

**IN THE TDC DISTRICT COURT HELD AT TEMA ON MONDAY THE 12TH DAY
OF FEBRUARY 2024 BEFORE HER HONOUR AKOSUA ANOKYEWAA
ADJEPONG (MRS.), CIRCUIT COURT JUDGE, SITTING AS AN ADDITIONAL
MAGISTRATE**

SUIT NO. A11/08/19

EMMANUEL TSIKATA

----- PLAINTIFF

H/NO. L/62

COMMUNITY 22, TEMA

VRS

1. TEMA DEVELOPMENT CORPORATION

TDC BUILDING, TEMA

2. WING COMMANDER (RTD) QUANSAH

TDC, COMMUNITY 1 TEMA

3. ALFONSO AMORIN

HSE NO L/61, COMM. 22 TEMA

----- DEFENDANTS

PARTIES: PLAINTIFF PRESENT

THIRD DEFENDANT PRESENT

FIRST AND SECOND DEFENDANTS ABSENT

COUNSEL: DENNIS LARSEY HOLDING THE BRIEF OF ANTHONY LARTEY, ESQ.
FOR

THE PLAINTIFF PRESENT

THEODORE ACHINA-NYARKO HOLDING THE BRIEF OF SOPHIA
ELIKPLIMI (MRS) FOR THE FIRST & SECOND DEFENDANTS

PRESENT

PATRICK A. SOGBODJOR, ESQ. FOR THE THIRD DEFENDANT

PRESENT

JUDGMENT

On the 14th day of November 2018, the Plaintiff herein caused a Writ of Summons to be issued in this Court claiming against the Defendants the following reliefs:

- a. An order directed at the first and second Defendants to restore to the Plaintiff all of the Plaintiff's items which were taken by the workers of the first Defendant or in the alternative to pay the assessed value of the said items.
- b. An order directed at the first and second Defendants to repair the Plaintiff's wall which was broken by the workers of the first Defendant or in the alternative an order for the first and second Defendants to pay the cost of repairing the said wall.
- c. A declaration that the Plaintiff is entitled to raise his fence wall.
- d. An order restraining the third Defendant from interfering with the construction of the Plaintiff's said wall.
- e. Damages against the first and second Defendants for trespass.

- f. Cost including legal fees.
- g. Any other relief or order the Honourable Court may deem fit in favour of the Plaintiff.

The first and second Defendants through their lawyer, filed Statement of Defence on 6th December 2018 and denied liability of the claims of the Plaintiff. The first and second Defendants counterclaimed as follows:

- a. A declaration that Plaintiff has breached the term of the agreement between first Defendant and the Plaintiff to use the land for residential purpose only.
- b. An order for the demolition of the new building which is intended for commercial purpose which is in breach of the terms of the grant of the land.

On 8th January 2019, the third Defendant in his Statement of Defence filed through his lawyer also denied liability of the claims of the Plaintiff and stated that the Plaintiff is not entitled to the reliefs sought in his Statement of Claim or any part thereof. He also counterclaimed as follows:

- a. A declaration that the current construction works being carried out by the Plaintiff are wrongful, illegal and in contravention of the National Building Regulations 1996 (LI 1630).
- b. An order of perpetual injunction restraining the Plaintiff, his agents, privies and assigns from carrying out construction works within the property occupied by the Plaintiff which are in contravention of the National Building Regulations 1996 (LI 1630).
- c. An order to restore damage done to the common boundary fence wall and the electric fence by the Plaintiff's illegal acts of construction.
- d. General damages for distress caused by the Plaintiff.

- e. Costs including legal fees.
- f. Any other order or orders that this Court deems fit.

The Plaintiff subsequently on 28th January 2019 filed a Reply and Statement of Defence to the first and second Defendants' Statement of Defence and Counterclaim, and on same day filed a Reply and Statement of Defence to the third Defendant's Statement of Defence and Counterclaim respectively.

