CIVIL PROCEDURE MADE SIMPLE

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Relevant matters before Issue of Writ of Summons

If a plaintiff decides to commence his action or suit with a writ of summons there are some preliminary issues that he or his solicitor must advert his mind. These are as follows:

- Jurisdiction and venue
- Accrual of cause of action
- Parties to the suit/action
- Joinder of causes of action.

JURISDICTION AND VENUE

Jurisdiction:

Order 1 r 1 of the High Court (Civil Procedure) Rules, 2004 (CI47) provides that the rules therein are applicable to all civil proceedings instituted at the High Court and the Circuit Court. However, in respect of the Circuit Court, the CI 47 provides the proviso that, some modifications to the rules will be required.

The mere fact that both the High Court and the Civil Court use the same rules does not mean that a plaintiff can commence his litigation in whatever court he prefers.

By section 41 of the Courts Act, 1993 (Act 459), the civil jurisdiction of the Circuit Court is as follows:

a. In all personal actions in contract or tort or for the recovery of any liquidated sum, where the amount claimed is not more that Ghs50,000.

b. In all actions between landlord and tenant for the possession of land claimed under lease and refused to be delivered up.

c. In all causes and matters involving the ownership, possession, occupation of or title to land.

d. To appoint guardians of infants and to make orders for the custody of infants.

e. To grant in any action instituted in the Court, injunctions or orders to stay waste, or alienation or for the detention and preservation of property the subject matter of that action or to sustain breaches of contract or the commission of any tort.

f. In all claims for relief by way of interpleader in respect of land or other property attached in execution of a decree made by the circuit court.

g. In applications for the grant of probate or Letters of Administration in respect of the estate of a deceased person, and in causes and matters relating to succession to property of a deceased person, who at the time of his death had a fixed place of abode within the area of jurisdiction of the circuit court and the value of the estate or property in question not exceeding Ghs1,000.

The High Court by section 15 of Act 459 has original jurisdiction in all civil matters.

Case: Yaro v. Duhu

Facts: The plaintiff suffered from an accident, which involved a vehicle belonging to the defendant. The accident occurred in the Volta Region. The defendant's car plied between Accra and Denu, carrying goods and passengers. The plaintiff instituted an action for damages at the High Court, Ho. Despite service (albeit substituted service), the defendant failed to enter appearance. The plaintiff applied for and obtained an interlocutory judgment against the defendant in default of appearance. With the leave of the court, the defendant entered appearance, objecting to the jurisdiction of the High Court, Ho to hear the case. The defendant requested that the court reports

to the Chief Justice the pendency of the action for an order to transfer the action to Accra to be heard by the High Court in the Greater Accra, where the defendant resides.

Holding:

a. The court dismissed the application.

b. The court held that the effect of the order 5 r 1(6) of L.N 140A (now Order 3 r1(5), CI 47) is that the plaintiff is enjoined to commence an action (e. negligent, run down actions) in the region in which the defendant resided or carried on business. In this respect, the residence of the owner of business is one thing and where the business is carried out is also another.

c. The court further held that the vehicle owner carried on business in the Volta Region and that the plaintiff rightly commenced the action in the Volta Region.

Reasoning:

- Defendant's affidavit only disclosed that the defendant's are personally resident in Accra and nothing more. There was nothing in the affidavit to show that the defendants have their registered offices in Accra, where they managed and control their transport business.

- If the defendants contended that they have their business offices or registered offices in Accra from where they manage and control their business, nothing prevented them from deposing this in their original affidavit. The implication of this is that, since the defendant did not swear any affidavit in answer to the plaintiff's claim that the defendant carried on business in the Volta Region, they (the defendants) cannot be said to have met the plaintiff's claim that they carried on business in the Volta Region and that it was during the course of this business that the accident occurred in the Volta Region.

- Under Order 3 r 2(1)(a), CI 47, if the defendant intended to raise an objection to the jurisdiction, he must do so before or at the time when he was required to plead to the action, or file a defence. The only inference to be deduced from this rule was to ensure that defendant raised his objection at the earliest available opportunity to avoid any hardship to the plaintiff. The court opined that since the defendant, in their earliest available opportunity, being the time they applied to set aside the judgment failed to raise any objection to the jurisdiction, they must be deemed to have waived their objection to the jurisdiction or venue.

Case: Yaro Transport & another v. Agyare

Facts: The defendant raised a preliminary objection, challenging the jurisdiction of the court in entertaining a running down action, which emanated from Sakyimase in the Eastern Region. The plaintiff had commenced an action at the High Court, Koforidua in respect of that case. The affidavit in support of the objection deposed that the first defendant carried business in

Kumasi whilst the second defendant was ordinarily resident in Kumasi. The defendant also sought an order for dismissal of the action.

Holding:

a. The court upheld the preliminary objection.
b. The court held that the action should have been commenced in the High Court, Kumasi where the first defendant, a limited liability company carried on business and the second defendant ordinarily resided as required by Order 3 r 1(5), CI 47.

c. Under Order 3 r 2 (1) a case started in the wrong region can nevertheless be made to proceed in that region unless the court reports to the Chief Justice that the case ought to be transferred and the Chief Justice transfers it by order. The court opined that in all such situations, the Chief Justice will transfer the case so that the case continue without throwing the parties into further expense and inconvenience by the institution of a fresh action in the appropriate region.

d. The court ruled that it will not be appropriate to dismiss the substantive action because the provision under which the objection is raised does not indicate what its fate must be when the objection to its entertainment by the court is taken by the defendant.

Venue of Action – Order 3 r 1

The following rules apply:

- In any matter relating to immovable property or the interest in that immovable property shall be commence in the Region where the immovable property or part of it is situated. Therefore, if land crosses two regions, say Central and Eastern Region, the action can be filed in either Region.

- Action relating to movable property distrained or seized for any cause shall be commenced in the region where the seizure took place.

- An action against a public officer to recover penalty or forfeiture shall be commenced in the Region where the cause of action arose.

- For actions relating to specific performance or breach of contract, there are three options as to where to file the action:
  - Where the contract was to have been performed.
  - Where the defendant resides
  - Where the defendant carries on business.

- In all other cases (such as in running down and other negligence actions), you sue:
  - Where the defendant resides.
  - Where the defendant carries on business.

- If there are two or more defendants residing in different regions, you sue in any of the Regions.

Transfer of Proceedings – Order 3 r 2

When any of the rules above is infringed, transfer of a matter from one court to another or from one Region to another only be by the Chief Justice. The following procedures are to be followed in this regard:

- The defendant must raise an objection before or at the time he is required to file a defence in the proceedings. If the court agrees with him, the court will then inform the CJ.

- The court may *suo moto* (i.e on its own motion) report a case to the Chief Justice for transfer. The Chief Justice may, but is not bound to order the transfer.

Note: The objection to jurisdiction of the court will not operate to invalidate or vitiate the prior proceedings.

2. ACCRUAL OF CAUSE OF ACTION

In **Spokesman (Publications) v. Attorney-General**, the court through Azu Crabbe CJ said that "a party has a cause of action when he is able to allege all the facts or combination of facts, which are necessary to establish his right to sue." Lord Diplock in **Letang v. Cooper** also defined cause of action as a factual situation which entitles one person to obtain a from the court remedy against another person.

An intending plaintiff must next consider:

- Whether he is vested with a present cause of action, or
- Whether the cause of action has accrued,
- If there is a pre-requisite before action should be commenced, such as the giving of notice under section 90 of the State Proceedings Act, 1961 (as amended), whether such pre-requisites have been satisfied, section 30 of the Legal Profession Act, 1960 (Act 30),
- Whether the cause of action is statute-barred (see section 16 of Limitations Act, 1972 (NRCD 322). See also **Accra-Tema City Council v. Ntim.**
- If there are some judgments against the plaintiff whether the matter is not ***res judicata***,
- If the action must be brought in a representative capacity whether such capacity has been acquired before or at the time of issue of writ.

Case: Bulley v. Akrong

Facts: The plaintiff was a mother of a man killed as a result of a negligent act of the driver of a tipper truck owned by the second defendant. In the writ, the plaintiff professed to sue as "successor and next-of-kin". Eight months after the issue of the writ, the plaintiff was in November 1962, granted leave to amend the title of the suit by prefixing to the words "successor and next-of-kin" the words "personal representative". However, the plaintiff did not take the Letters of Administration until December 1962.

Holding,

Since at the time the plaintiff issued her writ she had not taken the letters of administration, she lacked capacity to sue. This lack of capacity was not cured by the fact that she eventually took out letters of administration, since this took place after the period of limitation of 12 calender months, prescribed by the Fatal Accidents Act had run out. The court held that the plaintiff's writ was thus a nullity and so were the proceedings and judgment founded upon it.

- If the dispute should first be submitted to arbitration, whether this had been done otherwise the action will be stayed, as per section 8 of the arbitration Act, 1961 (Act 38).

Case: Khoury v. Khoury

JOINDER OF PARTIES TO A SUIT, Order 4 r 3, CI 47

The next point a plaintiff or his solicitor should consider is "who are to be plaintiffs and who are to be defendants?"

- If the plaintiffs is likely to put a conflicting claim or case to that of the rest he should not be added.

- If any person made a defendant has a good ground for a counter-claim against any of the plaintiffs in the action, this defendant should not be joined because his counterclaim may embarrass the other plaintiffs and/or delay and prolong the trial of the suit.

- If any of the parties sought to be joined as plaintiff is a man of straw he should not be added because in the event of joint liability for costs the indigent plaintiff may not be in a position to pay and execution may be levied against the property of the other plaintiffs.

Joinder of Plaintiffs – Order 4 r 3(1)

Subject to the considerations discussed above, all persons may be joined in one suit as plaintiffs if:

- There exist in them a right to relief arising out of the same transaction or a series of transactions. For example where several people were injured in a road accident (same transaction) or where several employees were dismissed on different dates on the same ground (series of transactions); or

- If such people brought separate actions, some common question of law and fact would arise for trial, example a road construction through land belonging to various people without their permission.

There is a proviso (Order 4 r 4) to the effect that if it appears to the court that such a joinder may embarrass any of the parties or delay the trial of the action the court may order separate trials; confine the action to some

causes of action and exclude others; order the plaintiff or plaintiffs which of the causes of action should be proceeded with; order which of the plaintiffs should remain as plaintiff; order a defendant to be struck out so as not to embarrass the defendant or cause the defendant to incur expenses in a case for which he has no interest; or make such other orders as may be expedient or just.

Joinder of Defendants – Order 4 r 3(2), and (3)
The rule is that all persons may be joined as defendants against whom a right to any relief is alleged to exist, whether jointly, severally or in the alternative, and judgment may be given against such one or more of them as may be found liable. For example, a person injured by the negligence of two drivers may sue them jointly, severally or in the alternative.

Where two or more persons are joined as defendants, it is not necessary that every defendant should be interested in all the reliefs claimed upon the writ or as to every cause of action included in the writ.

Illustration: If for instance, X sells A's land wrongly to Y, A may sue X and Y together claiming against X declaration of title and against Y recovery of possession and perpetual injunction.

Note: It may be pointed out that where liability of the defendants is several and not joint, judgment against one of such defendants cannot operate as a bar to action against the others.

Case: Sagoe v. Wallkden

Note: If two or more persons have coterminous interest in property it is not necessary to join all as defendants; a judgment against one will bind others whose interest is coterminous with the interest of the person(s) against whom judgment is obtained.

Case: Yode Kwao v. Kwasi Coker

This doctrine has ben extended, hence:
a) A judgment against a purchaser is binding on his vendor:
   See: Majolagbe v. Larbi
b) Pledgee and pledger
c) Sub-chief and Paramount chief.

Non-joinder and Misjoinder of Parties – Order 4 r 5
One of the preliminary considerations before the commencement of an action is the question as to who should be parties to the action. In answering this question, there is room for two possible mistakes.

a. The first is the failure to join as a party to the suit, a person who ought to have been joined either as a plaintiff or as a defendant. This gives rise to the mistake of **non-joinder** of party.

b. The other mistake is the joinder, as a party to the action, of a person who ought not to have been joined. Here, the mistake is that of **misjoinder** of party. The affected party might have been joined wrongly as a plaintiff or a defendant.

The legal effect is that non-joinder and misjoinder is not fatal to a suit. The defect in each being amenable in the manner provided for in the Rules.

Order 4 r 5 is to the effect that no cause or matter can be defeated by non-joinder or misjoinder. The court has the power under the Rules to deal with the matter in controversy between the parties, and at any stage of the proceedings either upon or without application of the parties to order the names of any of the parties improperly joined to be struck out either as plaintiff or defendant (Order 4 r 5(2)(a)).

In the case of a non-joinder, the court may order that any person whose presence is necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added as plaintiff or defendant.

Case: Ghana Railway & Port Authority v. Okakbu

The test to be applied whether a person should be joined or not was stated by Lord Denning in Grutner v. Circuit as follows:

"When two parties are in dispute in an action at law and the determination of that dispute will directly affect a third party in his legal right or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matter in the dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome".

The above test has been applied in Appenteng v. Bank of West Africa, to the effect that the order sought must directlt affect the person sought to be joined

JOINDER OF CAUSES OF ACTION – Order 4 r 2

A single cause of action is by itself a subject-matter of a suit. It does not therefore mean that for every cause of action a person has, a separate and distinct suit must be brought. This is so because the Rules (CI 47) allow a plaintiff to sue for different causes of action in a suit. By means of this device, multiplicity of actions is avoided with the consequent reduction in cost and duration of trials. Moreover, where the same witness may be required to testify in all or some of the causes of action, such joinder is particularly convenient for the plaintiff.

The various causes of action are brought in one writ of summons and may be against a defendant or two or more defendants. A defendant need not be sued in respect of all the causes of action but only in some or only one of them.

Specifically, Order 4 r 2 is to the effect that a plaintiff may join on the same writ of summons different and several causes of action to claim relief against the same defendant.

A plaintiff may join any number of causes of action falling within the provisions of Order 4 r 2(1) and (2) as follows:

- If the plaintiff claims, and the defendant is alleged to be liable in the same capacity in respect of all the causes of action.

