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WRITE-UPS

SUMMARY JUDGMENTS IN LAND LITIGATION; A 'QUICKIE' PATH TO OBTAIN JUDGMENTS? TO MOVE OR NOT TO MOVE, THE QUARGMIRE OF THE PRACTITIONER?

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> *"These 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 the parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided." Order 1 Rule 1(2) of High Court (Civil Procedure) Rules, 2004 (C.I. 47.)*

Introduction

The overriding interest of a Plaintiff in commencing a civil action is to obtain a favourable judgment in a quick and expeditious manner whether after full trial or in default prior to full trial. There are several means of securing judgments prior to the end of the trial. A judgment could be obtained by default of appearance[1] , of defence[2] or by summary judgment[3], which is the focus of this paper, but relative to land litigation. In a previous paper by the author, he discusses the procedural nuances on how to obtain judgments when the case involves declaratory reliefs.[4]

In land cases, the typical reliefs a Plaintiff may be seeking would include without limitation, a declaration of title to land lying situate and being at (detailed description provided), an order for perpetual injunction restraining the defendants from doing certain acts, an order for the recovery of possession etc. The Plaintiff therefore prays the Court to make an Order among others that he or she is the owner of a particular piece or parcel of land. The Rules of Court regarding Summary Judgment afford an opportunity to a plaintiff in an action where a defendant has been served with a Writ of Summons and has filed an appearance to apply for Summary judgment on the belief that the defendant has no defence to the claim or a part thereof. There is however a seeming uncertainty or debate among practitioners whether in land matters, a Plaintiff can obtain judgment summarily or not, seeing that the reliefs sought in such cases are usually **declaratory** in nature. It seems to the author that practitioners are not in agreement, there is no clear judicial authority on this, hence a vacuum created. The burden of the author in this article is to review the law on Summary Judgment, discuss the two opposing views of whether same can be granted in land matters or not, attempt to fill the vacuum and draw a conclusion that a party may not be wrong if he or she applies for Summary judgment in a land matter albeit the reliefs are declaratory in nature, and the courts must grant same once it is clear that the defendant has no defence and the evidence before the court shows that the Applicant is so entitled.

1 Order 10 of the High Court Civil Procedure Rules C.I. 47 2004
2 Order 13 of the High Court Civil Procedure Rules C.I. 47 2004
3 Order 14 of the High Court Civil Procedure Rules C.I. 47 2004
4 https://ghanalawhub.com/seeking-default-judgments-over-declaratory-reliefs-under-ghana-law-navigating-the-procedural-nuances/

Summary Judgment

Summary Judgment is provided for under Order 14 of the High Court (Civil Procedure) Rules 2004 C.I 47. It is an avenue where a party usually a Plaintiff or Counterclaimant as the case may be, may apply to the Court for judgment not necessarily because of a default, but on the basis of a belief that the Defendant has no defence to the entire claim or a part thereof. It may also be applied for, if the Defendant has filed a statement of defence to the action or part thereof, but if the Applicant takes the view that the defence filed is a sham, façade or same does not disclose any reasonable defence. The Court will therefore on an application for Summary Judgment consider the pleadings and affidavits before granting or refusing the application. If the Court takes the view that there are triable issues, that the defence or affidavit in opposition raises a reasonable defence to the action, leave must be granted to the defendant to defend the action. It matters not that the defendant may not have the requisite evidence to succeed.

Mode of Application for Summary Judgment

A Plaintiff must file the application for Summary judgment after the service of the Writ of Summons and Statement of Claim and the Defendant's entry of appearance[5]. As soon as the Defendant causes an entry of appearance to be filed, the time would be ripe to file this application. The application must be filed before the time of defence is elapsed, otherwise (if defence is filed as of right before the application for summary judgment filed), the applicant must explain the reason for the delay, although the author agrees with the view that the requirement for explanation may arguably defeat the whole purpose of the procedure under Order 14 of the C.I. 47 where the defendant has obviously no defence[6].

It is not fatal to file the application after a defence is filed, save that if that is the situation, then it is the defence as filed that will be attacked, by either praying the court to strike same off by arguing that same is a sham and a façade or does not disclose triable issues[7] or reasonable defence[8]. In that regard, the rules in Order 14 rule 1 provides that, "*Where **in an action**[9] a defendant has been served with a statement of claim and has filed appearance, the plaintiff may on notice apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such claim, or that the defendant has no defence to such a claim or part of a claim, except as to the amount of any damages claimed*". (emphasis mine).

