

1. The Plaintiff is, and was, at all material times, a trader and lives at Darkuman, Accra and Defendant is and was at all material times a priest and lives at Darkuman, Accra
2. The Plaintiff states that on or about the 3<sup>rd</sup> of May 1998, the Defendant introduced one Kwabena Ofori to him as a Visa Contractor who had obtained a visa for her (Defendant's) brother and which she showed the visa and the passport to the Plaintiff's parent.
3. The Plaintiff states that by an oral agreement made on 3<sup>rd</sup> May, 1998, the Plaintiff \$3,000.00 to the defendant for onward transmission to the said Kwabena Ofori the visa contractor.

4. The Defendant again demanded \$2,00.00 to be given to the said visa contractor for the purchase and an air ticket but the plaintiff refused to give more money to the Defendant because he had not seen the visa.
5. The Plaintiff states that the Defendant could not procure the visa for him so he demanded a refund of his \$3,000.00.
6. The Plaintiff avers that the Defendant's refusal to pay the debt is causing the Plaintiff financial difficulty and embarrassment.
- 7 By reason of the foregoing matters, the Plaintiff has suffered loss and damage.
8. The Plaintiff therefore claims the reliefs endorsed on his writ of summons the  
The reliefs endorsed on his writ of summons and referred to in the statement of claim are as follows:
  - “(a) cash the sum of \$3,000.00 or its equivalence of ø21,000,000.00  
being money had and received by the Defendant for the purposes of  
procuring a visa for the Plaintiff.
  - (b) Interest on the said sum from the 3<sup>rd</sup> day of May 1998 to date of final  
Payment.
  - (c) Costs.”

The records show that Plaintiff's writ of summons together with his statement of claim as set out above were served on the defendant on 1<sup>st</sup> August 2001 to which defendant entered appearance per Counsel on 8<sup>th</sup> August 2001.

After satisfying himself of that fact by an official search conducted on 14\8\01, plaintiff applied by summons and a supporting affidavit under Order 14 r.1. of the High Court (Civil Procedure) Rule, 1954 for summary judgement.

Since the supporting affidavit is very crucial, I reproduce it here as part of the Judgement. It reads:

**AFFIDAVIT IN SUPPORT OF SUMMONS**  
**FOR JUDGEMENT**

**I, PRINCE FREDERICK NII ASHIE NEEQUAYE ESQ.,** Legal Practitioner of  
AZINYO CHAMBERS, Accra, make Oath and say as follows:-

- (1) I am the Solicitor entrusted with the conduct of this suit and I have the authority of Plaintiff/Applicant. to swear to these facts which are within my knowledge, information and belief.
- (2) On 31\7\2001 as the Solicitor, I was entrusted, and I did sue out, a writ of summons in this Court claiming the following reliefs.
  - (a) Cash the sum of \$3,000.00 being money had and received by the Defendant for the purposes of procuring a visa for the Plaintiff.
  - (b) Interest on the said sum from the 3<sup>rd</sup> of May 1998 to date of final Payment.
  - (c) Costs.
- (3) On 8<sup>th</sup> August, 2001 the Defendant entered appearance to the Writ of summons Filed in this suit as a search results of which on this docket, reveals.
- (4) Indeed on the self-same 31\7\2001, when this writ was filed by the Plaintiff, it was accompanied by a statement of claim to which no defence has been so far filed.
- (5) The Defendant on 3<sup>rd</sup> May 1998 introduced one Kwabena Ofori to the Plaintiff as a Visa Contractor who could obtain a U.S. Visa for the Plaintiff.
- (6) On the same 3<sup>rd</sup> May 1998, the Defendant collected \$3,000.00 from the Plaintiff for transmission to the said Visa Contractor to procure U.S. Visa for the Plaintiff.
- (7) The Defendant could not procure the U.S.A. visa for the Plaintiff.
- (8) Although the Plaintiff has made several demands for the monies owed him, the Defendant has failed\refused to refund the \$3,000.00 owed the Plaintiff
- (9) In my belief, the defendant has no defence to this action. Wherefore I swear to

this affidavit in support of plaintiff's application for summary judgement. "The Plaintiff, by his affidavit is, in effect, asserting that on 3<sup>rd</sup> of May 1998, the defendant introduced one Kwabena Ofori to him (Plaintiff) as a Visa Contractor who procured a Visa for her brother, and that he (Defendant) on the same 3<sup>rd</sup> day of May 1998 collected \$3,000.00 intended for Kwabena Ofori. In his own words "the defendant collected the said \$3,000.00 from the Plaintiff for transmission to the said Visa Contractor to procure the U.S. Visa for the Plaintiff."

