THE JUDICIARY
OF GHANA

CIVIL PROCEDURE

BENCH BOOK

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FOREWORD

As part of the efforts to make justice delivery more efficient, the Judicial Training Institute (JTI) on behalf of the Judiciary and the Judicial Service of Ghana has developed this bench book as a guide to District Magistrates in the performance of their judicial duties.

The effort to produce a guide of this kind underscores the fact that the work of a District Magistrate comprises a significant portion of the work load of our courts.

We are mindful of the fact that the bench book may not embody all the essential guidelines covering all areas critical to the functions of the District Court. We remain convinced however, that it will serve as a beneficial starting point and a basis for standardizing practice in the operations of courtroom work in our District Courts.

We hope that all Magistrates will diligently study and apply the guidelines contained therein alongside the new District Court rules as well as other relevant legislations and regulations such as the Juvenile Justice Act and Practice Directions.

We trust that this benchbook will serve the District Court very well.

Ag. Director,
Judicial Training Institute (JTI)

May, 2011
Accra

SOURCES OF CIVIL PROCEDURE

The main sources for the procedure to be followed in civil cases by the District Courts are the following:

- District Court Rules (C1 59)
- Statute creating District Courts – Courts Act 1993, Act 459 as amended
- The 1992 Constitution
- Other Statutes such as Juvenile Justice Act 2003, Children's Act 1998, Act 560, Domestic Violence Act, 2007, Act 732.
- Decisions of Superior Courts on Procedure and Practice
- f. Practice Directions

The C.I 59 is a subsidiary legislation made by the Rules of Court Committee pursuant to Article 157 (2) of the 1992 Constitution. The CI 59 is the first source to guide a magistrate as to the procedure to follow in civil cases. The language is simple and clear and usually does not need much interpretation. In the unlikely event that it is silent on the procedure to be followed then, the next recourse should be to other statutes such as the High Court (Civil Procedure) Rules (2004) CI 47. When in doubt about the meaning of a procedure laid down in the CI 59, decided cases on the issue by the superior courts, preferably by the Supreme Court should be looked at for guidance.

Practice Directions do not have the force of law and in case of conflict, statute must prevail. They cannot supercede the first four mentioned sources, notwithstanding the fact that they may come from the Chief Justice or the proper authority.

PRELIMINARY MATTERS

JURISDICTION

The Courts Act (1993), Act 459, section 47(1) grants the District Court civil jurisdiction in the following cases:-

a. All personal actions arising under contract or tort for the recovery of any liquidated sum not exceeding five thousand Ghana cedis (Gh¢ 5000.00).
b. Injunction or orders to stay waste and preserve property, restrain breaches of contract or the commission of any tort.
c. Claims for relief by interpleader
d. Matters relating to landlord and tenant
e. Actions relating to ownership, possession or occupation of land with

value not exceeding five thousand Ghana cedis (Gh¢ 5000.00).

f. Divorce and other matrimonial causes, paternity and custody of children.
g. Application for grant of probate or letters of administration.
h. Charges and matters affecting juveniles (i.e. under 18 years).
i. Matters relating to maintenance of children (when sitting as a Family Tribunal)

The CI 59 provides guidance for the operations of the district court and is to be interpreted to:

a. Achieve speedy and effective justice
b. Avoid delays and unnecessary expense
c. Ensure complete, effective and final determination of disputes and
d. Avoid multiplicity of actions. [see Order 1 rule 1 (2) of C I 59]

PUBLICITY OF PROCEEDINGS

All proceedings of the court shall be in public except otherwise prescribed by law. Reasons shall be stated in the record book where for any reason proceedings are to be held in camera.

REPRESENTATION

i. A public officer may represent any of the following:
    a. The Republic
    b. The President
    c. The Government
    d. A Government employee

i. A party without legal representation and unable to attend court may be represented by his chosen representative.
ii. A plaintiff may sue in a representative capacity.

GUIDELINES FOR JUDGES/MAGISTRATES PRESIDING OVER MATTERS IN WHICH ONE OR MORE OF THE PARTIES IS SELF REPRESENTED

1. A judge/magistrate should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.
2. A judge/magistrate should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right

which he or she has to cross examine the witnesses.

3. A judge/magistrate should explain to the litigant in person any procedures relevant to the litigation.
4. A judge/magistrate should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
5. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge/magistrate may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.
6. A judge/magistrate may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A Judge is not obliged to provide advice on each occasion that particular question or documents arise.
7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.
8. A judge/magistrate should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated- (Neil v Nott (1994) 121 ALR 148 at 150).
9. Where the interests of justice and the circumstances of the case requires it, a judge/magistrate may:
    - Draw attention to the law applied by the court in determining issues before it.
    - Question witnesses;
    - Identify applications or submissions which ought to be put to the court;
    - Suggest procedural steps that may be taken by a party;
    - Clarify the particulars of the orders sought by a litigant in person or the bases for such orders.
    - Source: Diana Bryant, Chief Justice – Family Court of Australia

ACTING WITHOUT AUTHORITY

Where an action is commenced without authority the court shall either dismiss the action or require the plaintiff to indemnify the person in whose name the action was unlawfully commenced.

COMMENCEMENT OF PROCEEDINGS

The CI 59 provides in its first schedule forms for use to commence proceeding. These forms may be varied where necessary. Where there is none, the registrar is authorized by the court to design a suitable one for use.

MODES OF COMMENCING ACTIONS

a) Writ of Summons

These are easily filled out because of the blank spaces provided and the information needed are stated thereon. Every action commenced by a writ of summons must have a plaintiff and defendant. It is important to note that a writ cannot be altered without leave of the court and although a writ is valid for twelve months, the court may upon application (before it expires) extend it for a period not exceeding twelve months at a time.

Where the person does not sue in his personal capacity, the capacity in which he sues is usually endorsed on the writ. e.g. actions by trustees and representative. Where a person is given a power of attorney, the action should be in the name of the donor. The practice has been to state that the person sues per his lawful attorney. Failure to so state this on the writ does not offend the rules. What is important is the tendering of the power of attorney during the trial.

b) Petition

In the District Court proceedings for divorce, child custody, paternity and maintenance are commenced by filling the appropriate forms in the Second Schedule. In a divorce case, the parties are referred to as the petitioner and respondent.

PARTICULARS OF CLAIM

1. The plaintiff must state his or her claim briefly in the writ of summons and deliver same to the registrar. The particulars of the plaintiff's demand must give the defendant sufficient information on the details of the claim.
2. The plaintiff shall deliver to the registrar as many copies of the particulars as there are defendants.
3. An illiterate plaintiff shall procure an agent to reduce his particulars or narrative into writing.
4. Form 1 of the first schedule shall, where appropriate, be used for the written narrative to furnish the particulars which shall be signed by the plaintiff or his agent.
5. (See Order 3 of CI 59)

JUDGMENT NOT TO EXCEED CLAIM

The court shall not give judgment in excess of the sum claimed unless the particulars are amended to accord with the evidence led.

