IN THE CIRCUIT COURT HELD AT AMASAMAN – ACCRA ON MONDAY THE 26TH DAY OF JUNE, 2023 BEFORE HER HONOUR ENID MARFUL-SAU, CIRCUIT COURT JUDGE

SUIT NO:C11/12/2023

ISAAC KWARTENG

OF KUMASI …

PLAINTIFF

VRS.

1.HARUNA FEISEL IDDRIS

2.GEORGE ADDAI BOATENG

3.BERNARD DAMOAH …

DEFENDANTS

PARTIES: PLAINTIFF ABSENT REPRESENTED BY YAW BERKO

1ST DEFENDANT ABSENT

2ND DEFENDANT ABSENT

3RD DEFENDANT ABSENT REPRESENTED BY PAUL OPARE

COUNSEL: EKOW S. AMPAH KORSAH ESQ. FOR PLAINTIFF ABSENT

SAMMY KWAME DOMEH ESQ. FOR 1ST & 2ND DEFENDANTS ABSENT

FRANCIS E. POLLEY ESQ. FOR 3RD DEFENDANT PRESENT

RULING

By a Writ of Summons and Statement of Claim filed on 9th December, 2022, Plaintiff claims against Defendants jointly and severally the following reliefs:

a. "An order of the court directed at the defendant to release the car documents which they sold to plaintiff somewhere in June, 2021.
b. A further order of the court to retrain *[sic]* the defendants from harassing and threatening his life.
c. General damages for breach of contract.
d. Substantial cost."

It is the case of Plaintiff that he entered into an agreement with the 1st Defendant for the purchase of three shops at the cost of One Hundred and Fifty Thousand Ghana Cedis (GH¢150,000.00) and made part payment of Ninety Thousand Ghana Cedis (GH¢90,000.00). According to him, he demanded for the documents of the shop and requested to meet the shop owner before he paid the balance due, but 1st Defendant refused to do so and he found out that 1st Defendant had defrauded him. Plaintiff says that he made a report at the Kotoku Police Station where the matter was referred to the Police Headquarters. According to Plaintiff, at the Police Headquarters, 1st Defendant admitted selling the said shops to Plaintiff and pleaded to exchange his car for the said shops, so he sent the 2nd Defendant to bring his car. Plaintiff says that the car was brought, and 1st Defendant promised to provide the documents of the car within a week, but he failed to do so. He says that he made an additional payment of Eighty-five Thousand Ghana Cedis (GH¢85,000.00) as the total cost of the car. Plaintiff says that 1st and 2nd Defendants later brought the 3rd Defendant and introduced him as the owner of the car with the 3rd Defendant lodging a complaint at the police station that Plaintiff had stolen his vehicle.

1st and 2nd Defendants entered appearance through counsel on 7th February, 2023.

3rd Defendant entered appearance on 21st December, 2022 and filed a Statement of Defence and Counterclaim on 11th January, 2023. On the same date, 3rd Defendant filed an application for preservation of Honda CRV with Chasis No. 2HKRW2H85KH669012. The said motion is the subject of the instant Ruling. The 3rd Defendant deposed that in May, 2021, his mother sent a Honda CRV to him from the USA to Ghana for him to sell. He attached as *Exhibits 1,2* and *3* photographs of the said vehicle. He added that he paid the requisite duties and charges on the vehicle and cleared same from the port, he attached as *Exhibit 4* a photocopy of receipts he was issued. According to him, he knows the 1st Defendant as someone who owns a car garage, so he sent the vehicle to him to advertise for sale at a cost of Twenty-Six Thousand Dollars ($26,000.00). He says that he does not know the Plaintiff and has not sold the car to him nor taken any money from him for the vehicle. He adds that the vehicle which was given by the 1st Defendant to defray what is owed by 1st Defendant belongs to him. According to him, Plaintiff has sent the vehicle to an unknown place, and he believes the Plaintiff is using the vehicle and will cause same to depreciate. He therefore prays that the vehicle is preserved pending an expeditious hearing of the matter.

Plaintiff filed an affidavit in opposition on 18th January, 2023, he contends that the suit was commenced by him without a lawyer but he engaged the services of a lawyer who indicated to him that the instant writ is void as it does not conform with mandatory statutory provisions and therefore could not be continued so his counsel filed a new writ in the High Court, Accra in respect of the same subject matter and parties. He attached as *Exhibit IK1* the Writ of Summons in the High Court. He stated that the suit is pending before another

court which has jurisdiction to try the issues and as the writ is void, this court is incapable of making any orders in respect of the instant application.

