IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: DOTSE, JSC PRESIDING
GBADEGBE, JSC
AKOTO-BAMFO, JSC
BENIN, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/57/2014

25TH OCTOBER, 2017

AMARKAI AMARTEIFIO ..... PLAINTIFF/RESPONDENT/APPELLANT

VRS

ANANG SOWAH ..... DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

PWAMANG, JSC:-

This appeal lies from the decision of the Court of Appeal delivered on the 4th of June 2009 which upturned the decision of the High Court for the reason that it glossed over two serious legal questions namely; whether or not the action was determinable within the purview of the Legal Profession Act 1960, (Act 32) and whether the writ of summons in the case was valid at the time it was served. The appeal has suffered delay in this court for various reasons including the retirement of Akamba JSC who had participated actively in the hearing and consideration of the case but the judgment could not be delivered before his retirement, necessitating his replacement by Benin JSC and a rehearing. It is relieving that judgment is being delivered today.

FACTS

The parties in this appeal, from all indications, were great friends who had money transactions between them. However this great friendship has given way to rancor and ill feelings and not least is this spiral of litigation spanning some two decades. When the matter was called before us, we took time to recommend Alternative Dispute Resolution (ADR) to the parties so as to stem their continued bitterness for a more win-win resolution of their differences. The response we received was one of initial reluctance and eventual stark refusal from both parties. We have no option than to deal with the matter according to the law.

The early stages of this case were mired by procedural challenges which have followed the parties through their journey to this court. By a writ of summons with an accompanying statement of claim filed on 20th May 1997 in the High Court, Accra, the Plaintiff/Respondent/Appellant herein, (hereinafter simply referred to as the plaintiff), initiated his claims against the defendant/appellant/respondent herein, (herein after referred to as the defendant), for a number of reliefs set out below.

The rather terse accompanying statement of claim states that:

> "1. The plaintiff is a Lawyer.
>
> 2. The defendant is a businessman.
>
> 3. In February 1992, the Defendant received £15,000 from the plaintiff to repair his vessel 'M V Oblayoo' with the promise to repay it within three months.
>
> 4. The amount remains unpaid despite several demands.
>
> 5. During the period October 1991 to May 1994, the plaintiff has performed diverse services for the Defendant as a lawyer for which the Defendant has failed or refused to pay the Plaintiff despite several demands.

Wherefore the Plaintiff claims as per his Writ of Summons.

CLAIM

1. An order upon the Defendant to refund to the Plaintiff the sum of £15,000 being money had and received.
2. An order upon the Defendant to pay the sum of £20,000 being fees for professional service rendered to the Defendant.
3. Interest on the said £35,000 at the current bank interest rate from the 1st February 1992 to date of payment."

The plaintiff's writ of summons and statement of claim were served on the defendant by substituted service on the orders of the High Court. The defendant failed to enter appearance to the suit wherefore the High Court granted default judgment for the plaintiff on his reliefs on the 2nd March 1998. However, on 11th August 1998, the defendant, per his counsel, Cyril Quartey, Esq. filed a motion on notice praying the court to set aside the default judgment. The main grounds for the application as set out in the affidavit in support were as follows; (1) that defendant was out of the jurisdiction of the court at the time of issuance of the writ so it could not be served by substitution and defendant was entitled *ex debito justitiae* to have the default judgment set aside. (2) that the default judgment was premature as no default had occurred at the time it was taken. (3) that the defendant had a defence to the action as the amount claimed had already been paid to plaintiff. Plaintiff filed an affidavit in opposition denying the depositions in defendant's affidavit. From the record it evident that at the hearing of the motion on 3rd December, 1998 the plaintiff and defendant's lawyer came to a compromise for the judgment to be set aside so that defendant could file his intended defence. As a result the judge gave the following ruling;

> **"1. That the judgment of 2/3/98 be set aside as per Defendant's motion filed on 11/8/98, Plaintiff having withdrawn his opposition thereto.**
>
> **2. That copies of all process to date be served on the said Attorney viz Adjetey Sowah of 53/29 East Legon, P.O.Box 5515, Accra.**
>
> **3. That cost of ¢500,000. 00 be and is hereby awarded Plaintiff. Orders accordingly."**

Defendant was served the second time with copies of writ and statement of claim through his Attorney but he failed to enter appearance and file defence. Plaintiff was constrained to apply for default judgment for the second time and same was granted on 10th March, 1999. When the Entry of judgment was served on defendant he filed another motion to set aside the judgment of 10/3/1999 but neglected to appear in court either personally or by his counsel to move that motion so it was struck out. It was when defendant got to know that his house was about to be auctioned upon a *fi.fa* that he went back to the High Court and filed two frantic processes to arrest any sale and to relist his earlier motion. Defendant, as was usual of him, did not prosecute these motions and they were also struck out for want of prosecution. The appellant proceeded to go into execution by attachment of respondent's house. Several applications were subsequently filed on his behalf in a bid to stop the sale of the house but all failed and the property was sold by public auction on 4th August, 2004. On 1st December 2004 the High Court granted an order for the release of the proceeds of the sale to the appellant and this was done.