The application is made on notice and served on the defendant. The motion according to the rules has a unique feature, in the sense that the motion paper must set out the reliefs sought by the plaintiff.[10]This implies that the reliefs in the writ of summons and statement of claim must find expression on the face of the motion paper. Like all applications before the Court, it must be supported by an affidavit verifying the facts on which the relevant claim or part of a claim is based, and stating that in the deponent's belief there is no defence to that claim

5 Order 14 rule 1 of C.I. 47 2004
6 6 Sikasi (Ghana) Limited v Aluminum, Enterprise Limited [1999-2000] 2 GLR 113 CA
7 Atlanta Timber Co v Victoria Timber Co Ltd (1962) 2 GLR 11 "…. In the instance case as the statement of defence discloses a triable issue which cannot be determined on affidavits, the application for summary judgment will be dismissed.
8 ibid
9 In an action without exclusion, implying that land actions are actually in contemplation among others
10 Order 14 rule 2(1)

or part of a claim, or no defence except as to the amount of any damages claimed.[11]The rule that all applications must be accompanied by affidavit is subject to some exceptions under the rules like in Order 11 rule 18(1)(a) where an application is made to strike out pleadings on grounds that same discloses no reasonable cause of action or defence [12]and Order 19 rule 4 of C.I. 47[13]. The application can therefore be in respect of part of the claim and the remainder will be subject to trial as happened in the case of **Axes Company Limited v Kwame Poku.**[14] The rules provide that there must be at least four (4) clear days between the time of service and the return date of the application.[15]It will be a breach of the rules if the application is heard without the four clear days rules being adhered to. The Court in the case of **Azinogo v W E Augustt and Co Ltd**[16] held that,"*the clear days" had been construed to exclude the date from which the period commenced and the day when the act was done, from the computation of the notice period…. The defendant only had two clear days before the return date. The non- observance of the mandatory provision in Order 14, r. 2(3) was not merely irregular but void and the defendant was entitled ex debito justitiae to have the judgment set aside."*

This was the state of the law, that failure to observe the 'four clear days' requirement or short service rendered the proceedings a nullity, until the law changed to say, failure to observe the four clear days was not a nullity but a mere irregularity. In the case of **Republic v High Court Accra, Ex Parte Allgate Co Ltd**[17] the court overruled the decision in **Azinogo v W. E Augustt and Co. Ltd** cited supra and held that short service was a mere irregularity and not a nullity. Being an irregularity, same may be curable by the Court under Order 81 of C.I. 47. It should be emphasized that in reckoning the four clear days, Saturdays, Sundays and public holidays are not counted because the number of days are less than seven.[18]

Defendant showing cause

A defendant against whom an application for summary judgment has been filed and served has an option to show cause. The defendant may show cause according to the rules by affidavit or otherwise.[19]The Plaintiff in the case of **Afodofe v Central Insurance Co**[20], had argued that because a defendant who had filed a defence had not filed an affidavit in opposition, the application ought to be granted. It was held by the Courts that the otherwise in order 14 rule 3 includes a statement of defence.[21]The Court further held that, "*Order 13, r.3(1) of the High Court (Civil Procedure) (Amendment) (No. 2) Rules, 1977 (L.I. 1129) obliged a defendant to show cause against the granting of an application for summary judgment "by affidavit or otherwise to the*

11 Order 14 rule 2(2)
12 No evidence whatsoever shall be admissible on an application under subrule 1(a)
13 13 "Every application shall be supported by affidavit deposed to by the applicant or some person duly authorized by the applicant and stating the facts on which the applicant relies, unless any of these Rules provide that an affidavit shall not be used or unless the application is grounded entirely on matters of law or procedure which shall be stated in the motion paper"
14 (2011) 31 62 SC
15 Order 14 rule 2(3)
16 [1989-90] 2 GLR 278
17 [2007-2008] SCGLR 1041
18 18 Order 80 rule 1(5) of C.I. 47
19 Order 14 rule 3
20 [1992] 2 GLR 207
21 Afodofe v Central Insurance Co. [1992] 2 GLR 207

satisfaction of the court." The expression "otherwise" permitted the defendant to show cause by ways other than an affidavit in opposition. Accordingly, before a court could enter Summary judgment for a plaintiff, it should satisfy itself that on the totality of the pleadings, the defendant indeed had no defence to the action. Accordingly, where the defendant had already filed a defence, as in the instant case, it should be scrutinized to determine whether it discloses a defence in law. Consequently, the failure of the respondents to file an opposition did not bar them from showing cause. Since their defence disclosed a triable issue, they would be granted leave to defend the action".[22]A defendant shows cause by disclosing in his or her defence or affidavit that there is a reasonable defence to the action and the action raises triable issues for the determination of the court.[23]This means that, upon the application, the defendant can decide to either file an affidavit in opposition to the application or file a statement of defence to the statement of claim. It is the court's duty then to assess the pleadings and affidavit evidence to form a view whether the case is a proper one for which summary judgment can be made. The courts have been consistent on this point when they hold that, "*In applications to sign final judgment, the trial judge was required to examine the pleadings and determine whether there existed a bona fide or good defence known in law. Once any of them was established, it would constitute a triable issue. It would be an issue of fact or law. However, the judge was not empowered to try the merits of the respective claims using affidavit evidence on hand. In any case, the affidavit evidence presented in an application for summary judgment was not intended to be used for the resolution of triable issues that might emanate from the pleadings since that would undermine the very foundation of justice. In the instant case, the pleadings raised the crucial issue of validity of the respondent's undertakings and the quantum of the respondent's indebtedness to the appellant. Those were factual issues which in accordance with the rules of procedure had to be tried by viva voce evidence and be subjected to cross examination. Since these were triable issues, the trial judge was justified in rejecting the application for summary judgment."*[24]It therefore stands to reason and the author suggests, that in an application for summary judgment, the defendant need not file an opposition to the application per se, but once there is a statement of defence filed on record, the court must have regard to the content of the defence on record and if it discloses a reasonable defence known to law or triable issues, the court must reject the application for summary judgment and grant the defendant leave to defend the action.