EQUITABLE RELIEF, COUNTERCLAIM AND SET- OFF

a. The 1992 Constitution defines the laws of Ghana as comprising the Constitution, enactments made by or under the authority of parliament, the existing law, the common law and any orders, rules and regulations made by any person or authority under a power conferred by the Constitution. [Article 11(1) of the Constitution (1992)]
b. The common law of Ghana comprises the rules generally known as the common law, the rules generally known as the doctrines of equity, and the rules of customary law. [Article 11(2) of the Constitution (1992)]
c. Examples of equitable reliefs or remedies are specific performance, injunctions, rescission, delivery up and cancellation of documents, appointment of receivers and order of accounts.
d. An equitable relief may be granted where the facts stated and proved in the suit entitles the plaintiff to it even if not specifically asked for.
e. A counterclaim is a cross-action. It is the defendant's 'statement of claim' and where one is filed, the plaintiff will have to file his defence to it.
f. A set-off is also a pleading by way of defence to the whole or part of the plaintiff's claim. The defendant acknowledges the plaintiff's demand but sets up one which counterbalances it. Any amount must be set off at the time of the issue of the writ.
    - A defendant must lodge a notice of a counterclaim or a set-off with the registrar.
    - Since a counterclaim or a set-off is a claim by the defendant, rules governing particulars of claim are applicable and appropriate fees must be paid as if the claims were by writ of summons.
    - If a counterclaim or a set-off cannot be conveniently disposed of in the same action, the court may order a separate trial.[Order 15 rule 2(3) of CI 59]
    - Where there is a defence of partial set-off, the court may order the defendant to pay into court the amount he claims to be due to the plaintiff.
    - Where a counterclaim or a set-off is established, the court may give judgment for the defendant if the balance is in his favour, or award to the defendant a relief that he is entitled on the merits of his case. [see Order 15 of CI 59]

SERVICE OF PROCESS

The purpose of service is to give notice to the other party of proceedings against him. Failure to serve is a fundamental defect and can lead to orders of the court being set aside as a nullity. Using the required mode of service is also important. Service is by the bailiff, other officer of the court or a person authorized to do so by the court.

i) Time

Unless otherwise directed by the court, service of processes may be made at a reasonable time usually between 6 a.m. to 6 p.m. on any day with the exception of weekends and public holidays.

ii) Modes

- Personal
  Service shall be personal unless otherwise provided by the rules.
- Service other than personal

The following are some instances of service other than personal:

- Service through a party's lawyer
- Service through the parent or guardian of an infant or a person with disability.
- Service on a partner or at principal place of business where the party is a firm.
- Service through the occupant or regent where the party is a stool.
- Service through the head of family where the party is a family.
- Service through the administrative head where the party is a Ministry or Government department.
- Service on the one in charge of a prison or detention facility where the party is a prisoner. The process may be left with a warder or similar officer if the head is not available.
- Service on member of parliament through the clerk of parliament.

- **Substituted Service**
  This is the most frequently used form of non personal service. A party may seek leave of court for substituted service with or without an attempt at personal service having been made. The court may direct substituted service if satisfied that the circumstances so warrant. It is effected in any manner the court may direct, such as newspaper publication, posting of the subject matter of the dispute on the notice board of the court or leaving the process with an adult at the last known place of abode of the party or in other manner the court may direct.

- **Proof of service**
  Service must always be proved by the bailiff or other officer of the court in a manner provided by the rules. An affidavit of service on production is prima facie evidence of service. [See Order 4 rule 6 (2) of CI 59]

PLAINTIFF OUT OF JURISDICTION

The provision of service address is indispensable in order for parties to receive due notice of processes. Accordingly where a plaintiff acts by another person because he is out of the jurisdiction he shall indicate a service address within the jurisdiction, where notices or other papers issuing from the count may be served on the plaintiff. *(See Order 10 of CI 59)*

VENUE AND TRANSFER

Issues of venue and transfer are subject to section 104 of the Courts Act (1993, Act 459) which empowers the Chief Justice to transfer one suit from one court to another.

The following actions shall be commenced at the underlisted venues;

a. Immovable property – the district in which the property or part of it is situated.
b. Destrained or seized moveables – the district in which destraint or seizure took place.
c. Recovery of penalty or forfeiture against a public officer – district where the cause of action arises.
d. Specific performance or breach of contract -
    - The district in which the contract ought to have been performed
    - Or where the defendant resides or carries on business
e. Any other matter – the district in which defendant resides or carries on business
f. Where two defendants reside in different districts – in any of the districts. *(See Order 5 of CI 59)*

TRANSFER

a. Transfers may be effected when:
    i. The defendant objects to the jurisdiction before or at the time the plaintiff's case commences.
    ii. The court reports to a supervising judge of the High Court and the supervising judge orders the transfer.

b. In case of two actions on the same subject matter with substantially the same parties pending in two different districts, the supervising judge shall on being informed decide the venue;
c. In the following cases the magistrate may despite objections to jurisdiction, assume jurisdiction for good reasons stated:-
    - Action for maintenance
    - Child custody
    - Paternity or other matrimonial cause
    - Adoption

PARTIES

Parties in litigation are usually referred to as the plaintiff and defendant. The plaintiff must be clothed with capacity at the time the writ is issued. Capacity relates to the legal ability of the individual or entity to sue or be brought to court. (See Black's Law Dictionary 6th Edition, pg. 207). However, the plaintiff may sue or the defendant may be sued in a representative capacity.

Who should be parties in actions founded on the following:

a. Contract
The parties to the contract as are gleaned from the terms of the contract

b. Tort
The person who alleges that a tort has been committed against him or the person in possession of the land on which the alleged tort took place is the proper plaintiff.

c. Actions in respect of Land matters
i. Recovery of possession of land
ii. The plaintiff will be the one who lays claim to possession of the land at the material time. The defendant is any one against whom such a claim is made.
iii. Declaration of title to land
iv. The plaintiff is the person who seeks an order of declaration of title to the land. The defendant is the person against whom such an order is sought.

d. Declaration of a right
The parties who seek a formal pronouncement (declaration) or interpretation that they have a right or an interest in the subject matter without seeking enforcement

e. **Suits by infants and the mentally challenged**
These are instituted by the next friend as plaintiff or defended by a guardian ad litem as defendant.

a. **3rd Party Proceedings**

A defendant who claims that upon judgment being given against him he is entitled to be indemnified or entitled to contribution from a third party may join such a person as a third party.

JOINDER, NON JOINDER AND MISJOINDER OF PARTIES

Unless otherwise provided for by statute, all persons with a common claim or defence to an action may be joined in one action as plaintiffs or defendants. The rationale is to prevent multiplicity of suits, save time and ensure that justice is done. The person's presence should be necessary to 'ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon…'

Non joinder or misjoinder is not fatal to a case. The Court can order the joinder of a necessary party or strike out a person improperly joined at any stage of the proceedings either suo motu or upon application. (The discretion to strike out ****** should be exercised sparingly).

CHANGE OF PARTIES BY DEATH OR BANKRUPTCY

Death or bankruptcy does not always abate a cause of action. Where the action is not abated, the proceedings cannot continue in respect of the deceased party until the necessary substitution is done. The court upon application ex parte may substitute the person to whom the deceased's interest or liability is assigned. Upon service, the intended party has fourteen days to apply for a discharge or variation of the order. *[See Order 9 rule 15 (4) of CI 59]*

- Where the plaintiffs sue jointly or the defendants are jointly sued, the death of one of them will not affect the proceedings. The cause of action will survive.

- Where a sole plaintiff dies and a legal representative does not apply to be substituted, within a reasonable time, the court may upon application by the defendant order the legal representative to be joined or order the suit struck out with costs. All proceedings prior to the substitution remain valid.

ATTENDANCE OF PARTIES

Parties may be permitted to appear by proxy where the court is satisfied with the authority of the proxy. A party, his solicitor or agent may do any act specified by the rules. *(See Order 11).*

ORDER TO ARREST ABSCONDING DEFENDANT

Where a plaintiff's claim is in excess of Gh¢ 4500 (Four thousand, five hundred Ghana cedis)- and the defendant is about to leave the country, the plaintiff may upon an application ex parte seek an order from the court for the arrest of the defendant to show cause before the court why he should not be made to provide sufficient security for any judgment or order against him. The court is duty bound to investigate the plaintiff's claim that defendant intends to abscond before making the order. The plaintiff's affidavit is not sufficient. This is a discretion to be exercised sparingly. One has to weigh the embarrassment to a defendant who might be arrested and the possibility that a judgment obtained by the plaintiff would be rendered nugatory.