As expected, the Defendant filed an affidavit in opposition as follows:-

"AFFIDAVIT OF JULIANA QUAYE IN OPPOSITION

I, Juliana Quaye of Accra make Oath and say that:

- (1) I am the Defendant\Deponent herein.
- (2) I deny that on 3<sup>rd</sup> May 1998 I introduced Kwabena Ofori to the Plaintiff and collected \$3,000.00 U.S. Dollars from the Plaintiff for transmission to the said Kwabena Ofori to obtain U.S. visa for the Plaintiff.
- (3) The parents of the Plaintiff met with the said Kwabena Ofori in my presence and they negotiated with him to obtain a U.S. visa for the Plaintiff.
- (4) The mode of payment for Kwabena Ofori's services agreed upon by the Plaintiff's Parents and Kwabena Ofori was that any money intended for him should be Deposited with me for his collection.
- (5) The \$3,000.00 U.S. dollars was paid in 3 instalments, 2 instalments were deposited with me and were collected by Kwabena Ofori and the 3<sup>rd</sup> instalment was paid to Kwabena Ofori by the parents of the Plaintiff in my present
- (6) When Kwabena Ofori failed to deliver the visa at the appointed time the Plaintiff Arrested him personally and took him to the Darkuman Police Station and made a report.
- (7) The Police, after investigation, put Kwabena Ofori before the Community Tribunal at Adjabeng, Accra in Court case No. 454\2000 on a charge of defrauding by false pretences, vide Charge Sheet marked "JQ" attached hereto

- (8) Wherefore I swear to this affidavit in Opposition to the Plaintiff 's summons.”
- Going by her affidavit, defendant is seriously contesting plaintiff's claim as laid. She denies introducing Kwabena Ofori to the plaintiff and denies collecting \$3,000.00 from plaintiff to transmit to the said Kwabena Ofori for the purposes of procuring U.S. visa for the plaintiff. She rather explains the position to the effect that the plaintiff's parents met with Kwabena Ofori in her presence and they (plaintiff's parents) themselves negotiated with him (Kwabena Ofori) to obtain the U.S. visa for the plaintiff.” According to defendant, it was only the mode of payment for Kwabena Ofori's services which involved him; the involvement being any money intended for him (Kwabena Ofori) was to be deposited with the defendant for Kwabena Ofori's collection. And, accordingly, the first two of the instalments complied with the said arrangement, but the 3<sup>rd</sup> did not. It was rather paid to Kwabena Ofori directly by the parents of plaintiff in defendant's presence. In other words, the defendant is saying that the plaintiff has no cause of action against him (the defendant) and that just as he arrested Kwabena Ofori and had him charged and prosecute before the Adjabeng Community Tribunal, it is the same (Kwabena Ofori) who should be sued and not the defendant.

The plaintiff's summons was moved on 24\10\2001. Court notes of the day read as follows:

“Defendant present  
Plaintiff absent.

Mr. Owusu Somanu for Prince Neequaye for Plaintiff.

Counsel for Plaintiff moves his motion for summary judgement against the defendant. In terms of the motion paper and supporting affidavit. There is an affidavit in opposition to the motion. Defendant has also filed a defence to the action, which in the estimation of the court is frivolous.

**BY COURT** - “I enter summary judgement against the defendant for the sum of \$3,000.00 on its equivalence of I enter summary judgement against the defendant for the

sum of \$3,000.00 on its equivalence of ₦21 million being money had and received by the defendant.

- (a) Interest on the said sum from 3<sup>rd</sup> day of May 1998 to date of judgement an award costs of
- (b) Interest on the said sum from 3<sup>rd</sup> day of May 1998 to date of judgement. I award costs of ₦1 million against the defendant.”

It is to be noted that before the summons for summary judgement was moved on 24\10\2001, the defendant had filed her Statement of Defence on 9\10\2001 for its relevance, I introduce it here as part of the judgement.

