THE LEGAL CORNER

WHAT YOU WILL FIND

That a Statement of Case not filed contemporaneously together with an interim injunction application in terms of Order 25 Rule 1 (3) of C.I. 47 fails to meet the requirement of the law and is amenable to be set aside.

– H/L Kulendi JSC in Gyedu Frimpong v. Joana Gyan Cudjoe (2024).

DID YOU KNOW THAT

- Order 25 Rule 1 (3) of C.I. 47, by its intrinsic design, inhibits access to justice?
- Striking out a process based on late attachment of the Statement of Case to the application may exalt form over substance?
- Filing a Writ without a Statement of Claim goes to the root of the case, but filing an application for interim injunction without a Statement of Case is a mere irregularity?
- Contemporaneity of legal submission in an application for interim injunction is not a strict procedural norm in other common law jurisdictions?
- A thin line can be drawn between filing processes together and attaching a process to another?

JUSTICE ALEXANDER OSEI TUTU(J.A) & VICTOR ANKU-TSEDE ESQ.

Proverb Corner

The best way to eat an elephant is to slice it. - **Malawian Proverb**

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Beyond The Letter Of The Law:

The Frimpong v. Cudjoe's Procedural Lessons

Abstract

In the recent unreported case of **Gyedu Frimpong & 4 Ors. v. Joana Gyan Cudjoe & 2 Ors.**[1]**,** His Lordship Kulendi JSC, sitting as a single judge of the Supreme Court, held that a statement of case not filed contemporaneously with an affidavit supporting an injunction application, as stipulated by Order 25 Rule 1 (3) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47), is susceptible to being set aside.

His Lordship noted thus *"A preliminary legal issue, which the Court had cause to draw the attention of Counsel for the Applicant to was the fact that whilst the instant interim injunction application was filed at 12:20 pm on the 4th of December, 2024, it was filed without the required statement of case which was mandated by the applicable rules of Court, to be attached to any application for injunction. Curiously, the statement of case, which set out the Applicants legal arguments, complete with applicable legal authorities, was filed at 3.00 pm, over two hours after the instant application had been lodged before this Honourable Court. (C.I. 47) provides …"*

After citing the rule, His Lordship pressed that since the rule uses the word "shall", *"the only logical inference to be drawn from the stipulation under Order 25 Rule 1 (3) that the Applicant 'attach' the statement of case to the motion paper and supporting affidavit is that, the said statement of case must be filed contemporaneously together with the said application, as is the case in respect of the filing of a Writ of Summons and Statement of Claim. Anything short of this, in my opinion, fails to meet the requirement of the law and is amenable to be set aside."*

It is our respectful submission that, despite the emphasis placed on clear statutory language, the decision raises significant concerns regarding fairness, access to justice, and the overarching purpose of procedural rules. As a matter of fact, at a quick glance, one cannot disagree with His Lordship Kulendi that Order 25 Rule 1 (3) of C.I. 47 mandates the attachment of a Statement of Case to every motion and supporting affidavit in interlocutory applications for interlocutory injunctions. The rule's rigid language particularly the use of the word "*shall*" suggests a mandatory requirement. However, when carefully considered, procedural fairness and case law in Ghana support a more purposive interpretation.

This article argues that courts should adopt a more flexible approach to procedural rules, balancing the need for the order with the pursuit of fairness. It explores a proper construction of the rule under Ghanaian law, emphasizing the application of the mischief rule, the mandatory directory dichotomy, and the overriding objective of justice.

Drawing on the High Court (Civil Procedure) Rules, Ghanaian jurisprudence, and principles of natural justice, the article questions whether the strict adherence to

[1] Civil Motion No. J8/18/2025, dated 5th December, 2024, S.C. (Unreported), per Kulendi JSC.

the rule serves the ends of justice or instead promotes procedural rigidity. Ultimately, the writers suggest a more purposive flexible approach, aligning with the 1992 Constitution, the discretionary power granted under Order 81[2], the objective of the Court Rules, and comparative practice in other Common law jurisdictions.

The article concludes by positing that where the Statement of Case is filed shortly after the motion paper without prejudice to the opposing party or to the court the rule should be construed as directory, thereby permitting regularization of the process under Order 81 Rule 1 (1) of C.I. 47.

The Wording and Structure of Order 25 Rule 1 of C.I. 47

Where an applicant applies for an interlocutory injunction,[3] Order 25 Rule 1 (3) provides as follows: *"The applicant shall attach to the Motion paper and supporting affidavit, a Statement of Case setting out fully arguments, including all relevant legal authorities, in support of the application.*"

To clearly understand the provision supra, it is important to appreciate its placement within the broader context of Order 25. The Order is titled *"Interlocutory Injunction, Interim Preservation of Property,*" and outlines procedural requirements for seeking such reliefs.

As the Malawians say, *the best way to eat an elephant is to slice it.* Hence, we set below the structural summary of Order 25 Rule 1:

- Rule 1 (1)-(2): Confers discretionary power on the court to grant injunctions "*in all cases in which it appears …. just or convenient,'* whether or not pleaded originally.
- Rule 1 (3): Requires that a statement of case be attached to the motion and affidavit.
- Rule 1 (4): Mirrors this requirement for respondents filing an opposition.
- Rule 1 (5)-(6): Emphasize efficiency and flexibility (e.g., "*whenever possible*" for filing draft orders; discretion to hear oral submissions).
- Rule 1 (7)–(12): Outline special procedures for ex-parte applications, underscoring urgency, discretion, and time-bound limitations.