Undaunted, the defendant on the 27th May 2005 filed a motion to set aside the part of the default judgment relating to professional fees on the ground that it was given in breach of the mandatory provisions of Act 32. The plaintiff opposed the application contending that the defendant was estopped from raising the issue of Act 32 at the stage where execution had completed. He also stated in his affidavit in opposition that before proceeding in court against the defendant he made him aware of his indebtedness and referred to two documents in support. The motion was heard by Anthony Oppong, J. on the 21st July 2005 and dismissed as being bereft of any merit. It was that ruling of Anthony Oppong J that was appelled against to the Court of Appeal and finally to this court.

DECISION OF THE COURT OF APPEAL

In his written submissions in the Court of Appeal defendant, in addition to relying on Act 32, raised for the first time, a point about the validity of the writ of summons at the date of its second service on him and prayed the Court of Appeal to set aside the whole default judgment. In their judgment dated 4th June 2009 allowing the appeal the Court of Appeal

acceded to the prayer of the defendant and set aside the whole judgment of 10th March, 1999. They held as follows;

"...with such a challenge against the default judgment the trial judge ought to have assigned reasons for its refusal to enforce the mandatory requirements under the Legal Profession Act 1960. To simply state that the property had been sold pursuant to the judgment and that it was too late to set aside the judgment when that judgment appeared to have been obtained under apparent violation of a statute, in my view, falls short of the standard required of a Court of law. It is obvious by that ruling that the trial Court glossed over a serious question of law raised before it."

The court's next point of discontent with the decision of the High Court was that: **"...the Plaintiff who was duty bound to satisfy the court that he gave the defendant the statutory one month notice before mounting the action in compliance with section 30 of Act 32 failed to do so. Failure on the Plaintiff's part to give the statutory notice would render the claim to his professional fee void and in my view that omission gave the suit its fatal blow."**

On the issue of the validity of the writ of summons they held that: **"there is no evidence on record that the Writ was renewed in accordance with the existing rule then in force. Accordingly, service of the expired writ on the Defendant's Attorney, the Court's order notwithstanding, cannot be valid. An expired writ is void and incurably bad to the extent that the same could not be cured under Order 70 of the Civil Procedure Rules (LN 140A)".**

GROUNDS OF APPEAL IN THIS COURT

By his notice of appeal filed on 5th August 2009 against the decision of the Court of Appeal, the plaintiff raised the following grounds for determination in this court, namely:

(i) "That the Court of Appeal misdirected itself in holding that the Writ of Summons had lapsed at the time it was served on the lawful attorney of the Respondent.

(ii) That the Court of Appeal erred in holding that the Appellant had not served a bill for professional services in accordance with section 30 of the Legal Profession Act.

(iii) That the Appeal of the Respondent was not properly before the Court of Appeal as it was filed out of time leave (sic)."

INVOCATION OF RULE 15 (11) OF CI 16

Originally the appellant argued only the first two grounds of appeal in his statement of case and abandoned the third ground. The respondent also limited his arguments in response to those two grounds, after which the appeal was adjourned to the 17th February 2016 for judgment. However on 10th December 2015, the appellant filed a motion invoking rule 15 (11) of CI 16 for leave to amend his statement of case to incorporate arguments ground (iii) of the appeal earlier abandoned. The court in the interest of justice granted the prayer. The Rule 15 (11) of CI 16 states as follows:

> **"Notwithstanding anything to the contrary contained in these Rules, any party to a civil appeal may at any time before judgment apply to the Court to amend any part of the statement of his case and the Court may having regard to the interest of justice and to a proper determination of the issue between the parties, allow the amendment on such terms as it may consider fit."**

On 10th February 2016, the leave was granted and the parties filed further arguments to cover ground (iii).

As this last ground of appeal questions the propriety of the appeal against the decision of the High Court to the Court of Appeal and the validity of the judgment of the Court of Appeal for that matter, we shall consider that ground first.

