THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA A.D 2011

CORAM: **DR. S.K.DATE-BAH, JSC (PRESIDING)**
JONES DOTSE, JSC
ANIN YEBOAH, JSC
B.T.ARYEETEY, JSC
AKOTO-BAMFO (MRS.), JSC

CIVIL APPEAL
SUIT №: J4/49/2010
DATE: 1ST JUNE, 2011

LYDIA ANANE ASAMOAH **PLAINTIFF/RESPONDENTAPPELLANT**
H/№ PLOT 32 BLK H
KUMASI

VRS.

JENNIS MARFO - DEFENDANT/APPELLANT/RESPONDENT
ALIAS APPIAH KUBI

J U D G M E N T.

ANIN YEBOAH JSC

The appellant herein was the plaintiff in a suit at the High Court, Kumasi. Her claim against the respondent herein as defendant at the High Court was for the following reliefs:

> "1. An order for the payment of the sum of US$130,000 (One Hundred and Thirty Thousand United States Dollars) being the price agreed upon by the plaintiff and Defendant herein pursuant to a contract entered into between the parties herein for the defendant to supply to the plaintiff herein second-hand clothing between 26th December 2004 and April 2005 which clothing the defendant failed to deliver to the plaintiff herein and which amount the defendant has failed to refund to the plaintiff herein despite repeated demand.

2. Interest on the said sum of US$130,000.00 (One Hundred and Thirty Thousand United States Dollars) from May 2005 till date of final payment at the prevailing commercial bank rate"

The respondent entered appearance but failed to file any statement of defence within the statutory period provided under the rules of court. The appellant filed a motion for judgment which the trial court granted on the 14/12/2005. The nature of the judgment entered will be discussed later in this judgment. Upon the filing of an Entry of Judgment by the appellant the respondent filed a motion for stay of execution and further order to pay the judgment debt by installments. There were several applications which do not appear to be material in the determination of this appeal.

The respondent herein subsequently filed a motion to set aside the judgment on stated grounds that as the motion for judgment was fixed for the 13/12/2005 and adjourned to the 14/12/2005 without notice to the respondent the judgment so obtained was a nullity.

The learned trial judge after hearing arguments from both sides on the 9/06/2006 dismissed the application with cost. He concluded his ruling as follows:

"It is therefore my finding that the non-service of a hearing notice on the applicant to appear the next day was not so vital as to render the application that was granted a nullity. Bluntly put, there was no substantial miscarriage of justice against the applicant by that non-service. I award cost of ¢3,000,000.00 to the respondent".

The respondent herein lodged an appeal against the ruling at the Court of Appeal on the 13/07/2008 to set aside the judgment of the trial court together with the ruling of 9/06/06 and ordered a retrial before a court differently constituted.

At the Court of Appeal, the point was raised that as the motion for the judgment was fixed for 13/12/2005 but nothing on record happened on that day, without notice to the parties that the motion was to be moved on 14/12/2005, the judgment so obtained was irregular. The Court of Appeal per Gyaesayor, J.A said as follows:

> "With the doubts created in respect of service and date of judgment, the judgment ought to have been set aside. Further to this, it is clear that the matter was fixed for 13/12/2005 but changed without notice to the appellant to 14/12/2005 when judgment was pronounced against her"

In the conclusion to the judgment the learned justice of the Court of Appeal summed up as follows:

> "Since the service on the appellant is shrouded in mystery, the requirement in the above cited authority cannot be said to have been fulfilled and therefore runs contrary to the view of the court and thus leading to a miscarriage of justice"

The appellant herein who was the plaintiff at the trial High Court has appealed against the judgment of the Court of Appeal for the judgment of the High Court to be restored.

The grounds of appeal as stated in the notice of appeal are as follows:

1. The judgment is against the weight of evidence.

2. In the circumstances that the judgment of the High Court, Kumasi dated 14/12/2005 was obtained by summary procedure it was the defendant/appellant/respondent herein who ought to have applied to have the same set aside within 14 days of being served with the Entry of Judgment filed herein.

3. The defendant /appellant/respondent herein having applied for installment payment of the judgment debt entered by the high court on 14/12/2005 Kumasi clearly did not suffer miscarriage of justice.