The structure suggests that the Rule operates within a broader framework intended to facilitate, not frustrate, urgent interim reliefs. Its spirit favours flexibility, fairness

[2] Order 81 of the High Court (Civil Procedure) Rules 2004 (C.I. 47) provides that non-compliance with procedural rules should be treated as a mere irregularity rather than rendering the proceedings void, unless it causes prejudice or involves failure to serve a required document. The court retains discretion to regularise such defects in the interest of justice.

[3] It appears the provision applies equally to application for interim injunctions.

and judicial discretion in accordance with the overall objective under Order 1 Rule 1 (2) of C.I. 47.

The Issue of Attachment: Procedural or Evidentiary?

The Court's strict interpretation hinges on the phrase "*attach to the motion paper and supporting affidavit, a Statement of Case.*" Does this requirement mean the document must be filed simultaneously as a pre-condition to validity?

The term "*attach*" here seems procedural, not evidentiary. It may appear from a careful reading of the rules that unlike exhibits which must be annexed to and referenced in an affidavit,[4] the statement of case is a legal submission, not evidence. It performs a role akin to a skeleton argument or memorandum of law.

The question is, at what stage in an application is a legal argument required by the Court? In **Republic v. Court of Appeal, Accra, Ex parte Tsatsu Tsikata**[5], it was held that legal arguments may be canvassed at the hearing and not in an affidavit.[6] Generally, legal arguments are made when the application is formally moved. By implication, before the motion is heard by the court, the time for making legal argument, technically, would not be ripe.

Therefore, by the stipulations of Order 25 Rule 1 (3), while it is ideal for the Statement of Case to be filed together with the motion paper and the affidavit at the same time, a modest delay without prejudice to the respondent or disruption of the court's processes arguably, in our view, does not seriously violate the purpose of the Rule.

Superficially Skewed Comparison

We realized from the decision that His Lordship Kulendi took immense inspiration from Order 2 Rule (6) of C.I. 47, when he said: *"The said statement of case must be filed contemporaneously together with the said application,* ***as is the case in respect of the filing of a Writ of Summons and Statement of Claim****. Anything short of this, in my opinion, fails to meet the requirement of the law and is amenable to be set aside." (emphasis supplied).*

Order 2 Rule (6) provides thus:

"Writ and statement of claim

[4] See Order 20 Rule 14 of C.I. 47.
[5] [2005-2006] S.C.G.L.R. 612, 626.
[6] See also Dogbe v. Republic [1976] 2 G.L.R 82, 94.

*(6). Every writ shall be **filed together** with a statement of claim as provided for in Order 11 and no writ shall be issued unless a statement of claim **is filed with it.***" (our emphasis).

Per the provision in Order 2 Rule (6), the drafters of the Rule explicitly used the words "*filed together*" and "*filed with it*"; not merely "*attach*" as stipulated under Order 25 Rule 1. While "*filed together*" and "*attach"* are closely related in many respects and could even be argued as being a matter of mere semantics, we should not be in haste to overlook their distinct nuances. Every flower, our elders say, has its scent.

To "*file something together*" usually connotes placing related items in the same container or folder, while "*attach*" could imply a secondary item linked to a primary one. Attaching suggests a link or adding a copy of something to another item. For instance, in the digital context, an email may be attached as a separate file that either travels with the main message or linked to it, but remains a distinct entity that can be opened, saved, or detached without altering the original message.

Another example is that, tax returns or various documents may be treated as having been filed together if they were put in one envelope, but a receipt may be submitted separately to be attached or added to the original documents earlier filed.

While a party can file a supplementary affidavit and "attach" a document he/she intends to rely on during the hearing which he/she forgot to add to his/her original affidavit in support of an application, it does not appear that a Plaintiff who filed only a Writ of Summons can later file a supplementary affidavit or any form of application to annex the Statement of Claim to the previously filed Writ. In the case of the Writ, the rule's emphasis that it be "*filed with it*" (the statement of claim) accentuates the lawmaker's clear intent.

It might seem that the drafters of the rules had a reason for maintaining that the Writ of Summons must be filed together with the Statement of Claim; but with the Statement of Case, they only used the word "attach" to the motion paper and supporting affidavit, without focusing on the manner in which they are to be filed.

Adopting a purposive interpretation, a Statement of Case, even filed later, can be linked, attached or connected to the motion paper and the affidavit at the hearing of the application.

If Order 25 Rule 1 (3) is being applied strictly in the manner the Supreme Court did, it would mean that since the motion paper, the supporting affidavit and the statement of case are to be filed contemporaneously, any process filed by the applicant subsequent to the filing is unacceptable, because the rule does not make provision for that. In practice however, the courts do allow supplementary affidavits to be filed for additional documents to be "attached" to the application. It then raises

the question why the statement of case can also not be filed later if no prejudice is caused to the opposing party.

Since the Writ of Summons and the Statement of Claim jointly invoke the Court's jurisdiction, the filing of one without the other may raise jurisdictional issues, but the non compliance of the filing of a Statement of Case together with the motion and affidavit under Order 25 Rule 1 (3) is an irregularity which can be cured by Order 81.