- If the defendant claims and the defendant is alleged to be liable, in the capacity of executor or administrator of an estate in respect of one or more causes of action and in his personal capacity but with reference to the same estate in respect of all the others.

In exception of the above, leave of the court will be required to join causes of action. Where leave of the court is necessary to join two or more causes of action against a defendant or defendants on the same writ, the application for leave must be by a motion ex parte supported by an affidavit before the issue of the writ, or at the time of issue of the writ. But service of the writ should not be effected until and unless leave has been granted. The affidavit in support must state the grounds of the application. The defendant and defendants on the other hand upon service of the writ of summons can apply that the several causes of action cannot be conveniently disposed of together, or that the joinder may cause embarrassment or delay. The court may upon hearing the application order any of such causes of action to be excluded, and consequential amendments made subject to terms as it may deem fit.

COMMENCEMENT OF ACTION
Order 2, CI 47

Title of Parties –Order 2 r 1)
Party commencing the action is called the '**plaintiff**' and the one against whom the action is filed or who opposes the action is called the '**defendant**'. The proper names of the parties must be stated where they are known. If the true and full name of the defendant is not known he may be sued in the name he may have acquired by usage and reputation. Thus, misspelling a defendant's name does not make it irregular for he purpose of the writ, although it should be corrected in the course of the action.

Where the parties to be sued are so numerous that it is impracticable to include all the names and addresses in the prescribed form, the plaintiff can prepare and annex a schedule setting out the full details of the parties in question, refer to the schedule on the face of the writ and ensure that the schedule is securely annexed to the face of the writ.

Capacity of Parties – Order 2 r 4
Sometimes, a party sues or is sued not in his personal capacity but in a particular capacity, which he acts. Thus, in suits relating to trusts, the trustees are parties in their capacity as such, for the rights and obligations in dispute are not personal to them. Similarly and executor or administrator claims in or defend an action on behalf of the estate not in his personal capacity but in that in which he serves.

Indorsement in the writ of summons as to the capacity in which a party stands in the suit is required by the Rules, as per Order 2 r 4.

i. In representative actions, the parties sue and are sued in their representative capacities and not in their personal capacities (see Order 2 r 4(1)(a) and (b). The practice is that if the plaintiff sues or the defendant is sued in a representative capacity (eg. Personal representative, trustee, head of family, customary successor, legatee, devisee, next-of-kin, etc, the writ of summons should be indorsed with a statement to show the capacity in which he sues or is sued. The indorsement as to capacity is made underneath the name of the party.

Note: Where a plaintiff sues in a representative capacity, but at the date of the issue of writ he is not clothed with such capacity, the writ of summons and the statement of claim are null and void and incurably bad. It is immaterial that later during the course of the proceedings he acquired the capacity. In **Akrong v. Bulley** Apaloo JSC (as he then was) said:

"At the date when the plaintiff issued her writ she was neither an executor nor administratrix. No cause of action was therefore vested in her and she could not and did not commence a competent action……. I am therefore constrained to hold that the writ was a nullity and so the proceedings and judgment founded upon it."

In **Graves v. Oyewoo**, Justice Azu-Crabbe came to the same conclusion when he held that:

"In my judgment, the plaintiff's action was incompetent at the date when the writ was issued, and that his position ws not in any way ameliorated by the subsequent grant to him of Letters of Administration and the amendment of the writ. Consequently, the whole proceedings and the judgment of the trial judge were a nullity notwithstanding the plaintiff's subsequent appointment *pendente lite* as the administrator of the deceased's estate."

ii. If a plaintiff is acting by an order or on behalf of a non-resident person, for instance, under a power of attorney, he must state that in the writ and add the address of the non-resident person.

WRIT OF SUMMONS – Order 2 r 6-7

Definition: A writ of summons is a formal document issued by a court stating concisely the nature of the claim of a plaintiff against a defendant, the relief or remedy claimed and commanding the defendant to "cause an appearance to be entered" for him in an action at the suit of the plaintiff within a specified period of time, usually eight (8) days after the service of the writ on him, with a warning that, a default of his causing an appearance to be entered as commanded, the plaintiff may proceed therein and judgment may be given in defendant's absence.

Issue of the writ:

The Rules require that every writ issued must accompany with it, a statement of claim. The writ will be set aside for failure to comply with the provisions of Order 2 r 6, CI 47.

After all the indorsements have been made in the writ by the plaintiff or his lawyer, the writ is taken to the court registry. There he pays the appropriate court fees. The plaintiff or his lawyer on presenting the writ, leaves the original copy of it and all the indorsements thereon. Such a copy must bear the duty stamp as prescribed by law and should be signed by the plaintiff or his lawyer, as the case may be. The plaintiff or his lawyer leaves with the registrar as many additional unstamped copies of the writ as there are defendants. Once a plaintiff has taken all the steps, which are required by him to get the writ of summons issued, the action is commenced, for the purposes of limitation, even though the writ is ultimately issued well after the stipulated time. The duty to issue a writ of summons is not that of the plaintiff but the court's. Therefore, the plaintiff having applied for a writ on payment of appropriate fees leave the rest to the court. A plaintiff cannot therefore be held responsible for every other failure in the issue of the writ attributable to official negligence after he has done all that is required of him in law to commence an action.

The next important step to be taken is to 'issue' the writ, that is, to make it an official document emanating from the court. It is on being so issued that the writ acquires the legal force whereby a defendant is commanded by it to appear to answer the plaintiff's case.

Under Order 2 r 7, it is expressly provided that the issue of a writ takes place upon it being sealed by the registrar.

Every writ must also bear the date of the day of its issue. This is important. This is because an action speaks from the date of the writ. All the factual elements in the cause of action must have occurred before the date of its issue. If there no complete cause of action as at the date of the writ, anything that occurred after that date should not be used to eke out a cause of action.

Renewal of Writs – Order 2 r 9

A writ remains in force for twelve months from and including the date of its issue. If it is not served within that period, it becomes void. If the writ is served after this date without renewal, the defendant can apply to have it set aside. However, if after the twelve months the defendant is served but does not raise any objection and enters appearance, it cures the irregularity and the proceedings may continue. In **Potsia v. Klu, the court said albeit obiter that** even though under the rules, a writ was not in force for purposes of service after the expiration of a period of twelve months, it was still a writ. Consequently, an unconditional appearance by a defendant to such a writ was a step in the action and amounted to a waiver with regard to service so as to prevent such a defendant from being able to contend successfully that the service on him was bad. But in the instant case, the defendant, having entered a conditional appearance, had not waived his right to challenge the service.

The court is however empowered to extend the expiry period of a writ. Thus, where the defendant has not been served within the twelve months, the plaintiff may before the expiry of that period, apply to the court for leave to renew the writ. If the court is satisfied that reasonable efforts have been made to serve the defendant or for some good reason, it may order the writ to be renewed for a period not exceeding twelve months at a time, beginning with the day following that on which it would have expired.

Where a writ names more than one defendant, the fact that the writ is served on one of the defendants within the validity period does not make it valid for service on the other defendants after the twelve months, unless it is renewed. Failure to serve a writ within the twelve-month period is a mere irregularity, which may be waived by entry of unconditional appearance.

Concurrent Writs – Order 2 r 8

Concurrent writs are further sealed copies of the writ issued as concurrent writs at the request of the plaintiff. It must be a true copy of the original but must bear necessary difference according to the purpose for which it issued. It must be sealed by being specially marked ‘concurrent’, with an official stamp from the court. It will bear the date of the original writ but it is only valid from the date of its own issue so long as the original itself remains in force. Its lifespan is tied to the lifespan of the original writ.

Under Order 2 r 8(2), a concurrent becomes necessary where the need to serve notice on it outside Ghana or vice versa arises but the original was not validly issued for such service.

In **Lokko v. Lokko**, the court held that the leave of the court is required before a concurrent writ is issued to be served outside Ghana. But for the most part, concurrent writ are issued when the original writ is lost.

SERVICE OF WRIT – Order v7, CI 47

After the writ is issued, it must be served personally on the defendant. Without such service, the defendant may not know that the plaintiff has sued him in court and what for. He should be served so that the suit will be brought to his notice. The object of the service is therefore to give notice to the defendant, so that he may be aware of, and be able to resist, if he may, that which is sought against him. Where service of a process is required, failure to serve it is a fundamental vice and the person affected by the order but was not served with the process is entitled *ex debito justitiae* (i.e. as of right) to have the order set aside as a nullity. Service is also a condition precedent to the exercise of jurisdiction by the court out of whose registry the writ of summons was issued.

Mode of Service:

Service is generally effected by bailiffs or registered (i.e. registered by the court) process server, not by lawyers or by the plaintiff or any other person. This will invalidate or vitiate the writ. There are two ways by which a defendant may be served an originating process. These are personal service and by service other than personal.

Personal Service

Provisions under Order 7 r 2 & 12:

The Rules provide that persons who need to be served any document shall be served personally unless there is a contrary provision or the court directs otherwise (Order 7 r 2). Also, where the court orders personal service, any other service, which is not in accord with the order of the court is not proper service.

Service on a lawyer who has given a written undertaking to accept service on behalf of a defendant is deemed to be valid service on the defendant (Order 7 r 12, CI 47).

Order 7 r 3:

Personal service is effected by leaving a duplicate copy or attested copy of the writ with the person who is meant to be served. When personal service is hindered in any manner (eg. Through violence and threats), leaving the writ as near as practicable to the person to be served will constitute sufficient service.

Order 7 r 5:

Service on a corporate body may be effected by service on the chairman, president, or any head of the body, or on the MD, secretary (i.e. secretary appointed under the Companies Act), Treasurer or similar officer of it.

In the case of a firm of partners, the writ may be served on any one or more of the partners or at the place of business, on any one in control of management of the business there.

Substituted Service - Order 7 r 6

Where personal service of a writ or a document cannot be effected, an application to the court for substituted service should be made. The application is by ex parte motion supported by affidavit stating:

- The cause of action, and the relief or reliefs sought;
- The attempts made to effect personal service;
- The results of those attempts
- The method whereby service is sought to be effected.

The court, being satisfied that genuine efforts have been made may order that service be effected either:

- By delivery of the document to some adult inmate at the usual or last known place of abode or business of the person to be served; or
- By delivery of the document to some person who is an agent of the person to be served, or to some other person, having proved that there is reasonable probability that the document will come to the knowledge of the person to be served; or
- By advertisement in the gazette of in some newspaper circulating within the jurisdiction; or
- By notice put up at the court house or some other place of public resort of the district wherein the proceeding in respect of which the service is made is instituted, or at the usual or known place of abode or business of the person to be served; or
- By pre-paid registered letter addressed to the defendant at the address indicated in the affidavit filed by the plaintiff.

SERVICE OUT OF JURISDICTION – Order 8, CI 47

A writ issued in Ghana cannot be served out of the jurisdiction. What is served is a **NOTICE OF THE WRIT** (see form 3 @ p. 277 of CI 47). A plaintiff is required to file a motion ex parte for leave to serve the notice of the writ out of the jurisdiction.

STEPS TO BE TAKEN BY DEFENDANT AFTER BEING SERVED

The steps which a defendant should take after he has been served with a writ of summons is to **"enter appearance'** in court. This procedure is covered under Order 9 r 1 of CI 47. The purpose of this step is to prevent judgment being entered against the defendant for default of appearance. The defendant is after all commanded by the writ to enter appearance, within a specified time to answer to the suit by the plaintiff, otherwise the court may allow the plaintiff to proceed to judgment and execution.

Mode of Entering Appearance:

Order 9 r 2(1)

After the defendant has been served with the writ of summons, if he decides to contest the claim he must enter appearance within eight (8) days of service by completing the notice of appearance in triplicate and hand it in at the registry of the court or post to the registry of the court with two stamped envelopes addressed to:

- The plaintiff, if acting in person or his lawyer.
- The defendants; except when all defendants in the action file appearance by the same lawyer and at the same time, a defendant must file extra copies for service on other defendants in the action.

Order 9 r 2(2):

Where two or more defendants to an action enter appearance by the same lawyer and at the same time, only one set of notices in triplicate need to be completed and delivered for those defendants.

Order 9 r 2(3):
Where persons are sued as partners in the name of the partnership, they must appear individually in their own names. But all subsequent proceedings will continue in the name of the firm.

Order 9 r 3:
The notice of appearance must bear the residential address of the defendant. If the defendant enters appearance by a lawyer, the business address of the lawyer in Ghana.

If the defendant does not have a residential address in Ghana he is required to supply the address of a place in Ghana at which the documents may be served. If the defendant fails to state both addresses, the plaintiff may apply to the court for an order compelling the defendant to supply the said address with costs of the application being the cost of the defendant. The court in making the order must give the defendant a stipulated time within which to supply the required address. If the defendant fails to comply, he is deemed to have failed to file appearance.

The court may also set aside appearance if the plaintiff is able to show that any address specified in the notice of appearance is false. By Order 16 r. 2, the defendant shall not amend the notice of appearance without the leave of the court.

TYPES OF APPEARANCE: A defendant may enter an unconditional appearance or a conditional appearance.

Conditional Appearance – Order 9 r.7
Where the defendant thinks that the writ served upon him is for some reason irregular or defective, or that the service of the writ is in breach of the rules, or that the court at which the action is commenced has no jurisdiction, he must enter appearance conditionally and then move the court to have either the writ or the service of it, as the case may be, set aside. In **Tackie v. Baroudi**, the court emphasized that an application under Order 12, r. 24 of LN 140 A (now Order 9, r. 7) could be made on the grounds of irregularity in the service of the writ or notice of the writ or order authorizing such service or on grounds of want of jurisdiction. The court further noted that the onus, in such instances, was on the defendant to make out his objection and that if he fails to do this, the plaintiff could proceed as if an unconditional appearance had been entered.

