IN THE CIRCUIT COURT ONE HELD AT ACCRA ON MONDAY, 19TH OF JUNE 2023, BEFORE HER HONOUR AFIA OWUSUAA APPIAH (MRS) CIRCUIT COURT JUDGE

C2/103/2022

INTEGRAL ASSOCIATES LTD **PLAINTIFF**

V

ELIZABETH TORKU **DEFENDANT**

JUDGMENT

Plaintiff on 17/5/2021, issued a writ of summons with its accompanying statement of claim against Defendant herein praying for the following reliefs;

1. An injunction restraining the defendant from further construction of the unauthorized structure.
2. An order directed at the Defendant to pull down the unauthorized structure
3. Cost including legal fees.

Pursuant to an order of the court granting leave to Plaintiff, the writ of summons and statement of claim were amended with amended writ of summons and statement of claim filed on 2/8/22. The claims of Plaintiff against Defendant herein therefore is as follows:

a. a declaration that upon a true and proper interpretation of the sublease dated 26/8/2021, the Defendant cannot change the character of the building without the written consent of Plaintiff.
b. An injunction restraining the Defendant from further construction of the unauthorized structure.

c. An order directed at the Defendant to pull down the unauthorized structure.
d. Cost including counsel's fees.
e. General damages for breach of contract.

Defendant entered appearance to the suit and statement of defence. However upon service of the Amended writ of summons and statement of claim by the Plaintiff, Defendant also caused an amended statement of defence to be filed on 2/11/22.

I must say that after an amendment has been granted and duly made, it is not permissible to rely upon it or factor it again in the proceedings. This is because in law, the effect of an amendment is that an amendment made with or without leave, takes effect, not from the date when the amendment is made but from the date of the original document which it amends; and this rule applies to every successive amendment of whatever nature and at whatever stage the amendment is made. Thus the amendment made to the writ, statement of claim and Statement of defence dates to the date of the original issue of the writ and the action continues as though the amendment had been inserted from the beginning. As per Collins MR, in **SNEADE V WOTHERTON [1904] 1 KB 295, 297**,

> *"The writ as amended becomes the origin of the action, and any claim thereon indorsed is substituted for the claim originally indorsed".*

Similarly in pleadings,*"once Pleadings are amended, what stood before amendment is no longer material before the Court and no longer defines the issues to be tried"* as stated per Hodson LJ in **WARNER V SAMPSON [1959] 1QB 297, 321**.

Thus in the Ghanaian case of **KAI V AMARKYE [1982-83] GLR 317**, the Court of Appeal held that once pleadings are amended, what stood before the amendment was no longer material before the court and no longer defines the issues to be tried.

At the close of the case, the following were set down for trial;

(i) Whether or not the Defendant is erecting or building a structure on the property.

(ii) Whether or not the extension being carried out by the Defendant requires her to seek the prior consent in writing of the Plaintiff.

(iii) Whether or not the extension being carried out by the Defendant requires her to submit plans to the Plaintiff for its approval before construction.

(iv) Whether or not the extension is necessary to prevent the Defendant little one from falling off the plane porch.

(v) Whether or not other homeowners have carried out similar extensions.

(vi) Any other issues arising from the pleadings.

Plaintiff's case

Plaintiff, a company registered under the laws of Ghana and engaged in the business of Real Estate constructed a two bedroom house on Plot No 23, Abokobi in the Ga East District in the Greater Accra Region of Ghana (hereinafter referred to as the property). By a sublease dated 26th August 2021 upon payment of consideration, Plaintiff subleased this said property to Defendant herein with reversionary interest in same upon the expiration of the sublease on 2/8/2093 vested in the Plaintiff. Defendant. In this sublease, clause c (6) provided that the sublessee covenants with the sublessor "Not to build or permit to be built or erected on the property any structure or building except with the consent in writing of the sublessor and in accordance with plans previously submitted to and approved by the sublessor".

It came to the attention of Plaintiff's that Defendant was carrying out some works the house without their prior consent and authorization in breach of the sublease. Defendant was warned by Plaintiff to stop the works and seek

its consent. Defendant however had failed to heed the warning of Plaintiff and their counsel. Plaintiff averred that the acts of Defendant would change the character /landscape oft the property and also open the floodgate for other members of the community to construct unauthorized structures on their properties thereby destroying the uniformity and its gated community. Plaintiff's representative Ama Attakora Nsiah who testified for the company tendered in evidence the following exhibits;

i. a copy of sublease between the parties herein dated 26th August 2021 as exhibit A
ii. photographs of showing the works on the property in dispute as exhibits B, C, D and E.
iii. copy of building permit of Plaintiff Company as exhibit F
iv. letter form counsel for Plaintiff to Defendant to halt construction as exhibit G
v. layout of the estate on which the property is situate as exhibit H.

