IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION, HELD IN ACCRA ON MONDAY, THE 29TH DAY OF APRIL, 2024 BEFORE HIS LORDSHIP FRANCIS OBIRI 'J'.

SUIT NO. CM/BDC/0211/2023

JOSEPH ADE COKER - PLAINTIFF/RESPONDENT

Vs

NDK FINANCIAL SERVICES - DEFENDANT/APPLICANT

RULING

On 10th February 2023, the Defendant/Applicant (hereinafter called the Applicant) filed a motion before this court. The motion is praying the court to dismiss the instant suit on the grounds stated in the affidavit. The motion has exhibits attached to same. The relevant paragraphs are as follows:

3. By a Writ of Summons and Statement of Claim filed on 6th January 2023, the Respondent instituted an action against the Applicant for the reliefs endorsed in the Statement of Claim.

4. I am informed and believe same to be true, that an examination of the Writ of Summons, shows that the Respondent is only attempting to relitigate a matter that has been adjudicated to the Court of Appeal.

5. I am informed and believe same to be true, that the Respondent has canvassed the same facts before the High Court, (Commercial Division) Accra on countless occasions without success. Find attached as exhibits NDK 1, NDK 2, NDK 3 and NDK 4 being copies of applications and rulings in respect of the main suit in the Commercial Division of the High Court.

6. I am informed by counsel, and verily believe same to be true, that the instant suit is, vexatious and an abuse of the process of the Honourable Court.

7. That I am informed by counsel and verily believe same to be true, that the Statement of Claim of the Plaintiff discloses no reasonable cause of action.

8. By reason of the matters aforesaid, the Applicant prays that the instant suit should be dismissed.

The Plaintiff/Respondent (hereinafter called the Respondent) opposed the application by filing affidavit in opposition. The relevant paragraphs are as follows:

5. That counsel for the Respondent has been served with the Defendant/Applicant's motion praying this Honourable Court for an order to dismiss the Respondent's suit.

6. That the Respondent is opposed to the application.

8. That the Respondent denies paragraph 4 of the Applicant's affidavit in support of its motion, and states that on 22nd August 2014, the High Court (Commercial Division) Accra gave a ruling in which it held among other things, that "**the Court thinks that the expression in respect of the mode of the calculation of interest is almost meaningless. A calculation of interest per month at the rate of 6% should suffice.**"

9. That the Applicant was aggrieved by the above ruling and appealed to the Court of Appeal on the following grounds:

   a. The ruling is against the weight of evidence.

   b. The learned trial judge erred when he held, that the meaning of the default clause contained in paragraph 2(a)(vi) of the terms of settlement is unclear and obscured.

   c. The learned trial judge erred when he held, that interest "exigible" on the outstanding balance on the sum of GHS1,000,000.00 (One Million Ghana Cedis) at the date of default shall be calculated on simple interest basis.

   d. The learned trial judge erred, when he held that the mode of calculation of interest set out in the terms of settlement is almost meaningless.

   e. The learned trial judge erred, when he rejected the quantum of the defendant's indebtedness arrived at by the Auditor appointed by the court.

   f. Other grounds of appeal will be filed upon receipt of the record of proceedings.

10. That on the 9th of February 2016, the Applicant, pursuant to an order of the Court of Appeal, amended its notice of appeal to read as follows:

   a. The ruling is against the weight of evidence.

   b. The learned trial judge acted without jurisdiction when he suo motu amended the terms of settlement executed by the parties.

   c. The learned trial judge acted without jurisdiction when he held that the interest "exigible" on the outstanding balance on the sum of GHS1,000,000.00 (One Million Ghana Cedis) is at the date of default and shall be calculated on simple interest basis.

11. That the Court of Appeal on 17th November 2016, gave its judgment in respect of the Applicant's appeal and ruled in favour of the Applicant on all the grounds of appeal.

12. That the above Court of Appeal decision has been attached and exhibited as exhibit NDK in the Applicant's affidavit in support of this motion.