Upon his arrest, if the defendant fails to show cause, the court may order the defendant to provide good and sufficient security or bail for the satisfaction of any judgment that may be given against the defendant in the action. Failing this, the court can commit him into custody for a maximum of 21 days during which the matter should be heard. The plaintiff pays for the upkeep of the defendant in advance to the prison authorities. Failure to do this will lead to his release. The court must guard against being misused by the plaintiff to 'teach the defendant a lesson'. It is always prudent to order that when the defendant is arrested and the courts have closed for the day, he should be taken to the nearest Police Station for him to be bailed. However, the case of THE REPUBLIC V. HIGH COURT (FAST TRACK DIVISION), ACCRA, EX PARTE P.P.E. LTD and PAUL JURK (UNIQUE TRUST FINANCIAL SERVICES LTD) INTERESTED PARTY (2007 - 2008) SCGLR 188 has clearly determined that no person ought to be imprisoned for non-payment of ajudgment debt and this casts doubts on the continuous use of the imprisonment aspect of the above procedure. *(See Order 12 of CI 59)*

ARREST OF ABSCONDING DEFENDANT

1. A successful plaintiff must be able to execute his judgment without delay or obstruction. Therefore where the plaintiff's claim is over GH¢4,500.00 (Four thousand, five hundred Ghana cedis) he may at any time in any of the following cases apply ex parte (in Form 6 of the first schedule) for the defendant to give security to satisfy the judgment:
    - Where the defendant has disposed of or removed a substantial

part of the property.
- Defendant is about to leave the country.
- The action is a matrimonial cause.

The court if satisfied may issue a warrant to bring the defendant before the court to give security to satisfy any judgment or order that may be given against him. *(See Order 12 of CI 59)*

DEPOSIT IN LIEU OF SECURITY

The court may accept from the defendant a deposit of money or other valuable property sufficient to satisfy the plaintiff's claim and costs. (See order 12 rule 3 of CI 59)

WRITTEN STATEMENTS OF CLAIM AND DEFENCE

These are called pleadings in the superior courts. With the exception of the following, cases in the district courts shall be heard summarily; but for stated reason (which must include expediency and interest of justice), the court may at any stage of the proceedings, order Written Statements in actions of:

- Probate and Administration
- Defamation
- Adoption
- Negligence

The registrar can be ordered to assist illiterate parties who are not represented by Counsel to reduce their claim into writing. The magistrate has to verify the content of the written statement. Written statements are to state concisely all material facts to be relied on by the party. They must contain the relief sought, deny specific allegations, and set up specific defences such as fraud.
Set off or counterclaims are to be pleaded (stated). [(See the case of Hanna Assi (No. 2) vrs. Gihoc Refrigeration and Household Products Ltd. *(2007-2008) SCGLR 16]*

All this notwithstanding the defendant may lead evidence to dispute a claim or support a defence not stated in a written statement unless the court is of the opinion that such evidence ought to have been specifically pleaded, is inconsistent with the defence filed, will take the plaintiff by surprise or raise new issues.

Written statements are to be filed and served at a time and in a manner directed by the court. *(See Order 18 of CI 59)*

AMENDMENT

Trials in the district court being summary, pleadings are usually not filed so the need to amend does not arise. However, when the court orders written statements the need to apply for leave to amend may arise. *(See Order 19 of CI 59)*

WHO CAN APPLY FOR AMENDMENT?

The court may grant an amendment on its own motion or on application by either party and at any stage of the proceedings. It is irrelevant that the applicant is responsible for the error or lapse sought to be corrected. The court has the discretion to allow an amendment immediately an application is made.

PURPOSE OF AMENDMENTS

The purpose as with all other functions of the court is to do justice by eliminating statements that tend to prejudice, embarrass, or delay the fair trial of the action and ensure that the real issue in controversy between the parties is determined.

PRINCIPLES FOR THE GRANT OF LEAVE TO AMEND

Bowen LJ stated the principle aptly in Cropper and Smith1884 26 Ch D 700 as follows:

> *"I think it is a well established principle that the object of courts is to decide the rights of parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or grace……It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice as anything else in the case is a matter of right."*

Leave is usually granted to amend a pleading (written statement) to bring it in line with evidence led where no prejudice will be occasioned. The court should ensure that an amendment allowed after evidence has been taken will not lead to the party re opening his case.

Leave should not be granted if:

- The application is brought mala fide

- Injustice to the respondent cannot be compensated by costs
- The amendment sought is immaterial i.e. not essential for the determination of the matter in controversy
- Fraud is being introduced at a late stage

EFFECT OF AMENDMENT

It takes effect not from the date it is made but the date of the original written statement. The original pleadings as they stood no longer determine the issues between the parties. For example, where an amended written statement of defence leaves out a counterclaim in the original pleading statement of denfence, it will be deemed to have been abandoned.

DISMISSAL OF SUIT ON GROUNDS OF LAW

Where a defendant has a legal or equitable defence to the suit such that even if the allegations of the plaintiff were admitted or established the plaintiff would not be entitled to judgment, the defendant may apply to the court by motion to dismiss the suit without requiring him to answer questions of fact.
Such a situation may arise where a case is forbidden by any particular law, for example, an action which is statute barred, or a case based on a void contract, or an overruled precedent, or exceeds the jurisdiction of the court, or where the case discloses no cause of action.

- A dismissal under this rule (i.e. order 16 of CI 59) being on grounds of law, does not permit or allow a discussion of the facts. Indeed the defendant/applicant should be taken as having admitted the truth of the plaintiff's allegations of facts.
- If the motion succeeds, the court dismisses the suit, otherwise the defendant is ordered to answer the plaintiff's allegations of fact.

PAYMENT INTO COURT

A defendant in an action for debt or damages may at any time after service of the writ of summons on him make payment in satisfaction of the claim directly into court by notice in writing as in Form 10 or 10(A) of the First schedule of CI 59. If there are several causes of action, the notice shall specify the cause of action in respect of which payment is made and shall state whether liability is admitted or denied.

- The plaintiff has to acknowledge the notice in writing within 3 (three) days of receipt.
- The defendant may accept the payment into court in full satisfaction of the claim and apply by motion for payment out of court.
- When the court hears the motion, it may stay further proceedings wholly or in part and consider costs and other matters as it considers just

- If the action was for libel or slander, the court may permit the plaintiff to make a statement in open court in terms approved by the court.
- A failure of the plaintiff to accept the money is to be construed as a claim for indebtedness which is greater than the sum paid into court. In such a case, the court in determining the suit should consider the fact of the payment into court and its refusal, in awarding costs.
- In respect of estate matters, a person who desires to make payment or deposit anything in court may do so upon notice to all persons affected by the proceedings.

The defendant may also tender the sum of money claimed in debt or damages personally to the plaintiff.

- If the plaintiff refuses to accept the sum, the defendant may put up a defence of tender before trial, by paying the sum of money tendered into court. *[See Order 17 (1) (4) of CI 59]*
- If this defence is not pleaded, the fact that money has been paid into court is not to be inserted in the pleadings nor that fact made known to the court at the trial until the question of liability and amount of the debt or damages has been decided. *– [See Order 17 Rule (2) of CI 59]*

UNDEFENDED SUITS

Placing of a suit on the Undefended List is the court's prerogative

- **Procedure**

A plaintiff who wishes to place a suit on this list has to attach to the writ an affidavit and all supporting documents to the claim with the affidavit stating the plaintiff's belief that the defendant has no defence to the action. If satisfied by these, the court then places it on the undefended list.