Purpose of Summary Judgement

The overriding or guiding principle of the Rules of Court according to which the courts are required to interpret same and dispense justice, is to ensure speedy trial, avoid unnecessary expense and save cost. The Courts have said for instance in the case of **La Dadekotopon Youth Association v. Nii Kpobi Tettey Tsuru III and Ano,** that "The modern approach to the interpretation and application of court rules or procedure is to avoid their construction and application in a manner that creates inconvenience or occasions avoidable delays and expense to litigants".[25] In the case of **Atlanta Timber Co. v Victoria Timber Co. Ltd**[26], it was held on

22 supra
23 Joseph Marteye v Dora Karley Adotey [2017] 107 G.M.J 231 @234
24 Sadhwani v Al-Hassan [1999-2000] 1 GLR 19, citing with approval the Dictum of Anin JA in Wilson v Smith [1980] GLR 153
25 Civil Appeal No. J4/20/2021 judgment dated 31st March 2021
26 [1962] 1 GLR 221

the purpose of summary judgment thus, "*the purpose of Order 14, rule 1 of the rules of court is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly. Thus even though a statement of defence may have been filed, the court is not precluded from entertaining an application for summary judgment under Order 14, rule 1*".[27] Commenting on the scope of Order 14 on Summary Judgment, in the case of **Abivams Limited v Platun Gas Oil Ghana Limited**, this is what Benin JSC had to say, "*This rule has become popular even among students of law, because we are made to believe that it is the shortest route to obtain judgment in liquidated claims in particular, without going through the travails of litigation.*"[28] In the view of the author, the only thing that can prevent a court from granting an application for Summary judgment aside the exceptions in Order 14 rule 12 is that the defendant has showed cause against the application to the satisfaction of the court in accordance with Order 14 rule 3(1) of C.I. 47. Showing cause implies there is a valid defence known to law and/or that there are triable issues for the court to determine at trial. Indeed, in the case of **Ballast Nedam Ghana B.V. v Horizon Marine Construction Limited**[29] the court had this to say in that regard, "*Although the procedure for summary judgment without a trial even in cases where the defendant to the action expresses an intention to defend the action, the court may only grant the application in cases where the defendant is unable to set up a good defence or raise a triable issue which ought to be tried.*" The Courts have held that, the summary judgment is not an avenue to conduct a trial on the merits using affidavit evidence. The Court sounded this caution in the case of **Sadhwani v Al-Hassan**[30] thus.

> "*The approach advocated by the appellant's counsel namely that these issues be determined on the strength of affidavit and so he does this by presenting arguments why their version ought to be preferred, stems from a misapprehension of what constitutes triable issues and also a judge's duty in an application of this kind. I think that in such applications, i.e. applications to sign final judgment, what is required of a trial judge is that he or she examines the pleadings and determines whether there does exist a bona fide or good defence or a defence known in law. In my view, any such bona fide or good defence or defence known in law when raised would constitute a triable issue or an issue to be tried. It could be an issue of fact or law. But a judge is not empowered to try the merits of the respective claims using the affidavit evidence in hand. Indeed, the application for summary judgment is not intended to be used for the resolution of triable issues that may emanate from the pleadings.*"

It is the author's view therefore that, if a party can obtain judgment without having to go through the burden of a full trial, then that option is an ideal one to explore provided it is not prohibited by the rules for Summary judgments as seen in Order 14 rule 12 of C.I. 47.

