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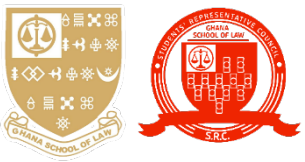

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FAILURE TO AMEND AFTER GRANT OF LEAVE: A MERE OR A FUNDAMENTAL IRREGULARITY? THE CASE OF *AKUFO V CATHELINE*

Richmond Agbelengor*

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ABSTRACT

The High Court (Civil Procedure) Rules, 2004, ("CI 47") recognises the fallible nature of the users of the court and has therefore made provisions to ameliorate any harsh effect of same. One of such safeguards relevant for the purpose of this article is "amendment", as provided for under Order 16 of CI 47. This article argues that the effect that follows, where a party fails to amend after obtaining leave to amend, no longer holds in its pristine state. This article seeks to demolish the simplistic, mechanical, and monolithic application of the Rules of Court, specifically, Order 16 rule 8 of CI 47. It argues that in spite of the peremptory tone of the said provision, the rule admits of exceptions.

* LL.B, University of Ghana, Legon (2021); B.L Candidate, Ghana School of Law.

1.0 INTRODUCTION

In a lawsuit, the court or a party can make sense of the opposite party's case based on the pleadings of the opposite party. Pleadings are thus, the nucleus around which the case—the whole case— revolves[1].

The general rule in respect of pleadings which has been rehashed *ad nauseam* is that parties are bound by their pleadings and are not allowed to give evidence of unpleaded facts. A forceful authority on the point is the recent Supreme Court decision of *Mahama v Mensah*[2], where Marful-Sau JSC (of blessed memory) stated as follows: 'A cardinal principle in procedural law is that parties in an action are bound by their pleadings and such parties may only depart from their pleadings through amendments allowed by the law'[3].

Thus, for a party to be able to escape from the trap of this general rule, one avenue open to such a party is to amend his pleadings by adding material facts in aid of his case or omitting facts which may not help his case.

As a prelude to considering the fulcrum of this paper, it is worth stating that, the pedestal upon which an amendment may be effected, may be with leave of court or without leave of court, depending on the given circumstance.

1.1 Purpose of the Article

The purpose of this article is to examine the scenario where an application for leave to amend is successfully granted by the court, but the applicant takes no implementary steps to formally file the amended process(es), pursuant to the leave granted. The question sought to be answered in this article is whether or not relief(s) granted by the court based on such "supposed" amendment, and not on the basis of the original writ and statement of claim, constitute a mere irregularity or a nullity.

Put simply, but perhaps more elegantly, does an application for leave to amend which has been granted, automatically operate to bring into existence an effective amendment?

2.0 FAILURE TO AMEND AFTER GRANT OF LEAVE TO AMEND: THE CASE OF *CATHELINE V AKUFO-ADDO*[4]

CI 47 provides that, where the court makes an order giving a party leave to amend a writ of summons, pleading or any other document, the party who so applied for the order shall effect the amendment within such period as the court may determine in the order granting leave to amend. If no period is specified in the order granting leave to amend, within 14 days

[1] Hammond v Odoi and another [1982-1983] 2 GLR 1215.

[2] [2020] GHASC 58.

[3] ibid.

[4] [1992] 1 GLR 377 (SC).

after the order is made, the order shall cease to have effect.[5] This is without prejudice to the power of the court to extend the period.

2.1 Facts of the Case

In the case of *Catheline v Akufo-Addo*[6], the deceased (O.P. Ofori-Atta) in his will, devised certain shares in a company (of which he was the Managing Director), and a house at Kaneshie Estate, as the absolute and beneficial owner, to his children.

The plaintiff (Mrs. Akufo-Addo) sued the executors of the will of the deceased and contended that even though the deceased held the legal title to the property, by operation of law, both the Kaneshie house and the shares in the company were held in trust by the deceased for the benefit of the plaintiff's late husband (Edward Akufo-Addo).

The plaintiff therefore sued the executors of the will of the deceased for *inter alia*, an order that the shares held by the deceased in the company were held in trust for the plaintiff's late husband or for the said husband's estate.

During the trial, the plaintiff obtained leave of the court on two occasions to amend her statement of claim, to include a claim of ownership to the Kaneshie house. There was however no such amendment filed, pursuant to the leave granted by the trial court.