Effect of Conditional appearance
In **re Adjapong (Deceased); Abosi v. Poku,** the court in dismissing the appeal noted that "The effect of the conditional appearance by the defendant is not only to prevent a default judgment being obtained against her but also to preserve the defendant's right to object to the writ either on grounds of irregularity regarding the issue or service of the writ or for want of jurisdiction."

Leave to enter Appearance

Leave is not required to for entry of conditional appearance. In **Tackie v. Baroudi**, where the appellant's wife entry of unconditional appearance was refused, the Court Appeal held that the trial judge erred in holding that leave of the court was required to enter conditional appearance. A defendant may enter appearance at any time before judgment, but where judgment has been entered in the action the leave of the court must be obtained.

In **Fofie v. Pomaa**, the first plaintiff as the mother and next friend of her infant children issued a writ against the defendant as the father of the said children claiming maintenance allowance for each of the children and expenses which she had incurred in maintaining the children for six and half years. Service of the writ on the defendant was not endorsed by the serving bailiff as required by Order 9, r. 17 of the 1954 rules (now Order 7 r. 12, CI 47). Upon the failure of the defendant to enter appearance, the plaintiff applied for and obtained final judgment for her claims for default of appearance and immediately thereafter caused a writ of fi. fa. to issue against the properties of the defendant.

The defendant thereupon applied and obtained leave of the court to enter a late appearance and also applied by motion on notice to set aside the default judgment on the grounds that the judgment was a nullity since service of the writ on him was not endorsed in accordance with the relevant rules. Counsel for the plaintiff on the other hand argued that failure to endorse the writ was a mere irregularity which could be waived or cured by Order 70 of L.N. 140A (now Order 81, ci 47) and that in any case the defendant should not have been granted a late appearance since the English Supreme Rules, 1954 (L.N. 140A), made no provision for entry of appearance after judgment.

Holding:

The effect of Order 9, r. 17 (Order 7 r. 12, CI 47) when read in conjunction with Order 70, r. 1 (Order 81) was that unless and until the endorsement of service on a writ was duly completed the plaintiff was not entitled to enter judgment, whether final or interlocutory, in default of appearance. Failure to comply with this requirement, however, would not nullify the judgment entered in default nor any proceedings under such judgment, but such failure would be treated as an **irregularity** which might be waived or the court might set aside such judgment wholly or in part on such terms as it thought just. Consequently although the judgment was not a nullity the defendant was entitled *ex debito justitiae* (i.e. as of right) to have it set aside since he was not estopped by conduct or waiver and it was signed in open defiance of the rules applied.

Where the defendant wishes to have a judgment obtained in default of appearance set aside on grounds that it was obtained by fraud, he should not seek the leave of the court to enter a late appearance, but should raise the issue of fraud in an entirely new action as plaintiff. Refer to **Heward-Mills v. Barclays Bank.**

If a defendant enters an appearance after the time limited for appearance, but before judgment, this does not entitle him, unless the court directs

otherwise, to serve a defence or do anything else in the action later than he could have done if he had appeared in time. This means that the defendant must obtain extension or enlargement of time to file his defence, if the time for doing so has elapsed, unless of course the plaintiff has considerably delayed in filling statement of claim or taking up further steps in the proceedings.

Notes

a. A writ that departs substantially from the prescribed form, such as omission of date of issue, may be set aside under the rules.

b. An entry of appearance may be withdrawn by the party any time with the leave of the court.

c. In **Republic v. High Court, Denu; Ex Parte Avadali**, the Supreme Court held that apart from the general rule that objection to jurisdiction might be raised at any time, a defendant might appear unconditionally and raise the issue of jurisdiction in the statement of defence as a defence and at the appropriate time ask the court to take that issue and try it in limine (at the start) or he might file a conditional appearance under the rules and move the court to set aside the writ of summons and statement of claim. In the later option, since there would be no statement of defence at that stage, the defendant's reasons for objecting to the court's jurisdiction could only be stated in the affidavit accompanying the motion.

d. In **Quaiko v. Mobil Oil (Ghana) Ltd**, the plaintiff, sued by her next of friend for damages for personal injuries sustained in a motor accident. The defendant entered an unconditional appearance to the writ of summons, followed by the filing of his statement of defence. Subsequently, the second defendant applied for the action to be struck out, alleging irregularity from non compliance the rules, which provided that before the name of any person should be used in any action as next friend of any infant, such person should sign a written authority for that purpose and that the authority should be filed in the registry of the court in which the cause was proceeding.

Holding:

- Even though under rules, the filing of a signed written authority by the next friend of an infant was a necessary pre-requisite to the institution of an action on behalf of an infant, the omission to file that document at the commencement of the suit was not always fatal to the case because the real concern of the defendant in such an action, was to ensure that there was a person with full legal capacity responsible for the propriety of the action who would give security for costs to the defendant.

- An irregularity in the issue or service of a writ of summons or an informality connected therewith, might be waived by the entry of an unconditional appearance. Consequently, having entered an

unconditional appearance, followed by the statement of defence, the second defendant was deemed to have waived the irregularity arising from non-compliance with the rules.

The entry of unconditional appearance does not preclude the defendant from raising by way of preliminary objection under Order 11 that the plaintiff's writ discloses no cause of action. The objection may be argued after appearance as preliminary point of law, and if upheld, the action may be struck out with costs.

A writ may be defective because:

- Leave of the court was not obtained before the writ was issued as in the case of service outside jurisdiction or in the case of vexatious litigant,
- Statutory notice was not given to the defendant before issue of writ,
- The action is statute-barred,
- The plaintiff is not vested with the present cause of action,
- The writ contains no, or no sufficient, endorsement of claim, or
- The defendant is not the proper person to be sued.

Default of Appearance

Where a defendant duly served with writ of summons does not enter appearance (within eight days in case of service within the jurisdiction or time stipulated in case of service outside the jurisdiction), the plaintiff is entitled to proceed to enter judgment for his claim upon the writ in default of appearance. Order 10, CI 47 sets out certain specific actions, how and what type of judgment a plaintiff may get in each case. These are actions for liquidated demand, unliquidated demand, detinue (ie. Detention of goods) and recovery of immovable property.

In any other actions not specifically provided for under the rules, where there is default of appearance by the defendant, the Rules require the plaintiff to serve a statement of claim on the defendant, nonetheless, and the action may then proceed as if appearance has been entered.

Setting aside a default judgment

When a judgment is void either:

- Because it is given or made without jurisdiction; or
- Because it is not warranted by law or rule of procedure,

The party affected is entitled *ex debito justitiae* to have it set aside, and the court is under obligation to set it aside. No judicial discretion arises here.

In **Mosi v. Bagyina**, the court said that where a judgment or an order is void either because it is given or made without jurisdiction or because it is not warranted by any law or rule or procedure, the party affected is entitled *ex debito justitiae* to have it set aside, and the court or a judge is under a legal obligation to set it aside, either *suo motu* or on the application of the party affected. No judicial discretion arises here. The power of the court or a judge to set aside any such judgment or order is derived from the inherent jurisdiction of the court to set aside its own void orders and it is irrespective of any expressed power of review vested in the court or a judge;

and the constitution of the court is for this purpose immaterial. Further, there is no time limit in which the party affected by a void order or judgment may apply to have it set aside

PLEADINGS – Order 11, CI 47

This topic will be discussed under the following headings:

1.	Definition	9	Actions for recovery of posession	
2.	Function and purpose of pleadings	10	Defence arising after commencement of action	
3.	Content of pleadings: – Facts not law – Material facts only – Facts not evidence – Facts in summary form	11	Time for filling pleadings	
4.	Additional requirements of pleadings: a. Particulars to be given b. Condition of mind c. Condition precedent d. Matters to be specifically pleaded e. Particular matters: content of documents, allegation of notice, etc	12.	Striking out pleadings	
5.	Statement of claim	13.	Amendment of pleadings	
6.	Statement of defence	14	Reply	
7.	Set-off	15.	Close of pleadings	
8.	Counterclaim			

Before the commencement of trial of a suit, it is necessary that:

- The court should know the matter that really is in dispute between the parties;

  Essence: It helps the court to know what it will have to determine at the conclusion of the trial.
- Either party should know his opponent's case against him will be;

  Essence: It enables each party to prepare to meet the adversary's case

These purposes are achieved by means of **pleadings.**

Definition:
Statutory definition :
Under Order 82, CI 47, pleading means the formal allegations by the parties to a lawsuit of their respective claims and defences with the intended purpose of providing notice of what is to be expected at the trial.

Common Law definition:
Pleading is a written statement of the parties in actions begun by writs, which are served by each party in turn on each other, setting forth in a summary form the material facts on which each relied in support of his claim or defences as the case may be.

Types of pleadings
Pleadings include:
- Statement of Claim delivered by the plaintiff
- Statement of Defence, which is the answer of the defendant
- Counterclaim, which is raised by the defendant as part of his statement of defence
- Reply, which is the plaintiff's answer to the defence on point of law
- Reply to Counterclaim, which is a reply to the defendant's counterclaim.
- Rejoinder
- Surrejoinder
- Rebutter; and
- Further and better particulars of any of the foregoing.

Functions/Purpose/Advantage of Pleadings
1. Define with clarity the issues or matters in controversy, which the court is called upon to adjudicate or determine. The issues, if defined, limit the area of the controversy and cannot be extended without the leave of the court for subsequent amendment of the pleadings in the suit:

In Odoi v. Hammond, the plaintiff was by his reply set up a case, which was completely inconsistent with his former pleadings without asking leave to amend his statement of claim.

Holding:

The Court of Appeal held that the learned trial judge should have disregarded that part of the reply and the evidence in support thereof, which was at variance with the case put forward in the statement of claim.

Azu Crabbe J.A. noted as follows:

The main purpose of a reply in pleadings is to raise in answer to the defence any matters which must be pleaded by way of confession and avoidance, or to make any admissions which the plaintiff may consider it proper to make ... The plaintiff may allege new facts in his reply in support of the case pleaded in his statement of claim, but he is not permitted to set up in his reply a new claim or cause of action which is not raised either in the writ or the statement of claim except by way of amendment.

2. Assist the parties by giving them reasonable notice of the case they are expected to meet, so that each can prepare the evidence in support of his own case and meet that of the opponent.

Refer to Dam v. Addo, where the speech of Lord Normand in **Esso Petroleum v. Southern Corporation** on the functions of pleadings was approved. The court in **Dam v. Addo** commented that the function of pleadings is to give fair notice of a case, which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a person on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

3. Place on record the issues in dispute so that the same disputants or persons claiming through or under them may not litigate those issues all over again. It is a principle of law that there must be an end to litigation.

4. The object of pleading is to inform the court what are the precise matters in issue between the parties, which alone the court may determine. They set the limits of the action, which may not be extended without due amendment.

Drafting of Pleadings – Order 11, r. 7

Order 11, r.7 provides that "every pleading shall contain only a statement in a summary form of the material facts on which the party relies for his claim or defence and not the evidence by which those facts are to be proved." This rule involves or requires four things before pleading can be described as good. These are:

a. The pleading must state facts not law;
b. It must state material facts only;
c. It must contain facts not evidence by which they are to be proved at the trial; and
d. The material facts must be stated in summary form.

Pleadings to state facts and not law

The disputes between parties to a suit are always based on facts. The pleadings set out the facts on which issues are joined. The legal consequence of the facts is entirely a matter for the court to determine. The parties have no role to play in this regard and any one of them that

dabbles into postulating this consequence is only usurping the function of the court.

A party is therefore not permitted to state the bare legal conclusions in his pleadings. This is all that the rule stipulating that pleadings should state the fact and not law means. Purely legal contentions must not be pleaded.

Therefore it is bad for a plaintiff to plead as follows:
'the defendant is under duty by virtue of the Motor Vehicles (Third Party) Insurance Act to satisfy the damages and costs awarded against his insured" or that the " plaintiff is entitled to recover the damaged and costs by virtue of the Acrt."

What the plaintiff is required to do is to set out in his statement of claim facts that which in his opinion put his case within the provision of the Act or impose on the defendant that liability or duty to satisfy that judgment debt.

A party may, however, raise for the consideration of the court "an objection in point of law", as provided under Order 11, r. 11. Example, that the plaintiff's writ of summons and the accompanying statement of claim discloses no cause of action or that the plaintiff has no capacity to sue or that the court has no jurisdiction to hear and determine the suit. Thus, where a party intends to raise a point of law on the facts pleased he may do so in the pleadings. It is also possible, nevertheless for a party at the trial to raise a point of law open to him although not pleaded.

Pleadings of material facts only
A fact is material to the issue at stake if when pleaded it will show that the plaintiff has a good cause of action or that the defendant has a good defence to the claim. Where a party omits to plead a material fact he will not be allowed to give evidence of it at the trial. The need to plead material facts was emphasized in **Oppong Kofi v. Fofie.**
Facts:

In this case, the respondent by his statement alleged that some farms on certain stool lands belonged to his family. The first appellant on the other hand averred that title to the disputed farms was originally vested in two junior members of the respondent's family as caretakers but those caretakers mortgaged the farms to him under a deed which empowered him to sell them. In pursuance of his power under that deed, the first appellant averred further, he instructed the second appellant, as auctioneer, to sell the farms. The respondent sued the appellants for (i) a declaration that the farms belonged to his family, (ii) an order of possession and (iii) damages for wrongful sale. It was during the trial that the respondent alleged that the farms were originally cultivated by his late uncle and upon his death they devolved on him as successor to hold as family property. The trial High Court judge gave judgment in his favour. The appellants appealed to the Supreme Court.

Holding:

In an action for the recovery of land where the plaintiff claims by devolution

from an alleged predecessor-in-title, the plaintiff must plead the material facts on which he relies to establish his title in such a way as to prevent the defendant from being embarrassed or taken by surprise. In the instant case, the plaintiff 's pleadings were gravely defective and embarrassing in that his statement of claim failed to indicate how the farms in dispute became his family properties.

