

IN THE CIRCUIT COURT "A", TEMA, HELD ON MONDAY THE 28TH
DAY OF AUGUST, 2023, BEFORE HER HONOUR AGNES OPOKU-
BARNIEH, CIRCUIT COURT JUDGE

SUIT NO. C11/140/21

MKR COMMODITIES LTD ---- PLAINTIFF

VRS.

ISAAC DOTEEB ---- DEFENDANT

PLAINTIFF CO. REP. BY VINOD KUMAR (MARKETING MARNAGER)

PRESENT

DEFENDANT

ABSENT

ISAAC BLANKSON, ESQ. HOLDING THE BRIEF OF KWAKU ADU

MINTAH, ESQ. FOR THE PLAINTIFF

PRESENT

OKYEAME YANKSON, ESQ. FOR THE DEFENDANT ABSENT

JUDGMENT

FACTS

The plaintiff caused a Writ of Summons with an accompanying Statement of Claim to be issued against the defendant for the following reliefs;

- a. Recovery of the sum of GH¢60,000.00 being the balance on quantities of sugar supplied to defendant at his request which sum defendant has since failed to pay in spite of several demands.

- b. Interest on the said sum at the prevailing commercial rate of interest from September 2020 till date of final payment.
- c. Cost inclusive of solicitor's fees.

The defendant entered appearance, filed a Statement of Defence and Counterclaimed against the plaintiff as follows;

- a. Recovery of the sum of GH¢57,575.00 being outstanding commission payment owed and due Defendant from Plaintiff.
- b. Interest on the said sum of GH¢57,575.00 at the prevailing commercial bank lending rate from 1st November, 2020 to the date of full and final payment.
- c. Costs incidental to this suit, including solicitor's fees.
- d. Any other order(s) as this court may deem fit.

The plaintiff avers that it is a company registered under the laws of Ghana and carries on the business of commodities trading. The plaintiff described the defendant as a businessman trading under the name and style Prince PDD Enterprise. The plaintiff says that in August 2020, at the defendant's request, it supplied defendant 1000 bags of 50kgs Brazilian sugar at a unit price of GH¢160 at a total cost of GH¢160,000.00. According to the plaintiff, the goods were supplied to the defendant on a 30-day credit line at its warehouse in Tema and the defendant subsequently sent same to his designated location

with payment to be made at plaintiff's premises in Tema or its designated bank accounts. The plaintiff says that the defendant has since sold the goods but till date he has failed, refused and or neglected to pay an outstanding balance of GH¢60,000.00 in spite of repeated demands for payment. The plaintiff says one of its officers has through several communications via WhatsApp with the defendant demanded payment for the due sum but defendant keeps making one unfulfilled promise after another. The plaintiff says that the defendant is truly and justly indebted to it in the sum of GH¢60,000.00 and he would not pay unless compelled on the orders of this court. The plaintiff therefore maintains that the defendant has no defence to this action.

The defendant denied the claim of the plaintiff. The defendant admits that the plaintiff supplied him with 1000 bags of 50kgs Brazilian sugar which was invoiced in the name of defendant's trading enterprise as a result of prior agreement and understanding between the parties herein for such peculiar transactions. The defendant states that the goods supplied were for the benefit of, and supplied by the plaintiff directly to two customers in Kumasi and Sampa who had been introduced to plaintiff herein by defendant. The defendant says further that since 2018, there has been an oral agreement between the parties herein, and at the time the plaintiff was then represented by Mr. Kamal Lohani, the owner and a director of plaintiff company, to the

effect that the defendant shall earn and be paid a commission of GH¢1.00 on every bag of sugar that plaintiff supplies to customers defendant had introduced to the plaintiff to do business with, which commission paid monthly was aimed at motivating defendant to get more customers for plaintiff and for plaintiff to generate more sales and more revenue.

Additionally, the defendant avers that with regards to the 'commission-based payment, customers introduced by him made their request and orders for plaintiff's sugar through defendant and also sometimes directly to plaintiff. On the basis of the orders thus made by these customers, the plaintiff supplied or delivered same directly from its warehouse to the respective customers' stores or their business location. The defendant says that on the basis of the quantity of bags of sugar supplied to the said customers by plaintiff, he earned and was subsequently paid his total commission accruing for that month. The defendant further says that after the orders have been delivered by the plaintiff to the customers and he (defendant) had been notified of the delivery by both plaintiff and the customers, he was then tasked to undertake the post supply collection of outstanding amounts of money owed plaintiff in respect of the purchase orders made by the customers. According to the defendant, some customers could not immediately make payment to the plaintiff when their orders for sugar had been delivered to them which arrangement had the approval of plaintiff

represented by Mr. Kamal Lohan at all material times.

