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By Kwame Yaro Appiah

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I. Introduction

In the exoteric and jurisprudential realms of Ghana's judicial system, the Court's responsibility to administer justice has always hinged on substantive and procedural laws. Procedural laws, like the High Court Civil Procedure Rules, 2004 (C.I. 47) play a pivotal role in ensuring effective justice delivery through prevention of undue delays in abating miscarriages of justice. In Ghana, Order 58 of the High Court Civil Procedure Rules; C.I. 47, has been the shrine for resolving commercial disputes since the2004 legal year. Over time, this rule evolved via amendments[1]; including that which occasioned in the 2020 legal year; the notorious C.I. 133. Much of this legal revolution has not been sheer semantic quibbles as C.I. 133 tacitly introduced the mechanics of Alternative Dispute Resolution to commercial disputes[2]. It has also introduced Pre-Trial Settlement Conference in commercial disputes at the Circuit Court[3]. This is a step forward. Not to make *ex cathedra* pronouncements, it has however smoked some confusion into the practice of the law; the uncertainty of the scope of the application of summary judgments at Pre-Trial Settlement stage. To wit, Order 58 Rule 3Sub-Rule 2 of C.I. 47 allows for the application for summary judgment *ONLY* after pre-trial settlement conferences. It is observed amongst many practitioners, academics, and legal enthusiasts that, C.I. 133 is intended to undo Order 58 Rule 3 Sub-Rule 2 of C.I. 47 thereby altering the traditional position of the law. This article argues that Order 58 Rule 3 (2) of C.I. 47 remains valid in spite of the operationalization of C.I. 133. The author's hermetically sealed position is rested on the decision of the Apex Court of Ghana, December 7, 2022, in the Springfield Energy Limited v. Bulk Oil Storage and Transportation Company Limited[4].

II. Application for Summary Judgment

A summary judgment is a judgment on the merits even though it is obtained by a formal motion without a plenary trial. It is meant to be used for disposing with speed, cases which are virtually uncontested or cases in which no reasonable defence exists in the opposite party. It assists to reduce costs, avoid delays and unnecessary expense.

The procedure for Summary Judgment is well-grounded in statute and common law. The *verba generalia* of this relief invokes the premise where it is materially established that no useful purpose would inure from full and possibly long-winded trials. For want of diction, it perfects when no triable legal issues are factually established. An authoritative Ghanaian case for this position is the SAM JONAH V. DUODU-KUMI [2003-2004] 1 SCGLR, 50 @ 54 case. In this case, the Supreme Court of Ghana speaking through Akuffo, JSC had cause to state thus:

> *"The objective of Order 14 of C.I. 47 is to facilitate the early conclusion of actions where it is clear from the pleadings that the defendant therein has no cogent defence. It is intended to prevent a plaintiff being*

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[1] High Court (Civil Procedure) (Amendment) Rules, 2014 (C.I. 87) amended Rule 7A of Order 32, Rule 2 of Order 34, Rule 1 of Order 38, Rule 3A to 3G of Order38, Rule 2A of Order 41, Rule 2 of Order 58 and the Schedule to the principal enactment.

[2] Order 58R5 (3) C.I.133

[3] Order 58R1(b) C.I. 133

[4] Civil Appeal No: J4/33/2022 (unreported) dated 7th December,2022.

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delayed when there is no fairly arguable defence to be brought forward… What we are, therefore required to do in this appeal is to ascertain whether, on the totality of the pleadings and all matters before the High Court at the moment it delivered the Summary Judgment, the respondent had demonstrably, any defence in law on the available facts, such as would justify his being granted leave to defend the Appellant's claim."

Summary judgment romance the sense of litigants as it erodes the level of evidential burden; it may be awarded on plaintiff's full claims or part or on a defendant's counterclaim devoid of witness evidence. Under C.I. 47, Order 14 Rule 1 as well as Rule 10 Sub-Rule 1.To add, there is no requirement for the satisfaction of the rules regarding trial. Thus, awards are founded entirely on the writ of summons and Statement of claim. The courts in a host of Ghanaian common law authorities have assembled the requirements that animates the award of summary judgement. These include:

1. The writ of summons and the statement of Claim have been served on the Defendant[5];
2. That an appearance has been entered by the Defendant to the writ of summons[6];
3. That the Defendant has no defence to the Plaintiff's claim[7].