Note: If a party is in doubt whether a fact is material or not it is safer to plead it than not to do so. Where, however, a material fact that ought to have been pleaded is not so pleaded, and evidence is led about it at the trial, and is not objected to, the court would consider it in determining the issue in dispute. This is the rule in **Abowaba v. Adeshima, which was applied in Marfo v. Adusei,** where the court held that *"the penalty for failing to plead a material fact is the exclusion, upon objection being taken, of evidence to establish it. But where evidence which could have been ruled out as inadmissible because it is adduced to prove a material fact which was not pleaded, has nevertheless been adduced without objection, a judge is bound to consider it."*

Facts and not evidence to be pleased

In **Williams v. Wilcox**, Lord Denman said:

"It is an elementary rule in pleading that, when a state is relied on, it is enough to allege it simply without setting out the subordinate facts, which are the means of producing it, or the evidence sustaining it.

Brett L.J also clarified this rule of pleading in Philips v. Philips by saying:

"Where facts in a pedigree are facts to be relied upon as facts to establish the right or title they must be set out, but where the pedigree is the means of producing the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out.

Examples:

1. If, for example, the issue in an action is whether the defendant is a partner with a third in a particular business, it will be bad pleadings to allege that he shared in the profit and contributed to the losses in the business, for these facts are evidence.

2. Where it is pleaded that the plaintiffs are administrators of a certain estate, the Letters of Administration, which are evidence in proof of the status of the plaintiff as the said administrators need not be pleaded.

3. In a running down action the fact that the driver drove fast immediately before the accident is a material fact to be pleaded but to plead further that:

   "Madam Amma Serwah, a trader whose goods were on the lorry and who sat in front by the driver, was shouting Papa driver drive slowly, you are going too fast you will ill us," is evidence by which the fact of driving fast is o be established. This is not to be pleaded.

Set-Off

A set-off is a money claim pleaded by the defendant as a defence to the claim made by the plaintiff also for money. It is a cross-claim for a sum of money ascertained or not. Thus, a set-off being a set-off for a sum of money raised as a defence, it can only be pleaded if the plaintiff's claim is also for a sum of money.

Features of set-off

1. The right of set-off is an equitable remedy, it must exist between the same parties and in the same right and capacity. Hence a defendant cannot set-off a debt due him by the plaintiff personally against a claim made by the plaintiff in a representative capacity. However, in a claim by a trustee, a defendant can set-off a debt due him by a beneficiary of the trust and it is immaterial whether the claim is for unliquidated damages.

2. A set-off must relate to a sum of money claimed upon the writ and must, if established, extinguish or reduce the amount claimed. A set-off cannot result in a judgment for the defendant or the difference between the set-off and the claim where the former overtops the latter. In such a situation, the defendant should come by way of a cross-action.

3. A set-off must be specifically pleaded as a defence.

4. In a set-off, if the plaintiff's action is discontinued the defendant's set-off would fall to the ground

Counterclaim

A counterclaim is a cross-action and may be independent of the claim. For that matter, a counterclaim may be greater or less than the claim. A counterclaim must be for a claim for which the defendant could have sued, as a plaintiff against the person against whom the counterclaim is brought and must be one, which the court would have jurisdiction to entertain in a separate action.

Unlike a set-off, a counterclaim need not be raised against the plaintiff in the capacity in which he sues. For example if Kofi Donkor sues as head of Asona Family a counterclaim can be raised against him personally for goods sold and delivered.

A defendant may join two or more causes of action against the plaintiff and other persons in his counterclaim, subject the rules in Order 4, CI 47 and if in the opinion of the court the joinder may embarrass or delay trial or otherwise inconvenient, it may order separate trials or make such orders as the court thinks fit.

If a plaintiff's claim is stayed, discontinued or dismissed, the defendant's counterclaim may be proceeded with unless the action is discontinued before the counterclaim is set up.

STRIKING OUT PLEADINGS

Under Order 11, r. 8 of CI 47, the following are the instances or grounds where the court may, at any stage of the proceedings order any pleading or anything in the pleading to be struck out:

- Where the pleading discloses no cause of action or defence; or
- Where the pleading is scandalous, frivolous or vexatious; or
- If the pleading will prejudice, embarrass or delay a fair trial of the action; or
- Where the pleading is otherwise an abuse of the process of the court.

By this, the court may order the action to be stayed or dismissed or enter judgment.

See Jonah v. Kulendi

Summary Judgment – Order 14, CI 47

The purpose of the procedure in Order 14, CI 47 is to enable plaintiff who has specially endorsed his writ to obtain summary judgment without going through a full trial provided he can show to the satisfaction of the court that there can be no answer to his case.

Thus, a summary judgment is a judgment, which is given to a plaintiff in a civil suit without going through a plenary trial. It therefore avoids pleadings, application for directions, calling evidence, addresses and final judgment.

In **Atlanta Timber v. Victoria**, the court held that the purpose of order 14 is to enable the plaintiff to obtain summary judgment without a trial if he can prove his case early. Even if a statement of defence may have been filed, the court is not precluded from entertaining a request for summary judgment. If the defence is not able to set up a bona fide …….then the application for summary judgment ought to be granted.

The order applies to all cases/actions except a few, namely: probate, maritime, defamation, malicious prosecution, seduction, breach of promise to

marry or a claim based on fraud.

In **Yartel Boat Building v. Annan**, Kpegah stated that:

"There are certain preliminary requirements which must exist before a plaintiff can proceed under this rule. The first is that the defendant must have been served with a statement of claim……. The important consideration is whether the plaintiff's claim is clear and whether the defendant has any defence to it.

Another important prerequisite is that the defendant must have 'entered appearance' to the plaintiff's writ. This is because if the defendant fails to enter appearance, the plaintiff can move for judgment in default of appearance. As stated in the Annual Practice (1957) p.172, "Appearance of defendant is a preliminary necessity to proceedings under order 14. If there is no appearance, judgment by default may be ordered under Order 13".

The preliminary requirements before Order 14 can be invoked to aid a plaintiff have been restated in the Supreme Court practice (1967), vol 1 at p.113 as follows:

"The following are the conditions precedent for the plaintiff employing the summary process of Order 14:

- The defendant must have entered an appearance;
- The statement of claim must be or have been served on the plaintiff; and
- The affidavit in support of the application must comply with the requirements of Rule 2.
- Service of the application for about four clear days.

In that case, no statement of claim was served; not only that, the defendant had not entered appearance as required by the rules before the plaintiff took out the summons for summary judgment. To complicate matters for the plaintiff, the writ and the summons for judgment were not only filed and served at the same time but served together; a clearly inadmissible procedure under Order 14."

The court held that although the plaintiff's affidavit satisfied the rules, no statement of claim had been served on the defendant and the defendant had not entered appearance before the plaintiff took out the summons for summary judgment.

Defendant showing cause (**Order 14, r.3**)

- The defendant, upon service may show cause by filling an affidavit in answer/opposition to the motion. He may admit part, deny part or deny the whole claim by an affidavit.
- The defendant may also file a statement of defence in answer to the claim. He may also file a defence and affidavit together.
- The defendant may also raise a technical point of law to attack the competency of the application under Order 14 as not being an appropriate application, example probate, defamation, etc.

Wilson v. Smith

- The defendant can also file a strong defence supported by affidavit that he or she has a good defence on the merit – Order 14, r. 5.

On hearing the application

- The court may give judgment for the plaintiff in its entirety or part
- The court may give the defendant leave to defend, either unconditionally or upon terms
- Dismiss the application with costs as not properly before the court.

Setting aside summary judgment

Within 14 days after service of Entry of Judgment, the defendant may move to set aside the judgment.

Differences between Summary Judgment and Default Judgment

Supporting Case: **Asamoah v. Marfo**

Facts:

The appellant-plaintiff brought an action against the respondent-defendant for an order to claim certain reliefs. The defendant entered appearance but failed to file any statement of defence within the statutory period provided under the rules of court. The plaintiff filed a motion for judgment in default of defence, which the trial court granted. When the plaintiff filed an entry of judgment, the defendant filed a motion for stay of execution and further order to pay the judgment debt in instalments. The defendant filed a motion to set aside the judgment on grounds of non-service of the notice of hearing. The trial judge dismissed the application. On appeal, the Court of Appeal reversed the decision of the High Court. The appellant-plaintiff subsequently appealed against the decision of the CA at the Supreme Court. The Supreme Court had to address a confusion regarding the nature of judgment, which was obtained at the trial court. This is because in the entry of judgment filed by the plaintiff, the counsel for the plaintiff framed it as if the judgment was a summary judgment.

Holding:

Summary judgment and default judgments are conceptually different. Summary judgment is a judgment on the merits even though it is obtained by formal motion without a plenary trial. It is a judgment obtained on a 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, 2004 (CI 47), the differences between the two are well spelt out and covered by different orders in CI 47. Thus, whereas summary judgment is provided for under Order 14 of CI 47,

default judgment, after appearance, is provided for under Order 13 of the same CI 47.

Morkor v. Kuma

Facts:

The plaintiff-respondent sued the appellant-defendant for non payment of outstanding balance of the purchase price of 400 metric tons. Appearance was entered for the appellant and the appellant's company. They then filed a joint statement of defence. Subsequently, the respondent applied for leave to enter summary judgment against the company and the appellant. In the supporting affidavit, the respondent deposed that part of the debt had been paid leaving a balance of over $86,000. The High Court presided over by entered judgment for the respondent. The judgment debtors then applied to the High Court for stay of execution and the setting aside of the summary judgment. The application was dismissed by the High Court. Appeal to the court of Appeal was also dismissed. The appellant then sued at the Supreme Court.

Holding:

Order 14, r. 9 of the High Court (Civil Procedure) Rules, 2004 (CI 47) did not stipulate the time within which an application might be brought to set aside a summary judgment given in the absence of the defendant. However, where such a judgment was entered for an amount greater than what was actually due then quite apart from any consideration of whether or not the defendant had a good defence on the merits, the judgment had to be set aside *ex debito justitiae*. Furthermore, the application to set such a judgment aside might be made at any time even where the judgment debtor had obtained a stay of execution; the rationale was that it was the duty of a creditor who obtained judgment for the wrong amount to have the same set aside. However, where a summary judgment which was otherwise regular was given in the absence of the defendant, the application to set it aside should be made as soon as the defendant became aware of the same although some delay would not necessarily be fatal if the parties could be restored to their former positions. Accordingly, in the instant case, since the summary judgment was obtained by the respondent in the absence of the appellant and for an amount greater than what was in fact due, the judgment could not be treated as final once the appellant filed the application to set it aside. Consequently, the proper date from which to compute the time within which an appeal could be made to the Court of Appeal was the date when the High Court dismissed the application to stay execution, rather than the date of the summary judgment. Accordingly, the appeal was within time and was not statute-barred.

AMENDMENT OF PLEADINGS – Order 16, CI 47

A pleader however good he may be is not omniscient, and for that matter, he may either inadvertently omit some fact, which ought to have been pleaded or not foresee all eventualities. He, therefore, ought to amend his pleadings to allege what has been left out. This can be done with or without leave of the court depending on the stage proceedings have reached.

The overriding principle with regard to amendment as contained in Order 16, r.7of CI 47 is that of the following:

- Determining the real question in controversy between the parties, or
- Correct any defect or error in the proceedings
- Avoid multiplicity of suits.

Amendment of Writ without leave – Order 16, r.1

The plaintiff may without leave of the court amend his writ once at any time before close of pleadings. The purpose of this rule is to save costs and the making of unnecessary applications. Where the writ is amended before service, the amended writ must be served as if it were the original in accordance with Order 7. If the amendment is made after service it must be re-served unless the court dispenses with re-service upon an ex-parte application. If the plaintiff amends the reliefs endorsed on the writ, he must also amend the statement of claim to reflect the amendment. It has been held in **Cargill v. Bower** and endorsed in **Hasnem v. ECG** that a relief that is not repeated in the statement of claim is deemed to have been abandoned.

Amendment of Notice of appearance – Order 16, r.2

A defendant can only amend his notice of appearance with leave of the court. An amendment of the notice of appearance is made by filling at the court registry a fresh notice, the heading which states that it has been amended pursuant to leave granted on a specified date. A copy will be served on the plaintiff. This rule should be read in conjunction with Order 17, r.1, which provides that a defendant may only withdraw his notice of appearance with leave of court.

Amendment of Pleading without leave

The rules provide for the amendment of pleadings once at anytime before close of pleadings without leave of the court. The party on whom an amended pleading is served has two options:

- To amend his pleadings in answer to the amendment without leave on condition that the answer must 'respond directly' to the amendments; or
- Within 14 days of the service of the amended pleading apply to the court under Order 16, r. 4 to strike out the amendment on the grounds that it is one which could not or might not have been allowed if made with leave. Note: for this reason, r. 4 should be read in conjunction with r. 5.

Remember that r. 3 applies to all pleadings upto the close f pleadings, but to only pleadings not to other document in the proceedings which can only be mended with leave under r. 7.

Effect of Amendment

An amendment that is duly made with or without leave takes effect not from the date the amendment is made but from the date of the original document that it amends. Accordingly, an amended writ dates back to the date of the original issue of the writ and action continues as though the amendment was inserted from the beginning. **In Kai v. Amakye,** the Court of Appeal held that once pleadings are amended, what stood before the court before the amendment was no

longer material before the court and no longer defines the issues to be tried so that the failure to repeat denials to allegations of facts made in the statement of claim in an amended defence in the absence of a general traverse amounted to an admission of those allegations of fact and no further proof is required.

In **Yeboah v. Bofour –** The court established the principle under which the courts will refuse amendment.