The first ground of appeal to us is completely misplaced given the facts of this appeal. The judgment obtained at the High Court Kumasi did not go beyond the close of pleadings as no statement of defence was even filed. It was a default judgment in every sense of the word, but learned counsel for the appellant in the

affidavit in support of the application filed at the High Court stated in paragraphs 4 and 5 thereof as follows:

4. That the defendant by his solicitors Messrs Minka-Premo & Co entered appearance.

5. That the defendant has admitted owing me in the sum of US$92,600 (Ninety – Two Thousand Six Hundred United States Dollars)

It appears that at the time the motion for judgment was filed, indeed the respondent who was the defendant had not filed any defence on record or made any admission on oath or otherwise in any manner or form. It thus sounds strange for counsel for the appellant to appeal against the judgment on the grounds that the judgment was against the weight of evidence. In our opinion this ground is clearly misconceived and same is dismissed as unmeritorious.

On the second ground there appears to be a confusion of thought on the nature of the judgment which was obtained. In the Entry of Judgment filed pursuant to the judgment, counsel framed it as if the judgment was a summary judgment. Summary judgment and default judgment are conceptually different.

A summary judgment is a judgment on the merits even though it is obtained by a formal motion without a plenary trial. It is a judgment granted on the simple grounds that the respondent to the application has no defence to the action or part thereof or any reasonable defence to be allowed to contest the case on the merits to waste time and expense.

A default judgment, on the contrary, though obtained by motion is not a judgment on the merits but a judgment based solely on the inability of a respondent to the application to file appearance or defence within the statutory periods set down by the rules. Under the High Court Civil Procedure Rules, CI 47, the differences between the two are well spelt out and covered by different orders in the CI 47. Whereas summary judgment is provided for under Order 14 of CI 47, default judgment, after entry of appearance is provided for under Order 13 of the same CI 47.

The record of proceedings for the day the judgment was obtained is reproduced below:

> "This is an application pleading for an order entering judgment against the defendant who has failed to file a statement of defence. Counsel moves the application filed on 30/11/05. Counsel submits that the defendant has failed to file a statement of defence. Counsel thus prays that the application filed on 30/11/05 be granted."
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> **"BY COURT**: The instant application was served on lawyer Oppong of Minkah-Premoh & Co on 1/12/05. No affidavit in opposition has been filed. No statement of defence has to-date been filed. I hereby enter final judgment for the plaintiff for the sum of ninety two thousand six hundred thousand dollars (US$92,600.00). I award interest on the above –mentioned sum from May, 2—5 till today. I ward cost of ¢90,000,000 to the plaintiff. (Emphasis ours)
>
> **Sgd. KWAME ANSU-GYEABOUR**
> **JUSTICE OF THE HIGH COURT"**

The judgment entered by the learned trial judge and the application by the counsel for the applicant clearly established that it was not a summary judgment but a judgment in default of defence. As the claim was a liquidated one the learned trial judge was enjoined by Order 13 rule 1 of CI 47 to enter final judgment in default of defence; which is not a summary judgment, but a judgment in default of pleading.

After careful perusal of the Entry of Judgment and the motion, it is clear that the motion did not specify whether it was for a summary judgment or motion on notice for judgment in default of defence. For a fuller record the relief sought on the notion is reproduced as follows:

"MOTION ON NOTICE"

"PLEASE TAKE NOTICE that this Honourable Court will be moved by Merssrs TOTOE LEGAL SERVICE counsel for and on behalf of the plaintiff/applicants herein praying this Honourable court for an order entering judgment in favour of the plaintiff/applicant herein against the defendant/respondent herein for the following reliefs"

Nothing in the body of the motion shows that the application was for summary judgment. 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 & OR (CONSOLIDATED) [1972] 2 GLR 380 CA. In any case, Order 81 rule 1 (1) CI 47 could be applied to cure the defect. See REPUBLIC V. HIGH COURT, ACCRA; EX PARTE ALLGATE CO. LTD [2007 – 08] 2 SCGLR 1041.