Powers available to the Court under Order 14

When an application is made for Summary Judgment, as discussed above, the Court would have to consider the pleadings and affidavit before it and make a determination whether to grant or refuse. In so doing, the Court at the hearing may exercise the following powers;
(1) grant such judgment for the plaintiff against the defendant on the relevant claim or part of a claim, unless the defendant satisfies the Court, that there is a triable issue[31], (2) give the defendant

27 Supra per Charles J.
28 Civil Appeal No. J4/29/2016 judgment dated 31st May 2017
29 Suit No. J4/18/2010 judgment dated 28th July 2010
30 [1999-2000] 1 GLR 19
31 31 Order 14 rule 5(1)(a)

leave to defend the action either conditionally or otherwise,[32] or dismiss the application with costs payable forthwith if the court takes the view that the application is not within the Order or that the plaintiff knew that the defendant relied on a contention that entitles the defendant leave to defend[33]. In the event that there is a counterclaim by the defendant, the court may also stay the execution of the judgment granted in favour of the plaintiff until after the trial of the counterclaim.[34]

Exceptions – Matters for which Summary Judgment is not available

Under the rules of Court, summary judgment is not applicable for all cases. It therefore means that it cannot be applied for in all cases. The Rules itself provides for exceptions under which a party cannot apply for a summary judgment and if applied for or granted must be refused or set aside by the same or a higher court. In that regard, the Rules provides that ***"Summary judgment shall not be given under this Order with respect to (a) probate, matrimonial or maritime proceedings; (b) a claim or counterclaim for defamation, malicious prosecution, seduction or breach of promise of marriage; or (c) a claim or counterclaim based on an allegation of fraud."***[35]It is instructive to note that the Courts have given judicial blessing to this provision in a number of cases including without limitation to **Cowries Finance v Pako Bay**[36], **Bello v Nyarko**[37] and **Joseph Marteye v Dora Karkey Adotey**[38] **(2017).** In the case of **Cowries Finance v Pako Bay**, the court speaking through Akoto Bamfo J *(as she then was)* under the old Civil Procedure rules LN 140A said that *"The procedure under Order 14, r 13 of the LN 140A as amended by the High Court (Civil Procedure) (Amendment) (No. 2) Rules, 1977 (LI 1129) enables a plaintiff to obtain summary judgment in an action begun by a writ which does not include a claim for liber, slander, malicious prosecution, false imprisonment, seduction, breach of promise to marry and a claim based on an allegation of fraud."*[39]A court would in the author's respectful view, therefore lack jurisdiction if it purports to preside over a case involving the exceptions and grants a summary judgment application, especially so when the provision on the exclusion is couched in mandatary terms. In the case of **Joseph Marteye v Dora Karley Adotey**[40] the court, citing Edward Wiredu JSC (as he then was) in the case of **Okofoh Estates Ltd v Modern Signs Ltd**[41] had this to say *"This court dare says that Order 14 Rr 13(c) of L1 1129's clear exclusion of cases founded on fraud from the summary judgment procedure goes to the jurisdiction. It is evident that the principle behind that exception was to ensure that allegations of fraud were investigated, and that summary proceedings were not used to sweep such matters under the carpet…."* In the case of **Afodofe v Central Insurance** cited supra, the Court succinctly held that *"…For example, rule 13 of L.I 1129 forbids the entry of summary judgment in certain types of actions including that for probate, defamation and those based on allegations of fraud. Accordingly, where the cause of action falls within one of the prohibited actions, a respondent can legitimately orally raise the issue as a point of law."*

This Order 14 rule 12 referred to supra with the title **"Actions and claims excluded"** has significant relevance to the core subject of this paper to which the author shall return.

32 Order 14 rule 5(1)(b)
33 Order 14 rules 5(1)(c)
34 Order 14 rule 5(2) C.I. 47
35 Order 14 rule 12, CI 47
36 [1999-2000] 1 GLR 514
37 (2011) 36 GMJ
38 [2017] 107 GMJ 231
39
40 Ibid at 237
41 [1996-1997] SCGLR 224