Upon service, a defendant who has partial or a full defence to the action shall at least five days to the hearing file an affidavit with supporting documents setting out the said defence.

Where the court is satisfied either by affidavit evidence or oral evidence on oath that the defendant indeed has a defence, it shall cause the suit to be entered on the general list for hearing. If not so satisfied, the court shall proceed to give judgment for the plaintiff either wholly or in part without a trial.

The situation is the same where one defendant has a good defence and the other does not.

Notwithstanding a failure to file an affidavit disclosing a defence on the merits on time, the Court may at any time before Judgment permit the filing of such an affidavit.

The Court may require oral evidence from the Plaintiff if it deems it fit notwithstanding the fact that a suit is on the undefended list. This is necessary where claims for damages have to be proved. *(See Order 8 of CI 59)*

INTERLOCUTORY PROCEEDINGS

Interlocutory Applications

General Principles

- Made in the course of pending proceedings
- There must be a substantive action pending
- Reliefs sought must be within ambit of the substantive case
- They terminate with the conclusion of the case or appeal
- Should not be used to prejudge substantive suit.
- Usually determined by affidavit evidence but oral evidence imperative where there is a conflict on material facts deposed to by the parties on a crucial issue in the affidavits
- The application is made on notice unless otherwise stated by the rules or in the case of a real emergency.
- When made ex-parte, it must be repeated within 10 days on notice failing which it lapses. *(See Order 13 rule 7 of CI 59)*

Orders which may be sought upon an interlocutory application

a. Interlocutory injunction and interim injunction
b. Interim preservation of property
    i. Order for sale of perishable goods
    ii. Order for detention, preservation or inspection of property
    iii. Power to order samples to be taken
c. Order to arrest absconding defendant *(Order 13 of CI 59)*

INTERLOCUTORY AND INTERIM INJUNCTIONS

An interlocutory injunction seeks to maintain the status quo pending the final determination of the case. Interim injunctions restrain a party till a named date, usually for a short period and in cases of emergency. Due to the urgency, it may be applied for ex- parte.

It is mandatory for the court to require an undertaking for damages before granting an interlocutory injunction where one party opposes the application. The purpose of this is to provide a means of recovering the losses, if any, suffered by the one who opposes it.

It is to be borne in mind that the court always has discretion to conduct an early and expeditious trial instead of granting an interlocutory injunction.

INTERIM PRESERVATION OF PROPERTY

Sale of Perishable Goods
The court may after making such an order upon an application on notice to prevent spoilage order that the money realized from sales be paid into Court to preserve its value in monetary terms. Unless both parties agree, it is always prudent to let an independent person conduct the sale.

ORDER FOR DETENTION, PRESERVATION OR INSPECTION OF PROPERTY
These orders apply to physical things and are usually necessary for the security of the goods, the subject matter of dispute. They are made to save them from perishing. The order should not attempt to state who has title to the goods. It will amount to prejudging the issue before the trial. The court may also order samples of the subject matter to be taken for the purpose of obtaining evidence.

PROCEEDINGS AT TRIAL

This order deals with attendance of the parties at the trial, adjournments, the order of giving evidence and exhibits.

ATTENDANCE AT TRIAL

- If an action is called for trial and all the parties are absent, the action may be struck off the trial list.
- If the plaintiff attends but the defendant does not, the defendant's counterclaim if any, may be dismissed and the plaintiff allowed to prove the claim.
- If the defendant attends but the plaintiff is absent, plaintiff's claim may be dismissed and the defendant allowed to prove the counterclaim if any.
- It is to be noted that any such judgment given in the absence of a party may be set aside or varied on an application brought within 14 (Fourteen) days after the trial. *[See Order 25 Rule (1) & (2) of CI 59*]

ADJOURNMENTS

Adjournments are at the discretion of the court. However, in exercising that discretion the court must have in mind the keynote objective of the rules as stated in Order 1 rule 1(2) of CI 59. The rule provides that the rules of procedure are to be interpreted and applied in a manner that helps to achieve speedy and effective justice, avoid delays and unnecessary expense, ensure that as far as possible, all matters in dispute between the parties are completely, effectively and finally determined, and to avoid multiplicity of proceedings.

It is also to be noted that under the audi alteram partem rule of natural justice, no man is to be condemned unheard. Therefore, if a party has not had notice of trial, the trial must be adjourned in order that notice is served on the party. The rules and principles relating to attendance at trial and adjournment if strictly employed by magistrates will ensure effective case management.
Lawyers must not be allowed to dictate the pace of trials. Adjournments must be strictly regulated and granted only when the court considers it necessary in the interest of justice. The powers given to a magistrate in Order 25 rule 1 (1) to strike the action off the trial list or to dismiss for failure to attend court must be exercised to forestall unnecessary requests for adjournments. *(See order 25 of CI 59)*

Relevant Authorities:

Lagudah vs. Ghana Commercial Bank *(2005-2006) SCGLR 388 at 394*
Rep. vs. High Court, (Fast Track Division) ex-parte State Housing Co. Ltd (No. 2) *(2009) SCGLR 185 at 190)*
Rep. vs. High Court ex-parte Sian Goldfields Ltd *(2009) SCGLR 204*

Case and time management entails that the magistrate organizes his time table, the number of cases set down for hearing, have stale cases which clog his cause list removed, not devote too much time to one case at the expense of others, not allow lawyers to play to the gallery, and any other action that ensures an efficient use of his court time.

THE ORDER OF GIVING EVIDENCE

The general rule is that witnesses have to be examined orally in open court. The order of giving evidence is as follows;

a. The plaintiff opens by giving evidence on his own behalf or through a representative.
b. Where one plaintiff testifies on behalf of other plaintiff, that fact must be stated.
c. The defendant cross examines the plaintiff if he chooses to.
d. The plaintiff may be re-examined by his lawyer. Re-examination is usually limited to matters arising from cross-examination for the first time, or to clarify matters which have been left in doubt after cross-examination.
e. The plaintiff calls his other witnesses, if any to testify, who may also be cross-examined and re-examined.
f. The plaintiff closes his case.
g. After a witness has been discharged after giving evidence, he may be recalled; for good reason (section 79 of Evidence Act 323)
h. The defendant opens his case if he elects to adduce evidence. He gives evidence on his own behalf or on behalf of the parties he represents.

i. The plaintiff may cross-examine the defendant.
j. The defendant may be re-examined
k. The defendant may also call witnesses who may be cross examined and re-examined.
l. The defendant closes his case
m. Where there are two or more defendants who appear separately or are separately represented, they and their witnesses also take their turn to adduce evidence if they elect to do so.
n. If the parties are not represented by lawyers then the court adjourns the case to a date for judgment.
o. If the parties are represented by lawyers, their lawyers may address the court before judgment is given.
p. The order for addresses is as follows:

- If the defendant calls no evidence then the plaintiff addresses first.
- If the defendant calls evidence, then he loses the right to have the last word.

His lawyer has to address the court first, and the plaintiff (or the party who begun) has the last word.

Under order 25 rule 5 of CI 59, the above order of proceedings may be varied by the court as necessary where pleadings have not been filed, or the parties or either of them is not capable of understanding the effect of the written pleading. The court may in such a situation, hear the defendant's statement of defence immediately after the plaintiff's statement of claim before any witnesses are examined.

EXHIBITS

Exhibits may be tendered by the parties themselves, by their witnesses or through their opponents.