Erosion of Oral Advocacy and Natural Justice Concerns

Historically, interlocutory applications under Ghanaian jurisprudence were argued *viva voce*, allowing lawyers to articulate their full submissions in court. The requirement to file a statement of case was introduced to streamline proceedings, enhance judicial efficiency, and ensure that arguments were clearly stated in advance not to suppress a party's voice due to a procedural misstep.

However, strict adherence to this rule especially where it leads to the dismissal or rejection of the applications based solely on minor procedural infractions risks violating the cardinal principle of *audi alteram partem*.

In **Re Effiduase Stool Affairs (No. 2), Republic v. Oduro Nimapau, President of the National House of Chiefs; Accra, Ex parte Ameyaw II (No. 2)**[7], the Supreme Court declared as follows: "*For, one of the basic principles of any civilized system of justice is that a person is entitled to a fair trial free from prejudice. No system of justice can be effective unless a fair trial to both sides is ensured … This common law right to a fair trial is now elevated to a fundamental right in the 1992 Constitution of Ghana.*"

In **Republic v. Eugene Baffoe-Bonnie and 4 Ors**.[8], the Supreme Court held that the right to a fair hearing is a *jus cogens*, a peremptory norm of generalized international law, noting: "*Access to administration of justice and the enforcement of the constitutional right to fair hearing shall be enforced in a manner that ensures that no individual is deprived, in procedural terms, of his/her right to seek justice.*"

In the recent case of **Jebuni & 2 Ors. v. Mwinibankuro & Anor**.,[9] the majority on the panel, held through His Lordship Tanko JSC that access to justice is an indicia and the component of the rule of law. Quoting Date-Bah JSC in **Adofo v. Attorney-General**[10] that "*unhampered access to the courts is an important element of the rule of law*", His Lordship explained that the concept inter alia seeks to prevent the

[7] [1998-99] SCGLR 639, 670.
[8] [2018] 123 GMJ 253.
[9] No. J8/81/2025, dated 23rd July 2025, S.C., Unreported.
[10] [2003-2005] 1 GLR 239.

refusal to grant an Applicant the opportunity to pursue just claims before the courts and the avoidance of procedural impediments that may thwart the resolution of cases.

"*In pursuance of this objective and in the interest of justice, the framers of the 1992 Constitution have even where statutorily, a litigant is out of time in pursuing particular claim, whether by appeal or review, created a window by way of special leave procedure to accommodate such a litigant upon a demonstration that, the matter is worth considering, either in the public interest and/or development of our jurisprudence*", Justice Tanko adumbrated.

The Court of Appeal in **Nartey v. Mechanical Lloyd Assembly Plant**[11]**,** stated that courts are not to shut the doors of justice on a litigant[12] because of counsel's inadvertence or technical slip. The Court held that justice is better served when the matter is determined on its merits than through rigid application of procedural rules.

Similarly, in **Okofo Estates Ltd. v. Modern Signs Ltd**. **and Anor.,**[13] the Supreme Court ruled that procedural rules exist to facilitate, not frustrate, the course of justice, and courts should be slow to strike out proceedings unless there is clear evidence of abuse of process or prejudice to the other party.

These authorities highlight the need for a purposive and flexible application of procedural rules especially governing interlocutory applications so that parties are not unjustly barred from having their cases heard due to filing irregularities, particularly where such irregularities are rectified prior to the hearing and cause no prejudice to the opposing party.

The Rule As A Barrier to Justice

The strict interpretation of the rule by the Supreme Court has the propensity to deny justice to unrepresented parties. The rule, by its intrinsic design, inhibits access to justice, so that when it is rigidly applied in the manner the Supreme Court construed it, it would be turning an already bad situation into a worse one.

We realize that under Order 4 Rule 1 (1) of C.I. 47, *"... any person may* ***begin and carry on proceedings in person*** *or by a lawyer.*" (our emphasis). It is only a body corporate[14] and a next friend or *guardian ad litem* of a person with disability that must act by a lawyer.[15]

[11] [1987-88] 2 GLR 312.
[12] See also Rebecca Gyamfi & Anor. v. Adu Anaji [2012] 43 GMJ 81 at 93, C.A.
[13] [1996-97] SCGLR 224.
[14] See Order 4 Rule 1 (2) of C.I. 47.
[15] See Order 4 Rule 1 (3) of C.I. 47.

The law's guarantee of self-representation rings hollow when unrepresented parties seek an interim or interlocutory injunction, as they are suddenly expected to meet complex legal standards, effectively retracting the very right it purports to grant. This is because, the Statement of Case under Order 25 Rule 1 (3) is essentially the *"relevant legal authorities*" illuminating the application. According to an African proverb, *You don't give someone a goat for a gift and still hold on to the rope.*

If the law does permit unrepresented parties to mount the witness box for their evidence alone to be considered by the Court, without strictly demanding from them a written address or a legal submission after the trial, then it is ironic that the same law would demand mandatory "legal submissions" from non-lawyers when they approach the court for interim or interlocutory injunctions.