The defendant further says that given the peculiar business operations of some of the customers he had introduced to plaintiff, the plaintiff represented by Mr. Kamal Lohani at the material time advised him to register a business name which he did. The essence of registering the business was for customers whom the defendant had introduced to the plaintiff and who did not have formal registered business names or enterprises could order or purchase sugar from plaintiff and these orders would be invoiced in the name of defendant's trading enterprise, but the order (for sugar) was in fact and in truth for the benefit of, was supplied to and delivered by Plaintiff directly to such customers. It was in such circumstance that the said 1000 bags of sugar were supplied and though invoiced in the name of defendant's trading enterprise, was supplied from plaintiff's warehouse in Tema and delivered directly to the said two customers by plaintiff.

Again, the defendant says that he did not have any 30-day credit line with the plaintiff but rather such credit line, if any, was for the benefit of customers who could not immediately pay cash to plaintiff for orders delivered to them. The defendant says that pursuant to the 'commission agreement he had with the plaintiff and pursuant also to his task of undertaking the post supply collection of outstanding amounts of money owed the plaintiff from

customers who could not immediately pay for their orders, an outstanding amount of GH¢100,000.00 arising out of the GH¢160,000.00 owed by the said two customers was collected by him and accordingly paid to the plaintiff. The defendant says that the balance of GH¢60,000.00 left to be paid was owed by the Sampa based customer known as 'Sadick' who has vacated the store where he traded, his present whereabouts was unknown and therefore cannot be traced which was the reason the defendant had not been able to collect the outstanding GH¢60,000.00 for onward payment to plaintiff. To the extent that one of Plaintiff's officers has been in touch with Defendant regards the outstanding GH¢60,000.00 owed by this customer in Sampa which he duly informed the plaintiff of through its officers.

The defendant says that the plaintiff owes him commission totaling GH¢57,575.00 which the plaintiff has failed, refused and or neglected to pay him and indicated to the plaintiff that, to the extent that he introduced this Sadick to plaintiff, to ensure that the good relations between the parties is not destroyed, the plaintiff should use the amount of GH¢57,575.00 being commission owed to him to defray the GH¢60,000.00 owed by Sadick while he continues to search for him to recover the said outstanding debt he owed. The defendant therefore contends that the plaintiff is not entitled to the reliefs sought.

The plaintiff in its Reply and Defence to the Counterclaim joined issues generally with the defendant. The plaintiff denies knowledge of two customers in Kumasi and Sampa and maintains that the goods were supplied to defendant personally and at his request. The plaintiff further says that Kamal Lohani has been away in India since February 2020 and even before the plaintiff started operations and has never at any point in time entered into any agreement on behalf of the plaintiff with the defendant. The plaintiff in further reply states that it was incorporated in the year 2019 and commenced operations in 2020 and has no agreement with the defendant for the payment of commission to defendant. In further answer, plaintiff says that all customers that order goods are invoiced directly and never through a third party and all customers pay for goods ordered from plaintiff directly without going through the defendant or any third party. The plaintiff maintains that it has never supplied any goods to third parties through defendant and that it has no agreement with the defendant to pay him any commission on sales and denies being indebted to defendant herein. The plaintiff denies the counter-claim of defendant and maintains that defendant is indebted to plaintiff in the sum of GH¢60,000.00 and plaintiff is entitled to all the reliefs endorsed on the Writ of Summons and Statement of Claim.

At the Application for directions stage, the court set down the following issues for trial contained in the Plaintiff's application for direction filed on 23rd

September 2021 and the defendant's additional issues set down for trial filed on 18th October, 2021

LEGAL ISSUES

1. Whether or not the 1000 bags of 50 kilograms of Brazilian sugar were supplied directly to defendant or through him for two customers in Kumasi and Sampa.
2. Whether or not there exists any agreement between plaintiff and defendant for payment of commission of GH¢1.00 per bag of sugar supplied to customers introduced by defendant.
3. Whether or not plaintiff had actually ever paid to defendant such commission on supplies of bags of sugar supplied by plaintiff to customers introduced to plaintiff by defendant.
4. Whether or not defendant ever undertook post supply collection of outstanding amounts of money owed plaintiff by customers introduced to plaintiff by defendant.