When exhibits are admitted in evidence, the court clerk takes charge of them and marks or labels each exhibit with a letter or a number.

An exhibit tendered at trial is not to be given out to any of the parties or taken out of the registry, except by order of the court but shall be kept at the registry of the trial court until the time limited for appeal has expired.

Where an appeal is lodged, the exhibits are forwarded to the High Court together with the record of proceedings. Usually, the plaintiff's exhibits are marked with the alphabet and the defendant's with numerals. Rejected exhibits are marked 'R' and exhibits tendered by court witnesses are marked 'CW'. *(See Order 25 rule 7 & 8 of CI 59)*

EVIDENCE GENERALLY

The Evidence Act, 1975 (NRCD 323) is the primary relevant enactment which provides for the general rules of evidence and other matters relating to the giving of evidence in courts.

Order 26 of CI 59 is subject to the Constitution, the Evidence Act and any other relevant enactment and deals with the general rule that witnesses must be examined orally. It also deals with evidence by affidavit, the limitation of expert evidence, reception of official documents in evidence, the form and issue of witness summons and the amendment, service, and duration of witness summons. The rule in summary provides that:

1. The court may grant an application for a person to give evidence by affidavit, but may order that person to attend for cross-examination.
2. The number of expert witnesses like medical officers may be limited by the court.
3. A document purporting to be sealed with the seal of an office or department is an official document and is to be received in evidence without further proof. Likewise, a copy of such a document shall be presumed to be an office copy and is receivable in evidence without further proof unless the contrary is shown.
4. A witness summons is a document issued by the court requiring a witness to attend court to give evidence or to produce a document to the court. [See Form 17 of the first schedule of C. I. 59]. It is issued and sealed at the registry of the court upon a request in Form 18 which states the name and address of the party or the lawyer making the request.
    a. The witness summons is to be served personally within 12 weeks of the date of its issue otherwise service is not valid.
    b. The summons continues to have effect after service until the conclusion of the trial in respect of which the attendance of the witness was required.

DELAY AND DISCONTINUANCE

It is the duty of parties, their lawyers and the court to avoid unnecessary adjournments and other delays and ensure that matters are disposed of as speedily as the justice of the case permits. The following steps are provided to curtail delays:

1. A party who wishes to proceed where six months has elapsed since the last step was taken, must give to every other party 28 days notice of intention to proceed.

2. Where no step has been taken in the matter for 12 months, the court may strike out a matter on application by the Registrar after 14 days notice to the parties.
3. Upon an application by a party, the court shall strike out the action as discontinued subject to the award of costs.
4. Discontinuance means that the entire claim is abandoned, and a withdrawal means the termination of a part of the claim.
5. Discontinuance or a withdrawal does not abate a counterclaim.
6. Discontinuance or a withdrawal is not a defence to a subsequent action
7. Where a party who has discontinued or withdrawn a case subsequently brings an action for the same or substantially the same cause of action, that action may upon application be stayed until costs awarded in the discontinued action are paid. *(see Order 27 of CI 59)*

JUDGMENT

Generally, all decisions and judgments of the court shall be delivered in open court, except for stated reasons.

a. A **JUDGMENT** is the court's final determination of the rights and obligations of the parties in a case. It is a final judgment or order if it determines the principal matter in question and the rights of parties.
b. An I**NTERLOCUTORY JUDGMENT** is a judgment which does not deal with or determine the final rights of the parties {see Republic v High Court (Fast Track Division), exparte State Housing Company (2009) SCGLR 187}.

    The **DECISION** comprises the conclusion of the court on the merits of the respective cases of the parties. It is rendered by a declaration that a party has succeeded or failed. A decision disposes of the whole matter by a finding on the disputed facts and an application of the law to the facts so found.

    A **RULING** is the decision of the court given on a motion, an application, an interlocutory issue, or preliminary objection relating to a disputed question of law. It may also determine the suit without a trial being gone through.

    An **ORDER** is a direction of the court or command issued by the court for something to be done or for a party or a witness to refrain from doing something.

c. Parties are deemed to have notice of the decision or judgment of the court if it is pronounced at the hearing, and the parties have been served

with notice to attend, whether they in fact attend or not. [see Order 28 rule 3 of CI 59]

d. The court has a duty to deliver judgment as soon as possible after the close of each case, but in any event, the rules require judgment to be delivered not later than four weeks after the close of the case. *[see Order 28 rule 1 (2) of CI 59]*

   If judgment is not delivered within the four week period, then the magistrate must inform the Chief Justice in writing within seven days after its expiration, stating reasons for the delay and the date on which the court proposes to deliver the judgment.

   Note that a party to the suit may also notify the Chief Justice if judgment is not delivered within the period of four weeks, and request a date to be fixed for the delivery of judgment.
   The Chief Justice on the receipt of a notice may fix a date for the delivery of judgment, and the court must ensure that judgment is delivered on that date.

e. Judgment is said to be "reserved" when the court pronounces its decision without assigning the reasons leading to the decision. Parties shall be served with notice to attend and hear the reasons for the judgment unless the court gave a date for this at the time judgment was pronounced. Reserving the reasons for judgment must be avoided unless it is absolutely necessary.
f. Minutes of every judgment, whether final or interlocutory is to be made. Such minutes are a decree of the court and have the full force and effect of a formal decree.
g. A party to the suit may apply for a formal decree to be drawn up and this shall be done as in form 19 of the first schedule of CI 59.
h. Where there is a set-off or counterclaim and the defendant is granted the set-off or counterclaim, the judgment must state the amount due to the plaintiff and due to the defendant.
g. The court may at the time of giving judgment, or making an order or at any time afterwards upon application by a party direct the time within which a payment is to be made or an act done. The court may also order the payment of interest at the same rate as a High Court may order in the circumstance.
i. The award of interest is governed by the Court (Award of Interest and Post Judgment) Rules, 2005 C.I. 52. It provides that in a civil cause or matter, if a court decides to make an order for the payment of interest on a sum of money due to a party, that interest shall be calculated at the bank rate prevailing at the time the order is made and at simple interest unless otherwise agreed. This is referred to as the statutory interest

rate. Generally, each judgment debt shall bear interest at the statutory interest rate from the date of delivery of the judgment up to the date of final payment, unless the transaction which results in the judgment debt was by an agreement which specified the rate of interest and the particular manner in which it was to be calculated.

j. When the losing party is served with the Decree or order to pay money or do any other act, it is to be obeyed without further demand. If a time for performance is not specified, the person is bound to obey it immediately unless he applies, and the court enlarges the time by a subsequent order.

k. The court may at the time of giving judgment, or at any time afterwards, for sufficient reason, order that the payment of money be made by instalment, with interest.

l. Magistrates must however ascertain that they have the necessary jurisdiction to make this order if the application is brought subsequent to the delivery of the judgment. The general rule is that a trial court becomes functus officio when there is a pending appeal to an appellate court.

m. Where payment by instalment is ordered, there can be no execution until after a default. It is also to be noted that where there is a default, execution cannot be levied for the whole sum unless the order was subject to "a default clause" and upon notice to the court. *(See Order 28 of CI 59)*

CIVIL APPEALS

A party aggrieved by a judgment of a District Court in a civil case may appeal to the High Court – See s.21 (2) of Act 459 as amended by Act 620.
An appeal against a substantive decision which is as of right must be filed within three (3) months from the day the final decision was delivered. – *See Order 51 rule 3(1) of CI 47.*

INTERLOCUTORY APPEALS

Appeals against interlocutory orders or decisions of the District Court lie to the High Court with the leave of the trial court or the High Court - See s. 21(2) of Act 459 as amended by Act 620.