The last ground of appeal which was argued was to the effect that when the motion for judgment which was fixed for the 13/12/2005 was adjourned to the 14/12/2005, hearing notice ought to have been served on the respondent herein or his counsel. From the record of proceedings, it does appear that on the 13/12/2005 there was no proceeding before the court. In the judgment of the Court of Appeal, His Lordship Gyeasayor JA who delivered the judgment of the court was of the view that the service on the appellant is shrouded in mystery. As the High Court did not sit on the 13/12/2005, and there is no record to that effect, the motion for judgment was not adjourned to the 14/12/2005 by the judge. A court clerk or Registrar in law does not exercise judicial power to adjourn a motion to another date. If on a particular day a Registrar or a court clerk adjourns a motion, it behoves a judge sitting on the motion to ascertain from the record whether parties have notice of the motion before he should proceed.

It is, however, the practice in civil proceedings that if a court does not sit on a particular day due to the fact that the day was declared a public holiday or for some reason there was no sitting at all the cases which ought to have been called as a result of the court's inability to sit are called the next sitting day. This practice has gained acceptance in our civil law and should be a guiding principle.

In our view, the fact that the case was called the next day did not deny the trial court any jurisdiction to hear the application.

Another serious procedural flaw was the default judgment entered by the court. The appellant who was the plaintiff had endorsed her writ for US$130,000.00 together with interest. This claim was repeated in the motion for judgment filed on 30/11/2005 but a different amount was deposed to the affidavit in support which was US$92,600.00 and the Entry of Judgment filed pursuant to the judgment stated the amount as US$92,600.00 with cost and interest. On record, no admission in any manner or form had been made by the respondent before the judgment was entered. The motion did not ask for any judgment or admissions in any manner or form. The only admission made was in the affidavit in support of the application to pay the judgment debt by installments and stay of execution filed on 4/01/2006 which was done some weeks later after the judgment on the 14/12/2005. The judgment for US$92,600.00 was not sanctioned by any known step in procedure as it was contrary to and inconsistent with the one endorsed on the writ when no amendment or any admission had been made prior to the judgment. To justify his stand, the learned judge said in the ruling refusing the motion to set aside the judgment as follows:

> "But then, in the instant case, the applicant acknowledged that he owed the respondent US$92,000 on 4th January, 2006. I reproduce paragraph 4 of the said affidavit: "4. That my instructions were that I did not owe the plaintiff the amount endorsed on the writ of summons but owned her about $92,000 since I had already supplied her with some of the goods"

The learned trial judgment concluded his delivery on this point as follows:

> "More so, after judgment, the applicant deposed to an affidavit that he owed the respondent $92.000. Please, on conduct amounting to estoppels see section 26 of the Evidence Decree (NRCD 323)"

The principle of law governing judgments in default of appearance or defence in civil proceedings is that, the judgment entered must be for the actual amount claimed. In the case of BONSU V. DOE [1984-86] GLR 778 CA, Jiagge JA stated the position of the law when she said at 780 as follows:

> "The legal position is that a judge may set aside a judgment entered in default either of appearance to the writ, or of delivery of a pleading or of appearance at the trial when the judgment was entered for a greater amount than was due or where there had been breach of good faith. The judgment will be set aside ex. debito justitiae, quite apart from any consideration whether there was a good defence on the merits: See Halsbury's Laws of England (3rd ed). Vol. 22 paragraph 1667.
>
> Judgment in default of appearance should be entered only for the actual amount due at the time of signing the judgment." [Emphasis ours]

We think that just as a judge has no power to enter a judgment for an amount more than what was claimed, he equally has no such power to enter judgment for a lower figure not asked for in the proceedings when on record there was no admission in any manner or from for the lesser amount.

In our opinion, the High Court as a trial court was in error in not setting aside the judgment so obtained when his jurisdiction was invoked to set aside the judgment on the above grounds. The lesser amount of US$92,600.00 was therefore wrongly entered as no enquiry of any sort was made by the court at that stage.

In conclusion, we think the Court of Appeal was right in setting aside the judgment and we affirm the decision.

[SGD] ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

[SGD] DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT

[SGD] J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

[SGD] B. T. ARYEETEY

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