a proper one to exercise discretion to waive the non-compliance or not, the *ratio dicidendi* of the ruling in that case was that, a motion for review without a valid accompanying statement of case was an incompetent application that ought to be struck out. Another significant holding of the court was, that for a party who defaults in complying with rule 56(1) of C.I.16 to be qualified for the court's discretion of waiver, the defaulting party must have applied specifically for that waiver and not unilaterally filed the process out of time without reference to the court. An improperly filed statement of case could not accompany a motion and affidavit to properly invoke the review jurisdiction of the court. The court said as follows at page 68;

"In the instant case, as stated earlier, the plaintiff and the co-plaintiff have not even applied to waive their non-compliance with rule 56(1) of …C.I.16. Rather, what they seek to do is to justify their conduct and maintain that they were right in so doing.

I have digested Agyekum & Alhassan v Amadu Baba in this manner because the respondent has argued that that case ought to be understood to have been decided within the exercise of the court's discretion of waiver under rule 79 of C.I.16. That is not a correct reading of the decision. As pointed out above, the reasoning of the court was that a statement of case for review filed out of time was not properly before the court so the review motion would be incompetent. On the discretion to waive non-compliance, the court came to the same conclusion as in Oppong v Attorney-General (supra), that it must be prayed for by an application to the court and cannot be relied on after the party not in default has taken up the objection.

But the respondent has also made reference to the case of **Luke Mensah v Attorney-General [2003-2004] 1 SCGLR 122** and posits, that even in the absence of prior application for waiver of non-compliance the Supreme Court may waive non-compliance after an objection has been taken. That case concerned a decision by the Electoral Commission in 2004 to create new electoral constituencies some months to general elections and its insistence that elections would be conducted in those new constituencies against open and public resistence by some opposition political parties. The plaintiff, who claimed to sue as a citizen, filed a writ in the Supreme Court with an accompanying statement of case, but without a verifying affidavit, and prayed the court for a declaration that the action of the Electoral Commission in creating the new constituencies in which it planned to conduct parliamentary elections in was constitutional. At the hearing of the case, it was pointed out that the plaintiff did not file a verifying affidavit in support of his statement of case contrary to rule 46(2) of C.I.16. In a brief judgment by a bench of five Justices of

the Supreme Court, Acquah, CJ who delivered the decision said as follows at p. 128 with regard to the plaintiff's non-compliance with rule 46(2);

"As stated earlier, it is because of the tremendous public interest generated by the decision of the Electoral Commission that we decided to overlook the flaws in the plaintiff's action, and deal with the substance of the action. We are convinced that as the highest court of the land, charged with the constitutional authority to interpret and enforce the Constitution, and thereby promote rule of law in our society, we should, in fitting situations, rise up to the occasion and determine disputes likely to endanger our infant democracy. And we should do this, if the subject-matter falls within our jurisdiction and the procedural errors committed by the plaintiff are not so fundamental as to amount to denial of our jurisdiction."

My Lords, it ought to be noted that the court did not purport to waive the non-compliance pursuant to rule 79 of C.I.79 and as such there was no mention of the rule or a discussion of the binding precedents of **Oppong v Attorney-General & Ors and Agyekum & Alhassan v Amadu Baba**. The court said it was exercising powers of a court charged with the constitutional authority to interpret and enforce the Constitution that was faced with a dispute likely to endanger our infant democracy at the time. The Luke Mensah case was clearly *per in curam* rule 79 and the binding precedents interpreting that rule so the case ought to be confined to what the court itself said it was doing. The case at hand is not a constitutional case and there is no imminent threat to our democracy. It is my considered view, that Luke Mensah did not change the position of Ghanaian law in the Supreme Court that a waiver under rule 79, as the respondent rely on in answer to this application, cannot be appropriated by a party from her office without first applying to the court for extension of time as held in **Oppong v Attorney-General** and **Agyekum & Alhassan v Amadu Baba.** To hold otherwise would be for the court to cede its jurisdiction to parties to direct the litigation process from the comfort of their offices which is a recipe for disorder in the administration of justice.

From a reading of the affidavit of the respondent, it has tried to justify its unilateral filing of a statement of case out of time and says that when the motion for review came to be heard, it intended to draw the court's attention and implore the court for waiver. But this is exactly the position that was rejected by this court in the decisions referred to above where after the objection was taken the defaulting parties sought refuge under rule 79. In Oppong v Attorney-General the plaintiff relied on rule 79 in the proceedings on the motion to strike out initiated by the defendant and that reliance was rejected. In Agyekum & Alhassan v Amadu Baba the applicant for review run to rule 79 when the respondent took a preliminary objection to the competence of the whole motion for review but the court held that that was the wrong manner to invoke the discretionary jurisdiction of the court under rule 79. The respondent before us has tried to contend that it is entitled to pray for waiver during the hearing of the application for review but, in my understanding of the binding precedents, the respondent is in error.