2.2 Decision of the Trial Court

The learned trial judge, relying on the equitable principle of tracing, found for the plaintiff against the defendant and ordered that the shares held by the deceased in the company be registered in the name of the plaintiff as the holder of the legal title. The learned trial judge also decreed that the plaintiff be the absolute owner of the Kaneshie house.

2.3 Decision of the Court of Appeal

On appeal, the Court of Appeal set aside the decision of the trial High Court. The Court of Appeal *suo motu* took issue with the plaintiff's failure to amend pursuant to leave granted by the trial court. The Court of Appeal held that, in law [rules 7-10 of Order 28 of the High Court (Civil Procedure) Rules, 1954 (L.N. 140A)], since the plaintiff after she obtained the leave to amend, failed to amend the writ and statement of claim to include a claim for the Kaneshie house, there had been no amendment of the plaintiff's writ and statement of claim.

Consequently, the trial court had no jurisdiction to grant any relief in respect of same, therefore, the order decreeing title in the Kaneshie house in the plaintiff was a nullity.

2.4 Decision of the Supreme Court

When the matter went before the apex court, the Supreme Court in affirming the Court of Appeal's decision held that, an order for leave to amend lapses if it is not acted upon within the time specified in the order or within fourteen days after the order is made unless the

[5] High Court (Civil Procedure) Rules, 2004, CI 47, Or 16 r 8.
[6] *Catheline* (n) 4.

court extends the order; the order to amend *ipso facto* becomes void and the right to amend lapses, and there will be deemed to be no amendment.

The Supreme Court therefore concluded that, in the instant case, since the claim of ownership to the Kaneshie house was never before the trial court, or was not submitted to the trial court by the parties for adjudication, the trial judge had no jurisdiction to pronounce on same.

3.0 ANALYSIS OF THE COURT'S DECISION

The author of this article is of the view that, the principle that 'an order to amend lapses if it is not acted on within the time specified in the order or within fourteen days after the order is made, and therefore becomes void and the right to amend lapses, unless the court extends the order', **is not an absolute principle of law**.

Under the following exceptional circumstances, the above principle of law may be inapplicable, and its scope may be whittled away.

3.1 Where Amendment is Ordered by the Court Proprio (Suo) Motu

It is now a settled principle of law that, where leave is required before an amendment can be made, the application for leave to amend may be made by a party either formally or otherwise (orally)[7]. Apart from the parties applying to the court for an order of leave to amend, the court may *suo motu* make an order for amendment.

The established principle from case law is that, where the court on its own motion makes an order for amendment, the order automatically operates to bring into existence an effective amendment.

In the case of *Ayiwah and Anor v Badu and ors*[8], the plaintiffs sued for the 'cancellation of a 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 for the amendment 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, and judgement was entered in favour of the plaintiffs (i.e., the plaintiffs' claim for 'cancellation of the mortgage deed' on the grounds of illegality was granted). On appeal, the defendant (who assumed that the leave granted by the trial court automatically operated to bring into existence an effective amendment) argued that the trial judge erred in law, by allowing an amendment which allowed for the re-opening of the loan transaction.

[7] *Ghana Ports and Harbours Authority v Issoufou* [1993-1994] 1 GLR 24(SC).

[8] [1963] 1 GLR 86 (SC).

The Supreme Court held that, the leave granted by the trial judge for the plaintiff to amend the writ and statement of claim became *ipso facto* void, upon the plaintiffs' failure to take steps to implement it. Thus, no amendment was effectively made to enable the plaintiff reopen the loan transaction.

In this case, however, the Supreme Court gave a caveat. The court stated that, 'Leave [to amend] may operate to bring into existence an effective amendment if the amendment is ordered by the court proprio motu'[9].

Simply stated, where the court on its own motion makes an order for certain processes to be amended and the party concerned fails to effect the necessary amendments, the processes that the court's order affected, would be deemed to have been, in fact, amended and filed.

The writer of this paper is further strengthened on his resolve by an *obiter dictum* in the case of *Abel Edusei (No. 2) v Attorney-General and Others*[10]. In this case which was a review application before the Supreme Court, counsel for the plaintiff who made a clerical error by referring to article 11(1) (2) and (3) instead of Article 17 of the 1992 Constitution, prayed the court in his written submission to correct the error. He did not however make any formal application seeking leave to amend the writ of summons and statement of case, as required by the Rules of Court. The Supreme Court per Kpegah JSC *suo motu* allowed the amendment.