When counsel for 3rd Defendant argued the motion on 1st June, 2023, he stated that the second action amounted to a *lis alibi pendes* and the filing of the second action does not oust the jurisdiction of the court before which the first action was mounted. He relied on the cases of Amoako Atta II & Others vrs Osei Kofi & Others No 2 (1962) 1 GLR 384 and William v Hans (1905) 1 KB 512 and Adamson v Tuff 44 LT 420. He added that the 3rd Defendant has a counterclaim in this action.

Counsel for Plaintiff argued that they do not intend to litigate the matter and intend to discontinue the case. According to him, the writ in the instant case is irretrievably bad.

This court differently constituted granted counsel for Plaintiff's prayer to file written submissions for ruling.

Since by his affidavit in opposition Plaintiff has called into question the jurisdiction of this court to entertain the instant action, I shall first determine that issue before considering the merits of the application. Counsel for Plaintiff has argued that the instant action is void as a result of flaws contained in the writ as such this court is incapable of making any orders in respect of the instant application. The reason for stating that the Writ of Summons is void was unraveled in counsel for Plaintiff's written submission filed on 9th June, 2023. He argues that under order 2 rule 3(2) of the High Court (Civil Procedure) Rules 2004, C.I. 47, the occupational and residential address of the parties shall be stated on the writ and the address of the Plaintiff rather than that of his lawyer shall be used in the writ. It is his case that the rule is mandatory, and compliance is essential for the action to be valid. He referred to Section 42 of the Interpretation Act, 2009, Act 759 on the

distinction between "may" and "shall" and referred to the cases of Naos Holding Inc v. Ghana Commercial Bank (2005-2006) SCGLR 407 and Standard Bank Offshore Trust Co. Ltd v. NIB [2017] GHASC 26 to say that the writ issued on 9th December, 2022 is void ab initio and therefore does not invoke the jurisdiction of the court.

It is trite that in certain cases, proceedings could be set aside for non-compliance with a rule of practice. However, non-compliance with a rule of practice does not automatically result in an invalidation of the proceedings in which the breach occurs. Thus, Order 81 rule 1 (1) of C.I. 47 provides as follows:

> *"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it."*

In this case, the breach complained of is the failure of Plaintiff to provide the residential and occupational address of himself and the Defendants contrary to Order 2 rule 3(2). The said order provides as follows:

> *"Rule 3—Contents of Writ*
>
> *(2) The occupational and residential address of the parties shall be stated on the writ and the address of the plaintiff rather than the address of the lawyer of the plaintiff shall be used in the writ."*

In the case of **STANDARD BANK OFFSHORE TRUST CO. LTD V. NIB [2017] 113 GMJ 174** the court held that:

> *"The rules of court form an integral part of the laws of Ghana, see article 11(1)(c) of the 1992 Constitution. Consequently, they must be treated with equal amount of respect in order to produce sanity in court proceedings. Where a rule is mandatory by the use of the expression 'shall', it should be so regarded in view of section 42 of the Interpretation Act, 2009, (Act 792). Where a court finds it necessary to express 'shall' as directional only, it must be forthcoming with reasons before deciding to exercise discretion to waive non-compliance."*

I consider that the failure to provide a residential and occupational address under order 2 rule 3(2) in the Writ of Summons is an irregularity which does not go to the root of the action to render it void and could be waived for non-compliance under Order 81 of the rules of court. The use of the word 'shall' in the said order is directional as opposed to same being mandatory. Indeed, under order 2 rule 5(5) the rules permit that where the address of the defendant after diligent search is not known, the plaintiff shall indicate on the writ that the plaintiff shall direct service. The instant case is clearly distinguishable from the cases relied upon and cited by counsel for Plaintiff. In the Standard Bank Case, the writ of summons was declared to be a nullity because the provisions of Order 2 rule 4(2) of C.I. 47 were held to be obligatory, and not one of the provisions which the court is permitted by Order 81 to waive for non-compliance. That was also the decision in the Naos Holding case, in which the court held that non-compliance with the provision of Order 2 rule 4(2) renders the writ void. The reason given behind the obligatory nature of the rule is that it is there to ensure that foreigners, human as well as corporate, are in existence in fact and have an address at which they may be reached by the defendant and by the court, if need be. In the Naos case, the decision of the High Court which was upheld was that the Appellant had failed to establish that it was a legal entity existing in Ghana or Panama.

In the Standard Bank Case, the Court proceeded to cite some instances of violation of the rules which result in invalidation. Some of these were want of jurisdiction as decided in FREMPONG v. NYARKO (1998-1999) SCGLR 734, a situation where the writ is not endorsed with any cause of action and none is disclosed in the statement of claim See REPUBLIC v. HIGH COURT, TEMA; EX PARTE OWNERS OF MV ESSCO SPIRIT (DARYA SHIPPING SA INTERESTED PARTY) (2003-2004) 2 SCGLR 689 and where on appeal it comes to light that a person who sued as an attorney for the plaintiff did not in fact hold a power of attorney as at the date he issued the writ, See. AKRONG and Another v. BULLEY (1965) GLR 469.