THE CASE OF THE PLAINTIFF

The Plaintiff in his Statement of Claim averred that he shares a common wall with the third Defendant and that he was the one who constructed a fence wall around his house. That the third Defendant placed an electric fence wire on the portion of the fence wall which separate their homes and has also built a storeroom adjoining their common wall. That the third Defendant has a basketball court in his compound and the balls as well as other objects frequently fall into the Plaintiff's home. That the third Defendant also has Close Circuit Television (CCTV) cameras installed in his home but overlooking his home thereby violating his right to privacy. According to the Plaintiff, the third Defendant has resisted and continues to resist every attempt by him to raise their common fence wall. That he decided to construct a gymnasium centre within his house and to protect patrons of the gymnasium and his household, he decided to raise his dwarf fence wall higher. That he obtained a permit from the Ashaiman Municipal Assembly to construct his said gymnasium. The Plaintiff further averred that on or about 2nd August 2018, workers of the first Defendant in the course of their work and under the supervision, instructions and control of the second Defendant scaled over his wall and made away with a number of items belonging to him. That on or about 3rd August 2018 the workers of the first

Defendant again in the course of their employment and under the supervision, instructions and control of the second Defendant returned to his property and broke down part of his wall. The Plaintiff concluded that the first and second Defendants have refused to return his items or repair the wall that was broken while the third Defendant is still preventing his workers from raising the fence wall higher. He claimed as per the endorsement on the Writ of Summons.

THE CASE OF THE FIRST AND SECOND DEFENDANTS

In their Statement of Defence and Counterclaim, the first and second Defendants denied the claims of the Plaintiff. They stated that the Plaintiff was granted the land by the first Defendant which was solely for residential use. That the Plaintiff has breached the terms in the offer letter that granted the land to him. That they noticed the Plaintiff was carrying out a construction of a building for commercial purposes which is contrary to the use of the lease granted by the first Defendant to the Plaintiff. That they only created a hole in the wall of the new building being erected by the Plaintiff as he did not apply for a change of use, to prevent him from continuing with the illegal construction. They concluded that the Plaintiff has refused to come for the tools and added that they cannot allow the Plaintiff to build in breach of the terms of the agreement as the first Defendant has the sole right to grant or refuse the change of use of land taking into consideration certain factors like location and traffic.

THE CASE OF THE THIRD DEFENDANT

The third Defendant in his Statement of Defence and Counterclaim also denied the claims of the Plaintiff and further stated that when he saw the illegal construction activities being perpetuated by the Plaintiff and his assigns he sought to write to the Ashaiman Municipal Assembly regarding the said construction by the Plaintiff. That upon receipt of his letter,

the Ashaiman Municipal Assembly visited the Plaintiff's property and subsequently wrote a letter to him which stated that the construction activities by the Plaintiff was at variance with the permit issued to him and thus in breach of the National Building Regulations, 1996 and the Local Governance Act 936, 2016. He concluded that by virtue of the Plaintiff's conduct he stands to suffer potential losses and damage to his property and that the conduct of the Plaintiff puts his life and that of his family at risk by the failure to adhere to the strict provisions of the National Building Regulations, 1996 (LI 1630). That the Plaintiff is not entitled to the reliefs sought in his Statement of Claim or any part thereof.

At the end of the hearing, all the lawyers for the parties filed their respective written addresses and the Court has duly taken notice of the same.

LEGAL ISSUES

Based on the pleadings and the evidence led, the Court set down the following issues for determination.

- 1. Whether or not the Plaintiff breached clause iii of the terms of agreement between Plaintiff and the first Defendant in the offer letter to the Plaintiff by the first Defendant.*
- 2. Whether or not the Plaintiff can use the said leased plot for commercial purposes.*
- 3. Whether or not the construction works carried out by Plaintiff is in violation of the National Building Regulations.*
- 4. Whether or not the Plaintiff can develop on the common boundary fence wall.*

5. *Whether or not the workers of the first and second Defendants took the Plaintiff's items worth USD125,000.00.*
6. *Whether or not the Plaintiff is entitled to damages against the first and second Defendants for trespass.*
7. *Whether or not the third Defendant is entitled to general damages against the Plaintiff.*

BURDEN AND STANDARD OF PROOF

In civil cases, the general rule is that the party who in his pleadings raises an issue essential to the success of his case assumes the onus of proof. See **sections 10, 11(1) and (4) and 12(1) and (2) of the Evidence Act, 1975 (NRCD 323)**.