This was what Kpegah JSC said:

> Although he [the plaintiff] did not make a formal application seeking leave to amend his writ and statement of case, as required by the Rules of this Court, I personally, suo motu, allowed the amendment. While those in the minority did not consider and never referred to Article 17 of the Constitution, both Ampiah and Adjabeng JJSC referred to the said article without formally amending the writ and statement of case. Which may indicate an implied acceptance of the proposed amendment[11].

3.1.1 Note of Caution; Where Amendment is Ordered by the Court Proprio (Suo) Motu

The note of caution expressed by the learned Adumua-Bossman JSC, in the case of *Ayiwah and anor. v. Badu and ors*[12], still holds true, that 'It would seem to be advisable, however, for counsel for the party in whose favour an amendment has been ordered, even if on the court's own initiative, to enquire about, and, if necessary, see to its implementation.'[13]

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[9] *Ibid.*
[10] [1998-1999] SCGLR 753.
[11] ibid, 773.
[12] *Ayiwah* (n) 8.
[13] ibid, 90.

3.2 Breach of Rules of Court Simpliciter

Among others, a principal objective of the application of CI 47 as set out under Order 1 Rule 1(2) is to achieve speedy and effective justice, and to avoid delays. Towards the attainment of the said objective of the Rules of Court, Order 81 of CI 47 is worth mentioning.

The general rule provided under Oder 81 Rule 1(1) of CI 47 is that, non-compliance with the Rules of Court, whether in respect of time, place, manner, form or content, or in any other respect, does not nullify the proceedings or any part of it; but shall be treated as a mere irregularity. Thus, the default position when it comes to breaches of the Rules of Court is that such breaches do not render any proceedings automatically void.

The only instances where Order 81 of CI 47 cannot be invoked to save a party who fails to comply with the Rules of Court, are where the alleged defect or default is against the *Constitution or statute*, the rules of *natural justice*, or one that goes to *jurisdiction*. Under these three headings, non-compliance with the Rules cannot be saved under Order 81[14].

Thus, whether or not Order 81 rule 1(1) of CI 47 applies to any particular case depends on whether or not the proceeding in issue is a nullity or a mere irregularity. If the procedural blunder is a nullity, then the subsequent proceedings or acts would be automatically void and could not be waived under Order 81 rule 1(1) of CI 47. Simply, Order 81 rule 1(1) does not apply under this circumstance. However, if the procedural blunder is a mere irregularity, then it can be validated by the subsequent acts of the parties such as a waiver or taking any such steps in the action that would be deemed to have amounted to a fresh action.

The author of this article argues that, in light of Order 81 of CI 47, if an order for leave to amend is granted by a court under Order 16 Rule 5 of CI 47 and the party/applicant defaults in carrying out such an order, such non-compliance with the order should under the appropriate circumstances be considered as a mere irregularity. The factors to be considered under the given circumstances would be whether or not the failure to effect the implementary steps has breached a statutory or constitutional provision, whether there has been a breach of the rules of natural justice, or whether there has been a breach of the rules on jurisdiction.

3.2.1 Failure to effect Implementary Steps: *A Breach of Natural Justice?*

In the case of *Catheline v Akufo-Addo*[15], a reason proffered by the Supreme Court that an order for leave to amend became *ipso facto* void on effluxion of time, was that, 'the defendants were denied the chance to file a defence to the amended statement of claim'[16].

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[14] *Republic v High Court, Accra; Ex parte Allgate Co Ltd (Amalgamated Bank Ltd Interested Party)* [2007-2008] SCGLR 1041.

[15] *Catheline* (n 4).

[16] ibid.

In other words, the court inter alia, grounded its decision on the fact that the plaintiff violated the principle of natural justice (*Audi Alterem Partem*).

It is trite learning that no person shall be condemned on a ground of which no fair notice has been given to him or her. That will amount to an injustice. This principle has been established in a litany of cases[17]. This principle is said to be as old as man.

Thus, a very vital role of pleadings is to give notice of one's case to the other party so that the party can have a fair notice of the nature of claim or defence of the other party[18].

