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WRITE-UP



# THE NEW 'PROCEDURE' FOR PAYMENT OF MONEY OUT OF COURT: A TRICK OR A TREAT?

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## **A: Introduction**

Going to court is serious business. People who file cases in court or defend cases that have been filed against them know that court processes are not matters one takes for fun. There are elaborate rules and procedures to follow for each step a litigant wants to take. To make for easy reference, the various courts have specific rules made to guide parties on how to conduct their cases before the courts. Whether a party chooses to handle her case by herself or appoint a lawyer to represent her, it is the same rules of procedure that apply to every case. One subject that is of importance to many parties in court cases is how they can pay money into court or how they can withdraw money that has been paid into court for them.

The courts' rules of procedure contain specific rules for payment of money into court and out of court. It is only the Rules of Court Committee set up under the Constitution<sup>1</sup> that has the power to make or change the rules of procedure of the various courts. This article discusses the procedure that a party in a court case has to follow in order to pay money into court for the other party. It outlines the steps to follow to withdraw money that has been paid into court for a party. It also discusses the recent 'public notice' issued by the Judicial Service announcing a 'special exercise' for parties in some court cases to access funds that have been paid into court by parties. The article takes the view that since the procedure for the so-called special exercise for payment of money out of court was not made by the Rules of Court Committee in accordance with law, the procedure is unlawful and any money paid out of court in reliance on that unlawful directive is an illegal payment, void and must be returned to chest.

## **B: Payment of money into court: Reasons and procedures to follow**

### *i) Reasons why a party may pay money into court*

There are several reasons why a person who has a case with another person in court will decide to pay money into court for the other person. One reason why a party will pay money into court will be to settle the claim of the person who has brought the case to court. Such payments are recognized under the Rules of Court. For instance, a person who has been sued for liquidated damages (that is, debt, such as not repaying a loan or not paying for goods bought on credit, etc.) can pay the amount of money owed to the plaintiff into court when he is served with a writ of summons. The defendant who pays the money into court must file a 'Notice of Payment of money into Court.'<sup>2</sup>

In a case of defamation (libel or slander), where a plaintiff sues several defendants together, the defendants or some of them, can pay an amount of money into court for the plaintiff to settle the plaintiff's claim. When the plaintiff accepts the money paid into court, he must file a 'Notice of Acceptance of Money paid into Court.'<sup>3</sup> The court will then stay the action against the defendant who paid the money into court, that is to say, the case will end there.<sup>4</sup>

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1 See: Article 157 of the 1992 Constitution

2 Order 2 rule 3 (3) of the High Court (Civil Procedure) Rules, 2004 (C.I 47). See also: Order 18 rule 1 (3) of C.I 47 and Form 7 in the Schedule to C.I 47

3 See: Order 18 rule 3 (1) of C.I 47; Form 8 in the Schedule to C.I 47

4 Order 57 rule 4 of C.I 47

Also, where a person has been sued for defamation, she can pay some money into court by way of amends. Payment by way of amends usually happens where the defamatory statement was published in any public newspaper or other periodical publication, and the defendant pays an amount of money into court to correct the mistake or repair the injury the plaintiff has suffered as a result of the publication before filing a statement of defence.<sup>5</sup>

There are other instances where one party may pay money into court for the benefit of the other party or to protect the subject matter of the case while the case is ongoing. The circumstances under which such payments may be made into court are discussed below. Firstly, where a plaintiff applies for summary judgment and the court grants the defendant leave to defend the action with respect to the claim or part of it, the defendant may have to make payment into court or provide other security as part of the terms for granting leave.<sup>6</sup> This will ensure that if his defence fails, the plaintiff will be assured of getting her money.

Secondly, a payment may be made into court after an application for security for costs has been granted. Where a plaintiff who is resident outside Ghana sues a defendant who lives in Ghana in a Ghanaian court, the court may order the plaintiff to pay some money into court when the defendant makes an application for security for costs.<sup>7</sup> In that case, if the plaintiff loses the case, the defendant can fall on the money in court to defray his costs/expenses in the case.