About the contents of an affidavit, Order 20 Rule 8(1) makes it abundantly clear that the affidavit *"must contain **only facts** that the deponent can prove …*" The settled law and the general practice in most common law jurisdictions is that legal arguments are not allowed to be articulated in an affidavit.[16] One writer, Hameed Ajibola Jimoh,[17] succinctly points out in a paper thus, "*It is 'facts' that an affidavit …. should contain and not 'law'*".

Contributing to the topic, an Indian lawyer, Altamish Khaki, emphasized that affidavits are meant to present facts, not legal arguments. He cited as an example, the deposition, *"The other party's action clearly violates the law'* as a legal argument that must be reserved for legal brief." The Nigerian Court of Appeal in **Enwo-Igariwey & Anor. v. Anozie & Ors.**[18] affirmed the universal position and intimated that legal arguments are the preserve of counsel. The Court elucidated thus: "*In law, legal arguments … are not issues which are capable of being led in oral evidence and therefore incapable of being deposed in an affidavit. Legal arguments are issues for **counsel** to urge on the Court.*"

As a result, when parties want to depose to a legal point in an affidavit, they hide behind their lawyers that they "*have been advised by counsel and verily believe the same to be true that ….*"

An unrepresented lay party cannot make such a legal deposition in an affidavit, yet he is expected to file a legal argument in a Statement of Case. Since affidavit evidence filed in support of the motion paper is a form of evidence, it should be sufficient for the court to consider it to make a determination in appropriate cases. After all, in other interlocutory applications such as joinder, amendment and

[16] See Dogbe v. Republic [1976] 2 G.L.R. 82, 94.
[17] Hameed Ajibola Jimoh, *Affidavit Evidence and its Requirement on 'Facts' Rather than 'Law': A Point of Order for Nigerian Lawyers!*, Law Pavillion Blog.
[18] (2018) LPELR – 45766 (CA).

substituted service, no Statement of Case is required, yet the courts are able to make a determination on the motion paper and supporting affidavit filed.

Similarly, whenever parties are represented, if after the close of their cases their lawyers fail to file written addresses on their behalf as directed by the court, their clients' cases are not struck out merely because their lawyers either failed to file their addresses or filed it beyond the time given by the court.

We are not in the least oblivious of the Supreme Court's misgivings in **Zainabu Naske Bako-Alhassan v. Attorney-General**[19] about the creation of a dualist or pluralistic system of procedure for the represented and unrepresented as regards meeting timelines.

Also, in **Ebusuapanyin Kwame Atta (subst. by Ebusuapanyin Kofi Kwa Dua) v. Ebusuapanyin Kwaku Amoesi**[20], His Lordship Kulendi JSC, apart from demanding strict compliance of the Court rules, set no different standards for represented and unrepresented parties. He noted as follows: "*It must be emphasized that it is the fundamental duty of a party prosecuting his or her case before a Court,* ***whether personally or through the service of retained Counsel****, to ensure* ***strict adherence to the Rules of Court*** *… These rules are* ***non-negotiable*** *yardstick which regulate the conduct of cases before the Court and ought to be treated with due regard.*"

Nevertheless, we cannot pretend not to know that while the courts are sometimes harsh on parties whose lawyers do not exercise due diligence in the conduct of cases,[21] they have often treated unrepresented parties with "soft gloves" by overlooking their minor slips where necessary.[22]

Far from advancing the argument for unrepresented parties under this point because we believe the parties in the case under review were unrepresented; we are mindful that they were duly represented. Our main concern, however, is that the Supreme Court's blanket ruling, without distinguishing between represented and unrepresented parties alone, stands in danger of setting a perilous precedent, inadvertently jeopardizing the rights of self-represented litigants and undermining access to justice.

Proportionality: What Happens to the Affidavit?

Another grey area that lends itself to ambiguity in the ruling is the fate of the affidavit filed in support of the application. If the statement of case is deemed invalid

[19] [2013] 61 G.M.J. 1, S.C.
[20] Civil App. No. J4/22/2024, dated 24th April, 2024, S.C., Unreported.
[21] See Otoo (No. 2) v. Otoo (No. 2) [2013-2014] 2 SCGLR 810, 821-822.
[22] See for instance, Edward Nasser & Co. Ltd. v. McVroom and Anor. [1996-97] SCGLR 468 at holding 3; Mabel Osei v. Stephen Boateng [2016] 99 GMJ 162, 168 and Yamak v. Yawson [1971] 2 GLR 465.

for late filing, what becomes of the affidavit? Order 25 envisages three core documents: motion paper, affidavit, and statement of case. If only the last is defective, does it vitiate the entire application?

The decision under reference is silent on whether the affidavit can stand independently, which raises concerns about proportionality and whether the application must wholly fail with a lately filed statement of case.

The decision also, did not clarify the fate of the supporting affidavit when the statement of case is filed late. Under Order 25 of C.I. 47, an application for interlocutory injunction must have three key documents: the motion paper, the supporting affidavit, and the statement of case. However, the rules of court are silent on the procedural consequence where one component, namely the statement of case, is delayed in filing. The vexing question arises: must the entire application fail because of this delayed filing?

