IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE, LAW COURT COMPLEX, ACCRA

(GENERAL JURISDICTION 11) HELD ON THURSDAY THE 1ST DAY OF JUNE, 2023

BEFORE HIS LORDSHIP JUSTICE RICHARD APIETU (J)

SUIT NO. GJ/0414/2023

AHIAFOKPOR INNOCENT JRN - PLAINTIFF

VRS.

NDK FINANCIAL SERVICES LTD - DEFENDANT

RULING

This is a Ruling on Preliminary Legal Objection to the Defendant/Applicant's hereinafter referred to as the Applicant's Motion to dismiss the Plaintiff/Respondent's hereinafter referred to as the Respondent's suit.

The brief facts of the matter is that on 19th January, 2023, the Respondent caused a Writ of Summons and Statement of Claim to be issued against the Applicant for reliefs endorsed thereon. The Applicant entered appearance and filed an Application to dismiss the Respondent's suit. The Respondent filed an Affidavit in Opposition and also filed a notice of intention to raise preliminary legal objection to the Applicant's Application to dismiss the suit on two main grounds namely:

1. That the Motion is legally and procedurally incompetent.
2. That the Applicant failed to properly invoke the jurisdiction of the Court with respect to the Application.

I have read the Written Submissions in Support of the Respondent's Preliminary Legal Objection and the Written Submissions of the Applicant in Opposition to the Preliminary Legal Objection. The issues which this court have been called upon to determine is:

> Whether or not the Application for an order to dismiss the suit should be dismissed on the grounds stated in the preliminary legal objection?

In doing so reference shall be made to the relevant laws and authority.

The purpose of a preliminary legal objection as stated in Ohemaa Fowaah Sarfo vs. Energy Bank Limited and Anor is to demonstrate to the Court "that the application (the subject matter of the objection) is incompetent or fundamentally defective such that it is not worth considering the merits of it."

This view of the law was affirmed by the Court of Appeal in Osei Bonsu II vs. Mensah and Others when the Court of Appeal, quoting with approval the Gambian Case of Kabo Airlines Ltd. vs. The Sheriff held as follows:

> "Let me say at once that the purpose of a preliminary objection, as I understand it, is to prevent the application in the notice of Motion before the court from being heard on its merit, either on, grounds of irregularity, or for non-compliance with some legal provision, or for some other good and sufficient reason."

S. Kwami Tetteh in his book titled Civil Procedure: A Practical Approach at page 305, an application to strike out a pleading or an averment in a pleading can be made either under the Rules or pursuant to the inherent jurisdiction of the Court or both. This means that a person seeking to strike out a pleading or dismiss a suit for being vexatious and/or an abuse of the Court's processes, can either proceed under the inherent jurisdiction of the Court or under Order 11 Rule 18 of the High Court (Civil Procedure) Rules 2004 (C. I. 47) or both.

There is no doubt that the legal regime that applies when an application is brought under the Rules to dismiss a suit for being vexatious and/or an abuse of the Court's processes is not the same as that which applies when the application is brought pursuant to the inherent jurisdiction of the Court. See Amissah-Abadoo vs. Abadoo, Halley vs. Ejura Farms (Ghana) Ltd.

It is clear from the above cases that separate legal regimes apply when an application is brought under the Rules to dismiss a suit for being vexatious and/or an abuse of the Court's processes as opposed to when the same application is brought pursuant to the inherent jurisdiction of the Court. Therefore a party seeking to dismiss a suit for being vexatious and/or an abuse of the Court's processes is required to indicate to the court whether he/she is coming under the Rules or is coming under the inherent jurisdiction, for the Court to determine which legal regime to apply. The Courts have also held that the two legal regimes illustrated in Amissah-Abadoo vs. Abadoo and Halley vs. Ejura Farms (Ghana) Ltd. cited above, are not interchangeable and must each be specifically applied for.

This means that ideally, in drafting an application, the order under which the application is brought must be apparent on the face of the motion paper.

However, notwithstanding the above, its absence is not fatal provided the reliefs sought are clear. See the case of **ASAMOAH VS. MARFO [2011] GHASC 40** where the court stated that:

> "The practice is that in application by motion to a court, it is desirable for counsel filing the motion to indicate the order and the rule under which the application is brought. It is, however, not mandatory that counsel for the applicant should state the order and rule under which an application is brought. It is not so fundamental to disable a court of law in advancement of substantial justice to determine an application in the absence of any order or rule stated on the face of the motion paper but the relief sought must be clear and apparent on its face. See Shardey v Adamtey and Shardey v Martey & Ors (Consolidated) [1972] 2 GLR 380 CA. In any case, Order 81 rule 1(1) C.I. 47 could be applied to cure the defect as buttressed by the Court in the case of The Republic v High Court, Accra; Ex-Parte Allgate Co. Ltd [2007-08] 2 SCGLR 1041".