13. That the Respondent on 16th of January 2023, instituted this present action against the Applicant for the following reliefs:

    a. A declaration that the terms of settlement entered into by the parties and filed on the 5th of May, 2011 is unconscionable.

    b. A declaration that the audit report made by Messrs Intellisys Chartered Accountants to reconcile the accounts to ascertain how much the Respondent owed is fraudulent.

    c. An order setting aside the terms of settlement as being unconscionable.

    d. An order setting aside the Audit report as being fraudulent.

    e. Cost including legal fees.

    f. Any other orders that this Honourable Court may deem fit to make.

14. That the issues determined by the Court of Appeal in its judgment dated 17th November 2016, and exhibited in the Applicant's affidavit in support as exhibit NDK are not the same as the issues raised by the Respondent's present action before this Honourable Court.

15. That the Court of Appeal decision dated 17th November 2016, and exhibited in the Applicant's affidavit in support as exhibit NDK dealt with the mode of calculation of the applicable interest rate on the amount owed the Applicant and the

jurisdiction of the High Court to vary the terms of settlement entered between the Applicant and the Respondent.

16. That nowhere in the Court of Appeal decision dated 17th November 2016, and exhibited in the Applicant's affidavit in support as exhibit NDK was the issue of the unconscionability of the terms of settlement entered between the parties raised and/or determined by the Court of Appeal.

17. That the issue of fraud for instance, which forms a crucial claim of the Respondent's case in this present action, was neither put before the Court of Appeal nor determined by the Court of Appeal.

18. That the issues before this court cannot therefore be said to have been adjudicated by the Court of Appeal as alleged by the Applicant in paragraph 4 of the affidavit in support of the motion.

19. That the Respondent, in the Writ of Summons and the Statement of Claim raised the issue of fraud.

22. That I have been further advised by counsel, and verily believe same to be true, that an allegation of fraud can only be established by taking evidence.

23. That I have also been advised by counsel, and verily believe same to be true, that an allegation of fraud raises a triable issue which a court cannot determine summarily.

25. That this Honourable Court must not accede to and/or countenance the Applicant's invitation to summarily determine the Respondent's issue of fraud.

26. That the Respondent denies paragraph 5 of the Applicant's affidavit in support of the application to dismiss the Respondent's suit.

28. That nowhere in the affidavit in support exhibited as exhibit NDK 3, nor the rulings of the court exhibited as exhibits NDK 2 and NDK 4 is there any reference whatsoever to the unconscionability of the terms of settlement filed on 5th May 2011, or the fraudulent audit report that the Respondent is seeking to set aside.

29. That those Applications and rulings have nothing to do with the merits of the Respondent's suit before this Honourable Court.

31. That in further denial of paragraph 6 of the Applicant's affidavit in support of the motion, the Respondent states that his suit before this court is not vexatious and does not amount to abuse of the court's process.

35. That the Respondent's present action was instituted on 6th January 2023, to set aside the unconscionable terms of settlement filed on 5th May 2011, and to further set aside the fraudulent audit report of Messers Intellisys Chartered Accountants.

36. That the Respondent's suit was instituted in good faith and is solidly grounded in both fact and law.

37. That beyond the mere allegation made by the Applicant, that the Respondent's suit is vexatious and therefore an abuse of the court process, the Applicant has not provided a single piece of evidence from which a reasonable inference of bad faith can be inferred on the part of the Respondent.

38. That I am therefore advised by counsel and verily believe same to be true, that the Respondent's instant suit before this court is not vexatious and does not amount to abuse of the court process.

39. That the Respondent denies paragraph 7 of the Applicant's affidavit in support of its motion and states, that the Respondent current suit discloses a reasonable cause of action.

43. That I am advised by counsel and verily believe same to be true, that a careful reading of the reliefs endorsed on the Respondent's Writ of Summons and the facts presented in the Respondent's Statement of Claim will reveal, that the Respondent's present suit raises serious triable issues which must be adjudicated by this Honourable court.