The court held as follows:

a. An application for an amendment under the rules of court may be made as soon as the necessity arises, and as a general rule the court will allow an amendment even up to the last moment, provided that:

    1. No surprise results,
    2. It does not enable a party to set up an entirely new case or to change completely the nature of his case.
    3. It is not sought to add new parties,
    4. It will not do any injury to the opponent's case or prejudice him in some way which cannot be compensated by costs or otherwise,
    5. The application be made bona fide; and
    6. The proposed amendment will not cause undue delay or is irrelevant or useless or would merely raise a technical point. However a court will not grant leave to amend the pleadings after final decree or entry of judgment.

b. The granting or refusal of an application for leave to amend pleadings, even at the last moment in the proceedings, is a matter entirely within the discretion of the trial judge. And the discretion to allow an amendment will be exercised in order that the real issues between the parties may be finally determined. The Court of Appeal will not interfere with the exercise of that discretion unless it is satisfied that the judge applied a wrong principle or can be said to have reached a conclusion, which would work a manifest injustice between parties. In this case the trial judge exercised his discretion properly in allowing the plaintiff to amend his claim or enable the court to award such damages as would fully compensate the plaintiff for the loss of his house

Ghana Cocoa marketing Board v. Agbettoh

Facts:

The plaintiffs sued the defendant for unlawful termination of contract of service, contrary to article 138(b) of the constitution 1969. The trial judge held for the plaintiffs. On appeal, the defendant-respondent alleged that the reinstatement of the plaintiffs was wrong. The court found that after a witness of the defendant board had concluded his evidence, the plaintiffs had

filed without leave, a notice of amendment in which they sought to add to the indorsement on the writ, the word “Reinstatement.

Holding:

It was not competent for the plaintiffs to have filed without leave, notice of amendment of the writ after the witness of the defendant board had concluded his evidence. Thus if the High Court had granted them leave under Order 28, r 1 of LN 140A (now Order 16, CI 47), the plaintiffs would still have had to comply with the procedure prescribed under the rule in order for the leave to become effective. But as the plaintiffs had failed to comply with the procedural rules, there was no valid claim for reinstatement and as such the High Court could not be held to have granted such a relief. That conclusion would, however, not avail the defendant board because if the purported retirement of the plaintiffs from office was a nullity in the face of a clear constitutional injunction, then the question of Reinstatement did not arise.

Ayiwah v. Badu

Facts:

The defendants advanced money to the plaintiffs and when the plaintiffs failed to pay within the stipulated time took steps to enforce the right of sale reserved by the mortgage deed. The plaintiffs then claimed cancellation of the mortgage deed on the ground of “illegality resulting from harshness relating to the rate of interest charged” and an injunction restraining the sale of the property comprised in the said mortgage deed. Prior to the hearing date, the plaintiffs applied for leave to amend the writ and statement of claim by deleting “cancellation of the mortgage deed and substituting “re-opening of the loan transaction.” Leave was granted but the plaintiffs did not take any further steps to effect the amendment as required by the rules. The trial proceeded on the basis of the original writ and statement of claim, the second plaintiff alone giving evidence in support of the claims by herself and her mother. Apaloo J. accepted her evidence, gave judgment for the plaintiffs, and held, inter alia, that the first defendant in preparing the mortgage deed had failed to satisfy the requirements of the Moneylenders Ordinance, in so far as the deed did not set out separately and distinctly the two transactions which the first defendant had admitted in his evidence. The defendants appealed.

Holding – Appeal dismissed

The leave to amend the writ and statement of claim *ipso facto* became void upon the plaintiffs’ failure to take steps to implement it. Leave may operate to bring into existence an effective amendment if the amendment is ordered by the court *proprio motu* but it is still advisable for counsel in whose favour it has been granted, to enquire about and if necessary see to its implementation.

Sarkodee I v. Boateng II

Facts:
The appellant, the Kyidomhene of the New Juaben Traditional Area (NJTA), before the Eastern Regional House of Chiefs for the destoolment of the respondent, the Omanhene of NJTA. The petition had the concurrence of customary officers (four by making their marks), which indicated that the five were proposed witnesses. However, the charges in support of that petition were signed by the appellant alone more than five years before the filing of the petition. By the time the petition was formally put before the judicial committee of the regional house of chiefs, all the five had died. Yet the title of the petition indicated that it was being brought by the appellant "and others." When the tribunal ordered him to divulge the names of the "others" he obtained leave and amended his capacity to read that he had brought the petition as: "the Kyidomhene, a serving divisional chief of New Juaben Traditional Area and ... as one of the persons entitled under customary law to bring a claim or complaint against or to institute proceedings for the destoolment of a chief." The respondent challenged the appellant's capacity to institute the proceedings alone. The tribunal upheld the appellant's capacity as the Kyidomhene, to institute the proceedings alone. On appeal by the Omanhene, the National House of Chiefs (NHC) reversed that decision on the ground that no single kingmaker had the right under Akan custom to institute proceedings for the destoolment of a chief. The appellant appealed against that decision of the Court of Appeal but the court by a majority decision affirmed the decision of the NHC. The appellant further appealed to the Supreme Court.

Holding:

The appellant's application to amend his capacity to read that he had brought the destoolment proceedings "for himself and on behalf of the kingmakers of NJTA" was rejected on the ground that since the case had been fought on the basis that the appellant, as Kyidomhene, was entitled by himself and without the consent and concurrence of other Kingmakers to sue the Omanhene, for destoolment, the proposed amendment would have altered the whole basis of the case.

APPLICATIONS (MOTIONS) – Order 19, CI 47

Where an application is to made to the court, such applications must be by MOTION supported by an AFFIDAVIT. For example, when you want to serve a party by substituted service, the rules require that your apply to the court via *ex parte* motion supported by affidavit to explain why this method of service is be adopted. If a party to the suit is to be affected, then the application must be on notice to him (Order 19, r. 1(3)), and unless the court otherwise provides, there must be three clear days between the service of the motion and the day named in the notice for hearing of the motion (Order 19, r. 2(1)).

If on hearing of the motion on notice the person to whom the notice should have been given has not yet been given such notice, the court may either dismiss the motion, or adjourn the hearing or order that such notice may be given to such a person (Order 19, r. 1(4)).

An application, which ought to be made on notice to the other side may be made ex parte if the court is satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serous mischief. But the other party affected by such application may move to set it aside.

Republic v. High Court, Accra; Ex Parte Salloum

In this case, the Supreme court expounded on the relation to motion on notice and motion ex parte as follows:

1. The practice in civil proceedings is that in pending matters, application are usually made to the court by motion for a grant of any order in terms of the prayers sought in the motion. The rules and practice of the high Court regulates how motions could be on notice of ex parte.

2. Order 19 of CI 47 provides rules for making applications by motion. Reference is made to Order 19, r 1(3) that except where the Rules provide otherwise, no motion shall be made without previous notice to the parties affected.

3. Order 19, r 1(4) however vests power in the High Court to entertain motions ex parte under limited circumstances. It is part of the rules and practice that certain motions by their nature ought to be made ex parte given the circumstances.

4. There are two main circumstances which as decided in **Leedo v. Bank of the North,** an application ex parte could be made:
   - When, from the nature of the application, the interest of the adverse party will not be affected; and
   - When time is of essence of the application.

   In any of these situations a court may rightly exercise its discretion by granting motion ex parte. But where the motion will affect the interest of the adverse party, a court of law should insist and order that the adverse party be put on notice. In other words, it has been the practice that even if the application is made ex parte and the court is of the view that it has to be on notice, the court should order for a copy of the motion to be served on the affected party even though the application has been sought ex parte. This practice has the statutory backing under Order 19, r. 1(4) of CI 47. It illustrates how parties ought not to be denied this basis and fundamental right in civil litigation.

5. The statement of the law in (4) is also supported by a passage in Atkin's Encyclopedia of Court Forms in Civil proceedings as follows:

   " Motions may be made either ex parte or upon notice. All motions in an action (other than motion for judgment) are interlocutory. The general rule is that no motion may be made without previous notice to the parties affected. But the court of judge if satisfied that the delay caused by proceeding in the usual way and giving the necessary notice

would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to cost or otherwise, and subject to such undertaking, if any, as the judge or court may think just, leaving any party affected by the order at liberty to move to set it aside."

6. The proposition of the law is also that in motions mounted ex parte, the utmost good faith is required of the applicant. For example, an application to set aside any order which was made by a court of competent jurisdiction relying on suppressed fact should not be made ex parte when there are no prevailing circumstance warranting it to be made ex parte without notice to the person to be affected.

Scope and applicability of Order 81

Reference Case: Republic v. High Court, Accra; Ex parte Salloum

There are existing saving provisions under Order 81 of CI 47, which have relaxed the strict application of the rules in matters of non-compliance. Much, however, depends on the extent of the irregularity of the proceedings and the nature thereof. In the application of Order 81, as to the preferred motion, the one of the grounds is the likely breach of the *audi alteram partem* rule. The right to be heard in proceedings before a court of law is well-established in every common law jurisdiction and it should be taken away only when the rules of court or practice permits it. The rules under order 81 of CI 47 cannot reasonable be applied to regulate a basis fundamental error which has denied a party's constitutional and inalienable right to be heard in a case which the applicant had been adjudged a victor in a civil proceedings and what is left is execution. To invoke Order 81 to cure this serious fundamental error would bring too much laxity in practice and such situations should be avoided.

The position of the law on the scope of Order 81 was summed up by the court through Dr. Date-Bah in the case of **Ex Parte Allgate Co Ltd** as follows:

"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 statute other than the rules of court or rules of natural justice or otherwise goes to jurisdiction."

AFFIDAVITS – Order 20, CI 47

Motion on notice or ex parte, must be supported by affidavit, and facts in which a party relies on must be deposed to in the affidavit except where the party opposing relies on a point of law.

Affidavit either in support or opposition to an application to the court must be instituted in the cause or matter in which it is shown. Where there are two or more plaintiffs or defendants, it is sufficient to state the name of

the first plaintiff or defendant and that there are other plaintiffs or defendants. For example, Yaw Manu and Another, if there are only two or Kofi Donkor and Others, if there are more than two.

Affidavit must be drawn up in the first person and divided into paragraphs. The paragraphs must be numbered consecutively. As nearly as possible, every paragraph must be confined to a distinct portion of the subject.

If there are interlineations, alterations and erasures in an affidavit, it must be initialed by the commissioner for oaths before whom the affidavit was sworn, otherwise it will not be read except with the leave of the court.

Where two or more people depose to an affidavit, the names of the deponents must be inserted in the jurat, except where one swears to he affidavit on behalf of all others.

Defective Affidavit

Reference Case: Republic v. High Court, Kumasi; Ex Parte Hans Kodua

APPLICATION FOR DIRECTIONS – Order 32

Within one month after the close of pleadings, plaintiff must take out application for directions. The notice of the application must be served on all parties to the action and there must be minimum of 8 days between the service of the notice and the return date (i.e. hearing date). It is therefore important to serve the notice on the other parties promptly in order that they may have at least the 8 days provided in which to give notice of their requirements and prepare for the hearing of the application. **Note:** This is critical because under Order 32, r. 4, the party on whom the application is served may also require that at the hearing of the application the court make orders or directions in respect of any matter that needs to be dealt with. Under those circumstances, that party is required to file an interlocutory application for additional directions and serve same on the party who filed the original application for directions not less than 7 days before hearing.

The direction stage of a trial is to afford the court the opportunity to look back and take stock of the issues and ensure that the pleadings are in order and that the case is fit and ready for trial. It is also the stage at which the court looks forward and considers the manner in which evidence is to be presented with the aim of shortening the length of the trial and saving cost. For example, at this stage the following can happen:

- Order for consolidation of cases: If in one cause of action, different plaintiffs have sued the defendant, the court can consolidate the cases.

- The judge can remit cases to different courts, e.g. to the circuit court (for trivial cases).

- Order for leave to amend writ/statement of claim – This can be done before the application for directions is made.

- Order for filling further and better particulars – You can take advantage of the eight clear days to file this.

- Order for admission of certain documents without calling the maker.

In this way, it reduces the number of interlocutory applications and save cost.

Failure to apply for directions

Under Order 32, r. 3, if the plaintiff fails to apply for directions within the time stipulated by the rules, the defendant may do one of two things, namely:

- Apply for directions; or
- Apply to dismiss the action.

When the defendant takes the second option, the court may either dismiss the action if it finds it just to do so or treat that application as an application for directions.

Exceptions

There are instances where the application for direction is not required. These include:

1) Actions in which a party applies for summary judgment and the court has made directions under Order 14, r. 6.

2) Where upon an application for interim injunction or interim preservation of property, the court gives directions for further conduct of the matter under Order 25, r. 7.

3) Actions in which order for the taking of an account is made under Order 29, r. 1
4) Patent actions
5) Matrimonial causes or matters under Order 65
6) Actions commenced at the commercial courts.

PLACE & MODE OF TRIAL – Order 33

Refer to Justice Marful-Sau

ENFORCEMENT & EXECUTION OF JUDGMENTS

Step 1: Entry of Judgment

The first step in enforcement and execution of judgment or notice to the judgment debtor after trial. Unless otherwise ordered by the court, a judgment must be dated as the day on which it is delivered and takes effect from that date. Ante-dating or post-dating a judgment does not affect the time of appealing as this is reckoned from the date the judgment is pronounced or delivered.

Step II: Execution

The mode of execution of a judgment depends solely on the relief claimed or granted.

Scenario 1: If a judgment decrees payment of money either by way of damages, debt or costs one can proceed to enforce payment by any of the following means:

- Writ of fi.fa
- Garnishee Order or proceedings
- Charging Order and Stop Order
- Summons to show cause.

Scenario 2: If the judgment decrees delivery of property other than land, one must use:

- Writ of sequestration
- Writ of attachment
- Writ of delivery.

Scenario 3: If the judgment decrees recovery of possession of land then the mode of execution is by writ of possession. However, where in a landlord and tenant suit the landlord had judgment for arrears of rent and ejection he can enforce them by one writ known as "writ of fi.fa and possession."

The various modes of execution are discussed as follows:

Enforcement of Money Judgments

1) Writ of fi.fa

Is a writ that authorises the registrar of the court to seize/attach and sell goods of the judgment debtor at either public auction or by treaty.

Its Nature:

The essence of writ of fi.fa is that the amount ordered to be paid is realized by the seizure and then sale of the judgment debtor's properties and chattels. From the proceeds of the sale, the judgment debt is satisfied. The writ of fi.fa is directed to the Sheriff requiring and ordering him to seize and sell enough of the judgment debtor's goods to satisfy the judgment. It is therefore a writ of attachment (i.e. seizure and detention) and sale against goods. By this writ, execution is levied not only against chattels but also immovable property of the judgment debtor.