GROUND THREE

> **"That the Appeal of the Respondent was not properly before the Court of Appeal as it was filed out of time leave (sic)."**

The gist of the plaintiff's argument is that the High Court order dated 21st July, 2005 from which the appeal was filed was an interlocutory order and the resultant appeal having been

filed on 12th August 2005, the same was out of time. By a rough reckoning, the appeal was filed twenty-two days after the refusal to set aside the default judgment whereas Rule 9 of the Court of Appeal Rules, 1997 (CI 19) stipulates 21 days in the case of an interlocutory order. The question for our determination is whether the order refusing to set aside the default judgment was interlocutory or final.

In support of his contention that the order was interlocutory the plaintiff submitted that it was the default judgment that conclusively determined the claims endorsed on the writ of summons so that was the final judgment and since the refusal to set aside did not determine anything, but only confirmed the default judgment it was interlocutory. He referred the court to the case of **Attorney-General v Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271, S.C.** He submitted that upon a proper application of either the application approach or the order approach in determining the question of whether the decision was final or interlocutory, the only conclusion the court would come to is that the refusal to set aside the default judgment was an interlocutory decision. The defendant on his part referred to the Canadian case of **Parson v Ontario** delivered on 13th March, 2015 and the Nigerian Supreme Court case of **Chief LLB Ogolo v Joseph Ogolo** dated 17th February, 2006, which decided that refusal to set aside a judgment in default of defence was a final order, in support of his argument. He contended that the refusal to set aside the default judgment was a final order as it left nothing more to be done in the court as far as his defence on the breach of Act 32 was concerned. We must however observe that the legal analysis applied in the later case when that court held that "the decision determined the rights of the parties; in this case, the issue as to whether or not to set aside the judgment in default of defence", if adopted can result in almost every order by a court in interlocutory proceedings being classified as final since it would have finally decided the issue arising for determination in the interlocutory proceedings. That would obliterate the distinction between final and interlocutory orders which distinction serves a useful purpose of properly regulating appeals especially.

There has been a long running controversy throughout common law jurisdictions as to the better criteria to be applied by judges in determining whether a decision of a court is final or interlocutory. The contest has been between what is referred to as the "nature of the

application" approach and the "nature of the order" approach. However, there is new learning in this area with some common law judges pointing out weaknesses in both approaches and doubting their relevance in circumstances which do not easily fit into either approach as formulated by the original proponents.

The first to be formulated was the nature of the application approach, referred to as the application approach for short, and it has been traced to the case of **Salaman v Warner [1891] 1 Q B 734 C.A** at 735 where Lord Esher MR held as follows;

"I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined. Applying this test to the present case, it is obvious that the order here was made on an application of which the result would not in one event be final. Therefore this is an interlocutory order."

The nature of the order approach, referred to as the Order approach for short, arose out of the case of **Bozson v Altrincham Urban District Council [1903] 1 KB 547** where Lord Alverstone CJ said as follows;

"Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

The courts of our country very early in the case of **Nkawie Stool v Kwadwo (1957) 1 WALR 241** chose to apply the Order approach in determining whether a decision is final or interlocutory. Our jurisprudence has, in a long line of cases too many to recount here, firmly established the Order approach as the one to be applied by our courts. See **Pomaa & Ors v Fosuhene [1987-88] 1 GLR 244. S. C, Republic v High Court (Fast Track Division) Accra; Ex parte State Housing Co Ltd (No2). [2009] SCGLR 185, S.C,** just to mention two. However, it would not be wholly correct to say that in Ghana the question of whether a decision is final or interlocutory is completely settled. What is settled is the approach to be adopted by our courts but its application to specific cases is not completely

settled in Ghana or in many of the common law countries. Where proceedings are ongoing and the court makes an order that does not decide the merits and terminate the proceedings, the question whether the order is final or interlocutory is fairly easy to answer using the Order approach. An example is the recent case of **Bosompem v Tetteh Kwame [2011] 1 SCGLR 397** where the Supreme Court unanimously and with ease held that dismissal of an application for stay of execution pending appeal and for leave to go into execution was an interlocutory decision since the rights of the parties would finally be determined when the appeal is heard. A second class of cases is where there has been a determination on the merits and orders are made afterwards. There, the question whether those orders are final or interlocutory is also not difficult to answer. Such was the case in **Okudzeto &Ors v Irani Bros [1975] 1 GLR 96, C.A** and **Republic v High Court (Fast Track Division) Accra; Ex parte State Housing Co Ltd (No2). [2009] SCGLR 185, S.C.** The difficulty is with a third category of cases in which there is no trial on the merits, no further proceedings are pending or impending but an order or decision is made that wholly terminates the proceedings between the parties. An application of the Order approach in this third category has led to different and sometimes contradictory conclusions on what is a final or interlocutory order in Ghana and other common law jurisdictions.