44. That the issue of the unconscionability of the terms of settlement filed on 5th May, 2011 and the fraudulent audit report of Messers Intellisys Chartered Accountants are serious triable issues raised by the Respondent's suit which must be determined by this Honourable Court.

The Applicant filed supplementary affidavit in support of the motion on 9th November 2023. The relevant paragraphs are as follows:

6. I am informed by counsel and believe same to be true, that this matter has been adjudicated to the Supreme Court which appeal by the Respondent was dismissed by the Court. A copy of the Supreme Court judgment is attached and marked as exhibit NDK 5.

7. I am advised and believe same to be true, that the Respondent contested the default clause of the terms of settlement which he seeks to set aside per his reliefs in the Writ of Summons. This issue was ruled upon by the High Court and resulted in an appeal by the Applicant. A copy of the ruling dated 22nd of August 2014 is attached and marked as exhibit NDK 6.

8. I am informed by counsel and believe same to be true, that the Court of Appeal determined the appeal in favour of the Applicant as shown in exhibit NDK.

9. I am informed by counsel and believe same to be true, that the Court of Appeal at page 17 of exhibit NDK determined that the parties were bound by the terms of

settlement, compromising the judgment of the trial court and further entered as consent judgment of the parties.

10. I am further advised by counsel and believe same to be true, that the issues raised by the Respondent in his Writ of Summons and Statement of Claim are issues which were delved into and ruled upon accordingly by the Court of Appeal.

The Respondent also filed supplementary affidavit on 20th November 2023. I hereby reproduce the relevant paragraphs in this opinion:

11. That in further response to paragraph 6 of the Applicant's supplementary affidavit in support, the Respondent says that his case in the instant suit as contained in his Writ of Summons and Statement of Claim filed on 6th January 2023, is premised on unconscionability, estoppel by conduct and fraud.

12. That in further response to paragraph 6 of the Applicant's supplementary affidavit in support, the Respondent says that a close reading of exhibit NDK 5 reveals that the Supreme Court was not called upon to decide any of the issues raised by the Respondent in his Writ of Summons and Statement of Claim issued against the Applicant on 6th January 2023.

15. That the Respondent in response to paragraph 7 of the Applicant's supplementary affidavit in support, says that the ground on which the Respondent contested the default clause of the terms of settlement in the appeal referred to by the Applicant in paragraph 7 of the supplementary affidavit is distinct from the ground contained in the Respondent's Writ of Summons and Statement of Claim issued against the Applicant on 6th January 2023.

16. That the Respondent in further response to paragraph 7 of the Applicant's supplementary affidavit in support, says that the issue on the default clause of the

terms of settlement which resulted in the ruling in exhibit NDK 6 was an interlocutory appeal and not an appeal based on the judgment of the trial court.

18. That I am advised and verily believe same to be true, that any agreement reached between two or more parties could be set aside by the court on grounds of unconscionability.

21. That the Respondent in response to paragraph 8 of the Applicant's supplementary affidavit in support says, that since the appeal before the Court of Appeal in exhibit NDK, and attached to the Applicant's substantive affidavit in support did not touch on unconscionability, estoppel by conduct, and fraud raised in the Respondent's Writ of Summons and Statement of Claim issued on 6th January 2023. It cannot be said that the decision of the Court of Appeal in exhibit NDK has determined the issues raised for determination in the instant suit.

23. That I am advised and verily believe same to be true, that terms of settlement though agreed upon by parties and same adopted by a court of competent jurisdiction, same can be set aside on grounds of unconscionability, or fraud.

I had opportunity to listen to the submissions for and against the application. The submissions were anchored around the affidavits in support and in opposition of which the relevant paragraphs have been quoted above.

Counsel for the Applicant submitted, that the application should be granted and the Respondent's Writ of Summons dismissed for abuse of court process. Counsel for the Respondent contended otherwise, and prayed the court to dismiss the application and hear the case on its merits.

It is now my duty to make a determination one way or the other.