Thirdly, a court can order that the subject-matter of the case between the parties (the money in controversy) must be paid into court. Such an order will usually be made by the court to preserve the subject-matter of the litigation or res litiga and to prevent a party from dissipating it while the case is pending.<sup>8</sup>

Fourthly, when a party loses a case, the successful party will go into execution to satisfy the judgment he has won court. When the losing party's property is seized and sold, the auctioneer must pay the proceeds from the auction sale of the property into court for the party who won the case, that is, the judgment-creditor.

Again, in a maritime action involving arrest of a ship, one of the conditions a party must satisfy before a court will make an order for caveat against arrest is that, the caveator must undertake to give a bond in a stated amount or make payment into court in like sum.<sup>9</sup>

The above scenarios demonstrate that there are many instances where a party in a court case may have to pay money into court.

*ii) Procedure for paying money into court*

The procedure for paying money into court is pretty simple. The party who is paying the

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5 Order 57 rule 5 (1) (c) of C.I 47

6 Order 14 rule 5 (1) (b) of C.I 47

7 Order 24 rule 1 of C.I 47. For an example of a case (Supreme Court) in which a High Court recently made an order for security for costs, See: *Zikpuitor Akpatsu Fenu & 4 Others v Attorney-General & 3 Others*, Civil Appeal No. J4/40/2018 judgment dated 17th October, 2018, SC (unreported)

8 Order 25 rule 2 of C.I 47. See also: Order 66 rule 2 (1) of C.I 47

9 Order 62 rule 3 (1) (b) of C.I 47

money into court must file a 'Notice of Payment of Money into Court'.<sup>10</sup> Where a defendant is paying money into court, he must specify the claims in respect of which the money is being paid. If there are more than one plaintiffs in the suit, the defendant must specify the one for whom he is paying the money into court.<sup>11</sup> Money paid into court on behalf of a party cannot be withdrawn unless there is an order of the court authorizing the withdrawal. In other words, a party does not need a court order to pay money into court but a party can only withdraw money out of court with an order of the court.

### **C: Payment of money out court: Reasons and procedures to follow**

#### *i) Reasons for withdrawing money out of court*

As stated in the previous paragraphs, there are several reasons why money may be paid into court when a case is filed or is pending in court. By the same token, several reasons may account for a party's decision to apply to withdraw money paid into court. For instance, where a plaintiff's claim is for a liquidated claim such as debt recovery, and the defendant pays the sum stated in the writ into court within the time for entering appearance to the writ, the plaintiff can apply to withdraw the money from the court.

Also, where a plaintiff in a defamation case accepts money paid into court by a defendant, the plaintiff can apply to withdraw the money and end the case against the defendant. Similarly, a plaintiff who accepts a full apology and money paid into court by a defendant by way of amends in a defamation case can withdraw the money and end the case.

Furthermore, where a defendant who has been granted leave to defend a case after an application for summary judgment loses the case, the plaintiff can apply to withdraw the money that the defendant was made to pay into court as a condition for granting him leave to defend.

Again, a defendant can apply to withdraw money paid into court on an order for security for costs to satisfy costs that are awarded in her favour in the case. Also, where the money that is the subject-matter in dispute in a case is ordered to be paid into court and the case is concluded, the party who wins the case can apply to withdraw it.

Another reason for a party to apply to a court to withdraw money paid into court is where after judgment, an auctioneer sells property at an auction and pays the proceeds into court. The judgment-creditor can later apply for an order to withdraw the proceeds paid into court.

In a maritime action, a party who pays money into court as security for a caveat against arrest can apply to withdraw the money when the case ends. It must be added that, this list is by no means exhaustive. Whenever money is paid into court, either on a court's order or by a party on its own, the party entitled to the money can apply for a court order to withdraw it. Indeed, there are instances where a party may mistakenly make a payment into court. In such a case, the party is entitled to apply for an order to withdraw the money.

