IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL [CIVIL DIVISION]

CORAM - AKAMBA, JA [PRESIDING]
OSEI, JA
R. ASAMOAH, J

CIVIL APPEAL
N0. HI/201/2005
29TH NOVEMBER, 2005

(1) ALPHONESO O. ARYEETEY
(2) JOHN O. ARYEETEY } **…PLAINTIFFS/RESPONDENTS**

v e r s u s

ROYAL INVESTMENT CO. LTD. & 18 ORS. … DEFENDANTS/APPELLANTS

J U D G M E N T

ASAMOAH, J - The Plaintiffs/Respondents described themselves as the Administrators of the Estate of the late Thomas Jonas Aryeetey who died in or about 1999 in Accra. The 1st Defendant/Appellant is a tenant in 19 stores in Houses No. D. 731/4, D. 731/4A and D. 731/4B whilst the rest of the Defendants/Appellants are her subtenants.

The houses mentioned form part of the estate of the defendant named above. In this judgment, we shall refer to the parties by their positions in the court below.

The facts which gave rise to this appeal can be nutshelled as follows:

On or about the 15th of October, 2004, the Plaintiff issued a Writ of summons accompanied by a Statement of Claim against all the 19 Defendants herein at the Circuit Court, Accra.

The Plaintiff claimed against the Defendants as follows:-

1. "Recovery of possession of store rooms occupied by the Defendants in House No. D. 731/4, D. 731/4A and D. 731.4B, Kojo Thompson road,
2. ¢9.5 million being arrears of rent.

In time, these process were duly served on all the Defendants who, by the Court's records, failed to enter appearance as required by the Rules of Court; Order 12 Rule 1 of LN 140A of 1954 (See the search certificate on p. 4 of the record of proceedings).

Consequently, the Plaintiffs moved for final judgment against the Defendants.

The matter came before His Honour Kwadwo Owusu who gave them judgment "in default of appearance" for all the reliefs sought.

Subsequently, the Plaintiff went into execution by taking possession of the stores in dispute. Thereupon, the 5th Defendant brought in an application to set aside the said judgment on the ground that she had never been served with the writ of summons. She stated that she was out of the jurisdiction and her store closed at the time service was purported to have been effected on her.

This application was argued both sides, with the trial judge bending over backwards to allow the 5th Defendant to produce further and better particulars of her alleged absence from Ghana at the material time. Later, he dismissed the application giving rise to this appeal.

Before us, the Appellant has appealed on the sole ground that:

"The trial Judge erred in dismissing the 5th Defendant's motion to set aside the default judgment when the 5th Defendant had produced compelling evidence that she was out of the jurisdiction and thus could not have been served with the Writ of Summons and Statement of Claim at the time she was

deemed to have been served."

For us, this ground of appeal raises two questions of mixed law and fact which may be re-cast thus:-

(a) Did she give a satisfactory explanation of her absence from Court; and

(b) Did she demonstrate that she has an arguable case.

I must hasten to add that failure on any one of these questions is fatal.

The law as we understand it is that different considerations should guide the trial Court in cases where the default judgment has been

(a) regularly obtained and (b) irregularly obtained.

A judgment is said to have been irregularly obtained where as here, the process was not served and yet judgment had been entered for the Plaintiff.

So also is it irregular where the process had been served on a wrong person or at a wrong address. It shall also be deemed to have been irregularly obtained if the Court which gave it had no jurisdiction so to do. This list is meant to be exhaustive.

The case of **BARCLAYS BANK OF GHANA LTD. VRS. GHANA CABLE CO. LTD. & ORS**. [1998-99] SC GLR1 has been pressed on us in this connection. In that case a Madam Alice had accepted the Writ or Summons from the bailiff of the Court as the Secretary of the Defendant there argued that she was unknown to her and that she had no authority to accept same on her behalf. The High court refused an application to set aside the judgment but the same was reversed by the Court of Appeal. On further appeal to the Supreme Court, it was held, inter alia, that since on the facts the said Madam Alice was unknown to the Defendants, the Defendants had not been served with the Writ of

Summons the High Court had no jurisdiction to enter final judgment against them. The judgment of the trial Court was thus set aside.