The Applicant's application is under Order 11 rule 18 of C.I. 47. Order 11 rule 18(1) provides:

"The Court may at any stage of the proceedings order any pleading or anything in any pleading to be struck out on the grounds that

a. It discloses no reasonable cause of action or defence; or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass, or delay the fair trial of the action; or

d. It is otherwise an abuse of the process of the Court:

and may order the action to be stayed or dismissed or judgment to be entered accordingly".

Order 11 rule 18 (2) also provides that;

"No evidence whatsoever shall be admissible on an application under subrule (1) (a)"

It is therefore clear, that Order 11 rule 18 (1) provides the remedy or the relief whereas, Order 11 rule 18 (2) provides the procedure for attaining the remedy under Order 11 rule 18 (1).

Order 11 rule 18 (1) of C.I. 47 gives disjunctive reliefs because of the use of the preposition **or** after Order 11 rule 18 (1) (a), (b), (c) and (d). Therefore, an Aplicant can only ask them alternatively in an application.

It is settled law, that an application under Order 11 rule 18 must be brought as soon as the defect is noticed and not at the stage the case has been set down for trial.

DANKWA & 3 OTHERS v ANGLOGOLD ASHANTI LIMITED [2019-2020] 1 SCLRG 641

GBENARTEY AND GLIE v NETAS PROPERTIES AND INVESTMENT AND OTHERS [2015-2016] 1 SCGLR 605

In this case, the Applicant filed its motion without filing a defence. Therefore, the application was filed timeously.

It must be emphasised, that the powers of the Court under Order 11 rule 18 are permissive and not mandatory. They confer jurisdiciton which a Court will exercise by taking into account all the circumstances of the case. This is to prevent parties being driven from the seat of judgment. It must therefore be exercised with greatest care and circumspection.

See: AHMED MUDDY ADAM v FRANK NUAMAH [2020] 163 GMJ 211 SC

In the substantive case, the Respondent is claiming in his reliefs "a" and "c" that previous terms of settlement which was entered into between the parties on or around 2011 as consent judgment was unconscionable. Again, the Respondent is praying in his reliefs "b" and "d" that an audit report made by Messrs Intellisys Chartered Accountants should be set aside on the grounds of being fraudulent.

However, the law is settled that in an action to set aside judgment on grounds of fraud or unconscionability, that should be the only issue which should be pleaded and considered by the court. It is not the rehearing of the whole case.

Therefore, the reliefs should only border on the fraud or the unconscionability and nothing else. In that case, if the party alleging that a judgment has been obtained fraudulently or unconscionably is able to prove same, the said judgment will be set aside,

and the case will go back to the original pleadings which gave birth to the said fraudulent judgment or the unconscionable judgment for same to proceed.

See: NANA ASUMADU II (SUBSTITUTED BY NANA DARKU AMPEM) & ANOTHER v AGYA AMEYAW [2019-2020] 1 SCLRG 681

ADUMUAH OKWEI v ASHIETEYE LARYEA [2011] 1 SCGLR 317

RANDOLPH v CAPTAN AND ANOTHER [1959] GLR 347

BRUTUW v AFERIBA [1984-1986] 1 GLR 25

Therefore, the contention by the Respondent counsel, that the terms of settlement were unconscionable should not have given rise to the other reliefs being asked for by the Respondent in his Writ of Summons.

Furthermore, the Respondent asked in his reliefs and "b" and "d" that an audit report should be set aside on the ground that it was fraudulent.

Some authorities have compared fraud to cancer which if not treated will affect the entire body. Fraud has been proven to have among others the following ingredients.

a. It vitiates every transaction including judgments and orders. Thus, once it is proved, it will wipe and sweep everything away.
b. It connotes criminal conduct and the sanctions may include imprisonment.
c. The burden to prove fraud is on the person alleging it.
d. It must be proved beyond reasonable doubt.