A few illustrations will do here. In **Nkawie Stool V Kwadwo (supra),** the West African Court of Appeal applying the Order approach held that an order which dismissed plaintiff's action but without prejudice to his right to bring another action does not finally dispose of the rights of the parties and was therefore interlocutory. The court was obviously referring to the rights of the parties in the subject matter of their dispute. Then in **State Gold Mining Corporation v Sisala [1971] 1 GLR 359**, Apaloo J.A. (as he then was) approved and applied the decision in the Nkawie Stool case and held an order that did not determine the rights of the parties as far as damages were concerned interlocutory. Nevertheless, in **Atta Kwadwo v Badu [1977] 1 GLR 1,** the same Apaloo J.A, delivering the unanimous judgment of the Court of Appeal, held that a notice of discontinuance and the order for costs against a respondent made pursuant to it was a final decision on the basis that it "wholly terminated the proceedings". In fact, in **Atta Kwadwo v Badu** Apaloo J.A. confessed to the uncertainty of the determination of the question whether a decision is final

or interlocutory when using the order approach in the following words at pages 4-5 of the report;

'Applying that test (the order approach), one might be tempted to agree with counsel that the order for costs was interlocutory inasmuch as the rights to the land have not been determined as between the parties. But the question is not so easy. As was said in ***Halsbury's Laws of England (3rd ed.), Vol. 22 at [p.5] p.742, para. 1606,*** *"a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required."*

In the Supreme Court case of **Pomaa& Ors v Fosuhene [1987-88] 1 GLR 244**, a case involving whether a judgment on admissions was final or interlocutory, Adade JSC acknowledged the problem with the application of the criteria in the Order approach and criticised Apaloo J.A.'s reasoning in Atta Kwadwo v Badu (supra) in the following words at page 248;

'An order for costs does not dispose of any rights between parties, and would seem to be interlocutory. Apaloo J.A. (as he then was) in Atta Kwadwo v. Badu [1977] 1 G.L.R. 1, C.A started off in the belief that such an order was interlocutory; he ended up holding that it was final. In that same case, a notice of discontinuance having been filed, the lower court made an order, as stated at p. 3 as follows: "Case struck out for lack of prosecution as per letter of discontinuance with full costs of ¢300 ... with liberty for fresh action …" This order was held by the Court of Appeal to be final, notwithstanding the "liberty for fresh action …" because, as stated by the court at p. 5, the notice of discontinuance and the order:

"… wholly terminated the proceedings. Although the respondent was given liberty to bring a fresh action, he might not do so. Even if he did that action will not be a continuation of the first but an entirely new action …"

One would have thought that since the "liberty [to bring a] fresh action" necessarily implies that the rights between the parties have not been determined the order would, by definition, be interlocutory. By tacking the indulgence on to the order striking out, is the

court not saying that the suit struck out has not been heard and therefore could not possibly have decided anything?'.

Nonetheless, Adade JSC ended his opinion on the question of interlocutory or final in that case on this note at page 249;

"In this case, given the circumstances, we have decided that the decision of the National House of Chiefs dated 27th September, 1985 is a final decision; it wholly terminates the proceedings."

But the Ghanaian judges are not alone in this line of reasoning, which is an adaptation of the original order approach, to the effect that where the decision terminates the proceedings in a particular court then it is final. In the case of **S.L.T Warehouse Co. Ltd v Webb 304 So. 2d 97,99 (Fla. 1974)** the Supreme Court of the State of Florida in the United States adopted a similar test for determining finality of orders for appeal purposes. They said;

"The test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected."

The uncertainty in the determination of whether a particular decision is final or interlocutory equally pertains in jurisdictions which apply the application approach such as England. As was stated with characteristic frankness by Lord Denning MR in the case of **Salter Rex & Co v Ghosh [1971] 2 All E.R 865 C.A.;**

"The question of final or interlocutory is so uncertain that the only thing for practitioners to do is to look up the practice books to see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way."