Defendant's case

In her defence, Defendant admitted that she was bound by clause C (6) of the sublease agreement. She however disputed that she was carrying out construction in the house. She contended that she was only adding courses of blocks to join the pillars which are already part of the main building which she purchased to prevent rain water from entering her porch and also prevent her little by who was then 2 years old from falling over the plain open porch. She contended that as the owner of the property, the extension she is carrying out does not involve digging a foundation, extension of the building and erecting of new structures and therefore does not require the consent and approval of the plaintiff. She contend further that the landscape of the property would not be changed in any form or shape and it would not destroy the beauty or uniformity in the community as other home owners had carried out similar extensions for their comfort. She therefore averred that Plaintiff was not entitled to its claim. Defendant testified solely and tendered

in evidence the following exhibits Contract of sale between Defendant and Plaintiff marked exhibit 1

i. Sub-lease dated 26/8/2021 between plaintiff and defendant marked exhibit 2
ii. Photograph of a house marked exhibit 3

For ease of analysis and to avoid sounding repetitive of authorities evidence, I shall be discussion some issues together.

Issues (i) Whether or not the Defendant is erecting or building a structure on the property

Plaintiff's claim before the court is that Defendant has breached clause C(6) of exhibit A/2 by erecting a structure thereon. According to her, Defendant had excavated the tiled floor of the porch of the property and erecting a structure with windows fixed to same. Defendant admits that she is carrying on some extensions in the house but challenges same amounting to a building or a structure by adding courses of blocks to join existing pillars already part of the main building. She vehemently challenges the said works amount building as stated in exhibit A/2 clause C (6) as no excavation works or new structure has been done on the property.

Plaintiff asserted that excavation works was done on the tiled floor of the terrace where the alleged building was on going but was unable to tender evidence of the said excavation works. Counsel for Defendant in his written submission submits that there is no evidence of excavation works on the property and plaintiff's failure to prove any excavation works by Defendant, her allegations fail.

From the evidence of the parties on record, per a contract of sale i.e exhibit 1 and subsequent sublease dated 26/8/2021 i.e exhibit A and or exhibit 2 respectively, Plaintiff's subleased their interest in the property to Defendant for a period of 74 years. Permit me to shortly discuss the interest both parties

upon the execution of exhibits 1 and A for better appreciation of the upcoming analysis of the issue.

Per exhibit 1, parties on the 10/7/2021, executed a contract for the sale of a two bedroom house, the property in dispute for valuable consideration of $65,000. Under this agreement, Plaintiff undertook to sell and Defendant agreed to purchase the property free from all encumbrances. It is trite learning that where a Vendor sells his property to a purchaser for consideration, the Vendor transfers his interest in the property to the purchaser and divests himself of all his interest in the land. Under such circumstances, the Vendor is expected to assign all his interest in the property to the Purchaser by a deed of assignment. However parties herein on 26/8/2021 executed a sublease and not an assignment. Unlike an assignment where the assignor assigns and divest himself of all his interest in the land to the assignor, with a sublease, the sublessor grants only a part of his unexpired interest in the land to the sublessor and reserves unto himself part of his unexpired interest in the form of a reversionary interest. A careful study of exhibit A clause A1 and Clause B Clause reveals that Plaintiff herein although having 99 years interest in the land on which the property is situated ending in the year 20115, divested itself of interest in the land to Defendant until 2093 i.e for a period of 74 years. Plaintiff reserved part of its unexpired period of his interest in the land to itself. **Section 25 of NRCD 323** states "***Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the document, or their successors in interest".*** Also in the case of **WILSON V BROBBEY [1974] 1 GLR 250 @ 251 Osei-Hwere J** had this to say " *the general rule*

….is that a man is estopped by his deed and although there is not such estoppel in the case of an ordinary signed document, a party of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not". By executing exhibit A, Defendant agreed to the content of same and is bound by them.

Defendant contends that she is only covering space already erected by two pillars on to already existing pillars in the property and not building. She further contended that building a structure comes with digging foundation and roofing it.