BURDEN OF PROOF

It is trite learning that in civil cases, he who asserts must prove and the standard of proof is proof on a balance of probabilities only. This standard of proof is applicable to a petition for divorce. In the case of **Ashalley Botwe Lands; Adjetey Agbosu & Others v. Kotey and Others** (2003-2004) SCGLR

420, 464, the Supreme Court stated that *“it is trite learning that by the statutory provisions of the Evidence Decree 1975 NRCD 323, the burden of producing evidence in any given case is not fixed, but shifts from party to party at various stages of the trial, depending on the issue(s) asserted and or denied”*. Also, in the case of **Aryeh & Akakpo v. Ayaa Iddrisu** [2010] SCGLR 891 @901, the Supreme Court per Brobbey JSC held as follows:

“A party who counterclaims bears the burden of proving his counterclaim on the preponderance of the probabilities and would not win on that issue only because the original claim has failed. The party wins on the counterclaim on the strength of his own case and not on the weakness of his opponent’s case.”

Also, in the case of **Total Ghana Ltd. v. Thompson** [2011] SCGLR, the court held that *“onus in law lays upon the party who would lose if no evidence was led in the case”* Thus, the burden is on the plaintiff to prove the facts alleged to establish the debt the defendant allegedly owes the plaintiff. Where, as in the instant case, the defendant has also counterclaimed, he bears the burden to prove his counterclaim on a balance of probabilities.

ANALYSIS

To discharge its legal burden, the plaintiff’s representative, Vinod Kumar, Marketing Manager of the plaintiff company testified the he knows the defendant herein as a businessman trading under the name and style Prince

PDD Enterprise. He is a customer of the plaintiff company and he initiated the transaction giving rise to the instant case by placing an order to be supplied sugar. On 28th August 2020, plaintiff at the defendant's request supplied defendant 1000 bags of 50kgs Brazilian sugar at a unit price of GH¢160 with a total cost of GH¢160,000.00. A copy of the invoice for the supply was admitted in evidence and marked as **Exhibit "A"**. According to the witness, the goods were supplied on credit to defendant at the plaintiff's warehouse in Tema and defendant subsequently lifted same to his designated location with payment to be made at plaintiff's premises in Tema or its designated bank accounts.

The plaintiff's witness further testified that the defendant has since sold the goods but till date he has failed, refused and or neglected to pay an outstanding balance of GH¢60,000.00 due plaintiff in spite of repeated demands for payment. Also, he has made several demands on defendant for payment through several communications via WhatsApp for the due sum but defendant keeps making one unfulfilled promise after another. Attached and marked **Exhibit "B"**. Per the witness, the defendant is truly and justly indebted to plaintiff in the sum of GH¢60,000.00 and his many promises to pay has all gone unfulfilled.

The plaintiff denies knowledge of two customers in Kumasi and Sampa and

maintains that the goods were supplied to defendant personally and at his request. The plaintiff further says that Kamal Lohani has been away in India since February 2020 and even before Plaintiff started operations and has never at any point in time entered into any agreement on behalf of plaintiff with the defendant. According to the witness, it is not true that plaintiff has an agreement with defendant to pay him commission on sales. According to his testimony, the plaintiff was incorporated in 2019 and commenced operations in 2020 and has no such agreement with defendant for the payment of commission to defendant. Copies of the certificate of incorporation and certificate to commence business issued to plaintiff are attached hereto and marked **Exhibits "C" and "C1"**. In fact, Mr. Lohani has not been present in Ghana since plaintiff commenced business until December 2021 and he could not have acted on behalf of plaintiff in any agreement with defendant to pay defendant commission. The plaintiff has never paid defendant any commission on any sales neither has plaintiff constituted defendant as its agent in any sales. Again, the plaintiff directly invoices all customers that order goods and has never issued invoices through defendant for a third party. Again, all customers who trade with plaintiff pay for goods ordered directly without going through the defendant or any third party. Also, the plaintiff has never supplied any goods to third parties through defendant and does not know anyone by name Sadick from Sampa and has never engaged defendant on any issue in respect of the said Sadick. Plaintiff does not owe

defendant any money. Rather, it is defendant that is indebted to the plaintiff in the sum of GH¢60,000.00 being the outstanding balance on goods supplied to him.