See: **MASS PROJECTS LTD v STANDARD CHARTERED BANK & ANOR [2014] 69 GMJ 39 SC**

TWUM v SGS LTD. [2011] 30 GMJ 92 CA

OKOFO ESTATES LTD v MODERN SIGNS LTD AND ANOTHER [1996-97] SCGLR 224

AMUZU v OKLIKAH [1998-99] SCGLR 141

SASU v AMUAH-SAKYI & ANOR [2003-2004] 2 SCGLR 742

REPUBLIC v CIRCUIT TRIBUNAL KOFORIDUA, EX PARTE NANA ANKU DODOZAH DIDIEYE III [2006] 4 MLRG 165 CA

POKU v POKU [2006] 9 MLRG 117 CA

Fraud is a serious matter that even in some instances, where it is not specifically pleaded but is led in evidence without objection, the rules of evidence are relaxed for the court to entertain same.

See: **PHILIP MORRO DJIMA v GLORIA LEKIAH DJIMA [2013] 63 GMJ 181 CA**

Again, it was held in the case of **APEAH AND ANOTHER v ASAMOAH [2003-2004] 1 SCGLR 226 at 229** as follows:

"**Notwithstanding the rules on pleadings, the law was that where there was clear evidence of fraud on the face of the record, the Court would not ignore it."**

An assertion of fraud however should not be based on flimsy or baseless allegations and accusations. In this respect, the dissenting opinion of Francois JSC in **DZOTEPE v HARHOMENE III [1987-1988] 2 GLR 681 SC,** which was affirmed by the Supreme Court in the case of **OSEI ANSONG & PASSION INTERNATIONAL SCHOOL v GHANA AIRPORT CO. LTD [2013-2014] SCGLR 25** is apt, which I quote as follows:

"There is no denying the fact that a judgment obtained by fraud is in the eyes of the Court no judgment, as it is not founded on the intrinsic merits of the case, but is borne out of an attempt to overreach the Courts by deceit and falsehood. See LAZARUS ESTATES LTD v BEASLEY (1956) 1 ALL ER 341. But the fact that the Courts abhor

fraud should not make them insensitive to the just claims of victorious parties. The judicial edifice was not constructed to lend a ready ear to every cry of fraud from suitors who had lost on the merits. If charges of fraud are not examined closely, the stratagem would subvert the very administration of justice and undermine the hallowed principle that a victorious party is entitled to the fruits of his judgment and should not be deprived of his victory without just cause."

In this case, the audit report was not prepared by the Applicant but an entity called Messrs Intellisys Chartered Accountants. It is this audit report which the Respondent is praying in his writ to be set aside on grounds of fraud. The said entity is not a party in this case. Therefore, it would be against natural justice, equity and good conscience if the court is called upon to make any determination on the audit report without the author of the report being heard.

In this application, the Applicant contends that the issues between the parties have already been been determined by the Court of Appeal. Therefore, it would be an abuse of court process for the merits of the case to be determined. The Respondent contends otherwise

The law is settled that suitors should not have an open ended opportunity to be litigating and relitigating over and over again in respect of the same issue which has already been decided by a court of competent jurisdiction.

See: JUSTICE GILBERT QUAYE (SUBSTITUTED BY DANIEL QUAYE) v KOIWAH INVESTMENT COMPANY LIMITED & 3 ORS [2019-2020] 1 SCLRG 658

The law is also settled under the doctrine of estoppel per rem judicata, that if a court of competent jurisdiction has tried and disposed of a case, the parties themselves and their privies, assigns, workmen etc. cannot thereafter bring an action on the same claim or issue.