Clause C (6) of exhibit A provides that "sub lessee covenants with the sub lessor not to build or permit to be built or erected on the property **any structure or building** except with the consent in writing of the sublessor and in accordance with plans previously submitted to and approved by the sub lessor**"** is acknowledged by both parties and same is not in dispute. The said provision states that the sublessee covenants with the sub lessor not to build or permit to be built or erected on the property **any structure or building** except with the consent in writing of the sublessor and in accordance with plans previously submitted to and approved by the sublessor**".** The key words in this provision are "build or erect" and any
structure or building" To erect also means **to put something in position and make it stand upright whilst to build means** Construct by putting parts or materials together over a period of time and make it permanent." **(see Oxford Learners Dictionary.)**

The question begging for determination is whether or not the extensions carried out by Defendant amount to structure or building as used in exhibit A. In interpreting the word Building or structure as used in clause C(6) of exhibit A, Modern Purposive Approach of interpretation dictate that the ordinary meaning of the word as well as the context in which they are used be taken into consideration.

A structure is defined by the Black's Law Dictionary as "a framework or construction with elements identifiable giving stability and form and able to resist strains and stresses".

Building is also defined as "a structure or edifice erected by the hand of man, composed of natural materials, as stone or wood, and intended for use or convenience"

In the case of **THOME v BARCLAYS BANK LTD (D.C.O) (1976) 2 GLR 126** the Full Bench of the Court Of Appeal speaking through the then CJ, Azu Crabbe defined at holding 4 the word structure as follows *"the word "structure" meant anything which was constructed and it involved the notion of something which was put together, consisting of different things which were so put together or built together, constructed so as to make one whole. "Structural alterations" meant alterations which had affected the form and structure of the premises. In this case the definition of the word "structure" was further held that in In Rolt Hammond's Dictionary of Civil Engineering, p. 221, "structure" is defined as "Any form of construction designed to sustain a load." According to Scott's A Dictionary of Civil Engineering the word "structure" means: "(1) The load-bearing part of a building; (2) [c.e.] Anything built by man, from a hydraulic fill dam built of earth or a pyramid of stone to a hydro-electric power station. A structure is not necessarily roofed, a building is."*

It was further held in the case of THOME V BARCLAYS BANK LTD supra that "structure" in its ordinary sense, means the whole building itself and every part of a building is a structure:"

From the definition of structure and building supra it is not excavation that qualifies works to be considered as a structure or building. Evidence of Defendant excavating the terrace of the property or otherwise before the erecting of the block courses on the property from one pillar of the house to the other is of no or little importance to the determination of the issue at hand. Clause B of exhibit A which precedes clause C (6) describes the property subleased to Defendant as follows "pursuant to the said agreement and in consideration of the sum of Three Hundred And Seventy-Seven Thousand Ghana Cedis (GH 377,000.00) paid by the Sublessee to the Sublessor (receipt

of which the Sublessor hereby acknowledges) and of the yearly ground rent of GHC1,000.00 payable in advance and of the covenants and conditions herein contained, the Sublessor sublets to the Sublessee the property together with the residential building erected thereon **comprising: two bedrooms, living and dining areas Kitchen, terrace and sanitary facilities (emphasis mine)** which is more particularly described in the schedule herein below and in the attached site plan edged red for a period of 74 years commencing 26th day of August 2021 to 25th day of August 2093"

Subsequently at Clause C (6) of exhibit A, sublessee covenants with the sublessor not to build or permit to be built or erected on the property **any structure or building** except with the consent in writing of the sublessor and in accordance with plans previously submitted to and approved by the sublessor**".**

The property subleased to Defendant is well defined in exhibit A clause B, therefore any extensions made to the property that changes the said property as described in the clause B amounts to a structure or building.

A careful study of exhibits B, C, D, E discloses uncompleted block courses laid up to the window level from the one end of the property to a front pillar of property I on a portion of the property identified by both parties as the terrace o the property. Exhibit 3, discloses an advanced stage/completed block laying work from the end of the property to a front pillar of the property with a fitted glass window. The block works are laid upright up to the roof/lintel level the property. The block works are stable and able to resist strains and stress, they are erected by the hand of man and would serve a convenience. The block works are further permanent in nature. The property in its current state as depicted in exhibit 3 has no terrace. The extension works being carried out by Defendant as seen in exhibits B, C, D, E and 3 which has a window fixed to same clearly amounts to a structure as used under clause

C(6) of exhibit A. The extension works carried out by Defendant amounts to a structure.] as used under clause C(6) of exhibit A/2.

Issues (ii) and (iii) whether or not the extension being carried out by Defendant requires her to seek the prior consent in writing of the plaintiff and Whether or not the extensions being carried out by Defendant requires her to submit plans to the Plaintiff for its approval before construction.