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10 Order 18 rule 1 (3) of C.I 47; and see: Form 7 in the Schedule to C.I 47

11 Order 18 rule 1 (2) of C.I 47

*ii) Procedure for paying money out of court*

It is clear at this stage that, any money that is paid into court, for whatever reason or purpose, either intentionally or by mistake, can be withdrawn only with an order given by a court. In the absence of an order made by a Judge and certified by a Registrar, no money paid into court in respect of any case can be withdrawn by a party.<sup>12</sup>

It seems there is only one exception under the Rules where a plaintiff can withdraw money paid into court without a court order. That exception may occur where a plaintiff accepts an amount paid into court by some but not all of the defendants sued jointly in a case. In such a situation, where the plaintiff discontinues the action against all the other defendants after accepting the money paid into court, the money may be paid out without a court order.<sup>13</sup> But in practice, it will be nigh impossible for such a plaintiff to receive the money without a court order. This is so because, no registrar will carry out any request for payment of money out of court without a court order.

There may be instances where a party may pay money into court for the other party but that party will not accept the payment so made. When that happens, the money remaining in the court's coffers will be paid out to the party who paid it into court only with a court order.

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*iii) How to obtain an order to withdraw money out of court*

A party in a case on whose behalf money has been paid into court can withdraw the money by following these steps under the Rules:

i. The applicant (mostly acting through her lawyer) must file a motion<sup>15</sup> ex parte with a supporting affidavit stating the reason why the money was paid into court, on whose behalf it was paid, and the reason for the withdrawal.

ii. When the 'Order for Release of Money paid into Court' is granted, it must be drawn up at the Registry and signed by the Judge.

iii. The registrar will issue certified copies of the Order for Release of Money paid into Court to the applicant, after paying a small fee.

iv. The applicant will then write a letter to the Director of Finance of the Judicial Service, through the Registrar, with a certified copy of the Order attached, requesting for the release of the money as stated in the court's order.

v. Within a few days, the Director of Finance will process the payment and write to inform the applicant as to the Bank where the money will be paid.

vi. The Bank will issue a cheque or make a direct bank transfer to the applicant's or the applicant's lawyer's account, according to the Order.

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<sup>12</sup> See: Order 18 rule 4 (1) of C.I 47

<sup>13</sup> Order 18 rule 4 (2) of C.I 47

<sup>14</sup> Order 18 rule 5 of C.I 47

<sup>15</sup> See: Order 19 rule 1 (1) of C.I 47 provides that every application in pending proceedings must be made by motion. Even the District Court Rules, 2009 (C.I 59) provides in Order 17 rule 3 thus: "Where the defendant pays money into Court, the plaintiff may (a) accept the money paid in full satisfaction and discharge of the cause of action in respect of which it is paid, and (b) apply by motion for payment of the money out of the Court to the plaintiff." (Emphasis added)

This procedure for paying money out of court is simple and easy to follow. All the stakeholders in the process – judges, registrars, lawyers, Judicial Service accounts staff and the Banks - play very important roles to assure checks and balances, transparency and overall accountability in the system. Of course, some times, there are delays in the process but considering the number of steps one needs to take to get money released from the Judicial Service (like any other government institution), such delays are unavoidable in certain situations.

#### **D: The public notice on a 'special exercise' for payment of money out of court**

By a 'public notice' dated 27th May, 2022, the general public was informed of a 'special exercise' to pay money out of court to parties/beneficiaries of the funds or their successors.<sup>16</sup> According to the public notice, money paid into court as a result of court orders have been lodged in deposit accounts of the Judicial Service, without any orders or directives for the money to be invested. The money have been unclaimed by successful parties/beneficiaries of the funds or their successors and the Judicial Service recognizes that it has no authority to hold depositors funds perpetually and not pay to the beneficiaries, the notice further stated.

The public notice then set out the following procedure for 'legitimate claimants only' to submit applications to access the money paid into court by following the procedure below:

(a) A claimant may directly or through a lawyer, submit an application supported by all the relevant documentation, which discloses the details of the case, to the registry of the court which issued the order for payment of money into court.

(b) The registrar of the court will conduct a preliminary assessment of the application and transmit only claims with proper documentation to the Judicial Secretary.

(c) A detailed evaluation of the application with supporting documents will be undertaken to establish the legitimacy of the claim.

(d) Once established, successful claimants will be advised of the necessary steps to take in order to access the funds.