See: AGBESHIE AND ANOTHER v AMORKOR AND ANOTHER [2009] SCGLR 594

IN RE MENSAH (DECEASED); MENSAH & SEY v INTERCONTINENTAL BANK GHANA LIMITED [2010] SCGLR 118

The parameters of estoppel per rem judicata was also discussed in the case of **IN RE SEKYEDUMASE STOOL; NYAME v KESE ALIAS KONTO [1998-1999] SCGLR 476.** It was held at page 479 as follows;

"The plea of res judicata encompasses three types of estoppel; cause of action estoppel, issue estoppel in the strict sense and issue estoppel in the wider sense. In summary, cause of action estoppel should properly be confined to cases where the cause of action and the parties (or their privies) are the same in both the present case and the previous proceedings. In contrast, issue estoppel arises where such a defence is not available because the cause of action are not the same in both proceedings. Instead, it operates where issues, whether factual or legal issues have already been determined in previous proceedings between the parties (issue estoppel in the strict sense), or where issues should have been litigated in previous proceedings but owing to negligence, inadvertence or even accident, they were not brought before the Court (issue estoppel in the wider sense), otherwise known as the principle in HENDERSON v HENDERSON (1843) 3 HARE 100".

See also, IN RE YENDI SKIN AFFAIRS; ANDANI v ABDULAI [1981] GLR 866 CA

The rationale underlying this estoppel is to encourage parties to put forward their whole case, and also to be diligent in prosecuting their case so as to avoid a succession of related actions. The plea of res judicata is based on the fact, that it is in the interest of public policy that there should be an end to litigation.

See: CONCA ENGINEERING (GH) LIMITED v MOSES [1984-1986] 2 GLR 319 CA

In the case of **ASSAFUAH v ARHIN DAVIES [2013-2014] 2 SCGLR 1459 at 1460 holding 3**, it was held that **"it is a rule of public policy that based on the desirability in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppresed by successive suits".**

The Black's Law Dictionary, Eighth (8th) Edition, has defined Res Judicata as **"a doctrine baring the same parties from litigating a second suit on the same transaction or any other claim arising from the same transaction or series of transactions or that could have been raised but was not raised in the first suit".** Therefore, for the doctrine to be invoked, the following must be present:

a. There must be an earlier decision on the subject matter or the issue.

b. A final judgment was given on its merits.

c. The involvement of the same parties or their privies with the original parties.

This means, for estoppel per rem judicata to be valid, there must be a valid and subsisting judgment. It must be a final judgment delivered by a court of competent jurisdiction. It must be between the same parties or their assigns, successors, privies etc.

See: REPUBLIC v HIGH COURT, ACCRA EX PARTE BRENYA [2001-2002] SCGLR 775

REPUBLIC v ADAMAH-THOMPSON & OTHERS EX PARTE AHINAKWA II (SUBTITUTED BY) AYIKAI (NO. 2) [2013-2014] SCGLR 1395

Therefore, in the interest of justice, ligation should come to an end. Litigation will never end if litigants would conduct their cases anyhow and when they lose on a specific ground, then they go back and obtain the grounds omitted in their earlier court hearing

for which they lost the case and then refile the same case in an attempt to revitalize or revive the case which was lost.

See: **BOAKYE v APPOLLO CINEMAS & ESTATES GHANA LTD. [2007-2008] 1 SCGLR 458**

Consequently, the court should prevent people who want to make the litigation arena, that is the court, an occupation from embarking upon such process. Such practice is also against public policy and waste of time and resources.

See: ABRAHAM ALIAS SALLOUM v SALLOUM [1989-90] 2 GLR 19 CA

NOAS HOLDING INC. v GHANA COMMERCIAL BANK [2011] 1 SCGLR 492

BROWN v NTIRI [2007] 11 MLRG 194 SC

TIAH v JOHNSON & ORS [1964] GLR 661

SASU v AMUAH-SEKYI & ANOR [2003-2004] 2 SCGLR 742

There are even certain instances where a party would be estopped by res judicata in respect of a default judgment where identical issues arising in the second action have been directly decided in the first action between the same parties.

The rule therefore applies even in interlocutory matters in certain situations. That is, where the issue or question involved has been conclusively determined in one way or the other between the parties in the first action.

Coming back to the application before me, the Applicant attached as exhibit NDK a judgment of the Court of Appeal with suit number H1/100/2015. It is dated 17th November 2016. The Applicant herein was the Plaintiff/Apellant while the Respondent herein was the Defendant/Respondent in that case.