Defendant's evidence before the court is that she is not required to seek the writing or submit her plan for approval arguing her extensions on the terrace of the property did not constitute a building or structure as mentioned in clause C (6) of exhibit A/2. An noted in clause C (6) of exhibit A/2, the sublessee is not to build or erect any structure or building on the property **without the consent in writing** of the sublessor and same must be done in accordance with plans **previously submitted to and approved by the sublessor**. It can be inferred from this provision that a sublessee who intends to erect or build any structure or building on the property must submit the plans of the intended structure or building for approval by the sublessor. From the evidence of parties the consent of Plaintiff was not sought by the Defendant prior to the erection of the structure on the terrace of the property no plan submitted to the Plaintiff for approval. The court having found that the "extension works carried out by Defendant amounts to a structure under Clause C (6) of exhibit A/2, prior consent of Plaintiff as well as prior submission of the plan and approval of same by Plaintiff was required before its erection.

The court therefore finds that Defendant is required to seek the written consent and required to submit plans to Plaintiff for it's approval, plan of the extension to be carried out before its construction under exhibit A/2.

From the findings in issues (i), (ii) and (iii) discussed above the court declares that upon a true and proper interpretation of the sublease dated 26/8/2021, the

Defendant cannot change the character of the building without the written consent of Plaintiff.

Whether or not the extension is necessary to prevent the Defendant's little one from falling off the plane porch/terrace and Whether or not other homeowners have carried out similar extensions.

Permit me to discuss the two issues together as it's analysis and case law are similar to avoid sounding repetitive.

Defendant as part of her defence to the suit of plaintiff contended that she had to carry out the extensions on the porch by adding courses of blocks to join existing pillars already part of the main building to prevent her then 2 year old son from falling off the porch/terrace and prevent rain from entering her porch. Defendant makes a further claim that she is not the only homeowner in the estate that have carried out extensions.

She testified on oath that as a mother and a health worker, she knows falling is a number one case of injury to the children and her then 2 year old child had fallen off the terrace on several occasions and she did the extensions to prevent the child and her subsequent children from falling. Further she stated that the extension was also to prevent rainwater from entering the porch and further contended that other homeowners in the estate had made similar extensions. Plaintiff challenged these assertions and contended. Counsel for defendant submits that Plaintiff and their counsel failed to cross-examine Defendant on this evidence therefore same amounts to an admission citing the case of AKUFFO ADDO, BAWUMIA & OBETSEBI (NO.4 V JOHN MAAHAMA, ELECTORAL COMMISSION & NDC (2013- SCGLR) SPECIAL EDITION PAGE 425. The circumstances of this instant case, it cannot be said that the plaintiff failure to cross-examine Defendant on this issue amounts to an admission. This is because issues are joined by parties when a claim of plaintiff is denied and another assertion is put up by the Defendant. as submitted by counsel for Plaintiff in his written submission, in the case of

Adjetey Agbosu vrs Kotey & Others [2003-2004] [2003-2005] 1 GLR 685 at holding 5, page 424 held "The failure of a plaintiff to file a formal reply to a statement of defence did not necessarily amount to an admission of the facts pleaded in the statement of defence and consequently, it was also not necessarily fatal to a plaintiff's case. The legal position was that a reply was not even necessary if its sole purpose was to deny the facts alleged in the defence, for in its absence, there was an implied joinder of issue on the defence and all the material allegations of fact in the defence were deemed denied. However, where the defence included a counterclaim, a reply would become necessary for the purpose of embodying the defence to the counterclaim in the reply."

At the close of pleadings in this case, these assertions of Defendant were set down as issues for trial. Further, Plaintiff under cross-examination vehemently challenged this assertion of Defendant. below is her answer to the question on this issue.

"Q. I put it to you that what Defendant did is not a construction of a building but an extension to a porch in order to prevent her 2 years old son from falling off the porch

A: I don't agree because the blocks you need to dig the ground before you do block work. Beside that per the document we have signed any construction whatsoever, everybody has to submit a request in writing. We look at it and approve. This construction has block works and windows. It is a whole structure on it's own. If she wanted to prevent a child from falling, she could have done a balustrade. In exhibit A paragraph C no. 6 there is a provision that consent and approval of the sub lessor is required for any construction. About 42 homes all with user friendly porch they all have kids in them."

The law is settled that where issues are set down for trial, the party that marks that assertion assumes the evidential burden. **Section 14** of the Evidence Act 1975, NRCD 323 provides "except as provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting". **Section 11(4) of NRCD 323** also states that "the burden of producing evidence required a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence" in the case of AGBOSU AND OTHERS v KOTEY AND OTHERS supra, per holding 6 where the Court stated that that, *"under the Evidence Decree, 1975 (NRCD 323) the burden of producing evidence in any given case was not fixed, but shifted from party to party at various stages of the trial depending on the issues asserted or denied or both".*

Defendant therefore assumed the burden of producing sufficient evidence on which a reasonable mind would conclude that her acts are necessary to prevent a child from falling off the porch and that other homeowners have done similar extensions by as claimed. Save repeating her denied assertions on oath, Defendant failed to lead any credible evidence to buttress her assertions. As held in the Supreme Court in the case of **DON ACKAH V PERGAH TRANSPORT LTD [2010] SCGLR 728 at 736,** held as follows "It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on

all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence.".