### **“STATEMENT OF DEFENCE**

1. Save as is hereinafter expressly admitted, the defendant denies each and every Allegation of fact contained in the statement of claim as if the same were herein set out in extenso and travened seriatim.
2. Save that the defendant is a prophetess of the Salvation Church of the Lord at Darkuman she is not in a position to admit or deny that the plaintiff is a trader.
  - a. In answer to paragraph 2 of the statement of claim, the defendant says that at the request of the plaintiff’s mother, the plaintiff and his parents met with Kwabena Ofori to the plaintiff’s house during which the defendant introduced Kwabena Ofori to the plaintiff’s parents as the person who helped her Brother to obtain a passport and a visa.
  - b. The defendant denies paragraph 3 of the statement of claim that on 3<sup>rd</sup> May, 1998 or any other date the plaintiff advanced her \$3,000.00 (Three Thousand) U.S. dollars for onward transmission to Kwabena Ofori.
- (1) Upon the plaintiff’s parents enquiry of Kwabena Ofori whether he could Assist the plaintiff to obtain a visa, he confirmed that he could and charged \$6,500.00 U.S. dollars for his services.

- (2) The mode of payment agreed upon between the plaintiff's parents and Kwabena Ofori was that any money intended for him should be deposited with the defendant for his collection.
- (3) 3 instalments of the fee charged totalling \$3,000.00 were paid to Kwabena on different occasions.
- (4) The defendant vehemently denies paragraph 4 of the statement of claim and Demands proof of it by the plaintiff.
- (5) The defendant never undertaken to obtain any visa for the plaintiff and no Money has been paid to her by the plaintiff or by any other person or persons For that purpose: she therefore denies paragraph 5, 6 and 7 of the statement of claim and requires proof of them.
- (6) When Kwabena Ofori collected the total of \$3,000.00 U.S. dollars and Failed to deliver the visa, the plaintiff arrested him to Darkuman Police Station and made a report.
- (7) After investigation, Kwabena Ofori was charged by the Police and he is Being prosecuted before the Community Tribunal Adjabeng for defrauding by false pretences in Court case No. 454\2002 titled: The Republic vrs. Kwabena Ofori.
- (8) The case is parheard and the defendant has given evidence for the Plaintiff as his key witness.
- (9) Wherefore the defendant says that the plaintiff has no cause of action against her and that this action be dismissed with costs."

This is how the trial Judge dealt with:-

- a. plaintiff's affidavit in support of his summons
- b. the defendant's affidavit in opposition and
- c. her statement of defence:

"Counsel for plaintiff moves his summons for summary judgement against the defendant in terms of the motion paper and the supporting affidavit. There is an affidavit inn

opposition to the motion. Defendant has also filed a defence which, in the estimation of the court is frivolous.

**BY COURT** - I enter summary judgement against the defendant for the sum of \$3,000.00 or its equivalence enter summary judgement against the defendant for the sum of \$3,000.00 or its equivalence of ₦21,000,000.00 being money had and received by the defendant.”

Dissatisfied with the learned trial Judge’s decision, as stated above, the defendant appealed to this court on 21\10\01 on the role proved that the judgement was against the weight of evidence, but has subsequently filed (5) five additional grounds, namely:

“3 (a) The learned trial Judge erred in law by dismissing the defence filed on behalf of the defendant (contained in the affidavit in opposition to the summons for judgement and the statement of defence to the action) as frivolous without determining the primary facts forward by the parties.”

“3 (b) The Learned Trial Judge misdirected himself by failing to consider the triable issue raised by the defendant\appellant that she had never collected a bulk sum of \$3,000.00 or any amount from the plaintiff on 3<sup>rd</sup> May 1998 and that the said amount was paid in 3 instalments by the parents of the plaintiff/respondant to Kwabena Ofori, in her presence.”

“ (a) The learned Judge also misdirected himself by non-direction on the question of the dispute that the \$3,000.00 was paid on 3 different occasions and on what an affirmative finding on the issue will have on the quantum of the interest being claimed by the plaintiff\respondent.”

“ 3(d) The error and misdirections, have caused substantial injustice to the defendant/Respondent.”



- (d) It was incompetent for the Solicitor for the plaintiff to swear to the affidavit in support of the summons for judgement filed on 7/9/01 and that affidavit showed have been ignored by the Court below.”