At page 15 of the Judgment, the Court of Appeal held that the parties herein and their counsel appended their signatures to the terms of settlement the terms were adopted. It is the same terms of settlement which the Respondent is asking in his writ that same should be set aside as being unconscionable. The Court of Appeal held at pages 19-20, that the terms of settlement were not unconscionable. The Court of Appeal also endorsed the auditors report as proper and valid, which said report the Respondent is praying in his Writ of Summons to be set aside on grounds of fraud.

If the Respondent was dissatisfied with the decision of the Court of Appeal dated 17th november 2016, he ought to have appealed against the decision within time and upon fulfilment of all the conditions regarding such appeal. I do not think it should be open to the Respondent to issue a fresh writ of summons as he has done in this case .

Also, the parties herein and their counsel signed the terms of settlement which the Respondent is praying in his reliefs "a" and "c" for same to be set aside as being unconscionable.

The law is settled, that it sounds ill in the mouth of a party who came to court with full professional assistance or lawyer and invited it to pronounce on judgment on terms he had fully agreed with his opponent, to return later and complain, that in acceding to his or their joint wishes, the court had committed an irregularity or portions of the consent judgment are absurd. Unless the court is persuaded, that it had done something or the parties have done something which is clearly illegal or offensive to any principle of justice, it ought resolutely to turn a deaf ear to such a plea.

See: **OWUSU v KUMAH AND ANOTHER [1984-1986] 2 GLR 29 CA**

It is therefore my view, that since the Respondent was assisted by counsel in writing the terms of settlement and its execution, it is too late in the day for the Respondent to

complain about the contents of the terms of settlement in this case as being unconscionable, which in any case was rejected by the Court of Appeal in the 17th November 2016 judgment.

Indeed, I do sympathise with the Respondent, that his present Writ of Summons will not find favour with the court. However, judicial sympathy however plausible cannot be elevated to become a principle of law. And justice to be dispensed with, is justice within the law and not justice out of sympathy.

See: NYARKO v FRIMPONG [1998-1999] SCGLR 734

KANGBERE v MOHAMMED [2011] 30 GMJ 68 CA

This case fits perfectly into the principles espoused in **HENDERSON v HENDERSON (supra)** which have been discussed above.

I therefore cannot craft new rules to aid the Respondent in this case, neither will justice be served in any attempt to do so.

See: DOKU v PRESBYTERIAN CHURCH OF GHANA [2005-2006] SCGLR 700

From the above rendition, I am of the view that the court will not be in limbo like Ato the protagonist in Ama Ata Aidoo book "The Dilemma of a Ghost" who did not know whether to follow his wife or his family. It is my decision, that the Respondent's present Writ of Summons with Suit No. CM/BDC/0211/2023 filed on 6th January 2023 against the Applicant is clearly an abuse of the court process and should be set aside.

I will therefore proceed to set same aside. The effect is that the Applicant's application succeeds in its entirety. I will award cost of **GHS 5,000.00** in favour of the Applicant against the Respondent. I order accordingly.

SGD.

FRANCIS OBIRI

(JUSTICE OF THE HIGH COURT)

COUNSEL

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ANDREW APPAU OBENG FOR THE DEFENDANT/APPLICANT

AUTHORITIES

1. **DANKWA & 3 OTHERS v ANGLOGOLD ASHANTI LIMITED [2019-2020] 1 SCLRG 641**
2. **GBENARTEY AND GLIE v NETAS PROPERTIES AND INVESTMENT AND OTHERS [2015-2016] 1 SCGLR 605**
3. **AHMED MUDDY ADAM v FRANK NUAMAH [2020] 163 GMJ 211 SC**
4. **NANA ASUMADU II (SUBSTITUTED BY NANA DARKU AMPEM) & ANOTHER v AGYA AMEYAW [2019-2020] 1 SCLRG 681**
5. **ADUMUAH OKWEI v ASHIETEYE LARYEA [2011] 1 SCGLR 317**
6. **RANDOLPH v CAPTAN AND ANOTHER [1959] GLR 347**
7. **BRUTUW v AFERIBA [1984-1986] 1 GLR 25**
8. **MASS PROJECTS LTD. v STANDARD CHARTERED BANK & ANOR [2014] 69 GMJ 39 SC**
9. **TWUM v SGS LTD. [2011] 30 GMJ 92 CA**