Section 12(1) of the Evidence Act, 1975 (NRCD 323), provides that:

“except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities.”

In the case of ***Adwubeng v. Domfe [1996-97] SCGLR 660***, the Supreme Court held thus:

“Sections 11(4) and 12 of the Evidence Decree, 1975 (NRCD 323)... have clearly provided that the standard of proof in all civil actions was proof by preponderance of probabilities – no exceptions were made.”

It is trite learning that in civil cases, the standard of proof is on the preponderance of probabilities. Thus, the Court determines whose case is more probable than not.

Section 12(2) of the Evidence Act, N.R.C.D 323 states:

“Preponderance of the probabilities means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence.”

Thus, in the case of **Serwah v. Kesse [1960] GLR 227**, Van Lare JSC stated:

“The law as I understand it is that in all civil cases the preponderance of probability in favour of a party may constitute sufficient ground for a judgment in favour of that party. The general rule, of course, is that the onus probandi lies on the party who substantially asserts the affirmative of the issue”.

Section 11(4) of the Evidence Act explains the burden of proof in civil cases as follows:

“In other circumstances, the burden of producing evidence requires 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”.

Ackah-Yensu J.A. (as she then was) in the discussion of the burden of proof on a party in the case of **Deliman Oil Company Ltd. v. HFC Bank Ghana Ltd. [2016] 92 G.M.J. 1** reproduced Lord Hoffman’s mathematical analogy in **Re B [2008] UKHL 3** as follows:

“If a legal rule required a fact to be proved (a ‘fact in issue’), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the act is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened”.

In the case of *Memuna Amoudi v. Kofi Antwi, Part 3, [2006] MLRG, 183 at 195*, the Supreme Court per Wood, JSC (as she then was) stated:

“A cardinal principle of law on proof ... is that a person who makes an averment or assertion ... has the burden to establish that his averment or assertion is true. He does not discharge his burden unless he leads admissible and credible evidence from which the fact or facts he asserts can be properly and safely inferred.”

ANALYSIS

I shall now analyse and evaluate the evidence adduced by the parties in support of their respective cases within the context of their corresponding burdens and the prescribed standard of proof as provided under *the Evidence Act, 1975 (NRCD 323)* to resolve the above issues.

- 1. Whether or not the Plaintiff breached clause iii of the terms of agreement between Plaintiff and the first Defendant in the offer letter to the Plaintiff by the first Defendant.*

From the case of the Plaintiff, he decided to construct a gymnasium centre within his house and to protect patrons of the gymnasium and his household, he decided to raise his dwarf fence wall higher. That he obtained a permit from the Ashaiman Municipal Assembly to construct his said gymnasium. It is also the case of the first and second Defendants that, in the offer letter from the first Defendant to the Plaintiff dated 15th December 2005 which the Plaintiff accepted by a letter dated 16th January 2006, the grant

of the land by the first Defendant to the Plaintiff was solely for residential use as stated in clause iii of the offer letter.

From the evidence on record, exhibit '4' is the offer letter dated 15th December 2005 where the first Defendant offered to lease to the Plaintiff a residential plot number RP/22/L/62 at community 22. Exhibit '4' has terms and conditions stated therein. The Plaintiff in exhibit '5' accepted the offer of the first Defendant in his letter dated 16th January 2006. The Plaintiff having accepted the terms and conditions in exhibit '4' was bound by the said terms and conditions unless same were reviewed the by offeror being the first Defendant.

From exhibit '4', clause iii states that *"the land shall be used for the erection of a single storey dwelling house only"*

From the evidence on record, the Plaintiff under cross examination by counsel for first and second Defendants admitted that he entered into an agreement with the first Defendant. He further admitted that one of the clauses in the agreement with the first Defendant limited him to use the land for residential purpose only. He again admitted that he is constructing a gymnasium on the land and the gymnasium is going to be for commercial use. But he disagreed with counsel for the first and second Defendants that he has acted contrary to the agreement between himself and first Defendant to use the land as a dwelling house only by constructing the gymnasium for commercial purpose.