Application for Issue:

If there is default or failure of payment of any sum of money payable under a court's judgment, application may be made by the judgment creditor to the registrar for the issue of a writ of fi.fa. No leave is required under writ of fi.fa.

Summary

- Writ of fi.f is resorted to for judgment or orders for the recovery of sums of money
- Writ to be accompanied by a Praecipe detailing the particulars of the attachment.
- Upon failure of the judgment s=debtor to pay the debt, the sheriff proceeds with the execution by seizing properties listed in the praecipe.
- Movable properties must be attached first.
- The properties taken in execution can only be sold after the court has fixed the reserve price in accordance with the Auction Sales Law, 1989 (PNDCL 230)
- The sale can only take place after a public notice of 7 days for movable properties and 21 days for immovable properties.
- The sale of an immovable property can be set aside for irregularity within 21 days from the date of the sale. The sale becomes absolute after the 21 days and the registrar will issue certificate of purchase to the buyer.

Writ of Sequestration

- This is a writ used when a judgment is for the payment of money within a

specified period, particularly under Order 53, r 5.

- Unlike the writ of fi.fa, a writ of sequestration is directed at two or more persons called Commissioners.
- The Commissioners are empowered to enter into any immovable property of the judgment debtor to receive the rents thereof and pay same to court.
- They are also to take hold of movable properties of the judgment debtor without selling them until the judgment is satisfied or the court directs otherwise.
- Leave of the court is required before the writ of sequestration can be issued.

Garnishee Order

- This is a process by which money due to a judgment debtor can be attached and used to satisfy the judgment debt.
- By this process a third party who owes the judgment debtor (called the Garnishee) is ordered by the court to pay the judgment debtor the sum due on the judgment.
- An order is first made upon ex parte application for the Garnishee to appear in court to show cause. This order attaches such debt due from the Garnishee or as much of it as may be specified in the order to satisfy the judgment debt.
- The order may be served on the Garnishee and the judgment debtor and the Garnishee shall be bound on service of the order.
- The order shall specify return date on which the garnishee is expected tom show cause.
- On the return date of the Garnishee does not dispute the debt an order absolute is made on the Garnishee.
- Note the need to do justice by not garnishing the entire account of corporate bodies their financially crippling their operations.

Writ of possession

- This is used where a judgment requires the giving up of an immovable property or for ejection.
- A writ of possession is not issued without leave of the court, except in mortgages action under Order 59.
- The leave shall be granted when the court is d=satisfied that all persons in actual possession have received the notice of the proceedings to enable a person apply for any relief to which the person may bbe entitled.

Charging Orders and stop Orders

- This is an order imposed on an immovable property or interest therein of a debtor to secure the payment of monies due or to become due under a judgment or order.
- On an ex parte application, the court will first make an order to show cause and thereafter where there is sufficient cause an order absolute

will be made with the appointment of a Receiver.

- The court may by order impose a charge on any interest in securities to which the judgment debtor is beneficiary entitled.
- The securities which are subject to such orders include the following:
  - Government stocks in the name of the AG.
  - Any stock of any company registered under any enactment
  - Any dividend of or interest payable on stocks mentioned above.
- The order is to prevent the transfer of shares and stocks as they stand charged with the payment of judgment debt.

Writ of Delivery

- This is used when an order is made for the return of movable property or goods to a successful party and there is a default.
- The writ will direct the sheriff to cause the delivery of the movable property mentioned in the writ to the judgment creditor.
- If the judgment does not give the debtor an alternative of paying the assessed value of the goods, then a writ of specific delivery will be issued.
- A judgment for the delivery of goods or payment of their assessed value may be enforced by either:
  - A writ of delivery to recover the goods or their assessed value.
  - A writ of specific delivery with leave of the court.
  - A writ of sequestration if Order 43 r 5 applies.

<u>Enforcement of Judgment to do or abstain from doing an act – Order 43 r 5</u>

1. Where a person required under a judgment to do an act within a specified time in the judgment or orders refuses or neglects to do it within that time; or
2. A person disobeys a judgment or order requiring the person to abstain from doing an act, then the judgment or the order may be enforced by any of the following means
   a. A writ of sequestration against the property of the person with leave of the court.
   b. A writ of sequestration against the property of any director or other officer of the body where that person is a body corporate, with leave of the court.
   c. An order of committal against that person or where that person is a body corporate, against any director or other officer.

<u>Condition Precedent to enforcement under Order 43 r 5</u>

Under Order 43 r 7, a judgment or order cannot be enforced unless the following conditions are fulfilled:

- A copy of the judgment or order has been served personally on the person required to do or abstain from doing the act in question; and

- In respect of a judgment or order requiring a person to do an act, the copy has been served before the expiration of the time within which the person was required to do the act.

An order requiring a corporate body to do or abstain from doing an act cannot be enforced unless the following conditions are fulfilled:

- A copy of the order has been served personally on the officer against whose property leave is to be sought to issue a of sequestration or against whom an order of committal is sought; and

- In the case of a order requiring a body corporate to do an act, the copy has been served before the expiration of the time within which the body was required to do the act.

Payment of judgment debt by installments

- Order 41 r 8(1) allows the judgment debtor to settle his indebtedness to the judgment creditor by installment payment for any sufficient reasons.
- Where the court orders installment payment, the execution of the judgment is stayed until after a default then execution may then be issued for the whole money due.

  Note that upon default execution can only commence with the leave of the court.

  See the following cases:
  Republic v. High Court; ex parte Kumoji
  Fiankuma v. Cobbina

PROBATE & ADMINISTRATION – Or. 66

Jurisdiction

Note the following:

- Probate is where there is a will. If there is a will and everything is okay with the will, you apply for probate.

- Administration is where there is a will with problems, or there is no will.

The application for probate or letters of administration must be made to the court with jurisdiction over the deceased's fixed place of abode. Where the deceased died outside Ghana without a fixed place of abode in Ghana, jurisdiction lies in any court in any area where any of his properties may be found. Where there are properties in more than one jurisdiction, the application shall be made to any of the courts in those jurisdictions with notice to the Registrars of the other courts and if a CAVEAT is filed it shall

be brought to the notice of the court before which the application is pending which may stay hearing until it has ascertained that no caveat has been filed in another court.

Interim Measures

The court may take interim measures to:

- Preserve the deceased's property within its jurisdiction
- For the discovery and preservation of the deceased's will.

Where the circumstances require, on the death of a person, the court may appoint any person to take possession of the deceased's property, or put it under seal until the property is dealt with inn accordance with law.

Inter-Meddling

This is an offence and a person convicted of it shall be liable to a fine, imprisonment or both. The offence is committed in two ways, namely:

a) By an intermeddler – That is a person other than the person named as the executor in the will or appointed by the court go administer the estate of deceased person, who takes possession of and administers or otherwise deals with the property of the deceased (Or 66 r. 3). An intermeddler also incurs civil liability by being imposed with the same obligations and liabilities as a duly named executor or adminjstrator.

b) By neglect to apply for probate i.e where the main executor take possession of and administrates or otherwise deals with the property but fails to apply for probate within 3 months after the death or after the termination of any relevant legal proceedings.

Application

The application for probate or Letters of Administration must be supported by the applicant's affidavit exhibiting such documents as the court may require. The court may require further evidence of the identity of the applicant where it deems necessary or desirable. The court is also required to ascertain the time and place of death and proof of death. The applicant must declare the value of property or estate.

Where an application for Letters of Administration is granted, the L/A shall not be issued until notice of the grant is given for not less than 21 days or such other period as the court may order as follows:

- On the notice board of the court.
- In any public place where it is likely to come to the notice of the interested persons
- At the deceased's last known place of abode.

Caveat

A caveat is a formal notice or warning given by a party with interest to a court to prevent the proving of a will or grant of Letters of Administration without notice to him.

Caveat may be filed before or after the application but definitely before the grant of the probate or the L/A. The Registrar is required to bring the caveat to the attention of the applicant or his lawyer and not to take any further steps until the applicant has duly warned the caveatpr or caveatrix. The caveat must remain in force for 3 months although it may be renewed from time to time. The Registrar shall not seal any probate or L/A granted if he knows than an effective caveat has been filed.

Upon the filling of a caveat, the applicant of the interested person will cause to be issued to the caveator/caveatrix a warning – see **Form 26,** that invites the caveator to file affidavit of interest (this is called warning to caveator), which will state the nature and particulars of any interest that he has in the estate. If the caveator neglects to file the affidavit of interest, the applicant may move the court in respect of the original application for the grant subject to the court's discretion to order that notice be served on the caveator. If the caveator files the affidavit of interest, the applicant will be served a copy. The applicant will then move the court for the grant on notice to the caveator who will also be entitled to copies of the affidavits filed in support of the application.

If by the date of the hearing the parties have agreed on whom the grant should be made to, the court will order the removal of the caveat and make a grant to that person(s). Where the parties are not able to agree, the court will summarily determine who is entitled to the grant, or if it deems it necessary, order the applicant to issue a writ against the caveator within 14 days to determine who is entitled to the grant.

Priority

Situation A: If the deceased died testate the court would determine the person entitled to the grant of probate or Letters of Administration with will annexed by the following priority:

- The Executor
- Any specific legatee or devisee

- Any creditor or the personal representative of a deceased person.
- Any legatee or devisee whether residuary or specific claiming to be entitled on the basis of a contingency
- A residuary legatee or devisee holding in trust for another.
- The ultimate residuary legatee or devisee where the will did not disposed of the residue.
- Any person with no interest under the will but who would have been entitled to a grant had the deceased died intestate.

Situation B: If the deceased died intestate after the coming into force of Intestate Succession Act, 1985 (PNDCL 111) the priority shall be as follows:

- Surviving Spouse
- Children
- Parents
- Customary Successor

Note: If the person with prior rights delays or refuses to take it, and does not agree to renounce his right, any person with an inferior right may serve notice (**per forms 27**) on him requesting that he takes the grant or renounces the right. If he does not apply within 25 days that other person may apply for the grant although the court would only make the grant if it considers it desirable so to do.

Question – June 2014

Under Order 66 r 13, what is the order of priority of grant of Letters of Administration when a person dies intestate?

Answer:

- Surviving Spouse
- Children
- Parents
- Customary Successor

Question – June 2014

What is Administration Action under Order 66 of CI. 47? How is it different from Probate Action?

Answer

An Administrative Action is an action seeking the direction of the court in the administration of the estate of the deceased person or for the execution of a trust created by will. An administrative action comes to play after the

grant of a probate or Letters of Administration and there is a mismanagement of the property, then administrative action is taken to resolve it in court. Thus any dispute that arises after the grant of probate or Letters of Administration are resolved through Administrative Action.

Probate action is an action for:

- A grant of probate or Letters of Administration of a deceased person;
- Revocation of the grant of probate or Letters of Administration; or
- An order or judgment prooouncing on the validity or otherwise of a will.

Question – June 2012

a) What is a caveat in a Probate Action? How and when is it filed?

b) What is meant by proof of Will in Form?

Answer

a. A caveat is a formal notice or warning given by a party with interest to a court to prevent the proving of a will or grant of Letters of Administration without notice to him.

   Caveat is filed must be filed in a prescribed form before or after the application but definitely before the grant of the probate or the L/A.

b. Proof of a will in solemn form is made where the validity of a will is in doubt or is disputed. The executors are required to prove the will by commencing an action by a writ of summons to seek the pronouncement of the court that the will is valid. Any person who claims to have interest in the estate of the deceased must notify the executor(s) in writing to request the executors named in the will to prove the will in solemn form. The notice must specify the following:
   - The name, address and description of the person filling it.
   - The interest the person has in the estate of the deceased; and
   - The grounds on which the validity of the will is didputed.

The executor is required to file an answer to the notice within 8 days to either renounce probate or prove the will in solemn form.

Contentious Probate Matters

All probate actions must be commenced by writ, endorsed with a statement of the nature of the interest of the plaintiff and the defendant in the estate. If the writ is for a revocation of a grant, it must be preceded by a notice

under r. 37 to the person with the grant to bring and leave the probate or LA at the court registry unless they have already been lodged there (The process filed in court in order to achieve this is called a CITATION).

REVOCATION OF GRANT

Where the action is for a revocation of a grant and the notice under r. 37 (i.e. CITATION) has been served to bring in the grant, the person on whom the notice is served shall comply within 4 days of service else the plaintiff may apply for an order compelling compliance within a time specified in the order.

Expected processes to be drafted

1. Caveat
2. Notice of filling Caveat
3. Warning to Caveator
4. Affidavit of interest for a caveat
5. Application for Probate or L/A with supporting affidavit
6. Citation

APPEALS

An appeal is an application to an appellate court, inviting it to:

- Set aside; or
- Vary the orders, decision, etc

Of a lower court on the grounds that it was given in error (either legal error, factual error or both)

Illustrative case: **Adusa v. Attorney-General**

Cross Appeal: This is by the respondent to the appeal seeking the intervention of the appellate court's to:

- set aside part of the judgment; or
- Vary an order

NB: A respondent served with a notice of appeal by the appellant may himself appeal against the same decision. Such an appeal by the respondent is referred to as cross appeal.

If the respondent does not appeal, he may desire to contend on the appeal that the decision of the court below be varied. In other words, an order for variation is also filed by the respondent for an appellate court to vary part of the judgment.

Illustrative case: **Heward-Mills v. RT Briscoe Ghana Ltd**

Jurisdiction for Appeals

All appeals are statutorily conferred- they are not conferred by common law or inferred from judicial decisions. Therefore, if statute does not confer appellate jurisdiction, a court will lack jurisdiction to hear an appeal.

Supporting case: **Bosompem v. Tetteh Kwame**

Legal Principle: The Supreme Court held that an appellate court had no inherent jurisdiction to entertain an appeal except as conferred by statute.

Under section 21 of the Courts Act, 1993 (Act 459), an appellate court should not entertain any appeal unless all the conditions are satisfied.