One of the sacred conventions on the award of sums prayed is that the judge in court is bereft of jurisdiction to vary the award beyond sums endorsed therein the writ of summons. This traditional rule does not exclude sums determinable on any part of the statement of claim.

III. Factual Background

a) Springfield Energy Limited v. Bulk Oil storage and Transportation Company Limited

For the sake of clarity, convenience and apposite appreciation, the facts as recounted are as follows:

The Plaintiff-Appellant and the Defendant – Respondent are limited liability companies incorporated under the laws of Ghana. The Plaintiff-Appellant alleged that it delivered certain volume of petroleum products to the Defendant - Respondent for storage and onward distribution. In 2013, the Plaintiff-Appellant alleged that Defendant - Respondent failed to account for a large volume of the products. Parties fixed 30th September, 2013 for the establishment of facts. The Plaintiff-Appellant established loss in the value of USD 16,333,794.60. Further notices of indebtedness were served on the Defendant – Respondent without honours. On the 10thof June, 2014 another notice with invoice of varied face value of USD 17,201,774.03 was attached. It was calculated at 19% at the rate of the Plaintiff-Appellant. On 13th April, 2015, the Defendant-Respondent via a letter acknowledged indebtedness to the tune of USD 17,201,774.03. After 21st April, 2015, Parties reached an agreement for upfront payment of USD 5,000,000.00 and twelve (12) month equal payment of the outstanding debt. The Defendant-Respondent however breached same. By the rate of the Plaintiff-Appellant, Plaintiff-Appellant alleged that debts as at 12th November, 2015 stood at USD 20,226,717.75. It alleged also, that it had lost USD 3,420,000.00 being foreseeable profits as at 12th November, 2015.The Plaintiff-Appellant commenced legal action on the amounts at the High Court. The Defendant-Respondent rejected liability for Plaintiff-Appellant's interests and counterclaimed.

After Pleadings had closed the case was placed before a Pre-Trial Judge for Pre-Trial Settlement Conference. However, attempts for Parties to settle proved unsuccessful. On the rules of Pre-Trial Settlement Conference, issues were set down and the case was referred to the Substantive Judge for trial. The Plaintiff-Appellant applied for summary judgment pursuant Order 14 Rules 1 and 2 (1) of C.I. 47 and obtained same on 16th August 2016.

The Defendant-Respondent applied on motion to set aside the summary judgment pursuant Order 14 Rule 9 of C.I. 47. The Trial Court on 31stAugust, 2016declined the Respondent's invitation to set aside the summary judgment but rather varied the judgment founding on Order 14 Rule 9 of C.I. 47, thus, USD 11,104,143.29 with interests at the Plaintiff-Appellant's rate.

Aggrieved by the decision of the Trial Court, the Defendant-Respondent appealed to the Court of Appeal. The Court of Appeal, after studying the relevant processes filed and copious submissions of Parties set aside the decision of the Trial Court.

Dissatisfied with the decision of the Court of Appeal, the Plaintiff-Appellant on 1st August, 2019 lodged an appeal at the Supreme Court. At the Apex Court, the Plaintiff–Appellant argued on grounds, *inter alia*, that the Court of Appeal erred in law when it held that the Pre-Trial Judge having indicated the matter be tried meant that there were triable issues which could not be determine by a summary judgment application and that the said application was brought in accordance with Order 58 Rule 3 (2) of the High Court Civil Procedure Rules 2004 (C.I.47) which permits applications for summary judgment only after the pre-trial settlement conference.

Upholding the Appellant's ground of appeal, the Supreme Court speaking through Amadu, JSC posited.