A proportionate and purposive interpretation of the rules tends to suggest otherwise. The supporting affidavit plays a crucial role as it contains the material facts of the case, often sworn under oath, forming the evidential backbone of the application. The statement of case, on the other hand, technically provides the legal argument and authorities supporting the motion. While both are important, it is the affidavit that satisfies the foundational evidentiary burden necessary for an interlocutory injunction. Therefore, where the affidavit is properly filed and served, the late filing of the statement of case, especially if filed before the hearing, and without prejudice to the other party should not render the entire application void.

If, however, the application is struck out solely due to the late filing of the statement of case, the consequence is grave: it would amount to the entire denial of the substantive right being sought by the application, often without any consideration of the merits. The applicant may lose interim protection against potential harm, sometimes with irreversible consequences, particularly in land, contract, or political disputes.

Systemic-Generated Delays

It must be appreciated that sometimes the parties have little or no control over the filing, and the delay in filing the processes together for interlocutory injunction may be caused by factors inherent in the system of adjudication. The delay may emanate from the operations of the court registry, the electronic filing and the lawyers of the parties.

When the application comprising the motion paper, the supporting affidavit and statement of case are submitted for filing, the receiving clerk at the Registry of the Court, can be interrupted midway in the filing process by a superior,

unprofessionally engage in a conversation with a colleague in the office or receive an urgent phone call that can occasion delay in the filing or create some time interval in the filing processes. The sad part is that the presumption of regularity[23] will operate to shield the incompetence of the court staff against the poor litigant unless otherwise rebutted.

The Supreme Court's decision does not indicate whether by the "contemporaneous filing" the three processes must all bear the same time of filing or whether some minutes' interval is permissible. If it is, how many minutes? Is it 2 minutes, 10 minutes, 30 minutes or an hour's interval?

It could happen that the clerks at the Registry who might not be aware of the technicality adopted by the Supreme Court may state different times on processes submitted to them for filing and that can end up affecting the litigants. It is feared that if the precedent set by the Supreme Court is applied fastidiously, there would be a "tsunami" in our courtrooms - many writs of summons bearing different times of filing from the accompanying statement of claim may fail on technical ground. Correspondingly, applications having different times stated on the motion papers and their supporting affidavits may lend themselves to attack and being eventually struck out.

The e-justice system is another area where delays in filing processes together may occur. It may impose logistical hurdles beyond the parties' influence. Finally, the delay can emanate from the lawyers of the parties, and when it does, the parties are not to be punished for their lawyers' inadvertence or negligence.[24] In **Republic v. High Court (Crim. Div.) Accra, Ex parte Francis Arthur (A.G. – Interested Party**)[25] for instance, the Supreme Court decided through Akoto Bamfo JSC that the courts deprecate the practice of visiting the sins of lawyers on their clients.

Balancing Procedural Order and Substantive Justice

If the affidavit is allowed to stand and the late statement of case is accepted, the court can still exercise its discretion under Order 81 to regulate the proceedings. In such circumstances, the integrity of the process remains intact; the respondent is not ambushed, the court is fully informed before the ruling, and the hearing proceeds without undue delay. This approach preserves the balance between procedural order and substantive justice, especially in the interim stages of litigation, where urgency and fairness are both crucial.

[23] Under section 37 of the Evidence Act, 1975 (NRCD 323), official duties are presumed to have been regularly performed.
[24] See Aryeetey v. SSNIT [2013] 56 G.M.J. 1, 42 & Republic v. Asokore Traditional Council, Ex Parte Tiwaa [1976] GLR 231 at Holding 1.
[25] Civil Motion No. J5/29/2016, dated 28th July, 2016, S.C., Unreported.

In the long run, striking out a process based on late attachment of the statement of case may exalt form over substance, thereby undermining the constitutional right to a fair hearing under Article 19 (13) of the 1992 Constitution. A better approach, we respectfully submit, is to view the omission as an irregularity subject to judicial cure, provided it is rectified prior to hearing and causes no demonstrable prejudice.

It is interesting that in the case under review, the Supreme Court expressed its disapproval of the practice of filing the statement of case after the motion paper and the affidavit, holding that the requirement to "attach" the statement of case suggests it must be filed contemporaneously with the other documents.

Nonetheless, His Lordship Kulendi eventually opted for judicial pragmatism rather than procedural harshness. His Lordship, in our respectful view, rightfully perceived the court rules as intending to regulate proceedings and not to serve as a snare to trip up litigants.

He allowed the application to proceed although the Statement of Case was not filed at the exact moment the motion paper and the affidavit were filed. Rather than viewing the delay as fatal, His Lordship Kulendi relied on "*national interest and overarching political impact of the … suit*" to treat it as a curable irregularity under Order 81 of C.I. 47.

The rules, thus give the courts the discretion to regularize procedural lapses that do not result in substantial injustice. Generally, procedural lapses are not allowed to stand in the way of substantive justice unless they result in a miscarriage of justice. In our considered view, the principle applies squarely to minor delays in filing a statement of case, provided no unfairness is occasioned and such lapses are curable by the courts.

The ruling, rather than being seen as laying down a hard fast rule ought to be seen as a cautionary guidance, and not a binding precedent that would render all late filings void. It illustrates the court's balancing act between upholding procedural discipline and preserving access to justice.

