OVERVEIW OF THE HIGH COURT (CIVIL PROCEDURE) RULES (C.I. 47)

By Justice Sule Gbadegbe
Justice of the Court of Appeal

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In this session an attempt is made to give an overview of the High Court (CIVIL PROCEDURE RULES) 2004, CI 47.This piece of subordinate legislation brings together under one enactment the rules of procedure applicable to the High Court and the Circuit Court that were previously contained in several instruments. Thus, in the repeal section other pieces of legislation that previously regulated civil procedure including LN 140A have been repealed. See- Order 82 rule 6. In the case of the Circuit Court, Order 1 rule 1 provides that the rules are to be applied with such modifications as may be necessary. See Order 1 rule 1. The purpose of the rules as spelt out in Order 1 rule 2 is to achieve the just, speedy and inexpensive resolution of disputes and also to avoid a multiplicity of actions. In my opinion Order 1 rule 2 of the rules that set out the objectives of CI 47 is of some importance in the application of the rules to cases that come before us and accordingly I refer to it in extenso:

"These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense and ensure that all matters in dispute between the parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided."

Against this background we may have to remind ourselves that the current rules came into being after the repealed legislation, LN 140A had been in existence for more than half a century. That piece of legislation in itself did not contain provisions that were inimical to a just and expeditious determination of disputes but as time went by some of its provisions tended to be applied by judges in a manner that undermined its efficacy with the result that the rules were perceived by many as being primarily responsible for the increasing delays in the administration of justice in the country. That view may not be correct but it is plain from a careful examination of some of the rules that they were behind modern trends and as such the coming into being of CI 47 was seen by judges and practitioners as a the beginning of a new era that would facilitate a reduction of delays in the delivery of justice in the country. Indeed, Order 1 rule 2 is an innovation, one that clearly highlights the objective of the rules in a manner that emphasizes the general purpose of civil procedural laws generally- the delivery of justice in a just, speedy and inexpensive manner. Accordingly, the rules have in some cases departed from the position that prevailed under the old law. One such example is the consequence that attaches to non- compliance with the rules.

Under the old law, defaults in complying with the rules were categorized into two namely- mere irregularities and fundamental irregularities. Whiles the former was capable of being rectified or waived either by the parties or the court the latter was said to be of such a nature that once it occurred the proceedings resulted in a nullity. In this regard, I mention the celebrated case of Mosi v Bagyina [1963] 1 G.L.R.337 Today, however, the new provisions on non-compliance that are contained in Order 81 are not to the same effect as those contained in Order 70 of LN 140A. Under these new rules, non-compliance with the rules is remediable except in cases where a rectification of the omission or non-compliance may occasion injustice. See-Order 81 rules 1 and 2. It is to be observed of the new rules that are expressed in the same words as Order 2 rule 1(1) of the Supreme Court Rules of England, 1964 that it is a departure from the old Order 70 on which a collection of cases including Mosi v Bagyina are based. Writing on the equivalent English rules, the learned authors in Halsbury's Laws of England, Volume 37 of the 4th Edition at para 36 page 35 observe as follows:

*"**This is one of the most beneficent rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity. Under the former rule, which it replaced, a distinction was** drawn **between a non-compliance which rendered proceedings a nullity, in which case the court had no discretion and no jurisdiction to do otherwise than set the proceedings aside, and a non-compliance which merely rendered the proceedings in which case the court had a discretion to amend the defective proceedings as it thought fit. The modern rule has done away with this old distinction, and every omission or mistake in practice or procedure is to be regarded as a mere irregularity which the court can and should rectify as long as it can do so without injustice."***