[5] Balast Nedam Ghana BV. v Horizon Marine Construction Limited. [2010] SCGLR 435
[6] Mechanical Lloyd Company Limited v. Brefo [2018-19] 1 GLR 642
[7] Sam Jonah v Duodu Kumi [2003-04] SCGLR 50

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"It is a requirement for the pre-trial settlement conference judge, if settlement breaks down, to refer the docket back to the Administrator of the court for it to be placed before the substantive judge. Before this is done, the parties are required to submit their issues for trial. The pre-trial judge forwards the issues presented by the parties, as well as a report indicating the failure of the parties to settle at the pre-trial conference stage to the Administrator for the case to be placed before a substantive judge. This is a requirement by the law. Does this imply that there are triable issues raised upon the failure of the parties to settle which requires that the matter must necessarily proceed to trial? We do not think so. For if it were so, then we daresay that there would never be an opportunity for a party to apply for summary judgment in commercial cases. We say this because, Order 58 Rule 3(2) provides that: "Applications for Summary judgment or judgment on admissions shall not be filed until after the pre-trial settlement conference".

The Learned Judge further opined thus:

"The rules provide that an application for summary judgment can only be brought after the pre-trial settlement conference has concluded. If this court is to hold that upon the failure of the parties to settle at the pre-trial settlement conference stage, the fact that issues have been presented by the parties means that there are triable genuine issues will defeat the unambiguous provision of Order 58 Rule 3 (2). Further, the very wording of Order 58 Rule 3(2) indicates that the rules envisaged the possibility of an application for summary judgment or judgment on admission and thus, made provisions for same upon the failure of the parties to settle at the pre-trial settlement conference stage. The Judge before whom a pre-trial settlement plays a substantially supervisory and not an adjudicatory role. By Order 58 Rule 8 of C.I.47, the requirement for issues to be set down for trial is only a matter of procedure. Indeed, Order 58 Rule 3 (2) of the C.I.47 precludes a Party from applying for Summary Judgment until after Pre-trial Conference, even in cases where there is no reasonable defence by the Defendant or summary judgment or judgment on admission would lie..."

The significance of the pertinent details within the Springfield Energy case, and specifically the dictum of Amadu JSC, lie at the core of this paper, offering a clear and enlightening perspective that is crucial for a comprehensive understanding of the diverse arguments explored under the subsequent head.

IV. Has C. I. 133 Amended or Revoked Order 58 Rule 3 (2) of the High Court Civil Procedure Rules (C.I. 47)

In addressing the above question, there would be the need to give credence to two (2) major arguments;

a. One perspective asserts that the omission of explicit provision for Order 58 R3(2) of C.I. 47 within C.I. 133 implies its tacit revocation or modification by the prevailing legal framework.
b. Conversely, another viewpoint contends that the absence of the aforementioned order in C.I. 133 results from a drafting error, attributing it solely to the draftsman's oversight.

To unring the bell, heavy reliance must be made on policy considerations and the interpretative mechanisms applicable to the Rules of Court.

By the common law authority of Attorney-General v. Marquet[8], amendments traditionally refer to the modification to, or alteration in the legal meaning of an existing law using a new enactment. It is expected therefore that the birth of C.I. 133 would refresh Order 58 Rule 3 Sub-Rule 2 of C.I. 47. For argument (A)*supra*, it is established, factually, that, C.I. 133 does not expressly contain any provision that seeks to reinforce Order 58 Rule 3 Sub-Rule 2 of C.I. 47.*Inparimateria*, the answer to this subject matter should therefore, on this basis be in the affirmative. In opposition to argument (B) *supra,* it is further submitted that no provision in C.I. 133 impliedly seeks to import Order 58 Rule 3 Sub-Rule 2 of C.I. 47 into continuous existence.

The debate however in favour of the argument that C.I. 133, though it appears not on the face that Order 58 Rule 3 Sub-Rule 2 of C.I. 47 has been preserved, its conspicuous absence has been attributed to mere omissions by the draftsman. This being the gravamen, it is the position this paper fervently seeks to uphold.

It is provided in *Order 58 Rule 3 of C.I. 47*[9] thus:

" (1).Except as otherwise provided in this order, actions the commercial court shall be commenced and regulated in the same way as actions in the High Court ; Consequently the rules in filing of writs of writ of summons, entry of appearance, defence and reply shall apply to actions in commercial courts .

(2). Applications for summary judgement or judgement on admission hall not be filed until after the Pre Trial settlement conference."