We have not come across a court decision in Ghana on whether a refusal to set aside a default judgment is a final or interlocutory order. In looking up the practice books or the

decisions of courts in other jurisdictions, we must be careful to note the test, either application or order or whatever criteria, that was used in arriving at the decision and the statutory framework within which the question of final or interlocutory was determined. The English Courts in most of the cases decided on final or interlocutory orders employed the application approach which Lord Denning expressed preference for in the case of **Salter Rex & Co v Ghosh (supra)**.

The courts in the State of Ontario, Canada (the largest common law jurisdiction state in Canada), like their Ghanaian counterparts, have adopted the Order approach in determining questions of finality of orders so their decisions are of better persuasive value to us than most of the decisions of the English courts. In the case of **Benington Development Ltd v Cohen [1966] 2 O.R 837-842 (H.C)** Lieff J, applying the order approach in the determination of whether an order refusing to set aside a default judgment is final or interlocutory reasoned as follows;

"It has been said that the real test has been stated as follows: Does the judgment on the motion before the County Court Judge finally dispose of the rights of the parties? In the present situation the judgment of the County Court and the judgment on the motion to set aside disposes of the rights of the parties. The original judgment was a judgment for a money demand. If nothing else had happened the plaintiff had a judgment upon which he could act. The next step was one to set aside this judgment. The applicant did not succeed which leaves the plaintiff in possession of a judgment adjudicating upon the money claim, upon which judgment the plaintiff can still act. In my opinion, that finally disposed of the matter. To put it as simply as I can, in a case of this kind if a default judgment in a case like the present is set aside then the order setting it aside is interlocutory because the rights of the parties have not been determined and await adjudication. But, if the County Court Judge refuses to set aside the default judgment and the judgment remains then the application so refusing is a final one."

See also **Broadhead v Rutman [1966] 2 Ont 834 (C.A.)**

We find the reasoning of Lieff J consistent with the tenets of the order approach which is the applicable approach in Ghana and it commends itself to us. With the refusal to set aside

the default judgment in this case there was nothing further that could be done in the High Court to change the rights of the parties declared in the judgment. The proceedings were effectively terminated in that court and it was only recourse to a higher court that could change the judgment so the refusal to set aside the default judgment was a final decision for the purpose of mounting an appeal against that refusal. We are not unaware of decisions, including one in the British Columbia Court of Appeal in **Bitz v. Bitz, [1947] 1 W.W.R. 959 (B.C.C.A.),** which hold that it is impossible to have two final orders in one action but I fail to see any inconsistency because, as it has been explained in Halsbury's Laws and endorsed by Apaloo J.A. in Atta Kwadwo v Badu (supra), an order may be final in one sense and interlocutory in another sense. In conclusion, the appeal to the Court of Appeal was filed within time and Ground three of the appeal is therefore dismissed as misconceived.

Having concluded that the appeal to the Court of Appeal was competent, we shall now examine grounds one and two of the appeal in that order.

GROUND ONE

Did the Court of Appeal misdirect itself in holding that the writ of summons had lapsed at the time it was served on the lawful attorney of the respondent?

By this ground of alleged misdirection, the appellant is in effect saying that the Court of Appeal failed to properly consider evidence on record pertaining to the validity of the writ of summons at the time it was served on the respondent's lawful attorney. This ground of appeal calls on us as an appellate court, and the final one at that, to peruse the record of appeal, examine all the processes filed and the rulings of the court to satisfy our self that the Court of Appeal did not properly apply the law to the proven evidence and processes in the record with respect to the validity of the writ of summons.

ARGUMENTS OF THE PARTIES

From the plaintiff's point of view, the Court of Appeal should have distinguished between an order setting aside a default judgment and an order setting aside the service of a writ but this it failed to do. This, according to him, is because an order of a superior court of

judicature can only be set aside or vacated by an express order of the superior court. Plaintiff stated that by setting aside the default judgment upon the respondent's application, the service of the writ on the respondent was never set aside. Plaintiff referred the court to the position of the law as stated by the learned author **S. Kwami Tetteh** in his book, **Civil Procedure: A Modern Approach,** at page 326 where he describes the effect of granting an order setting aside a default judgment as 'a plea to the court to extend time to comply with the timetable for entering appearance or filing a statement of defence.' From this perspective, the plaintiff maintained that the first substituted service of the writ upon the defendant was never set aside but that the trial court only took a precautionary step by ordering service of the entire process on defendant through his self-acclaimed attorney.

