IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- GHANA A.D. 2016

CORAM: DOTSE, JSC (PRESIDING)
ANIN YEBOAH, JSC
GBADEGBE, JSC
AKAMBA, JSC
PWAMANG, JSC

CIVIL APPEAL
No. J4/32/2013

14TH JULY 2016

PIETER RODOLPH J. ROOMJIN --- PLAINTIFF/RESPONDENT /APPELLANT

VRS.

GEORGE KWABENA BOADI --- DEFENDANT/APPELLANT /RESPONDENT

JUDGMENT

GBADEGBE JSC:

This appeal arises from the decision of the Court of Appeal dated November 19, 2009 by which the summary judgment obtained in the trial High Court was set aside. The circumstances in which our jurisdiction has been invoked may be briefly stated as follows. The Plaintiff/Respondent/Appellant (to whom I shall for convenience

hereinafter describe as the Plaintiff) took out the writ of summons herein against the Defendant/Appellant/Respondent (hereinafter conveniently referred to as the Defendant) seeking the refund of a specified sum of money denominated in the United States dollars. As the defendant was ordinarily resident outside the jurisdiction, the plaintiff applied and obtained leave to issue and have the writ served outside the jurisdiction. The defendant subsequently entered appearance to the writ and following his submission to the jurisdiction, the plaintiff applied for summary judgment against him on the claim. The defendant's solicitors filed an affidavit in answer to the application under order 14 of the rules of the High Court contained in High Court (Civil Procedure) Rules, CI 47. The hearing appears from the record of appeal to have suffered some adjournments from the return date of April 15, 2005 to May 06, 2005 when it was determined.

Following the entry of the summary judgment, the defendant applied to have the judgment set aside under Order 14 rule 9 of the High Court (Civil Procedure) Rules, LN 140A on the ground that he was not present at the hearing. The gravamen of his complaint at the hearing of the application to set aside the judgment was that he was not served with notice of the adjournment of the hearing of the application to May 06, 2005 when the court proceeded to hear the application and yielded to the prayer of the plaintiff. The said application was dismissed by the trial court and an appeal lodged there from to the Court of Appeal. In the Court of Appeal, the

defendant's appeal was allowed and an order of retrial ordered. The plaintiff has appealed to us and by the processes initiating these proceedings seek a reversal of the judgment of the Court of Appeal.

Before us, the plaintiff has contended among other grounds of objection contained in his notice of appeal that the appeal from the High Court to the Court of Appeal was improperly constituted as it was filed out of time. Although the notice of appeal did not specifically refer to the applicable rule, in the written briefs submitted by the parties, the arguments were submitted in relation to Rule 9 of the Court of Appeal Rules, CI 19.There is no dispute that although the decision on appeal from the trial court to the Court of Appeal was delivered on May 6, 2005, the appeal there from was filed on May 2, 2006.

The defendant's answer to the issue of the appeal to the Court of Appeal having been filed out of time is that by virtue of the decision in the case of **Morkor v Kuma** [1998-99] SCGLR 620, the right to appeal from the summary judgment first arose in his favour only after the court had refused to set aside the summary judgment on February 3, 2006. The substance of the said answer is that by the decision of the Supreme Court in the Morkor case (supra) the appeal was filed within time. It appears to us that this procedural point touches the question of our jurisdiction and so it is important that we consider it first before proceeding to a merit consideration of the other grounds of objection contained in the notice of appeal.

See: **Tindana (No 2) v Chief of Defence Staff and Another** [2011] 2 SCGLR, 732.

The first question which arises from the said jurisdictional point is whether the decision in the Morkor case (supra) applies to the circumstances of this appeal. A careful consideration of the Morkor case (supra) reveals as appears from holding 2 of the judgment is that the judgment must have been granted for a sum greater than what was claimed in the action. The judgment, it seems to me must not only be entered in the absence of a party within the scope of Order 9 rule 14 of the High Court (Civil Procedure) Rules, CI 47 but *"for an amount greater than what was in fact due, the summary judgment cannot be treated as final once the applicant had filed an application to set aside same*". In the instant case, the judgment granted by the trial court is not greater than what was claimed in the action and accordingly the decision is inapplicable to the issues before us.

Then there is the question regarding Order 14 rule 9 of the High Court Civil Procedure) Rules, CI 47 by which a summary judgment entered in the absence of a party may be set aside. The critical issue to be decided turning on this provision is what constitutes absence within the meaning of Order 14 rule 9. I commence the consideration of this question from the obligation placed on a respondent to an application for summary judgment as provided for in Order 14 rule 3 in the following words:

> "A defendant may show cause against an application by affidavit or otherwise".