In this case, there was a distinction as to which non -compliance will automatically result in a nullity of the proceedings and which non-compliance will be treated as a mere irregularity.

Dr. Date-Bah, J.S.C. opined that, "where the error is fundamental or goes to the jurisdiction of the court, thereby exposing the court's incompetence or lack of jurisdiction in the matter in which the said error was committed, then the court is incompetent to correct or waive such an error." To sum up, it was held that where there has been non-compliance with any of the rules contained in the High Court (Civil Procedure) Rules 2004 (CI 47), such non-compliance is to be regarded as an irregularity that does not result in nullity, unless the non-compliance is also a breach of the Constitution or of a statute

other than the Rules of Court or the rules of natural justice or otherwise goes to jurisdiction.

The question therefore is, can it be said that Order 81 of C. I. 47 cannot cure the procedural defect detected and raised by Counsel for Plaintiff/Respondent? I am of the opinion that this is not the case since this Court is clothed with the jurisdiction to hear the matter.

Admittedly, it is ideal for the rules to be stated, whether counsel was coming under the inherent jurisdiction of the Court. As held earlier by Justice Anin Yeboah (as he then was) in the Shardey vs. Adamtey and Shardey vrs Martey & Anor. case, this helps the Court avoid the inadvertent assistance to lawyers by providing relevant rules lawyers ought to have come by in the first place.

The Supreme Court has brought finality to this matter, thus the absence of the order and rule under which the application is brought is not fatal to the case of the Applicant. In view of the decision of the Supreme Court, the Applicant's failure to endorse on the motion paper, the order under which the application was brought is not fatal to its case.

I have noted that the Respondent made reference to **SHEIK AHMED RUFAI YAHAYA & 8 ORS VS. SUMMA HOLDING CORPORATION & 8 ORS [2005] DLCA 6984** and reproduced a portion of the judgment in paragraph 27 of their Written Submissions. The portion stated was only an opinion of the judge, which differ from the holding of the court on that matter. The entire position of the court is as follows:

> "Failure of solicitors to indicate the rule under which an application is brought in most cases present difficult problems for judges. It was pointed out in the case of Shardey vrs. Adamtey and Shardey vs. Martey & Another [Consolidated] [1972] 2 GLR 380 CA that failure to cite the relevant rule in an application is desirable but

> not indispensable, yet when an application is brought and no rule is cited and not brought under the court's inherent jurisdiction, the court must not entertain such an application. In this case, no rule of court was cited and the court's inherent jurisdiction was also not invoked. In my respectful opinion to avoid laxity in practice and make proceedings clear, an applicant must indicate the rule under which he has mounted an application and if he is invoking the court's inherent jurisdiction or both, same must be so stated to avoid the situation whereby judges have to explore the rules to ascertain the relevant rule under which the motion is brought. In my view the opinion of Archer, J.A. (as he then was) in the Shardey's case must regulate applications in courts."

The position in Archer's case is the position re-affirmed by the Supreme Court. See Asamoah vs. Marfo [2011] GHASC 40. See the statement made by Sir W. Scott in the Reward, which was reproduced by Archer J. A. in the case of **SHARDEY VS. ADAMTEY AND SHARDEY VS. MARTEY AND ANOTHER (CONSOLIDATED) [1972] 2 GLR 380-395**, the locus classics on the leniency of the court in hearing applications in which the order is not apparent on the face of the motion paper, which states that:

> "The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, de minimis non curat lex. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked."

From the above authorities, it is clear that the absence of the specific rule is not fatal to the case of the Applicant. It can be rectified under Order 81 of C. I. 47 as buttressed by

the court in the case of The Republic vs. The High Court And Amalgamated Bank Limited Ex-Parte: Allgate.

Having carefully read the authorities cited above especially the case of Sheik Ahmed Rufai Yahaya & 8 Ors vs. Summa Holding Corporation & 8 Ors referred to by both Counsel, it is my considered opinion that, not stating the rule, on the face of the application by the Defendant/Applicant, it is not so detrimental to cause the dismissal of his application to dismiss the suit. I would therefore overrule the preliminary objection of the Respondent and it is hereby overruled.

(SGD)

JUSTICE RICHARD APIETU

(HIGH COURT JUDGE)

COUNSEL:

SELORM DEY HOLDING THE BRIEF OF NII KPAKPO SAMOA ADDO FOR THE PLAINTIFF/RESPONDENT

AFIA BEMA OSEI LED BY ANDREW APPAU OBENG FOR THE DEFENDANT/APPLICANT