The defendant on the other hand has argued that the order by the High Court judge that copies of all processes be served on defendant's attorney had the effect of setting aside the first service of the writ of summons. He submitted that since the writ had lapsed and was not renewed before the second service the action proceeded upon a void writ of summons so the whole proceedings were incompetent. Defendant relied on the Court of Appeal case of **Ofori v Lartey [1978] GLR 490** which considered **Order 8 R1 of High Court (Civil Procedure) Rules, 1954 (LN 140A)** which provided as follows;

> "1. **No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date**; **but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge, for leave to renew the writ;**

ANALYSIS

In this case it is not disputed that the original writ of summons was first served within one year of its issuance. The claim of the defendant is that that service was set aside. It is also conceded by defendant that the High Court judge did not expressly set aside the first service but his contention is that the ruling setting aside the default judgment and the direction for all processes to be re-served by implication set aside the first service. However, in the motion to set aside the default judgment there was no prayer by the defendant for

the service of the writ to be set aside and it would have been out of place for the judge to have made such an order. In fact, in the ruling setting aside the default judgment the judge said the judgment was set aside as per defendant's motion filed on 11/8/98 which motion prayed only for the default judgment to be set aside. Nevertheless, the defendant is urging us to arrive at the conclusion that the first service of the writ was also set aside by an interpretative exercise of what the High Court judge intended by her ruling. But on 3rd December, 1998 when the High Court judge set aside the judgment and directed that all processes be served on defendant again, the writ of summons was older than twelve months. Is the defendant saying we should hold that the judge by implication directed the service of a void writ of summons? That interpretation of the direction by the court proffered by the defendant is perverse and leads to an absurdity and we shall reject it.

We agree with the plaintiff that the judge did not mean to set aside the first service of the writ of summons but intended to afford the defendant further facilities to competently defend the action hence the second service. This view is supported by the record for when the plaintiff applied for the second default judgment the inclination of the judge was to restore the first default judgment. If she had set aside the first service, upon what would she have expected to restore the first default judgment? Since the writ in this case was served within one year of issuance, it had effectively grounded the suit for the purpose of the proceedings provided, of course, the claims endorsed on it were valid in law. In the circumstances we uphold ground one of the appeal.

GROUND TWO

> **That the Court of Appeal erred in holding that the Appellant had not served a bill for professional services in accordance with section 30 of the Legal Profession Act**.

Section 30 of the Legal Profession Act, Act 32 provides as follows:

> **"Recovery of Fees**
>
> **Bill of fees**

(1) A lawyer **is not entitled to commence a suit for the recovery of fees for a business done as a barrister or solicitor until the expiration of one month after the lawyer has served on the party to be charged a bill of those fees.**

(2) The bill shall be signed by the lawyer, or in the case of a partnership by a partner personally or in the name of the partnership, and shall be enclosed in or accompanied by a letter signed in like manner referring to the bill." [Boldened for Emphasis]

The above stipulation of s. 30 of Act 32 is very clear as to what a lawyer is required by the law to do before commencing a suit to recover legal fees. The courts have been unwavering in the strict enforcement of that provision and have described the provision as laying down mandatory pre-conditions to a lawyer commencing legal action to recover her fees. The purpose for the provision was first explained in the case of **Ayarna vs Agyemang (1976) 1 GLR 306,** where the Court of Appeal per Apaloo JA stated at page 313 of the Report as follows; *"the fact that a court of justice always sets itself as an arbiter between lawyers who are its own officers and lay clients is to ensure that the fees demanded of the latter by the former are fair and reasonable, has its basis in the common law. For instance, in Clare v Joseph [1907] 2 K B 369 at p. 376 CA Fletcher Moulton L J. observed that the courts view agreements fixing amount of fees with great jealousy and would be slow to enforce such agreement where it is favourable to the solicitor, unless satisfied that it been made in circumstances precluding any suspicion of an improper attempt to gain benefit at the client's expense."* He then referred to long line of legal authorities including local decisions in this area of the law and concluded as follows at page 315; *"In as much as the plaintiffs sought the coercive power of the court to recover fees for work done by them as lawyers, they must comply with the mandatory provisions of section 30 of the Legal Profession Act, 1960, antecedently to the commencement of litigation. It is conceded that they did not do so and were accordingly not entitled to the court's assistance."*

See also **Nartey vs Gati (2010) SCGLR 744,** where the necessity for safeguarding the interest of the client as a matter of ethics of the legal profession was highlighted at page 760 in the concurring opinion of my able brother Dotse, JSC as follows:

"The Legal Profession Act, 1960 (Act 32), is, in my opinion, consistent with the 1992 Constitution in view of the clear provisions of article 109 (1) of the Constitution. Since legal practice is a profession, it is safe to conclude that an Act of Parliament such as the Legal Profession Act, 1960 (Act 32), is not only consistent with article 109 (1) of the Constitution but also consistent with article 11 of the Constitution on the Laws of Ghana. In my opinion, the request for lawyers under Act 32 to give a written demand for their fees one month before the commencement of a suit is mounted in the law courts to demand their legal fees, pursuant to section 30 (1) of Act 32, is only regulatory of the affairs of lawyers and not discriminatory. The rationale is not only sound but in line with the ethics of the legal profession. In any case, the right of the lawyer to go to court has never been taken away."