Interlocutory appeals should be filed within fourteen (14) days of the order – *See Order 51 rule 3(2) of CI 47.*

Where the District Court refuses leave, and special leave is sought to appeal to the High Court, the special leave must be filed within fourteen (14) days from the date the District Court refused to grant the leave to appeal – See Order 51 rule 3(3) of CI 47.

EXTENSION OF TIME TO APPEAL IN CIVIL CASES

An application for extension of time within which to appeal out of time in civil cases should be brought within one month after the expiration of the three (3) months allowed for filing civil appeals – See Ord. 51 rule 4 (2) of CI 47. Such application should be on notice and must give good and substantial reasons.

COSTS

Costs are at the discretion of the court and may be awarded to the successful party after the event. Notwithstanding the above, the court may order the successful party to pay the costs of a particular proceeding. *(See Order 7 of CI 59)*

SECURITY FOR COSTS

In appropriate cases the court may order a plaintiff or defendant counterclaimant to provide security for costs. (See Order 7 rule 2 of CI 59)
Costs may be ordered to be paid out of any fund or property to which the suit relates. *(See Order 7 rule 4 of CI 59).*

POWER OF REVIEW

Within 14 days after the delivery of a judgment, a party may apply by motion on notice for a review of that judgment.

- An application for a review may be brought where either party has obtained leave to appeal or a reference has been made on a special case and the appeal or the reference has not been withdrawn.
- Such an application shall not be entertained after 14 days unless the applicant files an application for special permission of the court within 30 days of the expiration of the 14 days.
- The power of review is exercisable only upon application.
- An erroneous view of the law is not a sufficient reason for a review. The trial judge cannot reconsider a point of law. (See Yanney vs. African Veneer [1960] GLR 89).
- A judgment can be reviewed when new and important evidence or matter is discovered which could not have earlier been discovered or

on account of an error apparent on the face of the record.

- An application for review does not operate as a stay of execution unless the court so orders. An order that the application is to operate as a stay of execution may be made on terms such as the provision of security for satisfaction or performance of the judgment.
- Any monies paid into court in the action are to be retained until the motion for review is determined. A magistrate may in the review open and hear the case wholly or in part and take fresh evidence, reverse, vary or confirm the previous judgment or decision.

PROBATE AND ADMINISTRATION

Jurisdiction
The district court has power to deal with applications for probate or letters of administration within its jurisdiction.

Section 47(1) (g) of the Courts Act 1993, Act 459 states that;

> *"in an application for the grant of probate or letters of administration in respect of the estate of a deceased person, and in [causes and matters] relating to succession to property of a deceased person, who had at the time of death a fixed place of abode within the area of jurisdiction of the District Court and the value of the estate or property in question does not exceed ten million cedis;"*

The district court also has jurisdiction to grant probate or letters of administration where the deceased has property, whether movable or immovable located in its area of jurisdiction.

Where the deceased has property within the jurisdiction of more than one court, the application for probate or letters of administration shall be made to only one of the courts in respect of all the properties, but notice has to be given to the registrar of every court which has jurisdiction over the area where property of the deceased is located. The district court cannot apply the Administration of Estates Act. The only legislation they can apply in this regard is C.1. 59.

A. Probate

A **PROBATE** is a document issued under the seal of the court as official evidence of the authority of an executor of the will of a deceased. Where the validity of the will is disputed, probate is granted only after the court has pronounced in favour of the executors in "solemn form". A person who claims to have an interest in the estate of the deceased may request proof of the will in solemn form, or the executors themselves may if they consider it necessary commence

an action by writ asking the court to pronounce the will valid and admitted to probate. *[Order 31 rule 26 of CI 59]*

Instead of the interested party requesting the will to be proved in solemn form, he may issue a writ against the executor for a declaration that the will is invalid.

- When the will appears regular on the face of it and there is no dispute as to its validity, probate is granted in "common form" *[Rule 25 of CI 59]*
- The court may on its own motion or on application of a person who has an interest in the will give notice to the executors named in the will to come and prove the will or renounce probate *[See Rule 7 of CI 59]*
- A person who is not the executor of a will but takes possession or deals with the property of the deceased, or an executor who takes possession of, and administers or deals with any part of the property of the deceased and does not apply for probate within three (3) months commits the offence of "intermeddling with property" *[See Rules 3 and 4 of CI 59]*

B. Letters Of Administration

Where the deceased died intestate, the proper application for authority to deal with the estate is by Letters of Administration. The Intestate Succession Act, 1985 (PNDCL 111) has codified the persons entitled to a share of the estate of the deceased intestate.

The orders of priority of grant are:

a. surviving spouse;
b. surviving children;
c. a surviving parent;
d. customary successor of the deceased.

The number of persons to whom a grant may be made is not to exceed four (4) unless any relevant enactment provides otherwise.

The person to whom administration is granted has to execute a bond as set out in Forms 34 of the First schedule.

If a person who has not been appointed by the court to administer the estate of the deceased takes possession of or deals with the property, that person is subject to the same obligation and liability as an administrator and commits the offence of "intermeddling with property".

C. Letters Of Administration With Will Annexed

The named executors in the will of a deceased are entitled to grant of probate.

However when the executors renounce or fail to take probate or pre-decease the testator, any person interested in the estate of the deceased may apply for letters of administration with will annexed.

The order of priority of persons entitled to grant of probate or letters of administration with will annexed are stated in Order 31 rule 12 (3) of C I 59. A specific legatee, devisee, creditor or the personal representative of any of these persons has a superior right except that administration shall be given to a living person in preference to the personal representation of a deceased person.
Letters of administration with will annexed is also granted in situations where all the persons to whom probate may be granted have died without completing administration. Grant is made in respect of the unadministered assets (de-bonis non) to those entitled. (See rule 58, Order 31 of CI 59)

D. Administration

The person to whom administration is granted has to execute a bond as set out in Forms 35 of the First schedule.

Administration actions are actions begun by writ of summons for the determination of any question or relief which can be determined or granted in any administrative action even if the question or relief does not involve a claim for administration of the estate under the direction of the court, or an execution under the direction of the court of a trust.

Administrative and similar actions are dealt with under rules 44, 45 and 46 of Order 31 of C I 59. The court may make an order for the full administration of the estate of the deceased person or for the execution of a trust or give directions as to the manner in which the estate shall be administered or the trust executed.

THE PROCEDURE FOR APPLICATION for probate in common form and letters of administration with or without will annexed are the same. It is by motion ex-parte supported by an affidavit sworn to by the applicants.

PROBATE OF A WILL

1. In the case of probate of a will, the following documents must accompany the application:

    a. The original will (which must have been deposited in the High Court) is to be inspected to find out whether it appears to have been signed by the testator or by some other person in the testator's presence and at the testator's direction, and

whether it has been subscribed by two (2) witnesses. If the will is properly signed and subscribed, then the attestation clause, if any, is examined to see if the will was executed in accordance with the Wills Act 1971, (Act 360). The will is also inspected for interlineations, alterations, erasures and obliterations as these are invalid unless they are made valid by the re-execution of the will or by the subsequent execution of a codicil.

b. An affidavit of one of the subscribing witnesses in proof of the due execution of the will. This affidavit verifying the signature of the deceased is important especially where there is no attestation clause or the attestation clause is insufficient.
c. A declaration of values of movable and immovable properties of the deceased as set out in Form 22 of the First Schedule.
d. Oath of execution by the executors
e. Death certificate or a burial permit or certified copy thereof.

It is important to note that probate is not to be granted if the will was not properly signed and subscribed, that is, executed in accordance with the Wills Act, 1971, Act 360.