The notice concludes that the general public is advised to take immediate steps to reclaim any moneys due them.

#### **E. Why the public notice for payment of money out of court is unlawful**

A reading of the procedure set out under the rules of court for paying money out of court and the new scheme stated in the public notice and quoted in detail above shows that, the public notice is seeking to introduce an entirely new procedure unknown to the Rules. It is submitted that, the public notice issued and directing litigants and so-called beneficiaries to follow a procedure that is contrary to the procedure stated in the Civil Procedure Rules of the courts is unlawful. Therefore, any money paid out of court based on the unlawful procedure announced in the public notice is null and of no legal effect. Those who seek to reap under the unlawful scheme stand the risk of repaying the money with interest, and possible prosecution in future.

The reasons for the submission are not far-fetched and are stated below.

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16 See: "PUBLIC NOTICE: Notice to legitimate Claimants to Submit Applications to Access Unclaimed Funds paid into Court by Parties." The Public Notice was issued under the signature of the Chief Justice, Justice Anin Yeboah. The period for the so-called special exercise is 1st June, 2022 to 30th December, 2022. The information was published on the internet as well; see: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Submit-applications-to-access-unclaimed-funds-Chief-Justice-1588307>

*(1) Only the Rules of Court Committee can make rules to regulate court procedures.*

The Constitution of Ghana is the highest law in the country. All other laws that shape and regulate our lives as a people take their source from the Constitution. The rules by which our law courts operate – from the District/Magistrate Court to the Supreme Court – are made by the Rules of Court Committee set up under the Constitution through constitutional instruments (C.Is).<sup>17</sup> Therefore, apart from the Rules of Court Committee, no individual or public institution can purport to create any scheme to kick away or operate alongside the Rules legitimately made under constitutional instruments to regulate our courts' procedures.

The Chief Justice, with great respect, lacked legal authority to make any new rules for payment of money out of court. In my opinion, the administrative directions given by the Chief Justice did not derive from any statutory power and as such, lacked legal authority. In the result, the Chief Justice erred in law when he gave the administrative directives contained in the public notice of 27th May, 2022. A similar scenario where a Chief Justice's administrative direction was held to be unlawful and void occurred in *Klu v Kwantreng II & Others*.<sup>18</sup> The facts of the case were that, the plaintiffs took action against the defendant for declaration of title to land. The High Court judge gave judgment in favour of the defendant and dismissed the plaintiff's case. The plaintiffs appealed to the Court of Appeal. Subsequently, the plaintiffs petitioned the Chief Justice twice, complaining about the delay in listing their appeal before the Court of Appeal. The plaintiffs added that since the judgment they had appealed against could not be traced and the High Court judge had been transferred to Botswana, the case should be tried afresh (*trial de novo*).

The Chief Justice directed that the case be tried afresh (as suggested by the plaintiff) since his investigations failed to recover the judgment. The defendant then sent a petition to the Chief Justice protesting against the decision to hear the case afresh but he got no reply. When the case was listed to be tried afresh at the High Court, the defendant's lawyer filed a motion on notice for an order to strike out the plaintiff's action on the ground that the earlier judgment of the trial court, though it could not be traced, operated as *res judicata* between the parties.

The High Court granted the application and dismissed the plaintiff's new action. It was held that, the Chief Justice lacked legal authority in the matter since it was a matter properly pending before the Court of Appeal. The administrative directive given by the Chief Justice that the case be

17 Article 157 of the 1992 Constitution provides as follows in clauses 1 and 2: "(1) There shall be a Rules of Court Committee which shall consist of (a) the Chief Justice, who shall be Chairman; (b) six members of the Judicial Council other than the chief Justice nominated by the Judicial Council; (c) two lawyers, one of not less than ten and the other of not more than five years' standing, both of whom shall be nominated by the Ghana Bar Association. (2) The Rules of Court Committee shall, by constitutional instrument, make rules and regulations for regulating the practice and procedure of all courts in Ghana." (Emphasis mine). Based upon this constitutional provision, the Rules of Court Committee has made the following Rules for the courts in Ghana: District Court (Civil Procedure) Rules, 2009 (C.I 59); High Court (Civil Procedure) Rules, 2004 (C.I 47) (as amended); Court of Appeal Rules, 1997 (C.I 19) (as amended) and Supreme Court Rules, 1996 (C.I 16) (as amended)