Distinction between Default Judgment and Summary Judgment

The distinction between Default Judgment and Summary Judgment is important to the author in this discussion because some practitioners think the procedure under default judgments for declaratory reliefs must be applied in all matters including applications under Order 14 of C.I. 47 for summary judgments. The procedure under default judgments and Summary judgments are different and never the same. They are two different concepts. Whereas Default judgments whether of appearance or of defence are procedural and taken because a defendant has defaulted in taking a step, Summary Judgment is a judgment on the merits and not necessarily arising out of a default. The default judgments can be set aside, but a summary judgment can be set aside only within a specific timeline and conditions. A party against whom judgment in default of appearance has been entered can apply to set same aside and the court may set it aside, vary it on such terms that the court thinks fit.[42] In a similar fashion, a judgment obtained in default of defence can also be set aside or varied on an application by a party affected and on such terms as the court thinks fit.[43]In all these, there is no time lines within which the application must be brought. On summary judgments however, the law although permits same to be set aside, imposes limitations as to time and conditions under which an application can succeed. The rules provide in this regard that, "A judgment given against a defendant who does not appear at the hearing of an application under this Order may be set aside or varied by the Court on such terms as it considers just upon an application brought within fourteen days of the service on the defendant of the notice of the judgment."[44] The person setting aside a summary judgment must apply within fourteen days and that person must not have appeared at the hearing. Not appearing or being absent at the hearing has been construed to mean failure to provide an affidavit or other document in answer to the application in the case of **Roomjin v Boadi**.[45] In this case, a Defendant applied to set aside a summary judgment entered against him. The gravamen of his complaint for so applying was that he was not served with notice of the adjournment of the hearing of the application. The application was dismissed and rightly so in the author's view and he appealed to the Court of Appeal. The Court of Appeal allowed the appeal and ordered a retrial whereupon a further appeal was launched to the Supreme Court. On the question of setting aside under Order 14 rule 9, the Supreme Court speaking through Gbadegbe JSC said, *"There is the question regarding Order 14 rule 9 of the High Court Civil Procedure Rules, C.I. 47 by which summary judgment entered in the absence of a party may be set aside. The critical issue to be decided turning on this provision* ***is what constitutes absence within the meaning of Order 14 rule 9.*** *I commence the consideration of this question from the obligation placed on a respondent to an application for summary judgment as provided in Order 14 rule 3 in the following words, "A defendant may show cause against an application by affidavit or otherwise"* The Court continued to reason thus *"A defendant who having been served with notice of an application to sign summary judgment filed an affidavit in answer to the application as the facts in this appeal portray but does not attend the hearing of the application cannot say that the judgment rendered by the court is on account if his absence. The correct position discernible from the settled practice in applications for summary judgment is that the decision in such a case was reached by the court after careful consideration of the application and the answer thereto and the reasonable inference*

42 Order 10 rule 8
43 Order 13 rule 8
44 Order 14 rule 9
45 J4/32/2013 [2016] GHASC dated July 14, 2016

is that the defendant did not satisfy the court that he has a good defence to the action or for some reason the matter ought to proceed to trial….It is apparent from the rules that the means by which he defendant's burden to show cause is by a process filed in answer to the application and that the defendant's absence within the context of Order 14 rule 9 must be interpreted to mean failure to provide an 'affidavit' or other document in answer to the application." (emphasis mine)

In the celebrated case of **Asamoah v Marfo**[46] the learned Anin Yeboah JSC *(as he then was)*, with whom the other members of the panel[47] agreed delivered himself excellently when he distinguished between defaults judgments and summary judgments thus, **"Summary judgment and default judgment are conceptually different. Summary judgment is a judgment on the merits even though it is obtained by a formal motion without a plenary trial. It is a judgment granted on the simple grounds that the respondent to the application has no defence to the action or part thereof or any reasonable defence to be allowed to contest the case on the merits to waste time and expense.**

A default judgment, on the contrary, though obtained by motion is not a judgment on the merits but a judgment based solely on the inability of a respondent to the application to file appearance or defence within the statutory periods set down by the rules. Under the High Court Civil Procedure Rules, CI 47, the differences between the two are well spelt out and covered by different Orders and Rules in the CI 47. Whereas summary judgment is provided for under Order 14 of CI 47, default judgment, after entry of appearance is provided for under Order 13 of the same CI 47."

With the distinction above, it is the authors respectful view that the approach to taking the various types of judgments when the reliefs are declaratory in nature are also different and cannot be mixed.

Arguments that Summary Judgment cannot be obtained in land matters.

The school of thought that believe and argue that summary judgments cannot be applied for in land matters anchor their basis on the fact that in land matters the reliefs are declaratory in nature. To them, to the extent that the rules of Court provide, (which rules the author shall discuss presently), that seem to be the proper course to adopt in land matter. Their authority for so arguing is Order 10 Rule 6 and Order 13 Rule 6 of the High Court (Civil Procedure) Rules, (2004) CI 47 which said Orders provides for ways of proceeding when there is a default, and the reliefs are declaratory in nature.

Order 10 rules 6 provides *"Where the plaintiff makes a claim of a description not mentioned in rules 1 to 4 against a defendant, and the defendant fails to file appearance, the plaintiff may, after the time limited for appearance and upon filing an affidavit proving due service of the writ and statement of claim on the defendant, proceed with the action as if the defendant had filed appearance".*

Mutatis mutandis, Order 13 Rule 6(1) also provides that *"Where the plaintiff makes against a defendant a claim of a description not mentioned in rules 1 to 4 and the defendant fails to file a defence to the claim, the plaintiff may, after the expiration of the period fixed by these Rules for filing the defence, apply to the Court*

46 Civil Appeal Suit No. J4/49/2010 judgment dated 1st June 2011

47 Dr. S.K Date-Bah, J.V.M. Dotse, B.T Aryeetey, and Vida Akoto-Bamfo JJSC

for judgment".