NOTE: Appellate jurisdiction is conferred by the Constitution and the Courts Act only. CI 47 only regulates the procedure for hearing appeals from the District Court to the High Court.

NOTICE OF APEAL

This is the first document to be filed in the appeal process and it must be signed by the appellant himself – that is , if he is not represented. However, if the lawyer signs the notice of appeal, he can do so with all the appellants.

Illustrative case: **Akunto v. Fofie**

Legal principle: The court held that a solicitor could sign the notice of appeal for his clients if he had authority to do so, but where there were several appellants, and the solicitor did not sign, then each party who was

dissatisfied with the decision of the court below must sign and file a notice of appeal.

Content of the Notice of Appeal

The notice must contain all the information regarding the appeal, in particular:

- The appellate court to which the appeal is directed
- The names of the appellants
- The names of the respondent and any person affected by the appeal
- The court below – i.e. the trial court
- The date of the decision being appealed
- The part of the judgment being appealed
- The grounds of appeal
- The relief being sought.

Capacity to Appeal

- Parties to the action
- Persons who are affected by the judgment although not parties to the action. Examples include: Landlords, Insurers, beneficiaries of a will in a probate action where the executors do not appeal upon refusal by the court to grant probate to a will.

TIME WITHIN WHICH TO APPEAL

Every appeal is limited by time and it is determined by the rule of the appellate court where the appeal is to be heard.

1. *Appeal from District Court to High Court*: Regulated by Order 51, CI 47. Time limit is 3 months from date judgment is given for final judgments and 14 days for interlocutory decision or order.

2. *Appeal from High Court to Court of Appeal*: Regulated by the Court of Appeal Rules, CI 19. Time limit is 3 months for substantive appeal (final judgment) and 21 days for interlocutory appeals (in respect of interlocutory judgments).

   NB: Appeals that are filed outside the statutory periods without any valid extension of time raises jurisdictional issues, thereby rendering the appeal incompetent.

   Illustrative case: **Tindana v. Chief of Defence Staff**

Legal Principle: The issue of whether or not appeal is filed outside the statutory period is one that borders on jurisdiction. The issue of jurisdiction could be raised by any court entertaining any proceedings and such jurisdiction issue cannot waived by any court (in the instant case, the Court of Appeal), when appeal is filed outside the statutory period without any valid extension of time to give life to the appeal. In other words, the condition precedent to the exercise of the right to appeal within the time frame specified by the rules could not be waived by any court. The power conferred on the courts to extend time in circumstances that they deem fit, was a recognition that beyond the statutory indulgence that has been expressly authorized by statute, any appeal filed outside the initial period of three months and in the period allowed for extension of time, would be incompetent and that the issue could be raised at the hearing of the appeal by the respondent.

TYPES OF APPEALS

There are two types:

- Interlocutory Appeals, ie Appeal against interlocutory decision
- Ordinary Appeals, ie. Appeal against a final decision.

How are the two distinguished?

1. The test for determining whether a decision was final or interlocutory was whether the decision had determine the case or had still left certain issues to be determined. If it did, then the decision was final, but if it did not, then it was interlocutory. Thus, an interlocutory decision was an order in procedure to preserve matters in status quo until the right of the parties could be determined. This approach is the 'nature of the order' approach also known as the "Lord Alverstone CJ Test". (Refer to: **Opoku v. Axes Co. Ltd** & **Poku v. Poku**).

2. Separate time limits are imposed by the rules for filling interlocutory appeals and ordinary appeals.
   - Under the rules, there is a three months' limitation period, in the case of an appeal against a final decision, which could be extended by the trial court or the Court of Appeal.

   - Under the rules, there is a twenty-one days' limitation period, in the case of an interlocutory appeal against an interlocutory decision, with no extension. In effect, unless a party strictly complied with the time limits and filed his appeal against an interlocutory decision within the 21 days, he would be out of time and could not be heard on the matter.

Requirement of Leave to file an Appeal

- Under section 21(12) of Act 459, interlocutory appeals from District Court to High Court require leave.

- Under section 11(5) of Act 459, interlocutory appeals to the Court of Appeal from the Circuit Court require leave of the Circuit Court or the Court of Appeal.

Relevance or need for the distinction – To determine the time for filling an appeal in interlocutory or final decisions and whether or not leave is required in some appeals.

REHEARING

An appeal is "by way of re-hearing" (Refer to: **Nkrumah v. Atta**) This means that:

- The appellate court is in the same position as if the rehearing were the original hearing.
- The appellate court may receive evidence in addition to that before the court below and may review the whole case and not merely the points as to which the appeal is brought.
- Evidence that was not given before the court below is not generally received.
- The appellate court may also consider what facts have occurred since the trial, and what relevant change has been made in the law. But in the exercise of its power to consider changes in the law since the trial, the court will apply legislation, since enacted, which is sufficiently retrospective and extends to pending proceedings or gives new remedies.
- The appellate court cannot, however, determine the substantive rights of the parties by applying subsequent legislation, which is not retrospective.

ADMISSION OF NEW LEGAL OR FACTUAL ISSUES FRESH ON APPEAL

The position of the law is that admission of new legal or factual issue on appeal is generally not permitted.

Exceptions:

- Where the issue strikes at the root of the action
- Issue bothers on jurisdiction
- Issue arises from statute
- The issue is substantial but does not require further evidence.
- Point of law arising from the records.

ADDUCTION OF FRESH EVIDENCE ON APEAL

General position of the law is that it is not opened to a party as of right to adduce fresh or new evidence on appeal.

Principles regulating adduction of fresh evidence on appeal:

Illustrative case: **Poku v. Poku**

The Supreme in this case applied the principles established in **Ladd v. Marshall** as follows:

- The applicant must establish that the evidence sought to be adduced was neither:
  - in the possession of the applicant; nor
  - obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was given by the lower court.

Note: After the first hurdle is had been surmounted, then the court will proceed to as determine whether or not:

- The intended evidence would have positive effect on the outcome

ORDERS ON APPEAL

The appellate court may do any of the following when deciding an appeal:

- Remit the case to the lower court for retrial (i.e. De novo).
- Direct the trial court to inquire into the case
- Allow the appeal
- Dismiss the appeal
- Draw new inferences of facts
- Orders not made could be made
- Grant injunctions

ENFORCEMENT OF JUDGMENTS FROM APPELLATE COURT

- Obtain order from the appellate court
- File same at the lower court
- Enforce the order through the same process of enforcement at the trial court.

INTERROGATORIES & DISCOVERIES

Introduction

1. From the pleadings the issues in an action become clear. Each party knows what he has the burden of proving and the necessary evidence to be adduced.

2. In a quest for this evidence, a party may find out that certain material documents are in the possession of the other party. Thus if this documents are material to his own case, he would need them as part of his evidence.

3. Similarly, where there is likely to be conflict of evidence, it will be cost and time saving for a party to know what facts, are admitted by the opponent. In this way the conflict is narrowed. Furthermore a fact, which a party needs in evidence may be within the knowledge of his opponent and if the opponent admits that fact, the burden of proof on the party is, to the extent of the admissions is lessened.

To assist a party in situations such as enumerated above, there are procedures whereby:

- He can cause his opponent to disclose to him before the trial material documents in the opponent's possession for him to inspect and make copies thereof, if necessary.

- He can obtain admissions from his opponent by asking questions in the form of what are known as *interrogatories.*

These two procedures are collectively known as *discoveries*. There are therefore discovery of documents by way of disclosure of them and discovery of facts by admissions through series of questions or interrogatories.

Examples:

A defendant-driver drove a vehicle negligently and knocked the plaintiff. There is no record of the accident because the defendant did not make a report to the police. The defendant however reported the accident to his insurers but files a defence denying that the accident ever occurred. The plaintiff would wish to compel the defendant to confirm the denial on oath. The process of discovery would compel the defendant to disclose the report he made to his insurers.

What then is Interrogatories?

Interrogatories are written questions, which one party to a cause or matter, with the leave of the court, puts to another party as to a matter in question between them.

Essence of Interrogatories:

The main object of interrogatories is to obtain admissions that may support the case of the party interrogating and also weaken the case of the party under interrogation. The party who is administering interrogatories may have his burden lessened by way of the answers to questions put forth.

In summary, the objectives of interrogatories are as follows:

- To elicit information to support the case of the party interrogating.
- Weaken the case of the party being interrogated
- Lessen the burden of prof on the party applying, save cost and time.
- Obtain admissions on oath by extracting information from the other party.

Who can apply interrogatories?

Both the plaintiff and the defendant can apply.

At what stage are interrogatories applied?

- Usually applied after close of pleadings but before application for directions.

Procedure used in applying for interrogatories

Order 22 of CI 547 deals with the procedure as follows:

- The party to any cause or matter may apply to the court for an order giving him leave to serve on the other party interrogatories, which relate to any matter in question between the applicant and the other party; and

- Requesting the other party to answer the interrogatories on affidavit within such period s as the court may specify.

Note: The application is by motion on notice and supported by an affidavit verifying the facts. A copy of the interrogatories must be served with the application.

Power of the Court to grant interrogatories

The judge has the discretion to grant the service of interrogatories. The discretion is governed by the following:

- Relevance
- Nature of questioning: Questions that relate solely on credibility not allowed.
- Fishing: That is when interrogatories relate to matters outside the pleadings and they are not allowed.
- Nessesity
- Questions that could not be answered.
- Oppressive interrogatories

Objections to Interrogatories

- Scandalous matters
- Irrelevant questions
- Mala fide interrogatories: ie. not serving the purpose
- Privilege under the Evidence Act

DISCOVERY – disclosure of documents and production of such documents for inspection

This is **the** process whereby a party to an action:

- discloses to; and where necessary
- produce for inspection by the other party all material documents in his possession.

Documents for recovery

- Must relate to any matter in question
- Should be in the possession, custody or power or control of the person ordered to comply.

Mutual discovery

1. Within fourteen days after the close of pleadings in an action, a party in that action with another has the right to make and file for service on the other party a list of all documents which are or have been in that party's possession, custody and power that relate any matter in question between them in the action. The application is in the form of Motion on Notice.

2. The parties may agree to dispense with discovery or limit the right to discovery.

3. A party's obligation to discovery extends to all relevant documents whenever they come in to that party's possession.

   NB: This requirement is liked with the principle that a party must not seek to take his opponent by surprise – Order 11, r 8 & 9 of CI 47 and also on the need not to hold document with the view to misleading the other party or the court.

4. If a party fails to make automatic discovery, the other party is entitled to apply to strike his pleading or apply for an order for recovery.

Exceptions

- Does not apply to third party proceedings
- Running down actions
- Actions to recover penalties or enforce forfeiture.

Documents privileged from production

- Incriminating document
- Documents containing confidential information, say between lawyer and client.
- Documents which when produced will be against public policy
- Documents marked without prejudice
- Documents owned by a third party
- Document of title of other persons

INTERPLEADER PROCEEDINGS - Order 48

Interpleader is a proceeding by which a person, from whom two or more persons claim the same property or debt or land who does not himself claim the property or the disputed debt, can protect himself from legal proceedings by calling on the two claimants to interplead, that is to say, claim against one another so that the title to the party or debt may be decided by the court. The person in possession of the subject matter in the dispute initiates the proceedings whereby the claimants are summoned before the court, which will then decide their claims.

OR:

Interpleader is a proceeding that offers a form of relief by which a person can protect himself from legal proceedings being brought or continues against him by calling upon two claimants to the same debt or property to interplead –

that is to say, each of them make his claim against each other, in other to determine the title to the property or debt.

There are two kinds of interpleader proceedings:

1. Stakeholder's Interpleader
2. Sheriffs or Registrar's Interpleader

Stakeholder's Interpleader

Is a proceeding that offers a form of relief by which a person can protect himself from legal proceedings being brought or continues against him by calling upon two claimants to the same debt or property to interplead – that is to say, each of them make his claim against each other, in other to determine the title to the property or debt.

Interpleader Application

- Made by motion on notice to all claimants.
- The court may order the claimants to appear and state the nature and particulars of their claim.
- If a claimant fails to appear, the court may bar him from re-litigating the matter.

Sheriff Interpleader

This arises where a sheriff seizes or intends to seize goods by way of execution and a person, other than the judgment debtor, claims them. In such a situation, the sheriff initiates the proceedings to determine whether the property belongs to the judgment debtor (and therefore can be seized) or to the claimant.

AMENDMENTS – Order 16

Purpose

The purpose of amendment is to allow the court to determine the real question or issues in controversy between the parties and to correct any errors or defects in the proceedings or avoid multiplicity of suits.

Illustrative case: **Yeboah v. Bofour**

Legal principle

An application for an amendment may be made as soon as the necessity arises, and as a general rule the court will allow an amendment even up to the last moment, provided that:

- No surprise results
- It does not enable a party to set up an entirely new case or to change completely the nature of his case
- It is not sought to add new parties,
- It will not do any injury to the opponent's case or prejudice him in some way, which cannot be compensated by costs or otherwise,
- The application be made bona fide; and
- The proposed amendment will not cause undue delay or is irrelevant or useless or would merely raise a technical point.

However a court will not grant leave to amend the pleadings after final decree or entry of judgment

Note:

1. **Order 81 r 1(2)-** where there is non-compliance to the rules, the courts may among others, allow such amendment to be made and also to make such others dealing with the proceedings, …..

2. **Order 4** – Generally allows amendment of process by joining parties or joining parties or causes of action.

Can a Writ be amended without leave of the court?

- The plaintiff may amend the writ once without leave at anytime before close of pleadings. Such a writ must be served on each defendant to the action.

- Can a defendant amend Notice of Appearance?
  - The Notice of Appearance cannot not be amended by a defendant without the leave of the court.

- Can a defendant amend pleadings?
  - A party to an action can amend any pleading without leave once at any time before the pleadings are closed. In this case, the amended pleading must be served an the other side.