But are the significant facts in the **Ghana Cable Co. Ltd** case the same as in his case? We shall deal with this question presently.

We must hasten to add that where a judgment is found to have been irregularly obtained, the same is set aside ***debito justitiae*** – as of right.

Different considerations however apply where the default judgment has been regularly obtained. A judgment is regular where the court has jurisdiction in the matter and all the Rules of Court have been complied with as to matters of service and others before the same was given.

Where the default judgment has been regularly obtained, the same can only set aside upon the Applicant showing by an affidavit of merits that:

(a) He has a good excuse for being absent from court or for not entering appearance, and

(b) That he has an arguable defence to the claim.

The applicant here seeks the discretion of the court and failure on any of these points is fatal.

Was the default judgment here in question regularly or irregularly obtained?

Whereas the Defendant's counsel contended that the same was irregularly obtained, the Plaintiff's counsel argued to the contrary.

On the facts here, was the 5th Defendant served with the Writ of Summons accompanied by the Statement of Claim?

The bailiff at the Court below to whom the processes were entrusted for service proved service to the effect that the 5th Defendant had been duly served by him on the 15th of October 2004. It was on the basis of this proof of service that the learned trial Circuit judge initially proceeded to render the final judgment for the Plaintiff.

The 5th Defendant however had it that she was out of the jurisdiction at the material time and she could not have been served as alleged. The affidavit in support of her application presented to the court was obviously unpersuasive, as the trial judge had to indulge her to produce further and better particulars on an adjourned date.

When her "better particulars" came, in the trial judge was still unpersuaded and dismissed her application. Seeing however that an appeal is by way of re-hearing, and seeing also that we ar4e in the same position as the trial Judge in relation to the documentary evidence subsequently presented to the trial Judge, we have ourselves examined them, and we also find them unconvincing and unpersuasive.

A perusal of her exhibit RH 2 shows that she went out of Ghana from the Kotoka International Airport on the 29th day of October, 2004, and she was also said to have departed from the Ikeja Nigeria Airport, on the 24th of October, 2004. The 5th Defendant also has a stamp in her passport from the officials at Ikeja Airport that she had departed from there on the 28th of February 2004. There was no explanation in her affidavit as to where she went from there.

We find from the particulars in her passport that she was in fact in Ghana on the 15th of October, 2004 when the bailiff swore that he served her. We therefore hold that service of the Writ was properly and actually served on her; and the trial court had

jurisdiction to proceed to determine as it did for she had no excuse to be absent from court.

The ratio in the Ghana Cable Company Limited case is thus inapplicable. There the lady on whom the Writ of Summons had been served had no authority to receive the process. Here, the Writ of Summons and the accompanying statement of claim had been personally served on the Defendant. The significant facts there are therefore distinguishable from the facts here. Even though her failure on this score is fatal, we shall briefly examine her defence to see whether the same is arguable on the merits.

The 5th Defendant relied on Exhibit RH 3 to found her tenancy in the premises in question. On the face of the exhibit however, the 5th Defendant was not a party thereto. The lease was made between Royal investment Company Limited and Chandrai industries Limited on the 27th of May, 1992 to commence from 1st January, 1992. If the 5th Defendant has an assignment of this lease however, the term of years for 10 years demised to the leasee therein expired on the 31st of December 2000, and so she cannot found any claim on it. We hold therefore that the 5th Defendant does not have any arguable defence to the action. No useful purpose shall be served in reversing the judgment at the Court below; and we shall uphold it albeit on different grounds.

Accordingly we shall dismiss the appeal with costs.

R. ASAMOAH
JUSTICE OF THE HIGH COURT

I agree.

J.B. AKAMBA
JUSTICE OF APPEAL

I also agree.

J.A. OSEI
JUSTICE OF APPEAL