Where both subscribing witnesses are dead, the affidavit of another person who was present at the execution of the will shall be accepted, or the court may require proof of the handwriting of the deceased and the subscribing witnesses. *{See Order 31 Rule 18 (4)(5) of CI 59}*

Where the testator was blind or illiterate, probate or letters of administration with will annexed shall not be granted unless the court is satisfied by a JURAT on the face of the will or by proof that the will was read over to the deceased before its execution.

The court may also require the production of any document referred to in the will to ascertain whether it is a constituent part of the will. *[See Order 31 Rule 21 of C I 59]*

Where the original will or codicil is lost, damaged or unobtainable, an application may be made to the court to admit the will to proof as contained in a copy draft or other admissible means such as a duly authenticated copy. *[Order 31 Rule 47of CI 59]*

Where it is necessary for the preservation of the estate, the court may make a grant pendente lite, that is, before those entitled to a grant of probate apply. The application may be made ex parte by a creditor or a person who has an interest in the estate.*[Order 31 Rules 56 and 57 of CI 59]*

LETTERS OF ADMINISTRATION

Documents required to be filed with the application for letters of administration are:

a. Oath of administrators [not with Will annexed]
b. Declaration of values of movable and immovable property of the intestate as set out in Form 22 of the First Schedule.
c. Death certificate or a burial permit or certified copy thereof.
d. Where it is required, an affidavit of the head of family deposing to the appointment of the customary successor

The court may also require evidence of the identity of the applicants.

PERSONS RESIDENT OUTSIDE THE JURISDICTION

Where the person entitled to grant of letters of administration is resident outside the country, the grant may be made to the attorney of the person. A power of attorney must be executed before a notary public and deposited at the registry of the court. *[See Order 31 Rule 48 of CI 59]*

When the application is granted, notice as set out in Form 23 in the First Schedule is required to be posted for a minimum of twenty-one days, or any other period ordered by the court before the letters of administration are issued. The notices are posted in the court where the application was made, in any public place within the jurisdiction and at the last known place of abode of the deceased. All persons entitled to a share of the estate of a deceased under the Intestate Succession Law, 1985 (PNDCL 111) must whenever practical, or if expedient, also be given notice. *[See Order 31Rrule 10 CI 59]*

MINORS AND PERSONS WITH DISABILITY

Grant of probate or letters of administration shall not be made to a minor, that is, a child under the age of eighteen (18) years. Where the person entitled to a grant is a minor, the grant shall be made to the child's guardian for the child's use and benefit. *[See Order 31 Rule 49 & 50 of C I 59]*

Likewise, a grant shall not be made to a person who by reason of mental or physical disability is unable to manage his affairs, or a person serving a sentence of imprisonment.

The grant may be made for that disabled person's use to a person the court considers fit or to the attorney of a person serving imprisonment for his use and benefit.

CAVEAT

A caveat is a notice filed by a person who claims to have an interest in the estate of the deceased intended to prevent the grant of letters of administration or probate without notice to him. It may be filed either before or after an application has been made. It remains in force for three (3) months from the date filed but may be renewed.

A caveat must be brought to the notice of the court by the registrar. The court shall then direct the registrar to bring it to the notice of the applicant and shall decline to take any further steps until the applicant 'warns' the caveator as set out in Form 26, to file an affidavit stating the nature and particulars of the caveator's interest in the estate of the deceased.

If the warning is not obeyed, the applicant moves the court in respect of his application. The court may however direct notice to be served on the caveator. If the warning is obeyed, a copy of the caveators affidavit is served on the applicant. The applicant then moves the court for the grant of the probate or letters of administration.

The parties may agree at the hearing as to the persons to whom the grant shall be made. If they come to agreement, the court removes the caveat from the file. If they fail to come to agreement, the court may summarily determine who is entitled to the grant or if necessary order the applicant to issue a writ against the caveator to determine who is entitled to grant of probate or letters of administration.

A Contentious probate matter as defined under Rule 32 means an action for the grant of probate or letters of administration, or the revocation of the grant of probate or letters of administration, or a judgment or order that pronounces on the validity or otherwise of an alleged will. It is commenced by a writ accompanied by a statement of claim. Appearance must be entered by the defendant and a statement of defence filed within fourteen (14) days. The defendant may also add a counterclaim for any relief or remedy he claims to be entitled to. The plaintiff then sets down the action for trial.

Where grant of probate or letters of administration has been made, a writ for the revocation of a grant shall not be issued unless a notice to bring in the grant is given. That is, notice must be served on the person to whom probate or letters of administration has been granted requiring him to lodge the probate or letters of administration at the Registry of the court. (See Rules 29, 33, and 37 of CI 59)

A judgment in default of appearance or in default of pleadings is not to be given in a probate action. Unless the court strikes out the action, the party who is not in default may apply to the court for leave to set down the action for trial after the expiration of the period fixed for the filing of the pleading.

A probate action can only be discontinued with leave of the court. *[See Order 31 Rule 11 of CI 59]*

MATRIMONIAL APPLICATIONS

1. **Jurisdiction:**

The District Court has jurisdiction to deal with the following;

a. Divorce
b. Paternity
c. Custody of children;
d. Other matrimonial causes
e. Parentage
f. Custody
g. Access
h. Maintenance
i. Adoption [see Sections 47 (1) & 47 (2) of the Courts Act 459 as amended by Section 35 of the Children's Act, 1998 (Act 560)]

2. The appropriate forms for commencing these proceedings are specified in the second schedule to the rules.
    i. The proceedings in the Family Tribunal shall be conducted in chambers.
3. The action is set down for trial within 14 (Fourteen) days after service on the defendant. Where the defendant fails to respond within 14 (Fourteen) days after service of defendant's form on the plaintiff, the court may make any order(s) in the interest of justice whether asked for or not. [See Order 32 Rule 5 (1) of C I 59]

ENFORCEMENT OF CUSTODY, ACCESS AND MAINTENANCE ORDERS

Willful refusal to comply with the court's orders may result in a contempt action in the High Court. *(See Order 32 of CI 59)*

RECEIVERS AND MANAGERS

a. A receiver is appointed to receive rent, income or other benefits from the property in dispute. Unless he is also appointed a manager, a receiver has no power to manage the property. The receiver has to open a deposit account specifically for the receivership into which payment of income or receipts shall be made.
    - The court must direct the intervals or dates on which the receiver is to submit his accounts to the court for auditing.

c. A manager is appointed to preserve property which is endangered for the benefit of those entitled to it

d. A receiver or a manager stands in a fiduciary relationship with the court which appointed him. He is required to provide security which may be a bank guarantee or a deposit of title deeds to an immovable property the value of which is not less than that of the property in dispute for the due performance of the duties of that office.
    - The receiver or manager has to keep proper books of account, including bank accounts where outgoings and other payments shall be made.
    - Where there is a bank account, the court must appoint one other person in addition to the receiver or manager to be joint signatory to the account.
    - There should be proper stocktaking before the manager takes over the management of the business and before he is discharged.

e. The receiver or manager is entitled to a reasonable monthly remuneration which is fixed by the court, but if he is a registrar of the court, that remuneration shall not exceed his monthly salary, and shall be paid into the consolidated fund. [See Order 20 of CI 59]

NB. The current view is that the practice of appointing registrars of the court as receivers is not acceptable as the registrar is also the official designated to monitor the performance of receivers.