It is the view of the author of this paper that, if a party/ applicant obtains an order for leave from the court to effect an amendment but fails to take the implementary steps, and the opposite party under the "erroneous" belief that the party/applicant has taken the implementary steps, thus, also amends or files other process(es) in response to the "amendment", the test of natural justice would be deemed to have been satisfied.

This stance of the author is even fortified the more, where the opposite party who "erroneously" believes that the party/applicant has taken the implementary steps, applies and obtains *adjournment(s),* to enable an amendment or filing of the necessary response(s) to the "amendment".

Under these scenarios, the potential natural justice problem of *surprise* will not arise.

Thus, in the *Catheline case* for instance, if the defendant was to have filed an amended statement of defence, denying the plaintiff's allegation of the ownership of the Kaneshie house, and both parties subsequently adduced evidence to establish their allegations, the test for the principle of natural justice *(Audi Alterem Partem)* would have been satisfied.

3.2.2 Failure to effect Implementary Steps: *A Breach of Jurisdiction?*

Another reason proffered by the Supreme Court in *Catheline v Akufo-Addo*[19] was that, since the claim for the Kaneshie house 'was never before the court, or was not submitted to it by the parties for adjudication, the trial judge had no jurisdiction to pronounce on same'. In other words, the court, inter alia, grounded its decision on lack of jurisdiction.

A starting point in respect of the jurisdiction of the High Court is that the Constitution and the Courts Act confer on the High Court, jurisdiction in all civil and criminal matters as a court of first instance or trial court[20]. I must add that in spite of this general rule, there are

[17] *Aboagye v Ghana Commercial Bank* [2001-2002] SCGLR 797; *Awuni v West African Examination Council* [2003-2004] 1 SCGLR 471.

[18] *Dam v JK Addo and Brothers* [1962] 2 GLR 200, SC. See also *GIHOC Refrigeration and Household Product Ltd (No. 2) v Hanna Assi (No. 2)* [2007-2008] 1 SCGLR 16, where Atuguba JSC said 'It is particularly said that the sole object of pleadings is to give notice of one's case to the other party.'

[19] *Catheline* (n 4).

[20] 1992 Constitution, art 140(1); Courts Act, 1993 (Act 459), s 15(1)(a).

exclusions to the jurisdiction of the High Court as a court of first instance - and these were enumerated by Amua-Sekyi JSC in the case of *Republic v High Court, Cape Coast, Ex parte Kow Larbie*[21].

Concerning jurisdiction, the proper question to ask considering the context of this article is whether a court is sanctioned under any substantive law or rule of procedure to make an order in the nature of relief(s), although parties to the action did not expressly claim for such relief(s)?

The general rule as held in a plethora of cases is that, a court could not *suo motu* grant any relief(s) that a party has not requested for, unless the endorsement on the party's writ has been amended to reflect the said relief(s). Thus, in the case of *Dzefi v Ablorlor*[22], the plaintiff's relief was for a declaration of title to the disputed land, and other ancillary reliefs. The trial court granted a different relief (i.e., an order setting aside a grant as being invalid). On appeal, the Court of Appeal held that the trial court erred since a court could not *suo motu* grant any relief(s) that a party has not asked for, without amending the endorsement on the writ, if appropriate to do so.

Exceptions have been provided to the principle of law stated in the *Dzefi case*[23], due to the development of case law.

An exception to the general rule stated in the *Dzefi Case*[24] is that, a court may grant a relief not sought by a party where evidence is adduced on record, and the relief(s) is not inconsistent with the stand and claim of the party, in whose favour the relief is granted.

In other words, where there is evidence on record to support the grant of a relief(s), the court may exercise its discretion and grant same, although the said relief(s) was not endorsed on the party's writ. In *In Re Gomoa Ajumako Paramount Stool; Acquah v Apaa & Another*[25], the Supreme Court per Acquah did not mince words when he stated as follows:

> It is conceded that in appropriate circumstances, a court of law can grant a relief not sought for by a party. However, any such relief must, first be supported by evidence on record, and secondly, not to be inconsistent with the stand and claim of the party in whose favour the relief is granted.[26]

In the case of *Martin J. Verdoes v Patricia Abena and Verdoes Koranchie*[27], an issue which confronted the court was whether or not a court could *proprio motu* grant relief(s) which a

[21] [1994-1995] GBR 553 (SC).

[22] [1999-2000] 2 GLR 101 (CA).

[23] ibid.

[24] ibid.