Both Order 10 rule 6 and 13 rule 6 deal with matters for which reliefs are declaratory in nature. Proponents of this school believe that once the relief being sort is a declaratory relief, the only way to proceed may be to proceed as if the defendant had entered appearance, set down the case or trial and proceed to take judgment.

To this school, the reason they say land matters are not amenable to summary judgment is the fact that in most cases, the reliefs are declaratory in nature and if so, one must go through full trial, to wit, issue a writ, be served with a defence, file for directions (or set down the case for trial if no defence is filed), file witness statement, conduct a trial, file written addresses before one can obtain judgment. To them, a person cannot prove title through affidavit evidence hence the approach they take. They rely on cases on which the Supreme Court has rendered like **Nii Odai Ayiku v Attorney General**,[48] **The Republic v High Court Winneba Ex-Parte Prof. Mawutor Avoke**[49], **Republic v High Court, Accra Ex-Parte Dr. Ernest Asiedu Osafo**[50], **Rev. Rocher De-Graft Sefa and Ors v Bank of Ghana**[51] in which cases their lordships at the Apex Court showed the way to proceed in taking default judgments when reliefs are declaratory in nature.

It is instructive to note that in all these cases, the application for judgments were for default judgments and not summary judgment. Additionally, none of these cases sited were land cases.

Arguments that Summary Judgment can be obtained in Land Matters.

Another school to which the author belongs argue that nothing precludes a plaintiff on a land matter with declaratory reliefs to apply to enjoy the benefits under Summary Judgment so far as he can establish on the basis of pleadings filed, and affidavit evidence that the defendant has no defence to the action. The basis of this contention which the author advances is that the remit of Order 14 does not exclude land matters or matters the reliefs of which are declaratory in nature. Indeed, a critical read at Order 14 rule 1 is instructive as same illustrates this point.

At the risk of sounding repetitive, Order 14 rule 1 provides that *"Where in **an action,** a defendant has been served with a statement of claim and has filed appearance, the plaintiff may on notice apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or that the defendant has no defence to such a claim or part of a claim, except as to the amount of damages claimed". (Emphasis mine.)*

This Order does not make any exclusions as to the types of actions for which summary judgments may be applied, neither was Order 14 rule 1 made subject to any other Order, law or procedural rules under the law. It is therefore the view of the author that a plaintiff can move the court for summary judgment if there is no reasonable defence to the action. The author is of the view that once the court is convinced that the plaintiff has in his pleadings and affidavit evidence proved his claim to the required standard of proof, which in civil cases is on the preponderance of the probabilities,[52] judgment could be entered in his favour without waiting to go through a full trial.

48 Civil Appeal No. J4/16/2009 judgment on 17/02/2010
49 J5/45/2018 dated 31/10/18
50 J5/31/2011 judgment on 28/06/2011
51 Civil Appeal No. J5/51/2015 judgment dated 19th November 2015
52 Section 12 of the Evidence Act, 1975 (Act 323)

Another reason the author takes this view is that Order 14 of C.I. 47 provides for exceptions to its application and the exclusion does not include land matters. In the view of the author, the only matters for which summary judgments cannot be applied are what the rules itself has expressly listed in Order 14 rule 12, being; **probate, matrimonial or maritime proceedings, a claim or counterclaim for defamation, malicious prosecution, seduction or breach of promise of marriage; or a claim or counterclaim based on an allegation of fraud.**

Any attempt to imply other exceptions would be legally unattractive. The law maker was clear in the exclusion and if they wanted to exclude land matters or matters for which the reliefs are declaratory, the law maker would have expressly mentioned that here. The Rules of Court are enacted pursuant to law under the hand of the rules of court committee made of up seasoned practitioners and jurists.

Among the several aids to interpretation of statutes is the cardinal aid known as *'Expressio Unus Est Exclusio Alterius rule'* by which the author is further fortified in his view that summary judgment can be taken in land matters. The *'expressio unus est exclusio alterius' rule is translated "the express mention of one, excludes others not mentioned."* The respected learned jurist Justice Sir Dennis Adjei in his book,[53]explained it simply when he says, "The rule states that the mentioning of one shows an intention to excludes the one not mentioned." Chitty on Contracts explains further thus, the express mention in an instrument of a particular person, power or thing may show an intention to exclude any other person, power, or thing; *expression unius est exclusion alterius.*

The author is here not oblivious of the caution given regarding the invocation of the rules or aids to interpretation that they are servants and/or handmaids and not masters. A warning was sent to members of the legal fraternity to apply the maxim 'expressio unius est exclusio alterius' with caution.[54] In the case of **Ghana Ports and Harbours Authority v Issoufu,**[55] the Supreme Court speaking through Aikins JSC, had this caution, *"The maxim expressio unius est exclusio alterius and expressum facit cassare tacitum apply to interpretation of documents. But it is important to appreciate that their application must be with caution because the omission to mention a thing which appear to be excluded may be due to inadvertence or accident or because it never occurred to the draftsman that they needed specific mention."*[56] The author takes the view that the exclusion of land matters from Order 14 rule 12 is deliberate and not inadvertence and clearly points to the fact that summary judgment can be taken in land litigation. If the law maker wanted land matters to be excluded from the scope of summary judgment, same would have found expression in Order 14 rule 12.