EXECUTION OF JUDGEMENTS

This is a process by which a judgment (other than a declaratory one or one for which there has been voluntary compliance) is enforced according to law. It is usually against the property or person of the judgment debtor. Execution is done by means of the various writs of execution or by orders of the court. *(See Order 21 of CI 59)*

GENERAL PRINCIPLES

i. Parties to execution are usually the judgment creditor and judgment debtor although a person in whose favour an order is made is entitled to enforce obedience through the process of execution. Again by leave of court, execution may issue on behalf of a person not party to the suit. A judgment which is made conditional on the doing of some act cannot be executed if that act has not been done. Failure to do the act in the time given will amount to an abandonment of the benefit of the judgment unless the court otherwise directs.
ii. Time within which execution is to be levied is determined by the rules although usually an order in a judgment should be complied with without a demand to do so.
iii. A Judgment is to be enforced by the court which gave the original judgment even when the final order comes from an appellate court.
iv. Except in cases where a judgment creditor has to seek the leave of the court, the usual practice is to apply for the appropriate process from the registrar.
v. A wrongful execution is not necessarily void. It depends on the circumstances.
vi. The judgment creditor is usually liable for any wrongful or irregular acts done on his behalf by the bailiff.

MODES OF EXECUTION

This is usually determined by the nature of the judgment and properties of the judgment debtor available.

Enforcement of judgment for payment of money (other than money to be paid into court) is done by one or more of the following:

- **Writ of fieri facias**

This is the most common of all writs of execution and it is usually called a 'fifa'. It is directed to the sheriff ordering him to seize and sell the judgment debtor's property. The proceeds are then used to satisfy the judgment debt. Execution may first be directed against immovable property but shall be stayed if the judgment debtor within 21 (Twenty one) days from the commencement of execution provides information about his movable property sufficient to satisfy the judgment debt. *[See Order 22 rule 4 of I 59]*

- **Garnishee proceedings**

A judgment creditor attaches or garnishees debts owed to the judgment debtor by a third party in satisfaction of the judgment debt. The debt must be due or accruing to the judgment debtor e.g. monies in his bank account.

- **Charging order**

A judgment or order for the payment of money which is not a judgment or order for the payment of money into court, may be enforced by a charging order. It is a statutory procedure where an individual partner's creditor can satisfy its claim from the partner's interest in a partnership. Magistrates do not have jurisdiction in ***company governance*** matters so the judgment creditor will have to enforce it in the High Court. [See Order 21 Rule 3(1) (c) of CI 59]

- **Appointment of a Receiver**

This appointment may be made by interlocutory order of the court and may be applied for whether or not it was included in the writ or particulars of claim. The registrar shall not manage the property unless the court appoints him as a receiver or a manager.

Payment or receipt of income shall be made into a deposit account opened specifically for the receivership.

There will be another signatory to the account in addition to the manager appointed by the court. They will render an account of their stewardship at an appointed time before the registrar and the parties. The receiver or manager shall provide security e.g. bank guarantee, deposit of title deed of an immovable property which is not less than the value of the property in dispute.

- **Summons to Show Cause**

This process has been abolished by virtue of the case of THE REPUBLIC V. HIGH COURT (FAST TRACK DIVISION), ACCRA, EX PARTE P.P.E. LTD and PAUL JURK (UNIQUE TRUST FINANCIAL SERVICES LTD) INTERESTED PARTY (2007 - 2008) SCGLR 188. The case clearly determined that no person ought to be imprisoned for non-payment of a judgment debt. From this decision and Practice Direction dated 20th May, 2009, J4 vol. 6 no one can be imprisoned for non-payment of debt. The judgment creditor has to resort to other processes of execution.

- **An order of committal from the High Court.**

ENFORCEMENT OF JUDGMENT FOR POSSESSION OF IMMOVABLE PROPERTY

- **Writ of possession**

It is addressed to the sheriff and commands him to enter the land and hand possession of it to the judgment creditor. Leave of court is required for its issuance. The court must be satisfied that the person in possession has notice of the proceedings which resulted in the judgment to enable him apply for relief if need be.

ENFORCEMENT OF JUDGMENT FOR DELIVERY OF GOODS

- **Writ of delivery and**
- **Writ of specific delivery**

They are addressed to the sheriff ordering him to seize the goods in question forthwith and deliver same to the judgment creditor. The writ may be for the recovery of the goods or their assessed value or may be for the delivery of specific goods simpliciter with leave of the court.

ENFORCEMENT OF JUDGMENT TO DO OR ABSTAIN FROM DOING AN ACT

- Committal for contempt

The district court does not have power to commit for contempt. The aggrieved person has to apply to the High Court for such an order.

- An order for the act to be done in the stead of and at the expense of the disobedient party

The party who obtains the judgment or a person appointed by the court may enforce a court order (at the expense of the disobedient party) if the latter fails to do so.

The registrar by order of court may execute a deed in the stead of a disobedient party. The deed will have the same validity as though it had been executed by the said disobedient party. He is also liable for contempt of court. *(See Order 21 Rule 6 & 7 of CI 59)*

(iii) Where a person is obstructed from carrying out the execution process he (the disobedient party) could be charged for obstruction of execution of a duty contrary to Section 222 (b) of Act 29. The charge arises from the use of violence with intent to deter a person from acting in execution of a duty as an agent of a court (such as bailiff or auctioneer) from executing his duties in any official capacity. See also section 110 of Act 459 which defines who is an agent or officer of the court for the purpose of execution.

INTERPLEADER PROCEEDINGS

There are two types of Interpleader proceedings-Stakeholder's and Sheriff's.

Stakeholder's Interpleader.
A person in possession of property or money, (the applicant) in which he has no personal interest but which is being claimed by rival claimants and expecting to be sued by them(the claimants) can issue interpleader proceedings by which the rival claimants are summoned to court for the ownership of the property to be determined as between them. The claims must be for the same property or money.

SHERIFF'S INTERPLEADER

When the sheriff seizes property in the course of execution and another person lays claim to them saying it does not belong to the judgment debtor, and the judgment creditor disputes the claim, the sheriff commences interpleader proceedings to determine who has a right to the goods. The interest by the claimant may not be one of ownership. It may for instance be a claim by a Bank that it has a charge over the goods.

When this interpleader application is made, execution is automatically stayed although the sheriff still retains custody of the property seized. An interpleader action must be brought before sale of the goods seized in execution, are sold.

MODE AND PROCEDURE OF INTERPLEADER SUIT

The application is made by motion on notice to the claimants.
The applicant must show, usually by affidavit that he has no interest in the property and that he is not in collusion with any of the claimants.

A claimant who fails to hadhere to the above indicated steps will be deemed to have abandoned the claim unless granted an extension of time by the court and he and those who claim through him can be forever barred against the applicant.
Upon appearance in court, the court may summarily decide the issue between them if it is one of law or if they both consent or one of them so requests. In the alternative, the court may have the issue between the parties stated and decide who is to be plaintiff and defendant and have the issue tried. *(See Order 14 of CI 59)*

TIME

Time fixed by the rules, judgment, order or directions shall be reckoned as follows: Where an act is to be done;

a. Within a specified period after or from a specified date – the period begins to run immediately after that date.
b. Within a specified period before a specified date – ends immediately before that date.
c. Not later than a specified date – ends immediately before the end of the specified date.
d. A specified number of clear days before or after a specified date – at least that number of days shall intervene.
    - Where time fixed is seven days or less, it shall exclude Saturdays, Sundays or Public Holidays.

NON-WORKING DAYS

An act prescribed to be done on a non-working day shall be considered done in time if done on the next working day following. The court may extend or reduce time prescribed by the rules.

DEFINITION OF MONTH

Month unless the context otherwise requires means a calendar month. *(See Order 6 of CI 59)*

REFERENCES

The District Court Rules, (C1 59)

The Supreme Court Practice (1993), Vol. 1 part 1, edited by Sweet & Maxwell

Civil Procedure in Nigeria by Fidelis Nwadialo