He mentioned one Ephraim as the person whom he paid money to and the said Ephraim asked him to commence his work whilst he waits for the approval. The Plaintiff further told the Court under cross examination that he was not issued with a receipt by the said Ephraim and also told the Court that he does not know if the money he paid to the said Ephraim was not for the first Defendant. From the evidence of the Plaintiff, he dealt with

the said Ephraim however counsel for first and second Defendants submitted that TDC did not send the said Ephraim on its behalf and do not even know the said Ephraim. Clearly whoever that Ephraim was, misled the Plaintiff as having capacity to deal with him on behalf of the first Defendant.

The Plaintiff's narrative about the said Ephraim cannot be accepted by the Court as there is no evidence on record to suggest that the said Ephraim existed and even if he did, there is no evidence that he acted on behalf of the first Defendant which the Plaintiff had an agreement with, as to the use of the property he purchased from the first Defendant. The Plaintiff also told the Court that the said Ephraim told him to go to either TMA or ASHMA and that he asked for the phone number of Mr. Ephraim and the people there told him Ephraim is not there.

From the evidence on record, the Plaintiff also told the Court that he obtained a permit from the Ashaiman Municipal Assembly to change the use of the land to commercial use. However the terms and conditions regarding the usage of the land Plaintiff purchased from the first Defendant were given by the first Defendant and not the Ashaiman Municipal Assembly therefore if Plaintiff wanted to add commercial use to the land which was specifically offered to him for residential use by the first Defendant, it is the same first Defendant the Plaintiff had to go to for the said terms and conditions to be reviewed. From the evidence of DW1 under cross examination, the Ashaiman Municipal Assembly did not have the sole authority to review the change of use of the land first Defendant offered the Plaintiff which he accepted the terms and conditions in respect of the said land.

From the above, it is patently clear from the evidence on record that the Plaintiff breached clause iii of the terms and conditions regarding the offer of the land by the first Defendant to him which he willfully accepted. This is because the Plaintiff admitted that he is

constructing a gymnasium on the land and the said gymnasium is going to be for commercial use knowing very well that such commercial use is contrary to the terms and conditions he accepted to use the land for. Accordingly, I do hereby find that the Plaintiff breached clause iii of the terms of agreement between Plaintiff and the first Defendant in the offer letter to the Plaintiff by the first Defendant which Plaintiff accepted.

2. Whether or not the Plaintiff can use the said leased plot for commercial purposes.

From the facts of the case, the first Defendant leased the land to the Plaintiff. This is evidenced by the offer letter which was accepted by the Plaintiff as discussed above. The agreement however, contains an express covenant that restricts the Plaintiff to use the land for residential purposes only. Therefore, when the Plaintiff agreed to the said terms and conditions in the offer letter, he knew exactly what he was signing up for. The argument by the Plaintiff that he obtained a permit from the Ashaiman Municipal Assembly cannot hold. This is because the lease agreement was made between the first Defendant and the Plaintiff, therefore it is the first Defendant that can give such permit to the Plaintiff to convert the land assigned for residential use into a commercial use. Indeed, during cross-examination, the Ashaiman Municipal Assembly admitted that they could not have given a permit to the Plaintiff to construct the gymnasium without the approval of the first Defendant. It flows from the facts and evidence before the Court that the Plaintiff could not have used the said land leased to him to construct a gymnasium which was to serve a commercial purpose without the approval of the first Defendant.

For that reason, I find from the evidence on record that the Plaintiff cannot use the said plot leased to him by the first Defendant for commercial purposes without the approval of the first Defendant.

I shall next consider issues 3 and 4 together. Issue 3 is *'whether or not the construction works carried out by Plaintiff is in violation of the National Building Regulations'* and issue 4 is *'whether or not the Plaintiff can develop on the common boundary fence wall.'*

Section 106 of the Local Governance Act 2016, Act 936 provides as follows:

"106. (1) A person shall obtain a building permit from a District Planning Authority before undertaking the construction of a building or other structure or undertaking any other work.

(2) The permit shall contain the conditions that the District Planning Authority considers necessary.