It is also provided in the High Court (Civil Procedure) (Amendment) Rules, 2020 C.I. 133, Order 58 R3 that:

[8] [2003] 217 CLR.
[9] The principal enactment.

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"Except as otherwise provided In this order, a commercial claim shall be commenced and regulated in the same manner as an action In the High Court, Consequently, the rules on filing of writ of summons , entry of appearance, counterclaim and reply apply to commercial claim."

Notably, C.I. 133 upheld the provisions of Order 58 R3 (1) of C.I.47, while omitting reference to Order 58 (R)(3)(2) of C.I.47. The contention put forth is that, based on the comprehensive title of C.I. 133, it has effectively nullified order 58 (R)(3)(2) of C.I.47. Consequently, this implies that within commercial disputes, parties are not restricted from seeking remedies such as summary judgment or judgment on admission, even during the Pre-Trial Settlement conference phase.

The alternative basis underlying stance on revocation of Order 58Rule 3(2) of C.I. 47is the perspective on the policy considerations driving the amendment of Order 58 Rule 3 of C.I. 47. Another rationale stems from the exploitation of Pre-Trial Conference settlements under Order 58 by unscrupulous litigants, who employ it to stall or disrupt potential settlements and take actions detrimental to their opponents' interests in the context of commercial law disputes.

The primary purpose of the Pre-trial Conference Settlement is to explore avenues for resolving disputes without undergoing a full trial. *Per* the rules, parties are expected to engage in this stage within thirty (30) days to pursue settlement. Failing this, the Pre-Trial Judge mandates the filing of issues, leading to referral to the Administrator and onward transfer to the Substantive Judge. However, practical instances reveal that certain litigants, in the early conference stages, intentionally avoid the Pre-Trial Judge. Subsequently, the Judge orders for hearing notices to be issued to encourage participation. Upon eventual participation, the focus on settling extends beyond the stipulated one-month period prescribed by the Rules of Court. In light of the purpose behind the Pre- Trial Settlement Conference, adjournments are common to allow parties time for settlement attempts. A critical issue arises when parties fail to settle before the end of the legal year, leading to a two-month wait until the subsequent legal year due to the inactivity of Pre-Trial matters during legal vacations. In response, the Rules of Court Committee[10] resolved to amend Order 58 Rule 3(2) of C.I. 47 in 2020, aiming to address unwarranted delays in commercial disputes. This amendment aims to enable parties to seek summary judgment and promptly recover what is rightfully theirs.

Contra to the above argument it is submitted by proponents of argument "B" that Constitutional Instrument 133 has not altered or invalidated Order 58 Rule 3(2) of C.I. 47. They advance the position that any interpretation diverging from this perspective would run counter to the underlying purpose of Order 58 within the framework of C.I. 47. These proponents advocate that the Rule Maker, in question, had no intention of excluding Subrule 2 from Rule 3 of Order 58. Instead, the omission should be solely attributed to an inadvertent error on the part of the draftsman.

In the context of commercial proceedings, once the phase of pleadings has concluded, the rules of court stipulate that the case is to be directed to a Pre- Trial Judge. This judge assumes the role of a neutral facilitator in a settlement conference, which is termed a Pre-Trial Settlement Conference according to the court's Rules on procedure. The primary aim of such a conference is to thoroughly examine all potential routes to resolving the dispute amicably between the involved parties. This approach serves to foster an efficient and expedient method of dispute resolution specifically within the realms of commerce and trade.

As aptly phrased by Lord Devlin in the case of Kumv Wat TatBank[11], the law functions as a lubricant that facilitates the smooth operation of commercial activities. Due to these considerations, the rules governing disputes of a commercial nature are distinct from other procedural rules. A secondary rationale is to uphold the business relationship existing between the parties, if feasible. In light of these factors, the Rules of Court Committee, demonstrating their judicious insight, have prohibited parties from seeking Summary judgment or judgment on admission during the stage of the Pre-Trial Settlement Conference.

It would indeed be absurd for parties engaging in a Pre-Trial settlement conference, with the intention of reaching a harmonious resolution to their dispute, to concurrently apply for summary judgment. This would be counterproductive given the available avenues for exploring settlement, which not only proves cost-effective but also prevents undue delays. To permit parties, who genuinely may be seeking an amicable resolution, to seek summary judgment would defeat the object of the settlement conference, given the available channels for pursuing cost-effective settlement options that eschew unnecessary delays[12].

