

IN THE CIRCUIT COURT HELD AT DANSOMAN, ACCRA ON THURSDAY, THE 25TH DAY OF JULY, 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL BAASIT, CIRCUIT COURT JUDGE

SUIT NO.: CCD/C2/04/23

DANSOMAN SDA CO-OPERATIVE
CREDIT UNION - PLAINTIFF/RESPONDENT

VS

RICHARD OFOSU - DEFENDANT/APPLICANT

RULING: PRELIMINARY LEGAL OBJECTION

Background:

The Plaintiff, a non-Banking Financial Institution, issued a Writ of Summons and a Statement of Claim against the Defendant herein on the 24/3/2023 for the following reliefs;

- (a) An Order for the Recovery of the sum of Ghc73, 458.00 loan facility of GHc100,000.00 with its accumulated interest from August 2021 to March 2023.
- (b) Costs.

On the 21/4/23, the Defendants entered Conditional Appearance through their Lawyer who filed the Notice of Entry of Conditional Appearance and on the 4/7/23, the Plaintiff procured the services of a Lawyer who filed a Notice of Appointment of Solicitor pursuant to Order 75 Rule 3(1) of C. I. 47. On 11/7/23, Plaintiff file a Motion on Notice for leave to amend Plaintiff's Writ of Summons and Statement of Claim pursuant to Order 16 of C. I. 47, however before the

Motion could be heard, Counsel for the Defendants raised a Preliminary legal objection.

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Submissions of Counsel for the Defendants

Counsel argued that per Order 16 Rule 1, a Plaintiff may without the leave of court amend the Writ once at any time before pleadings are closed yet Counsel for the Plaintiff is before the Court seeking leave of this honourable court to amend the writ of summons and statement of claim when pleadings are yet to be closed. The second ground of Counsel's argument is that Order 20 Rule 14 requires a party who files a Motion with an Affidavit in Support to attach the Certificate of Exhibits but same was not done and to that extent the Motion offends the rules of this honourable court. Hence her prayer that the instant Motion should be dismissed without going into the merits of the case.

Submissions of Counsel for the Plaintiff

Counsel for the Plaintiffs submitted that the Preliminary Legal Objection raised by Counsel for the Defendants unfounded because if the Defendants say that

pleadings have not closed, then there is a problem because the Writ in question was filed on 24/3/2023 and the Defendants entered Conditional Appearance on 21/4/2023 but vanished, as such Pleadings have closed per the timelines. He continued that assuming without admitting that Pleadings have not closed, the Rules of this honourable court gives way for an amendment with leave or without leave before the pleadings closed and have elected to seek leave before any amendment is done. Thus, the ground of objection is unfound. On the 2nd ground of objection under Order 20 Rule 14(3), Counsel submits that whether there is a breach of this rule or not the said breach is curable by the same rules of court as Order 81 grants solace. Counsel submitted that noncompliance with Order 20 Rule 14 is curable by Order 81 and prayed the court to overrule the Preliminary objection.

Issues for determination

In view of the submissions of both Counsel, the following are the issues for determination:

- (a) Whether or not Pleadings have closed for leave to be sought to amend the Writ of Summons and Statement of Claim.
- (b) Whether or not the noncompliance with Order 20 Rule 14(3) of C. I. 47 can be cured by Order 81 of C. I. 47.

Analysis

It is trite that the Court proceedings in the Circuit and High Courts are regulated by the High Court Civil Procedure Rule, 2004 (C. I. 47) and the overriding

objective of C. I. 47 as stipulated in Or 1 r 2 is as follows; *‘...these Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any such matter avoided.’* Per the Rules, pleadings are defined as formal allegations by the parties to a lawsuit of their respective claims and defences with the intended purpose of providing notice of what is expected at trial. The purpose of pleadings is to enable either party to prepare adequately for the hearing and to avoid surprise and embarrassment at the trial. (See Kwame Tetteh supra at page 249). In **Hammond v Odoi** [1982-83] GLR 1215 at 1245, Crabbe JSC stated the function of pleadings as follows; *‘Pleadings are the nucleus around which the case – the whole case – resolves. Their very nature and character thus demonstrate their importance in actions, as for the benefit of the court as well as for the parties. A trial Judge can only consider the evidence of the parties in the light of their pleadings. The pleadings form the basis of the respective case of each of the contestants. The pleadings bind and circumscribe the parties and place fetters on the evidence that they would lead. Amendment is the course to free them from such fetters. The pleadings thus manifest the true and substantive merits of the case...’*