The author is also of the view that Summary judgment is judgment on the merit of the case, albeit determined on affidavit evidence as opposed to full trial. In the case of **Asamoah v Marfo** cited supra, the court so held that such judgments are final judgments on the merit and a party aggrieved would have the right to appeal to the Court of Appeal.[57]

The argument that summary judgment has usually been in respect of liquidated demands of claim is one the author concedes, but it is the author's view that that practice alone does not mature that practice into law. It is trite that justice is administered by three yardsticks, statutes, case law and

53 Modern Approach to the Law of Interpretation in Ghana, 1st ed at p. 150
54 supra
55 [1993-94] 1 GLR 24
56 supra
57 Article 137 of the 1992 Constitution, section 11 of the Courts Act 1993 (Act 459)

long-established practice.[58] The fact that summary judgments have not been used in land matters therefore in the view of the author does not mean it cannot be used, or that it is wrong for a plaintiff with a clear case that satisfies the conditions for the grant of summary judgment to make use of same in accordance with the rules. The author associates himself in this regard with the statement of the celebrated jurist Lord Denning in the case of **Parker v Parker**[59] cited with approval in the celebrated case of **Mensah v Mensah,**[60] thus:

> *"what is the argument on the other side. Only that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything, which has not been done before we shall never act anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both… There is no decision of this court that an order cannot be made for custody of an illegitimate child and in the absence of direct decision preventing us, I think that we should follow the course which is permitted by statute and prescribed by good service."*

The author takes the view that, the fact that there are no known cases in which summary judgments have been applied for and granted in land cases with declaratory reliefs, should not hinder parties in appropriate cases to apply for and the courts from granting it for the first time. At least, if the case is made and application is granted, it saves time and avoids unnecessary expenses in accordance with Order 1 rule 1(2) of C.I. 47.

Last but by no means the least reason the author takes the view is that Order 14 rule 8 gives a signal in support of the view. The Rules provides that:

> *"Where the Court gives judgment under this Order for possession of land on the ground of forfeiture for non-payment of rent, a tenant shall have the same right to apply for relief as if the judgment had been given after trial."*[61]

In this instance, the application for judgment is made under Order 14 which is summary judgment, and the subject matter is land, although the relief is not declaratory in nature.

Does Summary Judgment shut the shrine of Justice to a Defendant?

The author is of the view that summary judgment does not necessarily shut or close the shrine of justice to a litigant. Every party is entitled to a hearing before the court. The shrine of justice therefore must be accessible to all. It is therefore a cardinal sin against the rules of natural justice to deny a party the opportunity to be heard. In an application for summary judgment, a defendant may show cause by affidavit or otherwise and the court is invited to consider all the pleadings and affidavit evidence before the court to ascertain whether a case is made out for summary judgment. A Defendant who shows cause by either affidavit in opposition or statement of defence and whose opposition is refused ought not be heard to say that the court has denied such a party audience. If however, the defendant files a defence that demonstrates triable issue and the defence is not a sham and the court refuses to grant leave to defend, that would be an error which could be a subject of appeal. In the **Ballast Nedam** case supra, the Supreme Court alluded to this point when their Lordships said ***"In our thinking, the said defence was made in good faith and not being a sham ought***

58 Harlley v Ejura Farms (Ghana) Ltd [1977] 2 GLR 179
59 [1953-54] Law Reports, Probate Division 15
60 [2012] 1 SCGLR 391
61 Order 14 rule 8 of C.I. 47