10. **OKOFO ESTATES LTD v MODERN SIGNS LTD AND ANOTHER [1996-97] SCGLR 224**
11. **AMUZU v OKLIKAH [1998-99] SCGLR 141**
12. **SASU v AMUAH-SAKYI & ANOR [2003-2004] 2 SCGLR 742**
13. **REPUBLIC v CIRCUIT TRIBUNAL KOFORIDUA, EX PARTE NANA ANKU DODOZAH DIDIEYE III [2006] 4 MLRG 165 CA**
14. **POKU v POKU [2006] 9 MLRG 117 CA**
15. **PHILIP MORRO DJIMA v GLORIA LEKIAH DJIMA [2013] 63 GMJ 181 CA**
16. **APEAH AND ANOTHER v ASAMOAH [2003-2004] 1 SCGLR 226**
17. **DZOTEPE v HARHOMENE III [1987-1988] 2 GLR 681 SC**
18. **OSEI ANSONG & PASSION INTERNATIONAL SCHOOL v GHANA AIRPORT CO. LTD [2013-2014] SCGLR 25**
19. **LAZARUS ESTATES LTD v BEASLEY (1956) 1 ALL ER 341**
20. **JUSTICE GILBERT QUAYE (SUBSTITUTED BY DANIEL QUAYE) v KOIWAH INVESTMENT COMPANY LIMITED & 3 ORS [2019-2020] 1 SCLRG 658**
21. **AGBESHIE AND ANOTHER v AMORKOR AND ANOTHER [2009] SCGLR 594**
22. **IN RE MENSAH (DECEASED);MENSAH & SEY v INTERCONTINENTAL BANK GHANA LIMITED [2010] SCGLR 118**
23. **IN RE SEKYEDUMASE STOOL; NYAME v KESE ALIAS KONTO [1998-1999] SCGLR 476**
24. **HENDERSON v HENDERSON (1843) 3 HARE 100**
25. **IN RE YENDI SKIN AFFAIRS; ANDANI v ABDULAI [1981] GLR 866 CA**
26. **CONCA ENGINEERING (GH) LIMITED v MOSES [1984-1986] 2 GLR 319 CA**

27. **ASSAFUAH v ARHIN DAVIES [2013-2014] 2 SCGLR 1459**

28. **REPUBLIC v HIGH COURT, ACCRA EX PARTE BRENYA [2001-2002] SCGLR 775**

29. **REPUBLIC v ADAMAH-THOMPSON & OTHERS EX PARTE AHINAKWA II (SUBTITUTED BY) AYIKAI (NO. 2) [2013-2014] SCGLR 1395**

30. **BOAKYE v APPOLLO CINEMAS & ESTATES GHANA LTD. [2007-2008] 1 SCGLR 458**

31. **ABRAHAM ALIAS SALLOUM v SALLOUM [1989-90] 2 GLR 19 CA**

32. **NOAS HOLDING INC. v GHANA COMMERCIAL BANK [2011] 1 SCGLR 492**

33. **BROWN v NTIRI [2007] 11 MLRG 194 SC**

34. **TIAH v JOHNSON & ORS [1964] GLR 661**

35. **SASU v AMUAH-SEKYI & ANOR [2003-2004] 2 SCGLR 742**

36. **OWUSU v KUMAH AND ANOTHER [1984-1986] 2 GLR 29 CA**

37. **NYARKO v FRIMPONG [1998-1999] SCGLR 734**

38. **KANGBERE v MOHAMMED [2011] 30 GMJ 68 CA**

39. **DOKU v PRESBYTERIAN CHURCH OF GHANA [2005-2006] SCGLR 700**