On the basis of the foregoing, I find that the failure to comply with Order 2 rule 3(2) of CI 47 by Plaintiff does not render the Writ of Summons void and this court is clothed with the requisite jurisdiction to entertain the instant application.

I shall now turn to the merits of the instant application. Order 25 rule 2(1) of C.I. 47 provides as follows:

> *"On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter or in respect of which any question may arise in the action or may order the inspection of any such property in the possession of a party."*

In the case of **IN RE YENDI SKIN AFFAIRS; YAKUBU II v. ABUDULAI [1984-86] 2 GLR 231; SC** it was held as follows:

> *"The courts had consistently operated on the principle that where two parties were litigating; every care must be taken to ensure that the party who eventually won did not find his judgment useless in his hands. Hence, at first*

instance, there were rules for interim preservation of the subject of litigation, and for injunction to prevent waste."

At this stage of the proceedings, having regard to pleadings and affidavit evidence before me, I consider that it will be in the interest of justice to have the vehicle, the subject matter of this suit preserved in the interim. Accordingly, the Honda CRV with Chasis No. 2HKRW2H85KH669012 is to be produced by Plaintiff within seven (7) days to the Registrar of this Court for same to be preserved until otherwise directed by this court.

I note from the record that counsel for Plaintiff disclosed his intent to discontinue the instant action for the first time when 3rd Defendant's lawyer moved the instant action. Order 17 rule 2(1) of the rules of court provides as follows:

"Except in the case of an interlocutory application, the plaintiff may at any time before service on the plaintiff of the defendant's defence or after the service of it and before taking other proceeding in the action, by notice in writing wholly discontinue the action against all or any of the defendants or withdraw any part of the alleged cause of action and thereupon the plaintiff shall pay the defendant's costs of the action or if the action is not wholly discontinued, the costs occasioned by the withdrawal."

In this case, no such notice in writing for discontinuance was ever given by Plaintiff and Defendants have filed their Statement of Defence and Counterclaims which have since been served on Plaintiff. Therefore, the matter may only be discontinued with leave of court. In the case of **SASRAKU III v. ELLIS & WOOD FAMILIES [1989-90] 1 GLR 498** it was held as follows:

"Where leave was required before a plaintiff could discontinue the action, the proper procedure was to bring a motion for that purpose and not by filing a

"notice of discontinuance with liberty to come back" as was done by the plaintiff in the instant case. Coming by way of a motion would give both parties the opportunity of putting before the court relevant facts to enable it to correctly exercise its discretion whether to allow the plaintiff to discontinue, and if so, on what terms as to costs and the option to bring a fresh action."

Counsel for Plaintiff has indicated that they do not intend to litigate this matter in this court and wish to have same discontinued. In the case of **AMISSAH VRS. ATTORNEY GENERAL [2003-2004] SCGLR 156** it was held as follows:

"The application by the plaintiff for leave to withdraw or discontinue the case calls for exercise of discretion by the court. Such discretion should be exercised judicially, i.e. In accordance with the law and rules of reasoning, And the court in exercising its discretion should consider all the circumstances of the case. For the discretion to be exercised in his favour, the plaintiff should show good and sufficient reasons."

In the Amissah Case supra, it was held by Brobbey JSC that a person cannot be compelled to litigate when he is not minded to do so, barring exceptional cases because that will go contrary to the letter and spirit of the 1992 Constitution. Therefore, having expressed a desire to have the matter discontinued and having gone ahead before the order of discontinuance to issue a fresh writ in the High Court, I shall grant Plaintiff's prayer to discontinue the matter but without liberty to reapply.

I note however that Defendants have counterclaims on the action. It was stated in the case of **FOSUHENE VRS ATTA WUSU [2011] SCGLR 273** as follows:

"…it was settled that a counterclaim was in law a separate and independent action tried together with the original claim of plaintiff. Consequently, where

in the course of an action in which there was a counterclaim, the plaintiff's claim was struck out, or dismissed, discontinued or stayed, the defendant could proceed to prosecute his counterclaim as it was independent of the original claim even though a counterclaim had no separate suit number different from the original suit…"

In the instant case, the Defendants' counterclaims constitute separate actions in law and are thus pending independent of the claim of Plaintiff which has just been discontinued without liberty. The matter shall therefore proceed on the counterclaims of Defendants.

(SGD.)

H/H ENID MARFUL-SAU

CIRCUIT JUDGE

AMASAMAN