Ghanaian Jurisprudence on Procedural Discretion

Ghanaian courts have consistently emphasized that rules of courts are handmaids of justice, not weapons of injustice.[26] In **Shardey v. Adamtey and Shardey v. Martey and Anor. (Consolidated)**,[27] the Court of Appeal held that procedural

[26] See Republic v. High Court Koforidua, Ex Parte Eastern Regional Development Corporation [2003-2004] SCGLR 21, 47 & Verdoes v. Koranchie [2016] 94 GMJ 164, 201.
[27] [1972] 2 GLR 380, C.A.

lapses such as citing the wrong rule, should not defeat otherwise valid applications. His Lordship Archer JA warned against pursuing technicalities "to an absurdity."[28]

Similarly, in **Kumah v. Bart-Plange**,[29] the High Court admonished the courts to weigh whether overlooking a procedural lapse will not cause injustice. If no prejudice arises, discretion should be exercised in favour of hearing the matter.

It is crucial to reminisce that the filing of a Statement of Case in an injunction application is a concept that was incorporated into our jurisprudence by C.I. 47; it was unknown to the old High Court Civil Procedure, 1954 (LN 140A). With the same level of obligation as Rule 1 (3) of Order 25 of C.I. 47, Rule 9 introduced the concept of undertaking as to damages in an application for an interlocutory order thus:

Rule 9—Undertaking as to Damages

(1) Where an application is made under rules 1 and 2 of this Order the Court ***shall,*** *if the application is opposed, require, before making an order, that the applicant* ***shall*** *give an undertaking to the person opposing the application to pay any damages that person may suffer as a result of the grant of the application if it turns out in the end that the applicant was not entitled to the order.*

(2) The giving of an undertaking required under subrule (1) ***shall*** *be a precondition to the making of any order under rules 1 and 2 of this order.*

(3) Where an applicant gives the undertaking the Court ***shall*** *at the end of the proceedings in which the undertaking was given assess the damages, if any, which the person who opposed the application has suffered and which the applicant is liable to pay and shall give such judgment as the circumstances require. (emphasis supplied).*

Just like the provision of Order 25 Rule 1(3), the above provision in the rules book on undertaking for damages is couched in imperative terms; yet the Supreme Court in the case of **Yehans International Ltd v. Martey Tsuru Family**[30] overlooked its compelling language and held that the undertakings required by the rules are discretionary. In **Kojach Ltd. v. Multichoice Gh. Ltd**.[31], the Court, differently constituted, abstained from treating the non-compliance of an undertaking as to damages as mandatory.[32]

It must further be noted that the Court's approach in dealing with timelines for the filing of courts' processes generally has also been liberal. For instance, while the rules and the established practice of the courts require Defendants to file their defence within fourteen days after entering appearance, where a defence is filed out of time even without the leave of the court, it is not struck out.

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[28] See page 387 of the Report.
[29] [1989-90] 1 GLR 119.
[30] [2012] 42 G.M.J. 194, 197.
[31] [2013-2014] 2 SCGLR 1494.
[32] See also Republic v. High Court Koforidua, Ex Parte Ansah Otu [2009] SCGLR 141.

Under LN 140A, their Lordships decided in **Republic v. High Court & Anor; Ex Parte Ohene**[33] thus: "*A defence delivered after the proper time cannot be disregarded even though it is not delivered until after the plaintiff has served notice of motion for judgement under this rule. In such a case, the court will have regard to the contents of the defence delivered out of time and deal with the case in such a manner that justice can be done.*"

Their Lordships in the case of **The Republic v. High Court (Commercial Division) Accra, Ex Parte: Port Handling Co. Ltd.**[34] reaffirmed their earlier position years later under C.I. 47 thus: "*In the light of different judicial authorities, it must be concluded that a court cannot regard a statement of defence filed out of time a nullity. As a matter of obligation, the court is bound to look at it and deal with it in such a manner that justice can be done. By extension, a trial judge is bound by settled practice above, to consider the statement of defence even though it was filed out of time set by the rules of the court.*"[35]

These precedents illustrate a trend towards substantial compliance over formalism. Order 81 reinforces this philosophy.

Procedural technicalities that deny substantial justice, it is submitted, are most unfair and unjust. The logic applies with even greater force where parties are not directly in control of the filing mechanisms.

The Court of Appeal per Forster JA in **Godka Group of Companies v. PS International Ltd.**[36] on whether parties should be punished where a judge fails to deliver judgment within the time provided by the rules, said: *"[t]o construe the local rules … in conformity with counsel's submission and declare null and void a whole judgment obtained after years of litigation would be most unjust and unfair to the parties, who have no control over the delivery of judgments by the courts. The parties would thereby be punished for the indolence and neglect of judicial officers but the real culprits pay no price. I think, short of a mandatory provision, the disciplinary power of the Chief Justice over offending judges is reasonably deterring enough to keep the judges on their toes. I do not therefore accept the invitation of counsel that the judgment ought to be declared a nullity.*"[37]

We recognized that when the case finally travelled to the Apex Court,[38] their Lordships pronounced that only documents tendered in evidence under oath qualify to be reckoned as evidence. Yet, after some years later in