[25] [1998-1999] SCGLR 312; [1999-2000] 2 GLR 896.

[26] ibid.

[27] (2015) JELR 64370 (CA).

party did not originally seek, without amending the endorsement on the writ. In this case, the petitioner prayed the court for a dissolution of the parties' marriage, and asked the court to, *inter alia*, settle certain properties in favour of the respondent. The trial court, however, held that the said properties should be held by both parties as joint owners. Dissatisfied with the trial court's decision, the respondent appealed to the Court of Appeal, arguing that a court could not *proprio motu* grant relief(s) to a party which the party did not ask for, without first amending the endorsement on the writ; and neither could a court accept a case in favour of a party which is different from what the party himself put forward in his pleadings.

The Court of Appeal per Dordzie JA, relying on the principle stated in the case of *In Re Gomoa Ajumako Paramount Stool; Acquah v Apaa & Another*[28], as well the objective of CI 47 as contained in Order 1 rule 1(2), held that, although the petitioner's relief was that the said properties be settled in the respondent's favour, evidence led at trial showed that, the ownership of the said properties were in dispute. The Court of Appeal therefore concluded as follows:

> It is erroneous to argue that the court is precluded from determining the issue of the ownership of the properties because it was not a triable issue or that the petitioner did not ask for declaration of title to the properties. The issue of ownership arose out of the evidence adduced to the court and the court is bound to make a determination on the issue.[29]

In the case of *GIHOC Refrigeration and Household Product Ltd (No. 2) v Hanna Assi (No. 2)*[30], the defendant (applicant) at the High Court satisfactorily established facts which could entitle her to a claim of declaration of title and recovery of possession to the disputed land. These reliefs were thus granted in her favour by the trial court. The granting of the said reliefs by the trial court were however reversed by the Court of Appeal. The Court of Appeal's decision was affirmed by a 3-2 majority decision of the ordinary bench of the Supreme Court on the ground that, the defendant (applicant) did not counterclaim for the said reliefs and neither did she amend her pleadings to entitle her to those reliefs.

When the case went on review, the Supreme Court, in exercising its review jurisdiction as conferred on it under article 133 of the 1992 Constitution of Ghana by a 6-1 majority decision, reversed the decision of the ordinary bench of the Supreme Court and granted the reliefs of declaration of title and recovery of possession in favour of the defendant (applicant). The court reasoned that in order to avoid multiplicity or proliferation of suits and to do substantial justice, technicalities should not be allowed to hold sway over substance.

The author of this article argues that, since a core purpose of the Rules of Court is to make access to justice speedy and cost-effective, where an order is given by a court under Order 16 Rule 5 of CI 47 and the party/applicant defaults in carrying out the implementary steps but

[28] *In Re Gomoa Ajumako Paramount Stool* (n 25).
[29] ibid.
[30] [2007-2008] 1 SCGLR 16

has been able to adduce evidence in support of the relief and such evidence is not inconsistent with his claim, the court should favourably exercise its discretion, and grant the relief, albeit that the relief is 'formally' unclaimed for.

Doing so will overcome the likelihood of the party/applicant being confronted with the defence of *res judicata*, if the party/applicant should attempt to retrace his steps to the trial court to file a fresh suit for the claim he was denied.

4.0 CONCLUSION

The Supreme Court speaking through Atuguba JSC in the case of GIHOC Refrigeration and Household Product Ltd (No. 2) v Hanna Assi (No. 2)[31] said as follows:

> The modern attitude of the courts is that, as much as possible, pleadings should not disable the doing of substantial justice, and the power of amendment in particular aids and abets that objective, subject always to the requirements of fairness and justice in the particular circumstance of a case.[32]

It is therefore the view of the author that, every case must be examined in its true perspective, and that, a failure by a party to take a formal implementary step after the grant of an order of amendment, should not automatically be held to have invalidated any proceeding(s) or order(s) given thereunder.

Based on the circumstances of each case, the courts of Ghana being courts of both Common Law and equity, have a duty to ensure justice, equity, fairness, good sense, and judicial economy; and should not let this duty be circumvented by mere technicalities.

A blind application of Order 16 Rule 8 of CI 47 will be an antithesis of the primary purpose and objective of the CI 47, which is to achieve speedy and effective justice, and to avoid delays.

[31] *Ibid.*
[32] ibid.