When the plaintiff's representative was under cross-examination, the lawyers prayed the court for an adjournment to enable them attempt settlement. After several adjournments, on 21st November, 2022, the lawyers announced in court that settlement had broken down for hearing of the case to resume. However, on the next date, Counsel for the defendant expressed interest in settling the matter but the parties were again not successful. Subsequently, the defendant and his Counsel failed to appear in court and the court deemed them to have concluded cross-examination. The defendant failed to appear in court to open his defence though he filed witness statement and supplementary witness statement in the case. It is trite law that witness statement is not evidence. The position of the law on a witness statement not relied on at the trial has been put to rest by the Supreme Court in the case of **John Dramani Mahama v. Electoral Commission & Anor** [Suit No. J1/5/2021], delivered on 11th day of February, 2021, where the Supreme Court referencing **Order 38 rule 3E (5)** held inter alia that: *"The above rule points to the fact that a witness statement filed and served does not constitute evidence in law till the author of the statement mounts the witness box, takes the oath and prays that the witness statement be adopted as evidence pursuant to Order 38 rule 3E(2)..."*

The defendant who participated in the proceedings by filing witness statement, participating in case management conference and participated in the trial when his counsel commenced cross-examination of the plaintiff's representative, but failed to appear after their attempts at settlement to further cross-examine the plaintiff's representative and to open his defence. Thus, the court is disabled from relying on the witness statement. The court has no duty to compel the defendant who is a party to testify in the case since it is the duty of the defendant to defend the suit and to prove his counterclaim before the court. In the case of **Armah v. Hydrafoam Estates Ltd.** (2013-2014) 2 SCGLR 1551 at 1567 as follows:

"A court has no duty to call upon any party to testify in the case; the court acts as an umpire and only hears such evidence as the parties will proffer; whether the parties will testify or not is none of the court's business... After determining the triable issues, the trial court leaves the field clear for the parties themselves to decide who will testify..."

The court having set down issues for trial based on the processes filed by the parties and the court having left the field clear for the parties to lead evidence to establish their respective case, the onus was squarely on the defendant to appear in court to further cross-examine the plaintiff's representative to discredit his evidence and also to put his case across to establish his

counterclaim. However, the need for a defendant to give evidence to explain his version of events culminating in the litigation cannot be gainsaid. Brobbey JSC (as he then was) put it succinctly in the case of **Ashalley Botwe Lands; Adjetey Agbosu & Others v. Kotey and Others** (2003-2004) SCGLR 420, 464, when he stated that:

".... A litigant who is a defendant in a civil case does not need to prove anything; the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realise that it cannot be based on nothing. If the defendant desires the determination to be made in his favour, then he has a duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour..."

The defendant has spurned the opportunity to be heard after due service of hearing notices on him. The evidence of the plaintiff's representative that the goods were supplied to the defendant who requested for the goods and the invoice issued to him personally remains unchallenged. There is also no evidence of a commission agreement between the parties based on which the court can set off the claim of the plaintiff against the counterclaim of the defendant. From the pleadings, the defendant never challenged the supply of the goods and the outstanding balance. The only contention of the defendant

based on the pleadings is that he had a “peculiar” arrangement with the plaintiff company by which he solicited for customers for the plaintiff and received commission and that the goods supplied though invoiced in the name of his Enterprise was not for his benefit but for other customers. However, the defendant failed to lead evidence to establish this assertion.

On the totality of the evidence led by the plaintiff, I hold that the plaintiff proved its claim against the defendant on a balance of probabilities. I therefore hold that the plaintiff is entitled to his claim against the defendant. The counterclaim of the defendant is dismissed.

CONCLUSION

On the totality of the evidence led, I hold that the plaintiff proved his claim against the defendant on a balance of probabilities. I therefore hold that the plaintiff is entitled to the reliefs against the defendant. I accordingly enter judgment in favour of the plaintiff against the defendant as follows;

- a. Recovery of the sum of GH¢60,000.00 being the balance on quantities of sugar supplied to defendant at his request which sum defendant has since failed to pay in spite of several demands.
- b. Interest on the said sum at the prevailing commercial rate of interest from September 2020 till date of final payment.
- c. The Counterclaim of the defendant is dismissed.
- d. Cost of Ten Thousand Ghana Cedis (GH¢10,000) in favour of the

plaintiff against the defendant.

H/H AGNES OPOKU-BARNIEH

(CIRCUIT COURT JUDGE)