18 [1989-90] 1 GLR 135, HC (Coram: Lamptey, JA). In the substantive appeal that was pending before the Court of Appeal, reported as *Kwantreng II v Klu* [1991] 2 GLR 93, CA, the plaintiffs lost the appeal. They lost again on further appeal to the Supreme Court in *Kwantreng II v Klu* [1993-94] 1 GLR 208, SC. At the Supreme Court, Adade, JSC commented on the impugned administrative direction by the Chief Justice as follows: "...the Chief Justice's intentions were admirable; unfortunately he tripped on the law...." I cannot hazard an opinion as to the Chief Justice's intention for issuing the new directives for payments out of court dated 27th May, 2022 but I share in Adade, JSC's sentiments that, he has tripped on the law.

heard afresh did not derive from any statutory power and as such, lacked legal authority. Therefore, the Chief Justice erred in law when he gave that administrative directive.

Admittedly, apart from our laws, various public institutions and agencies of Government issue administrative notices as part of their routine duties to inform their workers, clients and the general public about their work processes and other pieces of information. Such notices give general information and directives, mostly mundane in nature. So, a public notice such as the one under reference is purely administrative and cannot kick away, or operate alongside, the courts' rules of procedure made under law. It is, therefore, null and of no legal effect.

*(2) Registrars and the Judicial Secretary cannot replace Judges in the processes for paying money out of court:* The second reason why the public notice is unlawful is that, it has taken away the important constitutional supervisory role judges play in ensuring transparency and accountability in the judicial process and placed it in the hands of court registrars and the Judicial Secretary. The Rules of the trial courts are clear: money can only be paid out with a court order. And a court order can only be obtained by filing a motion and appearing before a Judge to state cogent reasons why the money must be paid to you. Under the Rules, it is the Judge who will scrutinize the basis for the request for payment, study the available documents, if any, and decide under the law whether an order for payment should be made or not.

Now, under the novel payment module introduced through the public notice, judges have been completely wiped out of the adjudication process as far as the payment of money out of court is concerned under the so-called 'special exercise'. That adjudicatory role of judges has now been placed in the hands of registrars and the Judicial Secretary, persons who perform administrative and not judicial roles. The interesting thing is that, the proponents of the new payment 'procedure' appear to have been in so much hurry to implement it<sup>19</sup> that, they failed to appreciate how ridiculous the notion of paying money out of court on the blind side of judges sounds, even to untutored minds.

*(3) Two concurrent regimes for paying money out of court not sanctioned by the Rules:* Thirdly, running two parallel procedures for payment of money out of court; one under the Rules and another under a public notice is not sanctioned by the Rules of Court.<sup>20</sup> If the new payment procedure set out in the public notice is to have any legal effect, then it ought to have been incorporated into the Rules (C.I 59 and C.I 47) by the Rules of Court Committee through an amendment. After all, we are still in the golden age of constitutional instruments<sup>21</sup> and we can survive another C.I. In the absence of a constitutional instrument to back such an alien process for paying money out of court, the notice is unlawful, it is void and it has no legal effect.

#### *(4) Other factors*

Quite apart from the legal reasons that make the directives in the public notice unlawful, other cogent

19 The public notice is dated 27th May, 2022 and it was scheduled to operate from 1st June, 2022; barely four days!

20 See: Order 17 rule 3 of C.I 59 and Order 18 rules 4 & 5 of C.I 47

21 The period from October, 2020 to date has seen an unprecedented number of constitutional instruments made by the Rules of Court Committee to make amendments in the Rules. These include C.I 131, 132, 133, 134 making amendments in the Supreme Court, Court of Appeal, High Court and District Court Rules respectively.



reasons make it unwise to implement such a directive. First of all, according to the public notice, 'successful parties/ beneficiaries and their successors' can make a claim to the registrar of a court to withdraw funds in court. The registrar will assess the application. Thereafter, the Judicial Secretary (not a sitting Judge) will also assess the claim and decide on it. This two-stage approach is totally without a critical judicial eye. Without a judge judicially determining who a 'party,' 'beneficiary' or 'successor' is, the new regime is open to abuse and corruption.