It being so, I think that decisions of the English courts on the above quoted rule though not pronouncements of Ghanaian courts and thus not binding on us by virtue of the rules of judicial precedent contained in Article 129 of the 1992 Constitution must be treated with respect and if I may venture since they are based on the same provisions as a rule of construction they must receive the same interpretation. See- (1) Harkness v Bell's Asbestos and Engineering Ltd [1966] 3 All ER 843 at 845; (2) Camel exporters (Sales) Ltd v Land Services Inc. [1981] 1 All ER 984. I am of the opinion that our new Order 81 in its operation may render cases such as Mosi v Bagyina from having any authoritative effect. This is not to say that in instances where the non-compliance is of such a nature that its rectification may result in injustice to a party the court is not enabled under Order 81 to set aside the proceedings either wholly or in part. Factors that a court faced with an application based on non-compliance may take into account include but are not limited to the length of time since the omission occurred, whether it is possible to cure the defect and whether third party rights have accrued in cases such that it is not reasonable to have the court's decision made earlier on recalled. I also think that the taking of a fresh step after knowledge of the irregularity may be taken into account by a court when an application is brought to set aside the proceedings. See-Order 81 rule 2

I will now turn to the various stages through which an action may have to pass before it is finally disposed of including execution processes. These stages may be broken down as follows:

(1) Commencement of Actions;
(2) Rules that determine what is actually in dispute between the parties (Pleadings)
(3) Pre-trial fact Investigation (Discovery):
(4) Pre –trial Orders (Interlocutories);
(5) Application for Directions;
(6) Trial;
(7) Judgments and Orders;
(8) Execution or Enforcement of Judgments.

COMMENCEMENT OF ACTIONS.

The rules regulating the initiation of actions or proceedings are contained in Order 2. In substance the rule deals with the form that a writ may take as it enters the court system. Such a writ is required by Order 2 rule 3 (1) to contain the residential address of the plaintiff which must be stated on the writ instead of the previous practice of providing the address of the lawyer. Also to be stated on the writ is the residential and occupational address of the parties. For a model precedent of a writ under the rules see Form 1 in the schedule to the rules at page 274 of CI 47.The rule also provides in sub rule 3 that in cases where the claim is for a liquidated demand only then the plaintiff should state in the writ that proceedings will be stayed if before the period provided for the entry of appearance the defendant pays the amount involved to the plaintiff or his lawyer and where the defendant is not resident within the jurisdiction the payment is made by the defendant into court. The requirement as to the indication of the address of the parties is again mentioned in Order 2 rule 5 that specially refers to the indorsement as to the plaintiff. There is the further requirement in Order 2 rule 4 as to the indorsement of the representative capacity of the plaintiff where he sues as such and if the defendant is sued in a representative capacity the fact must also be indorsed on the writ. I wish to point out that in all these instances the formulation of the rules is expressed by the use of the word " shall " and therefore these requirements are mandatory.

As a rule every writ has to be accompanied by a statement of claim-see Order 2 rule 6. By Order 11 the plaintiff is required to serve a statement of claim alongside the writ on the defendant and a default so to do may entitle the defendant to apply to have the action dismissed. In issuing the writ, the plaintiff has to comply with the provisions on venue or convenient forum contained in Order 3. In the event of a non-compliance with these provisions the defendant may raise an objection to the jurisdiction before or at the time that he is required to plead to the action. Where no objection is taken, the case may be proceeded with or the judge may report its pendency to the Chief Justice for her direction as to the venue. Where an objection to the jurisdiction is considered meritorious by the court then the judge shall inform the Chief Justice that in his opinion the action ought to

have been commenced in another region and the Chief justice may make such order as she considers appropriate.

It is to be observed that the provisions on convenient forum that use the word "jurisdiction" does not refer to the word as it is commonly employed in the literal sense to mean that the court does not have jurisdiction over the defendant in respect of the claim made or relief or remedy sought in the action but should be limited to an irregularity arising only out of commencing an action in the wrong forum. Thus, in my thinking the rule does not authorize parties to enter conditional appearance based only on the institution of the action in a wrong forum. That this is so is plain from the provisions of Order 3 rule 2 (1) that provides that

" … the defendant raises an objection to the jurisdiction before or at the time the defendant is required to file a defence in the proceedings."

Indeed the other rules of the order which permit the proceedings to be competently proceeded with if no such objection is taken also reinforces this interpretation of the effect of the provisions on venue contained in Order 3.