In the case of **ZABRAMA v. SEGBEDZI [1991] 2 GLR**

221. And the case of BAAH LTD. v. SALEH BROTHERS [1971] 1 GLR

119 It was held that *"where a party makes an averment in his pleadings which is capable of proof in a positive way and it is denied, that averment cannot be sufficiently proved by just mounting the witness-box and reciting the averment on oath without adducing some sort of corroborative evidence."*

The oral evidence of Defendant that the erected wall, which comes with a window, is necessary to prevent her then 2 year old and future siblings from falling off the porch from is not substantiated expert report. As rightly argued by Plaintiff, there are various temporal ways to be used to prevent the fall of a child on a porch. From exhibit 3, the structure of Defendant appears to create a room out of the terrace rather than to prevent a fall by a child. To prove that the construction as seen in exhibit 3 is necessary to prevent the fall of a child, by any Defendant's evidence on oath in the light of the opposition to same by Plaintiff fails to satisfy the court of the existence of her claims. The court therefore is unable to find that the extension is necessary to prevent Defendant's little one from falling off the plane porch. On the issue of or other homeowners having made similar extensions as asserted by the Defendant, Defendant put no evidence of these developments by other homeowners before the court for consideration the asserting party. The court is therefore unable to find that other homeowners have made similar construction as claimed by the Defendant.

CLAIM FOR COST INCLUDING LEGAL FEES

In respect of Plaintiff's claim for cost on including legal fees, cost naturally follows court proceedings. Nonetheless where one seeks cost including solicitors fees, it becomes imperative for the said solicitors fee to be specified, particularize and proven as same falls under the category of specific/special damage.

There is no evidence of how much Plaintiff paid as solicitors fees. Notwithstanding this, cost as stated supra naturally follows legal proceedings. The court however takes into consideration the fact that Plaintiff engaged legal services for the conduct of this case and naturally would pay some monies to the solicitor as his fees, incurred filing of court processes cost incurred transportation etc. Plaintiff is therefore entitled to cost in this matter. I therefore award cost in the sum of GHC10,000 in favour of Plaintiff against Defendant herein.

CLAIM FOR GENERAL DAMAGES

The Plaintiff further prayed for general damages. General damages are at large and are considered to be the direct natural or probable consequence of the action complained of. It is awarded as compensation to a party for reasonable loss that the party is likely to suffer as a result of a breach of contract or agreement. The Supreme Court in the case of **ROYAL DUTCH AIRLINES (KLM) AND ANOTHER v. FARMEX LTD[1989-90] 2 GLR 623** held "On the measure of damages for breach of contract, the principle adopted by the courts was restitutioin integrum, ie if the plaintiff has suffered damage not too remote he must, as far as money could do it, be restored to the position he would have been in, had that particular damage not occurred. What was required to put the plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost"

In this instant case, although Defendant has breached exhibit A/2, the evidence on record does not disclose any damage suffered by Plaintiff that entitles Plaintiff to restitution as far as they could be in monetary terms. The Court holds therefore that Plaintiff is not entitled to general damages.

CONCLUSION

In conclusion, I hold that the plaintiff has satisfactorily prove their case on a balance of probabilities that Defendant has breached exhibit A clause C(6). I accordingly enter judgment for the Plaintiff in the following terms;

a. I hereby declaration that upon a true and proper interpretation of the sublease dated 26/8/2021, the Defendant cannot change the character of the building without the written consent of Plaintiff.
b. Defendant is hereby restrained from further construction of the unauthorized structure.
c. Defendant is hereby ordered to remove the unauthorized structure within 30 days from today subject to any compromise that may be reached by the parties. In default, Plaintiff may cause same to be removed and surcharge the Defendant with the cost.
d. Cost assessed at GHC10,000.00

PLAINTIFF REPRESENTED BY AMMA ATTAKORA NSIAH PRESENT

DEFENDANT ABSENT

MR HANS AWUDE FOR PLAINTIFF PRESENT
MR MICHAEL AKAMBEK FOR DEFENDANT PRESENT

H/H AFIA OWUSUAA APPIAH (MRS)
CIRCUIT COURT (1) JUDGE