A lawyer commencing an action without compliance with Section 30 of Act 32 is considered to be a fundamental breach of the law which even if not raised by a defendant ought to be taken up by the court *suo moto*. In **Gaisie Zwennes Hughes & Co vs Loders Crocklaan B V (2012) SCGLR 363,** a firm of lawyers sued to recover legal fees and the case travelled up to the Supreme Court without the defendant raising objection on the ground of non-compliance with Section 30 of Act 32. However, upon a review of the record the Supreme Court detected that the lawyers did not comply with Section 30 of Act 32 before commencing the suit so they raised the point *suo moto* and requested the parties to address the court on it. The law firm conceded the non-compliance but argued that defendant never raised it so it ought to be deemed to have waived it. The court rejected that argument. In a lucid and authoritative judgment per my respected brother Gbadegbe, JSC, it was boldly stated as follows:

"In our opinion, not having satisfied the mandatory requirement of Legal Profession Act, 1960 (Act 32), s. 30 regarding the service on the client of a bill of fees before suing out the action herein, the action was improperly constituted and the appeal must fail. The non-compliance with the mandatory statutory requirement contained in section 30 of Act 32 rendered the action in the form in which it was taken before the High Court one that was not sanctioned by law; and as such it was competent for the court by itself to raise the point of law turning on it under rule 6 (7)(b) of the Supreme Court Rules, 1996 (CI 16)."

The import of the authorities on a suit by a lawyer to recover legal fees is that in such a case the lawyer in her statement of claim must aver and provide particulars of the bill for legal fees and the demand letter served on the defendant in compliance with the requirements of Section 30 of Act 32 before the court can entertain the claim. Furthermore, if those averments are denied she is required to offer proof and justify the quantum of fees before judgment will be entered for her, with the court reserving the power to make adjustments to the fees demanded and awarding what is justifiable having regard to the skill, labour and responsibility involved in the legal services provided by the lawyer.

In the instant case, there was no averment in the appellant's accompanying statement of claim which referred to a bill of legal fees and a demand letter served on the defendant later than one month before the suit was filed. There is only a general mention of legal services rendered by plaintiff to defendant without any particulars of the kind of legal services. When the issue of Section 30 of Act 32 came up for the first time in the High Court, plaintiff exhibited a fax he sent to defendant sometime before the commencement of the suit in which fax he offered to accept £10,000 from defendant in full satisfaction of loans and legal fees owed him. That document did not state what legal work plaintiff did for defendant and did not indicate how much of the £10,000.00 was for the loans and how much was for the legal fees and the manner the legal fees were arrived at. It falls woefully short of the requirement of Section 30 of Act 32. In the circumstances, the High Court had no power to entertain plaintiff's claim for recovery of £20,000.00 as legal fees owed him by defendant. The High Court committed a grievous error in using the coercive powers of the court to collect that money for plaintiff when he did not aver in his statement of claim that he had complied with section 30 of Act 32. In the result we affirm the decision of the Court of Appeal dismissing the appellant's claim in his relief (2), being a claim for twenty thousand pounds sterling (£20,000) as professional fees. This ground of appeal consequently fails.

CONSEQUENTIAL ORDERS

In sum, the appeal succeeds in part and fails in part. The High Court constituted by Mrs Ashong-Yakubu, J. on 1st December 2004 granted an order for the Registrar of the court to release to plaintiff the total sum of one billion five hundred and forty million old cedis

(¢1,540,000,000.00) being proceeds from the auction sale of H/No. 6 C153/29 East Legon, Mpeasem, Accra, in satisfaction of the judgment debt. In Ghana Cedi terms, this translates into a total of one hundred and fifty four thousand Ghana Cedis (GH¢ 154,000.00). This amount would be considered as being the equivalent of the £35,000.00 awarded to plaintiff plus interests and costs. By a pro rata calculation, GHC88, 000.00 of the amount would be the equivalent of the £20,000.00 plus interest and costs thereon, which we have held was wrongfully paid to plaintiff. In consequence, we order a return to defendant of the sum of GHC88, 000.00 with interest from the date of the Court of Appeal judgment which is 4th June, 2009 at current bank rate of interest to date of payment. The interest is made to start from the date of the judgment of the Court of Appeal because up to that date plaintiff retained possession of the money by virtue of the order of the High Court which was valid until it was set aside by the Court of Appeal.