PLEADINGS

The rules on pleadings are contained in Orders 11, 12 and 13 of C I 47. The provisions are intended to make the parties put forward in an intelligible manner for the consideration of the court the matter (s) in contention. As said earlier on the plaintiff is required to serve a statement of claim at the same time with the writ and upon service on him the defendant if he is desirous of contesting the action, the defendant may enter an appearance and file a defence to the action before the expiry of fourteen days after the time allowed under the rules for appearance. Order 11 rule 6 provides for the formal requirements of pleadings. As a general rule pleadings must only contain the material facts on which a party relies and not the evidence by which the facts are to be proved. See Order 11 rule 7. Rule 8 of Order 11 provides for matters that shall be specifically pleaded. Points of law may be pleaded by a party-Order 11 rule 11 (1). Where a party relies on a rule of customary law rule he is required in his pleading to sufficiently show the nature and effect of the customary law rule in question and the geographical area as well as the ethnic group to which it applies. Order 11 rules 12 provides for particulars of misrepresentation, fraud, and breach of trust, willful default or undue influence to be provided where a party relies on any of them. Failure by a party to specifically deny a material allegation of fact shall be construed as an admission. This means that parties are required to specifically deny allegations of fact contained in their adversaries pleading and not to rely on a general denial-Order 11 rule 13.See also Armah v Addoquaye [1972] 1 G.L,R. 109.

Where there is a contention that the pleading before the court discloses no reasonable cause of action or defence the court may upon an application in that behalf strike out the offending pleading and consequentially may either enter judgment on the claim or dismiss the action as the case may be-Order 11 rule 18. There is also power in the court

to strike out offending pleadings on grounds of prejudice, embarrassment or likelihood of delaying a fair trial. In considering applications under this rule that has the same effect as the repealed Order 25 in LN 140A, no evidence whatsoever shall be admissible. Order 12 contains provisions on counterclaims. Order 13 of the rules provides for default judgment in situations in which there has been a failure by the defendant to enter appearance to the action. The rules provide for specific instances such as where the claim is for only a unliquidated demand, detinue, possession of immovable property and, mixed claims. In cases where such a default relates tom a claim involving a relief such as declaration of title or damages that cannot be granted by the court on a motion, the correct procedure is for the applicant to apply to the court under its inherent jurisdiction for directions and for that aspect of the case to be set down for trial See-Nagy v Co-operative Press, Ltd [1949] 1 All ER 1019The practice by which after the entry of default judgment the plaintiff serves a hearing notice on the defendant for the assessment of damages without setting down the action for trial does not appear to be the right procedure.

DISCOVERY AND INSPECTION OF DOCUMENTS AND INTERROGATORIES

CI 47 introduces an obligation on parties to have a mutual discovery of documents. Order 21 rule 1(1) as in this regard provides:

" After the close of pleadings in an action there shall be discovery of documents in accordance with this order."

Rule 2 (1) further provides:

"Subject to this rule, a partying an actions shall within fourteen days after the pleadings in the action are closed between that party and any other party, make and file for service on the other party a list of documents which are or have been in that party's possession, custody or power relating to any question between them in the action"

The rules contained in Order 21 appear to be a departure from the position that prevailed under the old enactment in Order 31 that required leave of the court for discovery of documents or interrogatories to be made. Writing on the subject of discovery under Order 24 of the Rules of the Supreme Court England, 1964 that has the same expression as Order 21 rule 2 of CI 47, the learned authors in Halsbury's Laws of England, 4th edition, Volume 13 paragraph 1 at page 2 state as follows:

*" **The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their respective cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to use before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made against him, to eliminate surprise at or before the trial relating to documentary evidence and to reduce the costs of litigation**."*.

Rule 2(1) appears to make discovery obligatory without an order from the court. This way discovery may be seen by the opposite party as a matter of right since it does not require a prior order of the court. The right so created is mutual in that it requires the parties to make discovery to each other simultaneously by the exchange of list of documents. The parties may, however by virtue of rule 1(2) either dispense with or limit the extent of the discovery of documents. There are elaborate rules made in Order 21 for discoveries and inspection of documents. The right to discovery however is not available in all cases and exceptions have been mentioned in Order 21 rule 2 sub-rules (2) and (3). There are sanctions attached to non-compliance which are contained in rule 14 and may in appropriate cases justify the dismissal of an action or the striking out of a defence as well as judgment being entered against the defaulting party These sanctions, however are only to be applied in willful cases where the defaulting party is shown to be avoiding discovery. See- Husband's of Marchwood Ltd v Drummond Walker development Ltd [1975] 2 All ER 30.

