IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA 2015

CORAM: ANSAH, JSC (PRESIDING)

ANIN YEBOAH, JSC

BAFFOE BONNIE, JSC

GBADEGBE, JSC

AKOTO BAMFO (MRS), JSC

CIVIL APPEAL

NO. J4/51/2014

19TH NOVEMBER 2015

REV. ROCHER DE-GRAFT SEFA & ORS -- PLAINTIFFS/ RESPONENTS/ RESPONDENTS

VRS.

BANK OF GHANA --- DEFENDANT APPELLANT/ APPELLANT

JUDGMENT

GBADEGBE JSC:

:On June 29, 2012, the plaintiffs-respondents-respondents took out the writ of summons herein against the appellant-appellant-appellant (appellant) claiming among certain declaratory reliefs and one other relief for the recovery of what was described as a liquidated sum of money. We shall in this delivery refer only to three such reliefs - two declaratory reliefs and the monetary claim. The said reliefs which are numbered as (a), (b), and (d) are as follows:

(A) A declaration that the deliberate and or intentional act of the 1st defendant, 2nd defendant and 3rd defendants permitting and or indulging the 4th defendant to operate commercially as a bank concern in the Greater Accra Region, Ashanti Region and Brong Ahafo Region respectively for over 2 (two) years without the requisite Bank of Ghana banking license was not only negligent and or unconscionable but unconstitutional, fraudulent and legally impermissible and as result have caused substantial miscarriage of justice and civil injuries to the plaintiffs.

(B) A declaration that by the testimony of the Representative of the Governor of the Bank of Ghana and Head of Banking Supervision (i.e. 2nd and 3rd defendants) herein on oath in Civil Suit No RPC 102/ 2012 admitting and confirming that that the Bank of Ghana was aware that the 4th defendant was operating and also failing to warn the General Public from dealing with the 4th defendant who was operating illegally and fraudulently in foreign transactions/ exchange amounted to a breach of article 183.2(d) of the 1992 Constitution of Ghana, the Bank of Ghana Act, 2012 (Act 612) and Banking Act, 2004 (Act 673).

(D) Recovery of liquidated cash sum of GH 4, 977, 059.00 which the Plaintiff herein in Sunyani and Techiman respectively deposited with the 4th

defendant as a bank concern on grounds of the 1st, 2nd, and 3rd defendants admission and contribution to the 4th defendant's commission of fraud against the Plaintiff herein."

Following the service of the writ on the defendants, the plaintiffs applied for judgment in default of appearance against them on July 16, 2012. The minutes of the court's proceedings for that day which appears at page 42 of the record of appeal reveals that after learned counsel for the plaintiffs had moved the application the Court delivered itself as follows:

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"By Court. Motion is granted as it has merits. Plaintiffs are at liberty to enter final judgment for relief (d) and interlocutory judgment for the other reliefs. Cost calculated at 10% of the amount stated in relief (d) is allowed for plaintiffs."

The appellant entered appearance to the writ on July 17, 2012 and filed an application for transfer of the suit to Accra but unknown to them judgment had been recovered against them a day earlier. When the defendants discovered the recovery of judgment against them on July 16, 2012, they applied for leave to enter appearance out of time on July 18 and also applied for stay of execution of the judgment that was obtained two days earlier in default of appearance. The two applications were refused by the High Court, Kumasi and appeal therefrom to the Court of Appeal holden at Kumasi failed as the learned justices by a judgment that appears at page 390 of the record of appeal herein struck out the 2nd and 3rd defendants as unnecessary parties and dismissed the appeal for reasons that were provided in a case numbered as H1/10/14(J4/ 52/ 2014). It appears that the issues involved in both cases were similar as the plaintiffs in

that suit had deposited various sums of money with Onward Investment which they were seeking to retrieve. By the dismissal of the appeal, the learned justices of the Court of Appeal had reached the decision that the discretion which was exercised by the learned trial judge was proper. In the circumstances, the question for our decision is whether in reaching their decision the learned justices reached a reasonable conclusion on the processes before them.