[33] [1995-96] GLR 1, at pp. 6-7.
[34] [2014] 69 G.M.J. 1, 7; [2013-2014] 2 SCGLR 1219.
[35] See also Nana Ampofo Kyei Barfour v. Justmoh Construction Co. Ltd. & Ors. [2017] 113 GMJ 118, 146.
[36] [1999-2000] 1 GLR 409.
[37] See Page 426 of the Report.
[38] See Godka Group of Companies v. PS International Ltd. [2001-2002] SCGLR 918, 921.

the case of **Living Faith World Outreach Centre & Ors. v. The Registrar General & Ors,**[39] the Supreme Court extricated itself from its time-honoured principle to recognize a document not formally tendered in evidence to decide an issue for a party; noting**:** *"It is mere technicality devoid of the fruit of justice to say that the Court of Appeal should not have considered the certificates when they were present in the record just for the simple reason that they were not tendered in evidence but have been used in an application for interlocutory injunction and for which all the parties have had the opportunity to consider and scrutinize. This is not to encourage parties and counsel to be laxed in their approach in the prosecution of cases but … [t]he principles of substantial justice require that a court should not close its eyes to the truth when the truth beckons at it. Furthermore, as has been emphasized time and again by this and other courts, 'it is the duty of Courts to aim at doing substantial justice between parties and not to let that aim be turned aside by technicalities***."**

Comparative Jurisdictional Analysis

a. United Kingdom

Under the United Kingdom (UK's) Civil Procedure Rules, especially Part 25, interim application must be supported by evidence[40] (e.g. witness statements), but there is no equivalent rule requiring contemporaneous legal argument filing. Skeleton arguments are often filed later or presented orally.

This allows for procedural flexibility, not rigid bars.

b. Kenya

Order 40 of the Kenyan Civil Procedure Rules allows motions to be supported by affidavits, detailing facts, but not legal arguments. These are usually submitted orally or through supplementary filings. The courts fix their eyes on substance rather than form.

c. South Africa

South Africa motion practice similarly requires detailed founding affidavits as the core of pleadings. Legal arguments are optional and may be presented in heads of arguments at hearing. The approach prioritizes content and context over formal sequencing.[41]

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[39] No. J4/49/2021, dated 17th May, 2023, S.C., Unreported.
[40] See Rule 25.3.
[41] Erasmus, Superior Court Practice; Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa.*

d. The Gambia

Interlocutory Applications are provided for under Order XXV of Volume 2 of the Courts Act (Subsidiary Legislation) Cap. 6.01. The Rule provides that a motion paper for an interlocutory application should be accompanied by an affidavit.[42] Under rule (9) of the Order, parties may file an argument in support of the application. It is worth stressing that the rule is, however, not couched in mandatory terms.

These comparative models reinforce that contemporaneity of legal submission is not strict procedural norm in other common law jurisdictions. Under Order 82 (1) of C.I, 47, the rules' general regard for practices in other common law jurisdictions is a strong motivation for the courts to consider the standard practices in other jurisdictions in construing ambiguous provisions.

Objectives of the Court Rules and the Need for a Purposive Interpretation

If the rule on the mandatory filing of a Statement of Case with the motion paper and the supporting affidavit is applied in strict terms as His Lordship Kulendi had opined, it would defeat the very essence of the rules.

Order 1 Rule 1 (2) provides:

(2) 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 parties may be completely, effectively and finally determined and* ***multiplicity of proceedings concerning any of such matters avoided****.*

We must also not lose sight of the twin provision in Order 25 Rule 1 (4) of C.I. 47, which provides: "*A respondent who desires to oppose the application* ***shall*** *file an affidavit in opposition as well as a Statement of Case containing full arguments and the legal authorities to be relied on.*"

If the interpretation for the mandatory filing of a Statement of Case together with the motion paper and the supporting affidavit is brought to bear on the provision, an objection may be taken against a late or separate filing of the Statement of Case. When trial courts are confronted with the issue and they decide to adopt the precedent of the Supreme Court to strike out the process; they would be proceeding

[42] See rule (4).

without the process. In our respectful view, the courts would not be doing justice to the parties in that circumstance.

In practice, most lawyers who find themselves in that situation will pray for an adjournment to put their houses in order or refile the Statement of Case together with the motion paper and the supporting affidavit. A court minded to do justice will not decline such an application for adjournment and that will unfortunately birth a delay.

Besides the delay, the refiling of the processes altogether will certainly lead to unnecessary expense to the party. The delay and the unnecessary expense are the very devils the rule seeks to avoid in litigation, and that could have been achieved if the Court had not insisted on the mandatory requirement of filing the motion paper, supporting affidavit and the statement of case contemporaneously.

Consistency in Application

It is important that the courts apply the rules with some relative amount of consistency, focusing on its core objective in Order 1 Rule 1 (2) to avoid delay, unnecessary expense, and prevent multiple suits. This ensures fairness and efficiency. In situating the principle in its proper context, His Lordship Kulendi JSC has, in other cases, advanced the jurisprudence of fully and effectually determining issues between parties by not allowing speed at the trial to disable the Court from doing substantial justice.