In my opinion, applications for summary judgment are intended to cater for situations in which a defendant has no defence to the action as emphasized by the manner in which such a party may show cause as provided for in Order 14 rule 3. Accordingly, the defendant or any respondent to an application who is served and files an answer to the application by affidavit or otherwise has placed before the trial judge the necessary materials to enable the court determine if the application may be granted. Once such a process is filed as indeed, was done by counsel for the respondent in the matter herein, the court is properly seised of the application in which case the judge who hears the application has to decide whether on the processes before him, the defendant has satisfied him that there is any question or dispute which ought to be tried or for some other reason there ought to be a trial. It repays to refer to Order 14 rule 5 which regulates the exercise of power by the trial judge at the hearing of the application and in particular by sub-rule (a) to do the following:

> "Give such judgment for the plaintiff against the defendant on the relevant claim or part of the claim as may be just having regard to the nature of the remedy or relief sought, unless the defendant satisfies the Court

with respect to that claim or part of it that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial."

A defendant who having been served with notice of an application to sign summary judgment files an affidavit in answer to the application as the facts in this appeal portray but does not attend the hearing of the application cannot say that the judgment rendered by the court is on account of his absence. The correct position discernible from the settled practice in applications for summary judgment is that the decision in such a case was reached by the court after a careful consideration of the application and the answer thereto and the reasonable inference is that the defendant did not satisfy the court that that he has a defence to the action or for some other reason the matter ought to proceed to trial. The defendant's obligation to show cause must appear from the 'affidavit or otherwise'. It is apparent from the rules that the means by which the defendant's burden to show cause is by a process filed in answer to the application and that the defendant's absence within the context of Order 14 rule 9 must be interpreted to mean failure to provide an 'affidavit' or other document in answer to the application. Where a defendant, for example intends to raise a point regarding the competency of the application, he is required as a matter of practice discernible from the reading of Order 14 as a whole document to indicate same in the affidavit or other process by which he seeks to show cause against the application for

summary judgment. In my view, the decision in the case of **Dsane v Hagan** [1961] 3 All ER 380, which is of persuasive effect provides us with an analogous situation that may be applied to this appeal. In the said case, although the decision turned on the meaning of "judgment by default", it presents us with similar considerations. At page 383, the Buckley J made the following speech:

> " In my judgment, the words 'judgment by default" in this rule indicate a judgment obtained by a plaintiff in reliance on some default on the Part of the defendant in respect of something which he is directed to do by the rules. A judgment obtained in default of appearance under R.S.C., Ord.13 would, I think clearly be such a judgment. To an application under Ord.14A, however, it is irrelevant whether the defendant has entered appearance or not. If the action is for the type of relief indicated in the rule and if the plaintiff swears the necessary affidavit verifying the cause of action and stating that he believes that there is no defence to the action, the court is concerned to see whether the defendant avails himself of the opportunity to show cause why he should be permitted to defend the action."

Unfortunately for the respondent, the record of appeal does not demonstrate in the slightest degree that he has any defence to the claim or that there was some other reason which in the interest of

justice required the action to proceed to trial. In applications under Order 14 rule 9, it is not enough for the applicant to show that he was not present at the hearing but go further to show that he has a defence to the action or as is peculiar to Order 14 applications, there is some reason for which the action ought to proceed to trial. In my opinion the practice of the court in requiring parties who seek to set aside default judgments to show a defence on the merits equally applies to applications mounted under Order 14 rule 9 of CI 47.

Before ending this short delivery, it is observed that a defendant who enters an appearance to an action through a lawyer represents to the other parties to the action and indeed, the court that the person so appointed has his full authority to act in the matter. That authority includes filing processes in response to all steps required to be taken in the matter. In the circumstances, it is difficult to comprehend how the lawyer for the respondent could have filed an affidavit in response to the application in the manner disclosed from the record of appeal. It is unacceptable for a lawyer acting in a matter to depose to an affidavit that because his client is outside the jurisdiction, he does not have instructions to file an answer to a simple application under Order 14. An appearance entered to an action is good for all purposes unless by leave of the court it is withdrawn or a new lawyer appointed in the stead of the original person. Accordingly, the learned trial judge was within his powers when he exercised his jurisdiction by considering the affidavit filed

by the defendant's lawyer before reaching his decision on the application. In my view, based on the said processes, the learned trial judge came to the right conclusion on the application for summary judgment.

For these reasons, it follows that the rule in **Morkor v Kuma** (supra) on which the respondent has placed great reliance to answer the objection raised to the competency of the appeal before the Court of Appeal is not applicable; the result being that the appeal to the intermediate appellate court was filed nearly a year after it was granted is out of time. See: **Tindana (No 1) v Chief of Defence Staff** [2011], 2 SCGLR 724.

Having been filed out of time, the court lacked and or had no jurisdiction to determine the merits of the said appeal and consequently the processes and all steps based thereon including the judgment on appeal to us are of no effect and are hereby set aside. The result is that the ground of appeal touching and concerning the time limit of three months within which the appeal ought to have been filed to the Court of Appeal succeeds and the judgment of the High Court is restored subject to the amount ordered there under to be paid by the respondent being the cedi equivalent of the claim which was denominated in the United States dollar.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) G. PWAMANG.

JUSTICE OF THE SUPREME COURT

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