Illustrative case: **Hasnem v. ECG**

Legal Principle

DRAFTING-STATEMENT OF CLAIM (RUNNING DOWN ACTION)

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

KUMASI – ASHANTI REGION

SUIT NO…

JONATHAN BOATENG

H/NO. P.49

PRABON – ASHANTI REGION PLAINTIFF

VRS

1. JOANA ASANTE

   H/NO. 123

   EJISU – KUMASI

DEFENDANTS

2. KWABENA MENSAH

   H/NO. 456

   OBUASI

STATEMENT OF CLAIM

1. The Plaintiff was at the time material to this action a carpenter and lives at Prabon, near Sewua, Kumasi in the Ashanti Region.

2. The first defendat was at the time material to this action the owner of Nissan Urvan Bus with registration number AS 9832 W and employer of the second defendant herein as his servant of the said vehicle and lives at Ejisu in the Ashanti region.

3. The second defendant was at the time material to this action the driver of Nissan Urvan Bus with registration number AS 9832 W and an employee of the first defendant and lives at Obuasi in the Ashanti Region.

4. The Plaintiff states that on or about 10/08/2009 at about 5.00 am, he was travelling from Effiduase to Kumasi on board Nissan Bus Number AT 9832 T driven by the second defendant in the course of his employment.

5. On reaching a section of the road at Kwamo on the main Kumasi-Accra road, the second defendant drove the vehicle number AT 9832 T so fast and so negligently that he veered off the outer lane of the dual carriage road and hit the rear nearside portion of Mercedez Benz Tanker Truck with registration AS 1190 Z ahead of him which was branching to his nearside with its indicator signal on.

PARTICULARS OF NEGLIGENCE

a) Driving so fast
b) Veering off his lane to hit the vehicle ahead of him
c) Failure to be on proper look out.

d) Failure to control the vehicle to avoid accident.
e) Failure to observe the road traffic regulations.

6. As a result of the accident, the plaintiff sustained serious injuries and was rushed to the Okomfo Anokye Teaching Hospital where he underwent surgery and treatment.

PARTICULARS OF INJURY

a) Fracture of the neck of the femur
b) Segmental fractures of the distal and supracondylar region of the femur
c) Head injury
d) Injury in the thigh
e) Injury to the pelvis
f) Injury to the hip joint
g) Multiple abrasion of the body

7. The Plaintiff was therefore admitted at the hospital from the 10/08/2009 and discharged on 31/08/2009.

8. The Plaintiff also attended hospital thereafter as an outpatient.

9. The Plaintiff was admitted again at the hospital on 17/02/2012 for the removal of the implant and discharged on 11/03/2012 after treatment.

10. The plaintiff also incurred expenses, damages and loss of income of Ghs300 a month due to the accident.

PARTICICULARS OF SPECIAL DAMAGES

a) Medical report	Ghs200.00
b) Police report	Ghs50.00
c) Drugs	Ghs60.00
d) Hospital fees	Ghs100.00
e) Admission at KNUST hospital	Ghs300.00
f) Special nourishment	Ghs150.00
g) Second surgery	Ghs500.00
h) Transport	Ghs90.00
i) Transport to Okomfo Anokye	Ghs2,400.00
j) X-ray	Ghs10.00
TOTAL	**Ghs3,860.00**

11. The Plaintiff cannot live a normal life due to the injuries sustained.

Wherefore, the Plaintiff claims against the defendants jointly and severally

as follows:

Special and General damages and consequential loss suffered by the Plaintiff through the negligent driving of the second defendant while driving the first defendant's vehicle in the course of his employment, which negligence the first defendant is vicariously liable as follows:

h. General damages
i. Special damages - Ghs3,860.00

DATED AT DOMINION CHAMBERS, ACCRA THIS 10TH DAY OF MAY, 2016

LAWYER FOR PLAINTIFF

THE REGISTRAR

HIGH COURT

KUMASI

AND TO THE DEFENDANT HEREIN

DRAFTING-STATEMENT OF CLAIM (LAND CASE)

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

LAND DIVISION

KUMASI – ASHANTI REGION

SUIT NO…

JONATHAN BOATENG

H/NO. P.49

Dominase – ASHANTI REGION PLAINTIFF

VRS

1. JOANA ASANTE

   H/NO. 123

   Dominase – KUMASI

DEFENDANTS

2. KWABENA MENSAH

   H/NO. 456

   ASHANTI NEW TOWN - KUMASI

STATEMENT OF CLAIM

1. The Plaintiff was at the time material to this action a farmer living at Dominase, in the Ashanti Region.

2. The first defendant was at the time material to this action also a farmer living at Dominase in the Ashanti Region.

3. The second defendant was at the time material to this action sand and stones contractor living at Kumasi.
4. The Plaintiff states that his family owns all that piece or parcel of farm land at Aboaboso at Dominase on Essumeja Stool land bounded by the properties of Kwame Nimo (deceased), Opanyin Gyasi (deceased), Maame Psas ad thence to the Aboabo and Akai streams.

5. The plaintiff says that the said land was originally acquired by the plaintiffs grand uncle Kwame Poku about 100 years ago as a virgin forest as a native of Dominase under the Essumeja Paramount.

6. Upon acquiring the land, the plaintiffs said granduncle reduced the same into cocoa farm and built a cottage farm thereon.

7. The late Kwame Poku was therefore in possession of the land until his death and thereafter same devolved upon his family as family property.

8. However, in February 2012, the second defendant started winning sand and stone on the land.

9. The second defendant claims he was permitted to do same by the first defendant.

10. The plaintiff contends that the conduct of the defendants amount to trespass.

Wherefore the plaintiff claims as follows:

a) Declaration of title to all the piece or parcel of farm land
b) Damages for trespass
c) Recovery of possession of the said land
d) Perpetual injunction

DATED AT DOMINION CHAMBERS, ACCRA THIS 10TH DAY OF MAY, 2016

LAWYER FOR PLAINTIFF

THE REGISTRAR

HIGH COURT

KUMASI

AND COPY FOR SERVICE ON THE WITHIN-NAMED DEFENDANT

JUDGMENT IN DEFAULT OF APPEARANCE– ORDER 10 RULE 1

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HOGH COURT OF JUSTICE

ACCRA- GREATER ACCRA

AD 2016

SUIT NO….

BETWEEN:

PHILP MENSAH

(Suing as the Administratrix of Estate

of Akosua Manu (Deceased)) **PLAINTIFF/APPLICANT**

VRS

NYARKO HOUSEHOLD

ACHIMOTA, ACCRA **DEFENDANT/RESPONDENT**

(PLANTIFF TO DIRECT SERVICE)

MOTION EX-PARTE FOR JUDGMENT IN DEFAULT OF APPEARANCE (ORDER 10 RULE 1, CI 47)

THIS HONIRABLE COURT will be moved by Counsel for and on behalf of the Plaintiff/Applicant herein praying this Honorable Court to enter judgment inn favour of the Plaintiff/Applicant against the Defendant/Respondent in default of appearance and upon the grounds contained in the affidavit in support and for further and other orders as this Honorable Court may deem fit.

COURT TO BE MOVED …. DAY OF …., 2016 AT 9.00 am or so soon thereafter as counsel for Plaintiff/Applicant could be heard.

DATED AT DOMINION CHAMBERS, ACCRA, THIS … DAY OF MAY, 2016.

DRAFTING-STATEMENT OF DEFENCE AND COUNTERCLAIM

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

LAND DIVISION

KUMASI – ASHANTI REGION

SUIT NO…

JONATHAN BOATENG

H/NO. P.49

Dominase – ASHANTI REGION PLAINTIFF

VRS

1. JOANA ASANTE

   H/NO. 123

   Dominase – KUMASI

   DEFENDANTS

2. KWABENA MENSAH

   H/NO. 456

   ASHANTI NEW TOWN - KUMASI

STATEMENT OF DEFEMCE AND COUNTERCLAIM

Save as hereinafter expressly admitted the defendant denies each and every allegation of fact contained in the Plaintiff's Statement of Claim as if same were set out in extensor and denied seriatim.

1.

2.

3.

COUNTERCLAIM

Defendant repeats his averments contained in paragraphs [] to [] above and counterclaim against the Plaintiff as follows:

(a)

(b)

(c)

DATED AT DOMINION CHAMBERS, ACCRA THIS 10TH DAY OF MAY, 2016

LAWYER FOR DEFENDANT

THE REGISTRAR

HIGH COURT

ACCRA

AND COPY TO THE ABOVE NAMED PLAINTIFF

APPLICATION FOR SUMMARY JUDGMENT

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

KUMASI – ASHANTI REGION

SUIT NO…

ASEMPANEYE RURAL BANK

G24, GOASO

BRONG AHAFO PLAINTIFF/APPLICANT

VRS

ODUM YE SAWMILL

18 NYAMEDUA STREET

TEPA – ASHANTI REGION DEFENDANT/RESPONDANT

MOTION ON NOTICE FOR SUMMARY JUDGMENT UNDER ORDER 14 RULE 1 OF CI 47

PLEASE TAKE NOTICE that this honorable court will be moved by PHILIP MENSAH of Dominion Chambers of counsel for and on behalf of Plaintiff/Applicant herein praying this honorable court to enter summary judgment for Ghs[X] with interest at [%] per annum and cost against the defendant/respondent herein per the grounds set forth in the supporting affidavit and for any order(s) as this honorable court may deem fit.

COURT TO BE MOVED on … day of … at 9.00 am or soon thereafter as counsel for plaintiff/Applicant herein could be heard.

DATED AT DOMINION CHAMBERS, ACCRA THIS 10TH DAY OF MAY, 2016

LAWYER FOR PLAINTIFF/APPLICANT

THE REGISTRAR

HIGH COURT

KUMASI-ASHANTI REGION

AND SERVICE ON THE WITHIN-NAMED DEFENDANT/RESPONDENT

APPLICATION FOR JUDGMENT IN DEFAULT OF DEFENCE

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

ACCRA – GREATER ACCRA REGION

SUIT NO…

JONATHAN BOATENG

H/NO. P.49

Dominase – ASHANTI REGION PLAINTIFF/APPLICANT

VRS

DEFENDANT/RESPONDENT

KWABENA MENSAH

H/NO. 456

ASHANTI NEW TOWN - KUMASI

MOTION ON NOTICE FOR AN APPLICATION FOR JUDGMENT IN DEFAULT OF DEFENCE

TAKE NOTICE that this Honorable court will be moved by counsel for and on behalf of the Plaintiff herein on an application for judgment in default of defence against the Defendant herein for the reliefs endorsed on the Plaintiff's writ of summons and for any other order or orders as this Honorable Court may deem fit.

COURT TO BE MOVED on … day of … , 2016 at 9.00 am in the forenoon or so soon thereafter as the counsel for plaintiff may be heard.

DATED AT DOMINION CHAMBERS, ACCTA THIS 10TH DAY OF MAY, 2016

LAWYER FOR PLAINTIFF

THER REGIUSTRAR

HIGH COURT

ACCRA

AND SERVICE ON DEFENDANT HEREIN

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

ACCRA- GREATER ACCRA REGION

SUIT NO.

JONATHAN BOATENG

H/NO. P.49

Dominase – ASHANTI REGION PLAINTIFF

VRS

KWABENA MENSAH DEFENDANT

H/NO. 456

ASHANTI NEW TOWN - KUMASI

AFFIDAVIT IN SUPPORT OF MOTION

I PHILIP MENSAH of Accra do make oath and say as follows:

1. I am the deponent herein

MOTION EX-PARTE FOR LEAVE FOR SUBSTITUTED SERVICE OUTSIDE JURISDICTION

IN THE SUPERIOR COURT OF JUDICTURE
IN THE HIGH COURT OF JUSTICE
ACCRA – GREATER ACCRA REGION
AD – 2016

SUIT NO.

BETWEEN

PHILIP MENSAH
Unnumbered House
Near Presby Primary
Weija, Accra PLAINTIFF

AND

AMA AMPONSAH
2140 Medical District Drive
Dalas, Texas
1234 DEFENDANT

MOTION EX-PARTE FOR LEAVE TO SERVE NOTICE OF WRIT OUT OF THE JURISDICTION

MOTION EX-PARTE by counsel for and on behalf of the plaintiff praying this Honorable Court for leave to serve the notice of the writ on the defendant herein outside the jurisdiction of this Honorable Court at 2140 Medical District Drive, Dallas, Texas 1234, United States of America and for such further and other order as to this Honorable Court may deem fit.

COURT TO BE MOVED this … day of …., 2016 at the hour of 9.00 am in the forenoon or so soon thereafter as counsel for the plaintiff may be heard.

DATED AT DOMINION CHAMBERS, ACCRA, THIS … DAY OF …., 2016

Lawyer for plaintiff

THE REGISTRAR
HIGH COURT
ACCRA

IN THE SUPERIOR COURT OF JUDICTURE
IN THE HIGH COURT OF JUSTICE
ACCRA – GREATER ACCRA REGION
AD – 2016

SUIT NO.

BETWEEN

PHILIP MENSAH
Unnumbered House
Near Presby Primary
Weija, Accra PLAINTIFF

AND

AMA AMPONSAH
2140 Medical District Drive
Dalas, Texas
1234 DEFENDANT

AFFIDAVIT IN SUPPORT OF MOTION EX-PARTE FOR LEAVE TO SERVE NOTICE OF WRIT OUT OF THE JURISDICTION

I, DANIEL MARFO, Lawyer make oath and say that:

1. I am a lawyer in the plaintiff's lawyer's firm and I have the said plaintiff's consent to swear to this affidavit on his behalf.

2. The matters to which I hereinafter depose are true to the best of my knowledge and belief and are within my personal knowledge unless expressly stated to the contrary.

3. On [Date], the plaintiff filed the instant writ against the respondent for the reliefs therein.

4. The respondent is ordinarily resident outside the jurisdiction at [address]

5. I am advised and verily believe same to be true that except with leave of the court the respondent cannot be served with the notice of the writ.

6. Wherefore, I swear to this affidavit on behalf of the plaintiff for leave to serve by courier, the writ on the respondent at [date].

SWORN in Accra this

Day of …, 2016

……

DEPONENT

BEFORE ME

COMMISSINORE FOR OATH.