

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION HELD IN ACCRA ON THE 27<sup>th</sup> DAY OF MARCH 2023, BEFORE HIS LORDSHIP JUSTICE JUSTIN KOFI DORGU

SUIT NO CM/BFS/0277/2021

BANK OF AFRICA GHANA LTD

PLAINTIFF

VRS

ALUKINGS SYSTEMS LTD & 2ORS

DEFENDANTS

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**PARTIES:** PLAINTIFF REPRESENTED BY BERTHA AFRIYIE  
DONKOR

**3<sup>RD</sup> DEFENDANT/APPLICANT PRESENT**

**COUNSEL:** DAVID OBENG-MENSAH HOLDING BRIEF FOR  
EMMANUEL EFFAH ANNAN FOR THE  
PLAINTIFF/RESPONDENT – PRESENT

**DR. EUGENE ASIAMAH BOADU FOR THE 3<sup>RD</sup>  
DEFENDANT/APPLICANT – PRESENT**

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### RULING

On or about the 18<sup>th</sup> January, 2021, the Plaintiff herein, a limited liability company engaged in the business of banking issued out a Writ of Summons against the three Defendants herein praying for the following reliefs;

- a. Recovery of the sum of GH¢ 267, 011.22 being the outstanding balance as at 17<sup>th</sup> June, 2020 on the overdraft facility granted by Plaintiff to 1<sup>st</sup> Defendant on the latter's request

- b. Interest on the said amount at the rate of forty percent (40%) per annum (inclusive of penal interest of 6% and a default charge of two (2%) from 18<sup>th</sup> June, 2020 to the date of final payment
- c. Costs

Now, I will quote some pertinent paragraphs in the accompanying Statement of Claim which sort of incriminate the 3<sup>rd</sup> Defendant/Applicant in this suit in order to **situate** the application in its rightful perception. The said paragraphs are 3, 7, 9, and 9 thus;

“3. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are Directors of the 1<sup>st</sup> Defendant Company and guarantors of a facility granted the 1<sup>st</sup> Defendant by the Plaintiff which is the subject matter of the instant proceedings. 2<sup>nd</sup> Defendant is also the Managing Director of 1<sup>st</sup> Defendant Company”.

7. As a condition precedent to the grant of the facility, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 3<sup>rd</sup> November, 2017 jointly executed a Deed of Guarantee in favour of the Plaintiff whereby 2<sup>nd</sup> and 3<sup>rd</sup> Defendants undertook to be liable to Plaintiff should 1<sup>st</sup> Defendant fail to honour its obligations to Plaintiff.

8. Plaintiff says that the 1<sup>st</sup> Defendant has failed and or refused to meet the terms and conditions of the overdrafts facility by defaulting in the terms of repayment in spite of several and repeated demands made thereof’ and

“9. Plaintiff further avers that 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have also failed and or refused to make good the indebtedness in terms of the Deed of Guarantee they executed in favour of the Plaintiff.”

I must admit that service of the processes including the Writ of Summons on the Defendants was very arduous as they were evasive. The Plaintiff had to resort to application after application for leave to serve the Defendants by way of substituted service at every stage of the proceedings. At a point when the Plaintiff was satisfied that the Defendants were duly served but failed, refused or neglected to enter

appearance to the Writ, they took out an application under Order 10 Rule 1(1) and (9) of the C.I 47 filed on 4<sup>th</sup> February, 2022 and prayed the Court to enter final judgment against the Defendants in default of appearance. Again since the application was put on notice, the application had to still go through substituted service. On the 25<sup>th</sup> July, 2022 when the Court was satisfied that the due notice of the application was given, it granted leave to the Plaintiff to move the application which was duly done and final judgment entered for the Plaintiff against the Defendants jointly and severally for the endorsed reliefs.