It is worthy to note that the fundamental principle in procedural law is that no one possesses an inherent entitlement to a specific procedure. When changes occur in procedural laws, their impact is both

[10] A Constitutional body responsible for making rules and regulations for regulating the practice and procedure of all Courts in Ghana. See Articles 33(4) and 157 of the Constitution 1992

[11] [1971] 1 Lloyds Rep 439

[12]Order 1R2 provides that: the rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense and ensure that as far as possible, all matters in dispute between parties are completely, effectively and finally determined.

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prospective and retrospective.[13] The rules of court, as they pertain to adjectival law, play a supportive role and are not meant to dictate. Adherence to these rules should be cautious, especially when strict compliance could impede the wheels of justice.

In the case of Springfield Energy v Bulk Oil, *supra*, it is significant to note that no mention was made of Order 58 Rule 3 of C.I.133 when the Supreme Court was tasked with determining the vexed issue of whether the Plaintiff was entitled to summary judgment, particularly when the issues set down were scheduled for trial. Justice Amadu, reading the opinion of the Court, affirmed this possibility, drawing on Order 58 Rule 3(2) of C.I. 47, which prohibits parties from seeking summary judgment or judgment on admission during the Pre-Trial settlement conference phase.

The author strongly supports the position that interpreting Order 58 R 3(2) of C I. 47 as revoked by C.I. 133 would hinder the settlement process by allowing frivolous applications to disrupt it. This would render the Pre-Trial Settlement likely to fail from the onset.

Additionally, the requirement for the Pre-Trial Judge to report on the failure of parties to settle to the Administrator for the case to be placed before the Substantive Judge, if not expressly provided, precludes parties from applying for Summary judgment during the Pre-Trial Settlement Conference. The reason being that prior to the Pre-Trial Settlement Conference, the docket that rest with the Substantive Judge is transferred to the Pre-trial Judge. This transition serves the purpose of familiarizing the Pre-Trial Judge with the case and to aid his role in assisting parties explore potential avenues for settlement. The Pre-Trial Settlement Conference, for want of diction, stays the hand of the Substantive Judge to adjudicate over the matter[14]. This suggests that any subsequent Applications can only be heard after Pre Trial settlement Conference had concluded and the case has been transferred to the Substantive Judge. Any other interpretation risks derailing the Pre Trial Settlement process.

Lastly, C.I. 133 introduces Alternative Dispute Resolution (ADR) mechanisms into Commercial Dispute Resolution, promoting options like mediation, negotiation, arbitration, and other hybrid ADR Mechanism[15]. These ADR avenues are typically explored during the Pre Trial Settlement Conference, allowing parties to choose a resolution method. Given litigation's cost and time burdens, arguing for summary judgment at this stage could undermine the innovative approach C.I. 133 brings to commercial dispute resolution.

V. Conclusion and Recommendation

In conclusion, taking into account the insightful perspective presented by Amadu JSC in the Springfield Energy case, as well as the growing apprehension within the legal community concerning the rigid interpretation of C.I. 133 in relation to the application for summary judgment, it is now evident that parties in commercial disputes may only apply for summary judgment after Pre-Trial Settlement Conference. Given this analysis, it is strongly recommended that the Rules of Court Committee, in accordance with its constitutional mandate, undertake an amendment of Order 58 within the High Court Civil Procedure Rules, 2004 (C.I.47). This amendment is essential to reinstate the Inert and reintroduce legal certainty, thereby promoting a sense of order in Commercial disputes.

[13] Yew Bon Tew v Kenderaan Bas Mara [1982] 3 ALLER 833 and Adwoa Yeboah v Augustus Asante Suit No: H1/53/21 (unreported) dated 22nd April,2021.

[14] Order 58 R5(5) C.I. 133 reads: "Where the Parties agree to pre-trial settlement, the judge shall make the relevant orders pursuant to the subsequent provisions of this Order and *stay proceedings* in the case for not more than thirty days".

[15] See Order 58 Rule 5 Subrule 3 of C.I. 133.

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