And talking about corruption, this is a most inauspicious time for such a scheme for payment of money to be introduced. In a recent report on corruption in Ghana, Prosecutors, Judges and Magistrates did not fare well in the league of infamy.<sup>22</sup> That was quite disturbing because there are many decent judges and magistrates doing their work with diligence and candour. So for the public to express such perception about a greater number of them is worrying. One would have thought that the Judiciary will take the findings seriously and address the shortcomings that are fueling the negative public perception, as the Police Service is doing.<sup>23</sup> But till date, nothing has been heard from the Judiciary in reaction to the report. The Association of Magistrates & Judges of Ghana has been quiet. So is the Ghana Bar Association, their sibling of the full blood. If we have chosen to be quiet when we must be speaking, then at least, we should not provoke our citizens with phantom judicial gymnastics in the name of public notices.

Secondly, the argument that the payments to be handled under the public notice are decades old and that is why they are to be handled under the 'special exercise' (and outside the courtroom) rings hollow, at best. Courts operate as a continuum. No matter how long ago a case was heard in a particular court; no matter how many millennia pass, the judge who will be sitting in that court at any point in time will have jurisdiction to hear any application that may be brought concerning a case that was heard before that court, qua court. Such applications include those for payment of money out of court. Therefore, creating a 'special exercise' outside the Rules for such situations is worrying, to say the least.

Another sore point generated by the public notice is the sheer investment of time and money. By the public notice as issued, it is the Judicial Secretary who must finally decide whether a party, beneficiary or successor is entitled to withdraw any money that has been sitting in the Judicial Service's coffers for decades. The public notice appears to be applicable throughout Ghana. And there is only one Judicial Secretary whose office is in Accra. This means that every registrar, no matter where her court is located in Ghana, who receives an application letter based on the public notice, must assess the claim and forward the documents to Accra. It is difficult to imagine how the Judicial Secretary can decide on the applications without the parties' presence and participation. Under the Rules as we have it, the parties applying to withdraw money from court must appear before the Magistrate or Judge sitting at the court. The Judge will have the benefit of the full Case

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22 The report is available online: [https://www.unodc.org/documents/data-and-analysis/statistics/corruption/Ghana/UN\\_ghana\\_report\\_v4.pdf](https://www.unodc.org/documents/data-and-analysis/statistics/corruption/Ghana/UN_ghana_report_v4.pdf)

23 The Police topped the league of infamy and the Inspector-General of Police has typically issued a thesis of a rebuttal. But most significantly, the report seems to have spared the Police Service on to do more to change the perception and move to a more respectable level on the rankings. For instance, it has been reported that, now all Police recruits are trained to drive and swim. The Police are also working towards using virtual Police Stations to reduce the human contact that fuel corrupt practices. Kudos, Mr. I.G.P

Docket as well see the applicant in person. The Judge will have the opportunity to ask for further evidence where necessary. The applicant can even be cross-examined on her affidavit evidence before the order for release of money will be made. It is as simple as that. But not so under the payment regime set out in the public notice.

### **F: Conclusion**

The rules of procedure that are used in court serve a number of important purposes among which is fostering certainty, transparency and integrity in the judicial process. In view of the crucial role they play in the trial of cases, the rules are made by the Rules of Court Committee specially created under the Constitution for that purpose. Consequently, apart from the Rules of Court Committee, no individual or institution can arrogate to its self any power to make rules to regulate the processes and procedures of the courts in Ghana. For that reason, the public notice that was issued recently by the Chief Justice announcing a new procedure for persons who allegedly have money paid into court on their behalf to make a claim through court registrars and the Judicial Secretary has no legal authority. It is unlawful. The procedure set out in the public notice offends against the procedure for paying money out of court that is stated in the various trial court Rules. In that wise, any money paid out of court under the procedure contained in the Chief Justice's public notice will be a nullity.