In the instant case, the contention of Counsel for the Defendants is that pleadings have not closed as to warrant leave before amendment of the Writ of Summons. To appreciate Counsel’s submission, there is the need to appreciate the timelines of this case. The Writ of Summons was filed on the 24/3/23 and the Defendants entered Conditional Appearance on the 21/4/23 and having entered Conditional Appearance, the Defendant per the Rules, must within Fourteen (14) days, apply to court to among others, set aside the Writ or service of the Writ. (See Order 9 r 7 and 8 of C. I. 47). The Defendants 14 days elapsed sometime in May 2023 and as

such the Conditional Appearance becomes unconditional but the Defendants failed to file a Statement of Defence within the stipulated period as provided by the Rules. The Plaintiff however procured the services of a Lawyer after issuing a Writ of which the said Lawyer duly notified the court and the Defendants of his presence in the matter by filing a Notice of Appointment of Solicitor on 4/7/2023. Counsel for the Plaintiff then again notified the court and the Defendants of his intention to amend the said Writ of Summons having detected some errors but Counsel raises the instant objection on grounds that pleadings have not closed hence there is no need for the intention to amend the writ to be on Notice.

The Court agrees with Counsel for the Defendant that pleadings have not closed but is inclined to agree with Counsel for the Plaintiff when he submitted that he elected to file the amendment on Notice. Indeed, it is the contention of the court that having been appointed after the Writ had been issued, Counsel erred on the side of caution by filing the notice to amend. According to Kwame Tetteh *supra* at page 442, *'... once filed, a Writ is beyond the Plaintiff's reach. It cannot be withdrawn on account of mistakes. The Rules however enable the plaintiff to correct those mistakes in one or two ways ...'* at page 454, the learned author continued by stating that *'... the administration of justice is a human activity and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right, even if this causes delay and expense, provided that it can be done without injustice to the other party...'*

Counsel for the Defendants' second ground of objection is that Counsel for the Defendant failed to comply with Order 20 Rule 14(3) of C. I. 47 as at the time he was filing his Motion on Notice for leave to amend the Writ of Summons and Statement of Claim. To understand Counsel's contention, Order 20 r 14 provides as follows; *14(1) any document to be used in conjunction with an Affidavit shall be*

exhibited and not merely annexed or attached to the Affidavit. (2) Any exhibit to an Affidavit shall be identified by a certificate of the person before whom the Affidavit is sworn. (3) The certificate shall be titled in the same manner as the Affidavit and rule 3 subrules (1), (2) and (3) shall apply accordingly. In view of this, it is conspicuously clear that Counsel for the Plaintiff is in breach of Rules. Obviously, there was non-compliance on the part of the Plaintiff, violation of which rendered the instant Application irregular. However, the questions in the mind of the court are that, is the breach as fundamental as to warrant the dismissal of the instant Application? Does the non-compliance with the Rules go to the root of the matter such that it cannot be cured? It is the contention of the instant court that there would be a frustration of litigation in its entirety if every mistake or non-compliance will result in the said process being thrown out just for the process to start all over again. This is because although a breach of the Rules is indeed a breach of the Rules, Lawyers and litigants must also ensure strict compliance of the Rules as well as avoid making slips in filing a process, but there are some slips, such as the instant one, that may be considered as 'minor and inconsequential'. In the case of **Shardey vs. Adamtey; Shardey vs Martey** (Consolidated), Archer JA stated, '*...it would have been manifestly wrong to throw of this application to have requested the plaintiff to bring a fresh motion, for, in the words of the former West African Court of Appeal in chief Attu Kofie v. Kobina Attu, 17 June 1948, unreported, it would be pursuing technicalities to an absurdity to hold that the appellant had to fulfil the formality all over again in filing a fresh motion paper...*'

Counsel for the Plaintiff being notified of the non-compliance however prays the court to rely on Order 81 of C. I. 47 which is the Effect of Non-Compliance with Rules and provides that (1) *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 anything 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. (2) The Court may, on the ground that there has been such a failure as stated in subrule (1), and on such terms as to costs or otherwise as it considers just (a) set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or (b) exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just.

Order 81 is a procedure for the correction of any proceeding or step taken in an action that violates the Rules as well as the consequences of violating the Rules but also proceeds to vest the trial Judge the power to regulate the proceedings and determine the way forward in the proceeding. As such, the court is of the considered opinion, humbly, with due respect to Counsel for the Defendants and in the interest of justice that the non-compliance by Counsel for the Plaintiff is one that is not so fatal and can be cured under Order 81.

Conclusion:

Although the Plaintiff and/or Counsel for the Plaintiff failed to comply with the Rules of Procedure of this Court and therefore renders the process irregular, such irregularity is not so fatal as to warrant a dismissal of the Application for a fresh Application to be filed. Indeed, according to the learned Kwame Tetteh *supra* at page 27, ‘...the Rules must be applied as a means of obtaining the objective, not an end to itself. The objective of doing justice entails determining disputes on its merits.

Shutting out a party on a procedural default is inconsistent with the objective unless it cannot be helped. The Preliminary Legal Objection is hereby dismissed.