to have been inquired to by the learned trial judge else it would be to shut out the respondent." The import of this dicta is that a defendant is shut out only if there is a reasonable defence and leave is not granted to defend the action. The learned authors of Halsbury's Laws of England[62] capture it aptly thus ***"The procedure under Order 14 was not intended to shut out a defendant who could show that there was an issue or question that ought to be tried or that for some other reason there ought to be a trial."*** Judges are cautioned not to use summary judgments to deny defendants the opportunity to have their cases heard on its merit. Benin JSC in the Abivam case supra, said ***"…. But to the unwary judge who falls into that trap, he may be tempted to dismiss a defence to a claim under this order, as it were, to save time, especially bearing in mind the fact that the court is required to adopt expeditious and less expensive means to dispose of a case before it. But we must not lose sight of the fact that the rules of court are meant to regulate orderly proceedings and nobody should be made to suffer therefrom, without real or just cause. The rules of natural justice prevail in all proceedings, hence the requirement that a person should not be made to suffer unless he has been heard in his defence, except by his own showing he does not want to be heard or clearly he has no defence to an action and should therefore not engage in a wild goose chase"***.[63] The author therefore is of the view that summary judgment applications properly considered, does not shut the door to the shrine of justice to parties, it rather shuts the door to the shrine of justice to defendants who have no reasonable defence but whose main objective is to *'buy time,'* abuse the processes of the court to frustrate the plaintiff and prevent him from obtain an early judgment, a practice the author is not oblivious of. In fact, the author believes, such parties are not entitled to be entertained. Expeditious justice, not expeditious disposal of cases is the objective of the procedure for summary judgment.[64]The Court of Appeal speaking through Anin JA once said ***"While it is true that the rationale behind the summary procedure under Order 14… is to provide the plaintiff with a speedy mode of recovery of judgment…provided of course there is no arguable defence to the action-nevertheless, the Order was not intended as an engine for the suppression of the defendant"***[65]

Analysis of the views

From the above, it is the author's view that a Plaintiff who takes the view or position that he has a straightforward case which cannot be answered by a defendant or the answer of the defendant is a sham or façade to his claim can apply for and obtain summary judgment even if the reliefs are in respect of land and declaratory in nature. For instance, if a Plaintiff in a land matter has sues for declaration of title to land and the basis of his claim is that he acquired the parcel of land from the Head of Family acting with the consent and concurrence of the principal members of the family in accordance with law. The acquisition was done after performing all the due diligence required of a prudent purchaser, an indenture has been duly executed, registered in accordance with law at the Lands Commission and Land Title Certificate obtained; Plaintiff has taken possession and exercised acts of ownership for over several years. Assuming a defendant trespasses and his basis of being on the land is that he acquired a licence or a grant from a stool, acting per its alleged Stool occupant and principal elders of the stool. Now per these facts, assuming for purposes of

62 Volume 37 (Fourth Edition) at pages 308-309
63 Abivams v Platun Gas Oil
64 S. Kwami Tetteh, Civil Procedure, A Practical Approach p.361
65 Wilson v Smith (1980) GLR 152 at CA

arguments, the ownership of such lands is established by law to be family lands and not stool lands, it is the author's view that in such a scenario the plaintiff should be able to succeed in an application for summary judgment. The issues in such a case, it is suggested do not need to go for full trial once the core issue about ownership is established beyond doubt. No triable issues of facts or law arises, nothing is in contention, the law is clear and so are the facts. The author is of the view that these facts are not far-fetched since there are several areas in Ghana where the ownership of the land is settled and beyond doubt by case law. For instance, in the case of **Amoeda v Podier & Ameoda v Fordzi & Others Consolidated**[66], it has been held that Ningo Prampram lands belong to the Family and not the Ningo Prampram Stool. It is the author's view that compelling such a Plaintiff with a grant from the family from taking a summary judgment against a defendant who traces his root of title to a certain stool occupant without more is a sin against the overriding goal of the rules of court in Order 1 rule 1(2) C.I. 47.

A critical review of the case law cited by the proponents of the school that summary judgment cannot be obtained in land litigation will show that aside the fact that the cases were all on default judgments for which a particular procedure had been provided by the rules, none of these cases were land cases and as such cannot in the author's respectful view be cited as the authority for that position.

It is trite learning that the utility of summary judgment is to offer the plaintiff quick access to judgment without going through a needless trial. It is the hope of the author that in the near future a Plaintiff in a land matter with declaratory reliefs, with the appropriate conditions for the grant of summary judgment would apply for same and observe the reaction of the court. That way the law is developed at least if there is a judicial precedent on the subject matter confronting practitioners and the uncertainty settled beyond legal controversy. Until then, the author suggests that this should be the position of the law until a judicial decision is made to the contrary that a party cannot get summary judgment in land litigation or the rules amended to exclude land cases from the scope of summary judgments as seen in Order 14 rule 12 of C.I. 47.

Conclusion

From the above discussion, summary judgment may be a preferred way to end a trial at an early stage without the need to go the full haul of a trial. The author takes the view that even though summary judgment offers a quick means to obtain judgment in usually liquidated demand claims, nothing in the rules or under the law prohibit a plaintiff in a land matter where reliefs are declaratory in nature to apply for judgment under Order 14 of the CI 47. A Plaintiff in a land matter who has a belief that the defendant has no defence to the claim on the land or any part thereof can explore the option of getting summary judgment. It is up to the defendant to show cause by demonstrating that he or she has a reasonable defence to the claim and the court may make a determination upon hearing the parties. The view that summary judgment cannot be applied in land matters in the author's view has no legal basis, legally unattractive and hence that argument should be rejected and consigned to the dustbin of legal inconsequential.

66 [1967] GLR 479