The court is also authorized at the hearing of the application for directions or subsequent thereto to make an order for discovery. This power may only be exercised by the court when the parties fail to make mutual discovery as provided for in Order 21 rule 2(1) and upon being satisfied that discovery is necessary for fairly disposing of the action or for saving costs. See- Beauchanan- Michaelson v Rubinstein [1965] 1 All ER 599. It is important to observe that in making an order for discovery the documents in respect of which the order is made must be relevant to the determination of the maters before the court.

Parties are also enabled to have inspection of documents referred to in pleadings or affidavits. Where a party defaults after service of a notice on him to provide for inspection by the other party of certain documents mentioned in his pleading then the court may upon an application made to it make an order for the production of the documents in question at a given place and time to be contained in the order for production of the documents. See rule 11. The order for production of documents is a way of enforcing the right to have their inspection but which has been denied. Again the court will only make such an order only when satisfied that it is necessary to fairly dispose of the matter or for saving costs. The court is also authorized under Order 21 rule to order any party in whose possession or custody a document is to produce same to the court. Under Order 21 rule 15 any order made in respect of discovery or inspection of documents may be revoked or varied by the court upon sufficient cause shown. This rule is an exception to the general rule of practice that an order made on an interlocutory application cannot be revoked or varied except on appeal or by consent .see- Ainsworth v Wilding[1896] 1 Ch. 673; Lewis v Daily Telegraph (No 20 [1964]1 All ER 705.

Order 22 also provides for interrogatories which in their nature are a mode of discovery of facts. The order is obtained with leave of the court for written questions to be served by one party on another relating to any matter in question between them in the action. The answer to the questions is by an order of the court to be by affidavit within the time specified in the court's order. The power to order interrogatories is discretionary and may

only be made when relevant and necessary. Its purpose of interrogatories is no different from that which has been quoted from Halsbury's on the discovery. See forms 10 and 11 in the schedule to CI 47 for model precedents of Interrogatories.

INTERLOCUTORIES

These deal with orders that may be made by the court between the commencement of the action and its determination. Their function is to deal with the rights of the parties in contention before the court finally pronounces on them by the grant or interim relief or remedy as may be just or convenient. Such orders may be made for example to enable the parties to better prepare the action towards trial or to maintain the status quo ante, to prevent hardship or prejudice to a party, to preserve a fair balance between the partes and to give them protection pending the final determination of their disputed rights and also to prevent a party from overreaching or outwitting the other opposite party. Sometimes they are resorted to dispose of actions without a full scale trial, for example by dismissing an action under Order 11 rule 18 of the rules or entering judgment on admissions. These orders therefore play an important part in the litigation process. In any of these instances an application is made to the court as provided for under Order 19 by way of a motion supported by an affidavit. In cases falling under rules except in cases of urgency must be made on notice to the other side. The court must be satisfied where the application is not inter partes that irreparable damage would be caused if the application were to be made on notice. See- Order 19 rule 3. Where the court has before it an ex-parte application that it thinks should be on notice it may make an order directing service on persons that may be affected by the order sought. Interlocutory orders that may be made in an action include amendments, joinder, interlocutory injunctions, and preservation of the subject matter of the action. In view of the frequent resort by parties to the order of interlocutory injunction, and interim preservation of property, I will spend some time on these.

Applications for these orders are authorized under Order 25 of the rules of court. Unlike previously, an applicant is required in the case of injunctions to submit a statement of case containing the full arguments and authorities to be relied upon. Further where the application is opposed, the applicant shall give an undertaking as to damages that may be sustained by the respondent by virtue of the order of interlocutory injunction. The giving of such an undertaking is a condition precedent to the making of the order. See- Order 25 rule 9. At the end of the trial, when the plaintiff losses the action then the court is required to assess damages based upon the undertaking given before the grant of the application.