Before resting this judgment, we wish to deal with a prayer defendant included in his statement case. He prayed the court to set aside the auction sale of his house on the basis that the whole proceedings were void and so too the auction. Defendant also claims that the purchaser knew all along that the case was on appeal so he is bound by the final decision in the case. To begin with, we have held that the proceedings were not void so to the extent that defendant has not otherwise successfully set aside the auction as illegal or irregular, it effectively divested him of his interest in the house. Furthermore, the challenge against the auction which defendant says culminated in the case of **Anang Sowah v Adams [2009] SCGLR 111** was not part of this appeal and the purchaser was not a party to the proceedings before us so we cannot grant any prayer in respect of the auction.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

GBADEGBE JSC:-

My Lords, while expressing my agreement with the decision that has just been rendered by my worthy brother, Pwamang JSC in the matter, I wish to detain the precious time of the court to make some observation in regard to a matter of procedural importance touching the application to set aside the judgment of the trial High Court with which we are concerned in these proceedings. The said application which may be found at pages 222-224 of the record of appeal in this matter was initiated by a motion in a cause (motion in pending proceedings) as it was not an originating notice of motion but one impliedly dependent upon the pendency of the substantive action in which it was filed. In the decision of the learned trial judge which triggered the appeal herein at page 233 of the record of appeal, he in very few words dismissed the application to set aside the judgment of the High Court. Although by the decision that we have pronounced this morning we have expressed our disagreement with him on the substance of the ruling, there is one aspect of the matter which is factual in nature, which has not been contested in the proceedings before us. It is that at the time the invitation was made to him to set aside the judgment, execution in the matter was at an end. The obvious implication from this assertion of fact is that the proceedings before the trial court were over and by Order 19 rule1 of the High Court (Civil Procedure) Rules, CI 47 of 2004 the application which was filed on May 27, 2005 was not in respect of a pending proceeding. The pendency of proceedings is an essential pre-requisite to the taking out of a motion in a cause as was done in the instant case by the respondent. The pendency of proceedings is common to Order 19 rule 1(1) and Order 81 rule 1(1) of the High Court (Civil Procedure) Rules, CI 47 of 2004. The said requirements are in my opinion not fortuitous but deliberate as applications in pending cases are dependent upon the court in which such processes are filed being in control of the proceedings. Indeed, in relation to this court, there is a similar provision in Rule 16 (1) of CI 16 while the Court of Appeal has provision made to this effect in rule 21 of CI 19. It repays to make reference to Order 19 rule 1(1), which in my opinion is central to the taking out of motions in the cause and is expressed as follows:

ORDER 19 RULE 1:

"Every application in pending proceedings shall be made by motion"

The word "proceedings" contemplate the pendency of a matter before the court in which a motion in a cause might be filed. In the case of Salt v Cooper (1880) 16 Ch D 544 at 551, Jessel, M. R delivered himself as follows:

> "A cause is still pending even though there has been final judgment given, and the Court has very large powers in dealing with a judgment until it is finally satisfied. It may stay proceedings on the judgment, either wholly or partially, and the cause is still pending, therefore, for this purpose, as it appears to me, and must be considered as pending, although there may have been final judgment given in the action, provided that the judgment has not been satisfied."

The pendency of proceedings is a condition precedent to the making of any application in the cause whether under the rules of court or in its inherent jurisdiction. This being the case, in my view every application which seeks to result in the annulment, variation or modification cannot be made to the trial court after the processes of execution are at end as was stated clearly by the learned trial judge. In such a case, I have no doubt that there are other sufficient remedies open to an aggrieved party to resort to in order to and it is not our business in this appeal to identify what these modes of redress are. As the appeal before us was contested on grounds that do not touch the views herein expressed are intended for future guidance only. It is important to observe that this matter has extended over some time, having travelled through the court system from 1997, we do not intend to delay in bringing it to a closure. It is hoped that in the future, we would have the opportunity of pronouncing on the points of procedure raised in this opinion and are not intended to detract from the judgment of my brother to whom reference was made in my opening words.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

V. J. M DOTSE
(JUSTICE OF THE SUPREME COURT)

V. AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

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