We have carefully examined the processes before as on which the decision on appeal to us is based and have reached the conclusion that the application of the appellant disclosed points of law that provided a reasonable defence to the action against it. In the said premises, according to the settled opinion of the court which is discernible from a collection of cases, the learned justices ought to have granted the appellant leave to enter appearance out of time.

The record of appeal also reveals that the appellant, who was out of time to enter appearance to the action, had filed its application for leave only two days after the default judgment was obtained against it. Additionally, so the record of appeal portrays, it has demonstrated by its conduct a sufficient desire to contest the action herein. In the said circumstances, we think that we cannot drive the appellant from the judgment seat. The authorities direct us in the situation with which we are confronted to grant leave to the appellant to enter appearance out of time so that the action herein which from the written briefs submitted to us by the parties raise interesting and important points of law that are not limited only to the question of liability of the defendants for the acts of a company that among others operated unlawfully and, fraudulently and in breach of the fiduciary relation between them and their customers may be determined on the merits. In view of the conclusion reached in this matter, we are of the view that it is not necessary for us to consider in detail the points of law which arise in the appeal

herein as to do so will have the effect of prejudicing a fair consideration of the said issues in the substantive matter.

There is also a question of procedure of some importance which is disclosed by the appeal herein that unfortunately was not adverted to by the learned justices of the Court of Appeal whose function it was in the nature of a re-hearing of the application for leave which had been refused by the trial court to consider which is referred to shortly. The proceedings of July 16, 2012 at which the default judgment with which we are concerned in these proceedings was entered to which reference has earlier on been made show apparently that although the plaintiffs right to the recovery of the liquidated sum, which was contained in a separate relief numbered as (d), their right to that relief was dependent upon the declaratory reliefs which were demanded from the court and numbered as (a), (b), (c), (e) and (f). It being so, we are of the opinion that it was not proper for the learned trial judge to have entered the default judgment in favor of the plaintiffs on the same date. The grant of the monetary judgment before the consideration of the declaratory reliefs on which it turned may be likened to the saying in the game of cricket as placing the ball before the wicket. As the recovery of the amount claimed was dependent upon the grant of the declarations, it seems that its grant was premature and had the effect of putting something on nothing, a situation which we all know will result in a crumble. At law, the said declaratory reliefs which were proceeded with by the learned trial judge without jurisdiction on July 16, 2012 are still pending and creates a compelling reason that leaves us with no discretion in the matter but to annul the said award in order to preserve the procedural integrity of the court.

In our view, the trial court erred in considering the applications to sign default judgment at that stage as it is precluded by Order 10 rule 6 from doing so. The said rule provides:

> *"Where the plaintiff makes a claim of a description not mentioned in rules 1 to 4 against a defendant, and the defendant fails to file appearance, the plaintiff may after the time limited for appearance and upon filing an affidavit of service of the writ and statement of claim on the defendant proceed with the action as if the defendant had filed a defence."*

A careful reading of Order 10 of the High Court (civil Procedure) Rules, CI 47 reveals that a declaratory relief does not come within the reliefs mentioned in rules 1 to 4 of the order and this is justifiably so because the settled practice of the court is that a declaratory relief cannot be obtained by a motion in the cause but after hearing the parties either by way of legal argument or a full scale trial. See: **The Republic v High Court Accra, Ex Osafo** [2011] 2 SCGLR. 966 It is interesting to observe that even though in the Osafo case (supra), the declaratory judgment was obtained in default of a defence, the Supreme Court refused to give its assent to the said judgment on the ground that it was a clear departure from the settled practice of the court and the mandatory requirements of order 13 rule 6(1) and (2). The point being made here is that as the judgment ex-parte was not authorised by the rules and had the learned justices in their corrective function adverted their minds to this procedural lapse, they will in all probability have intervened to grant the application of the appellant.

The above reasons are sufficient to enable us allow the appeal herein. Accordingly the judgment of the Court of Appeal is set aside and in place thereof is substituted an order granting the appellant leave to enter appearance out of time.

N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

J. ANSAH

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

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