A respondent who seeks to contest the application for injunction is also required to file a statement of case in answer to that of the applicant. Where the court is satisfied that having regard to the circumstances, irreparable damage may be sustained if the application were to be made on notice then an order may be made ex-parte limited only to ten days to be saved by the applicant a default of which lapses the order after the ten days. See Order 25 rule 1 sub-rules 8, 9 and 10. The court is authorized at the hearing of applications for interlocutory injunctions or receivers and managers or preservation of subject matter to make an order for early trial see rule 5 of Order 25.

APPLICATION FOR DIRECTIONS.

The rules provide in Order 32 for directions to be considered by the court so that

"(a) all matters which have not already been dealt with may so far as possible be dealt with and
(b) directions may be given as to the future course of the action as appear best to secure the expeditious and inexpensive disposal of it."

In my view the powers conferred on the court under this Order are so extensive that when properly utilized it may afford the judge who presides over the application for directions the opportunity of making orders that will in their nature better prepare the action for trial .Accordingly there is power in the court to adjourn the application when it considers that all the matters in respect of which directions have to be made cannot be taken on the return date. The Court is also required to ensure that that all matters that may be the subject of an interlocutory application that have not already been dealt with are also dealt with. See-order 32 rule 5. In order to render the court's power at the hearing of applications for directions effective it is considered that the judge must prepare before taking the application. The docket must be read thoroughly and in any case not casually by the judge and he must advert his When this is done the judge may be able to have the issues for trial narrowed down and refuse to make orders in respect of matters that are not intended to advance the future course of the action. Our role under Order 32 must be pro-active. This way the judge becomes a case manager and places himself in a position to direct the pace of the action instead of living it to the parties. It is to be observed that Order 32 should be read together with the ancillary orders of 33 and 34. While Orders 33 makes provision for the court to make orders for the trial separately of different issues of fact and or law and determine the mode of trial, Order 34 deals with how an action may be set down for trial and indeed specifies the nature of orders that a judge may make.(Read Orders 33 and 34 to the participants.).

TRIAL

After the action has been set down for trial and the requisite notices served for the notice of the trial have been complied with the matter comes up before the judge normally for a full scale trial in which the parties tender evidence and are cross-examined. The right to begin is dependent on the nature of the issues as they turn on the pleadings. It must be said that the right to begin in certain instances may be exercised by the defendant for example when there are presumptions of law arising from certain facts in favor of the plaintiff. At the conclusion of the case by the party on whom the initial burden of proof rests, his adversary also gives his evidence and may call witneses in support. After the case for the second party is closed the court is to give a date for addresses and then deliver its judgment not more than six weeks after the delivery of the addresses by the parties.

JUDGMENTS AND ORDERS

The judgment of the court is normally pronounced in open court after the parties have been notified to that effect. There are several orders that may be made by the court depending on the reliefs claimed in the action. In a land case, the court may make an order for declaration of title, perpetual injunction, and recovery of possession, specific perform mane and or damages. In some land cases, the court may make an order directed at the judgment debtor to execute a conveyance in favor of the judgment creditor. When, however, this is not complied with the court upon being so satisfied as to the default may direct the Registrar of the court to execute the conveyance in the stead of the disobedient party who under the rules is liable to be proceeded against by way of execution for the costs incurred in carrying out the order that he has disobeyed. See-Order 43 rule 8. In cases where the subject matter is for example a debt the court's order is for the payment of the amount due plus interest if any.

EXECUTION AND OR ENFORCEMENT OF JUDGMENTS.

As said earlier on the mode of execution depends on the reliefs granted by the judge in his judgment. In cases of money or debts the usual mode is by writ of fifa and garnishee proceedings. In land cases there are various types of writs of execution such as writ of possession and writ of delivery. Where there is an order of perpetual injunction this may be enforced by attachment but it appears that this is a relief available only to the High Court. In certain cases, execution does not issue without leave of the court to be obtained by an application made ex-parte to the court See- Order 44 rule 3.There are other means of execution available under the rules such as writ of sequestration, charges on immovable property and charges on securities belonging to the judgment debtor. See-order 49