But, even the apparent aberration that occurred in **Luke Mensah v Attorney-General** has been rectified by the very recent unanimous decision by a seven member bench of the Supreme Court in the case of **Mahama Ayariga v Attorney-General & Ors; Writ No J1/13/2022 unreported ruling dated 29th March, 2022.** The plaintiff therein, on a public interest constitutional matter, filed a writ with a verifying affidavit to invoke the original jurisdiction of the Supreme Court but filed his statement of case four days later than the 14 days provided by Rule 46(1) of C.I.16. One of the defendants brought a motion to strike out the writ on the ground that the plaintiff did not fully comply with rule 46(1). This court, presided over by Dotse, JSC, upheld the arguments by the applicant that the non-compliance was fundamental so the writ and affidavit without the statement of case did not invoke the jurisdiction of the Supreme Court. The court accordingly struck out the writ. It would appear that our democracy has come of age so even in constitutional cases the rules of procedure must be strictly observed. It bears repeating, that in the application

at bar we are not even dealing with a constitutional matter but litigation between two private persons.

My Lords, it is pertinent to recognise that the review jurisdiction of the Supreme Court is a separate head of jurisdiction conferred by the Constitution, equal in legal status with the other heads of jurisdiction of the court and it is regulated by a distinct set of procedure rules contained at Part V of C.I.16. For that reason, the rules for invoking the review jurisdiction of the Supreme Court have the same legal foundational importance as the rules for invoking any of the court's other jurisdictions. In **Frimpong v Nyarko (supra)** the court dismissed a process that sought to invoke the appellate jurisdiction without strictly complying with the rules relating to invocation of the court's appellate jurisdiction. In **Oppong v Attorney-General** and **Mahama Ayariga v Attorney-General (supra),** writs that sought to invoke the original jurisdiction of the court without strictly complying with the relevant rules were struck out. Concomitantly, in line with Agyekum & Alhassan v Amadu Baba, non-compliance with any of the procedural steps set out under Rule 56 of C.I.16 for invoking the review jurisdiction of the court is a fundamental error that invalidates the invocation thereof. In the circumstances of this case, I hold that the legal consequences of the respondent's failure to comply with Rule 56(1) of C.I.16 within the terms of the order granting it leave is that the jurisdiction of the court has not been competently invoked and the motion ought to be struck out.

Even if the court had jurisdiction to exercise a discretion of waiver under Rule 79 of C.I.16, this could only have arisen if the respondent had first applied for extension of the one week ordered by the court and not waited to rely on it after an objection has been taken by the party not in default. Having failed to do so, and rather arrogating to itself power to file a statement of case out of time, the court is not clothed with a discretion in the matter**.**

Another unsatisfactory aspect of the approach of the respondent to this application is, that I fail to find any cogent evidence which could even have been considered, in appropriate proceedings, in order to exercise a discretion to waive non-compliance or extend the time ordered by the court on 19th October, 2021 and admit the late statement of case. A court can only exercise a discretion of waiver or extension of time where satisfactory, cogent and reasonable explanation is offered for the non-compliance, especially where a party in default is pleading to the court's discretion for the second time as in this case. The law clerk of the law firm who is said to have undertaken the filing of the processes in question was not made to depose to affidavit evidence explaining what happened. It has not been said that the law clerk is unavailable as a witness, and though these may be said to be interlocutory proceedings, the lawyer's affidavit does not state the grounds for his belief of what the clerk told him. Having regard to the admission by the respondent that it had filed multiple processes after judgment on 25th July, 2018, one would have expected it to put the best evidence available forward. Therefore, apart from what I have said above, even if these were the appropriate proceedings applying for waiver, the respondent has not helped its course as the evidence is not compelling.

The maxim is, that equity helps the vigilant and not the indolent. The respondent failed to file for review within the time allowed by the rules, but when it came for extension of time the court indulged on terms. Only for the respondent to wait and act at the close of the time allowed by the court and fail to take advantage of the discretion exercised in its favour.

For the reasons explained above, the application to strike out the motion for review succeeds and is hereby granted as prayed. The motion for review filed on 26 the October, 2021 is hereby struck out.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

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