When the notice of judgment got to the 3<sup>rd</sup> Defendant/Applicant finally, they filed on the 25<sup>th</sup> April, 2023, the instant motion under the inherent jurisdiction to set aside the final judgment recovered against him on the 25<sup>th</sup> July, 2022. The basis of the application is that he (the 3<sup>rd</sup> Defendant/Applicant) had resigned his directorship of the 1<sup>st</sup> Defendant Company since April 2018 and so since that date had no business with the 1<sup>st</sup> Defendant Company again. As a result, the Applicant contends that he had no notice of any proceedings against him for which matter he did not contest the case. The 3<sup>rd</sup> Defendant/Applicant put his defence this way in paragraphs 8 and 9 of the Affidavit in Support

“8. That I am advised by Counsel and verily believe same to be true that the doctrine of natural justice has been breached as the 3<sup>rd</sup> Defendant was not given the opportunity to be heard in the matter before this Court granted the judgment in favour of the Plaintiff

9. I am further advised by Counsel and verily believe same to be true that per the Companies Act, the 3<sup>rd</sup> Defendant /Applicant was not served at all with any of the Court processes required to have been duly served on a party to pave way for the grant of judgment in favour of the Plaintiff”.

It is based on the above that the 3<sup>rd</sup> Defendant/Applicant is inviting the Court to set aside the final judgment albeit in default of appearance and to allow the 3<sup>rd</sup> Defendant to contest the case.

Naturally, the Plaintiff/Respondent opposed the application and filed a 15 paragraph Affidavit in Opposition. Attached to the Affidavit are Exhibits JD to JD5 that captures all the proceedings of the applications for substituted service and proof of service through posting and in paragraphs 11 and 12 thus;

“11. I am further advised and verily believe same to be true that the resignation of the 3<sup>rd</sup> Defendant/Applicant as a Director of the 1<sup>st</sup> Defendant Company does not absolve him from liability on his personal guarantee.

12. Plaintiff vehemently denies paragraphs 8 and 9 of the Affidavit in Support and states that there was no breach of the doctrine of natural justice as alleged.”

The parties were then allowed to make viva voce submissions for and against the application.

Indeed, reviewing the depositions and all the processes including the viva voce submissions in Court, I have come to the conclusions that but for one reason, this application should have failed. This is so because I hold as good service all the processes filed and served on the 3<sup>rd</sup> Defendant albeit by substituted service. This is so because service by substitution is a permitted procedure known to our jurisprudence and once it has been effected with the leave of the Court, it is as good as personal service. The fact also that the 3<sup>rd</sup> Defendant/Applicant had resigned his position as a Director of the 1<sup>st</sup> Defendant company also does not automatically relieve him of the procedural obligation to enter appearance and contest a case that has been brought against him whether rightly or wrongly. The personal opinion of the 3<sup>rd</sup> Defendant/Applicant regarding his liability or otherwise of an action brought against

him is to me immaterial and not a defence for defaulting on your obligation to enter appearance and defend the action that has been brought against you.

I have resolved to however grant the application only on the basis that there was no actual evidence attached to the application for final judgment that prima facie shows that the 3<sup>rd</sup> Defendant/Applicant actually executed a Deed of Guarantee as a Director either in his personal capacity or in the nature of a corporate guarantee. That to me is fundamental and the offer by the Plaintiff/Respondent to furnish the Court with a copy of same to me is late in the day as the 3<sup>rd</sup> Defendant had already filed the instant motion to set aside the judgment for the various infractions identified by him.

Accordingly, I grant the application and hereby set aside the judgment recovered against the 3<sup>rd</sup> Defendant/Applicant on the 25<sup>th</sup> July, 2022. This of course is without prejudice to the Plaintiff re-applying in the appropriate case.

All properties of the 3<sup>rd</sup> Defendant/Applicant seized in execution and attached as a result of this judgment and which have not been sold already are to be released from attachment accordingly.

I award cost of GH¢ 2, 000.00 against the Plaintiff/Respondent.

**(SGD)**

**JUSTICE JUSTIN KOFI DORGU**

**(JUSTICE OF THE HIGH COURT)**