In **Emmanuel Justus Briandt v. Nana Kwasi Ankrah III**[43], His Lordship, in his concurring opinion held thus: "*This Court has repeatedly admonished that the requirement of the Court to fully and finally determine the issues in dispute between parties, cannot be sacrificed at the altar of convenience and speed at trial; and whilst it is a duty incumbent on the Court that it ensures that a party does not conduct his case in such a manner as to unduly retard the progress of a case, this duty is in every sense subservient and subordinate to the pre-eminent requirement that the party* ***ought to be afforded all avenues*** *that are reasonably and practically possible to ensure that disputes are fully and finally determined and disposed of.*"

To further strengthen his position, His Lordship relied on the Supreme Court's prior decision in **Nii Lante Lamptey v. R.O. Lamptey & Ors**.[44] which affirmed the overriding necessity of affording parties the opportunity to fully ventilate their cases by not visiting the sins of Counsel on the parties.

[43] Civil App. No. J4/63/2022, dated 19th June, 2024, S.C., Unreported.
[44] Suit No. J4/17/2021, dated 1st December, 2021, S.C., Unreported.

Similarly, in **Vincent Ekow Assafuah v. The Attorney General**[45], the Supreme Court, through His Lordship, highlighted the Court's reluctance to worship technicality and the sacrificing of justice on its unforgiving altar.

The Court of Appeal in **Godka Group v. PS International**[46] rightly refused to nullify a judgment due to judicial delay, reasoning that litigants must not suffer for errors outside their control.

It is, with respect, inconsistent to demand rigid compliance where the same approach would otherwise excuse delay in the name of justice.

With the adoption of the e-justice system, it has been recognized that parties often face logistical and technical delays beyond their control; hence, it is imperative that the Courts adapt by balancing compliance with fair access to justice.

The Overriding Considerations for Adopting a Flexible Approach

It has been observed earlier in this paper that the Supreme Court relied on "*national interest and overarching political impact of the … suit*" to treat the non-compliance of filing the Statement of Case with the motion paper and the supporting affidavit together under Order 25 Rule 1 (3) as a curable irregularity.

While "*national interest*" and "*overarching political impact of the case"* might be pivotal in the interpretation and enforcement of a constitutional provision, it is open to debate whether they command the same weight or force in the interpretation of the court rules. Our elders say, *sugar is sweeter than salt, but not when they are in a soup*.

In the application of the court rules, the primary focus is cast on procedural efficiency, which finds direct expression in Order 1 Rule 1 (2) in terms of interpretation that avoids delay in the trial, minimizes expenses to litigants and prevents multiple suits. His Lordship Kulendi in **Emmanuel Justus Briandt v. Nana Kwasi Ankrah III**[47], extolled this virtue under Order 1 Rule 1 (2) thus: "*In the symphony of C.I. 47 (as amended), Order 1 rule 1 (2) is the chorus and compass that points trial judges, lawyers and other stakeholders in the law and due process to over-arching philosophy and objective of the rules of procedure and the powers and discretions that derive from them."*

Reading the **Frimpong v. Cudjoe** decision under discussion, we get the impression that, but for the national interest and the overarching political impact of the case, the supposed irregularity in not filing the Statement of Case contemporaneously

[45] Writ No. J1/18/2025, dated 6th May, 2025, S.C., Unreported.
[46] [1999-2000] 1 GLR 409.
[47] *Supra.*

with the motion and affidavit together under Order 25 Rule 1 (3) could not have been cured. However, we believe that other than fundamental breaches such as those impinging on jurisdiction[48], Order 81 has the panacea to cure all manner of irregularities irrespective of the national interest or the political relevance of the case.

Perhaps, the national interest and overarching political impact of the case could be vital in determining the merits of the interim or interlocutory injunction application itself when assessing the balance of hardship and inconvenience in granting the application,[49] but not as a basis to regularize non compliance of the rules.

Conclusion

The Supreme Court's pronouncement in **Gyedu Frimpong v. Joana Gyan Cudjoe**, though grounded in textual strictness, risks undermining substantive justice by elevating form over function. Order 25 Rule 1 (3) of C.I. 47 must be read in context with its purpose, the court's discretion under Order 81, the purpose of the rules under Order 1 Rule 1 (2), and comparative practice in mind. We submit that where a statement of case is filed shortly after the motion and affidavit, before hearing, and causes no prejudice, the rule should be interpreted as directory, not mandatory.

Strict enforcement in such cases, in our respectful view, defeats the overriding aim of judicial fairness, especially under Article 19 of the 1992 Constitution, which guarantees a fair trial and equality of arms.

We highly anticipate that the forthcoming High Court Civil Procedure Rules that will replace C.I. 47 will thoughtfully consider the concerns raised in this article, thereby setting the seal on procedural rules to serve as supportive instruments rather than hindrances in litigation.

[48] Save irregularities of the rules that conflict with the Constitution, statute or the rules of natural justice. See Republic v. High Court, Accra, Ex Parte All Gate Co. Ltd. (Almagamated Bank Ltd. – Interested Party) [2007-2008] 2 S.C.G.L.R. 1041; Jescan Construction Ltd. v. Hippo Ltd. & Ors. [2016] 64 G.M.J. 64, 94.

[49] In dealing with interim or interlocutory injunctions, the Courts consider balance of convenience or hardship. See cases such as Ekwam v. Pianim [1996-97] SCGLR 117; Frimpong v. Nana Asase Obeng II [1974] 2 G.L.R. 16 and Mr Collins Otoo v. Solomon Pupulampo & Anor. [2014] 75 G.M.J. 137 at holding 1.