Both before the Court below and this court, the role question or issue for determination is whether or not the defendant’s affidavit in opposition discloses a Reasonable defence to the plaintiff’s action; alternatively, whether the defendant ought to be granted leave to defend the action on the merits or be shut out.

Relevant portions of defendant’s affidavit in opposition are as follows:-

- “ 2. I deny that on 3<sup>rd</sup> May 1998, I introduced Kwabena Ofori to the plaintiff and I collected \$3,000.00 U.S. dollars from the plaintiff for onward transmission to the said Kwabena Ofori to obtain U.S. visa for the plaintiff.”
3. The parents of the plaintiff met with the said Kwabena Ofori in my presence and they negotiated with to obtain the U.S. visa for the plaintiff.
4. The mode of payment for Kwabena Ofori ‘s services agreed upon by the Plaintiff Kwabena Ofori was that any money intended for him should be deposited with me for his collection.
- “5. The \$3,000.00 U.S. dollars was paid in 3 instalments, 2 instalments were e deposited with me and were collected by Kwabena Ofori and the 3<sup>rd</sup> instalment was paid to Kwabena Ofori by the parents of the plaintiff in my presence.”

By the foregoing paragraphs, the defendant successfully, in my view, raised two trial issues which could not be determined on the affidavit evidence deposed to by the parties, these were:

- (a) That the negotiations which led to this action were rather held between the Plaintiff and the defendant; in other words, that the plaintiff has no cause of action against the defendant and
- (b) That it will be inaccurate to calculate whatever interest is due on the

Money involved from one particular date since it was paid in three separate dates.

I will take the original ground (1) one together with additional grounds 3(a) and (b) supra. Under these grounds, Counsel for defendant argues that the learned trial Judge erred in dismissing the defence filed on behalf of the defendant as frivolous without determining the primary facts raised by the conflicting averments put forward by the parties. He contends that having raised the issue that it was plaintiff's parents themselves who negotiated with Kwabena Ofori directly for the procurement of the U.S. visa, that, in turn raises a major issue as to whether it was the defendant who was liable to the plaintiff or rather Kwabena Ofori who was liable to the plaintiff and his parents. As regards the quantum of any interest payable on the total amount involved Counsel contends that since the \$3,000.00 was paid in 3 instalments and on three separate occasions, the respective payment dates were issued to be determined on evidence. I agree with Counsel.

In the case of J.G.SARKIES VRS. TIMBER & CO. Ltd. [1975] 1GLR 39

My Learned Brother ANIN JA (as he then was) had this to say: Assuming, at this stage, the facts disclosed in this affidavit in opposition to be true, then it is apparent that genuine triable issues ie , total failure of consideration and the issue of accounts had been raised such as ought to entitle the appellants to leave to defend the action on the merits."

The proper test in this connection was laid down in the case of JACOB VRS. BOOTH'S DISTILLERY CO. [1901] 85 LT 262 H.L. where the headnote states:

"Judgement should only be ordered under Order XIV (14) where, assuming all the facts in favour of the defendant, they do not amount to a defence in law. Where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant ought not to be shut out from laying his defence before the court either by having judgement entered against him or by being put under terms to pay money into court as a condition of obtaining leave to defend."

And in the case of SHEPPARDS & CO. VRS. WILKINSON & JARVIS [1889] 6 TLR 13 it was laid down that: “The summary jurisdiction conferred by this order must be used with care. A Defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion”

I am indeed satisfied that the learned trial Judge discussed the defendant’s defence contained both in her affidavit in opposition and her Statement of Defence in Error. It is my belief that if he had availed himself of the directions given in J.G. SARKIS VRS. TIMBER & TRANSPORT CO. LTD; and SHEPPARDS & CO. VRS. WILKINSON & jarvins [1889] 6 TRL 13 CA and had applied the test laid down in JACOB VRS. BOOTHS DISTELLERY CO. as he ought to have done, before coming to the conclusion, that conclusion would have been different. The Learned trial Judge clearly erred when he shut out the defendant at that stage. Having come to this conclusion, I deem it unnecessary to consider further the other grounds of Appeal. I allow the appeal and order that the case be remitted to the Court below to be heard on its merits.

**J. A. OSEI**  
**JUSTICE OF APPEAL**

**COUNSEL - P.F.N.A NEEQUAYE FOR RESPONDENT.**