(3) A District Planning Authority may give notice in writing in the form set out in the Sixth Schedule, to an owner, occupier or developer of premises, if the owner, occupier or developer

(a) is constructing a building or other structure;

(b) has constructed a building or other structure; or

(c) is working or executing work

without a permit or in contravention of a by-law made by the District Assembly.

(4) The notice shall require

(a) the owner, occupier or developer to show sufficient cause why the building, structure or work should not be removed, altered or demolished on or before the day specified by the District Planning Authority; and

(b) a written response by the owner, occupier, developer or duly authorised agent to be served on the District Planning Authority.

(5) If the owner, occupier or developer fails to show sufficient cause why the building, structure or other work should not be removed, altered or demolished, the District Planning Authority shall by notice order the owner, occupier or developer within one month to remove, alter or demolish the building, structure or other work at a personal cost.

(6) If the owner, occupier or developer fails to comply with the order of the District Planning Authority within the one month, the District Planning Authority may carry out the removal, alteration or demolition and shall be entitled to recover the expense incurred by the District Assembly from the owner, occupier or developer as a debt owed to the District Assembly.

(7) A person who contravenes the terms of a permit, commits an offence and is liable on summary conviction to a fine of not less than two hundred penalty units and not more than four hundred penalty units or to a term of imprisonment of not less than three months and not more than six months or to both the fine and term of imprisonment and in the case of a continuing offence to a fine of not more than four penalty units or each day that the contravention continues after written notice of the contravention has been served on the offender."

The ***National Building Regulation 1996, (LI 1630)*** contains regulations that apply to the erection, alteration or extension of a building as defined in the Regulations.

Regulation 2 of L.I 1630 provides that:

“any person who intends to - erect any building; or make any structural alteration to any building; or execute any works or install any fittings in connection with any building shall apply to the District Planning Authority of the district where the building, structure or works is or is intended to be and shall submit in duplicate the relevant plans with the Form.”

Regulation 33 of L.I 1630 provides that:

“notwithstanding a District Planning Authority may, having regard to the architectural values and the general standard of development of any particular area, reject any application for approval of a building, if in its view, the building would detract from the general trend of development in that area.”

The letter which the Ashaiman Municipal Assembly sent to the third Defendant’s solicitor remarked as exhibit ‘8’ indicates that the permit given to the Plaintiff did not permit the Plaintiff to construct the gymnasium at the boundary fence wall. It follows therefore that the Plaintiff had no authority to construct the said gymnasium at the boundary fence wall. In exhibit ‘8’, the Ashaiman Municipal Assembly intimated that the plan which the Plaintiff sent them was different from what the Plaintiff was actually doing. Plaintiff’s claim that he was only extending the boundary fence wall he shares with the third Defendant because third Defendant had CCTV overlooking his compound and also his claim that items from the third Defendant compound regularly get into his compound was not satisfactorily proved before this Court. From the evidence on record, the Plaintiff had no permit to construct a gymnasium on the common boundary fence wall he shares with the third Defendant. From the evidence of DW1 under cross examination, they realized upon inspection of the third Defendant’s premises that the

Plaintiff was constructing on the common boundary fence wall which was not the nature of the permit he was granted. DW1, an officer from Ashaiman Municipal Assembly in his evidence under cross examination testified that the Plaintiff did not build according to the building permit they issued him. That the nature of the permit was just to extend portions of the existing building to be used as a gymnasium. The Plaintiff also admitted under cross examination that there is no space between his boundary wall and that of the third Defendant, as he stated that there is no where he will say there is a space because he is just working on the boundary.

Flowing from the above analysis, I find from the evidence on record that the construction works carried out by Plaintiff is in violation of the National Building Regulations, and I also find that in the absence of the requisite permit and authorization from the appropriate institution(s), the Plaintiff cannot develop on the said common boundary fence wall.

5. Whether or not the workers of the first and second Defendants took the Plaintiff's items worth USD125,000.00.

From the evidence on record, the second Defendant told the Court that, he and his workers on behalf of the first Defendant, seized the tools of the workers of Plaintiff and also punched holes in extent of four concrete building blocks to deter the Plaintiff from perpetuating the breach any further after the Plaintiff had failed to stop same upon warnings by the first Defendant. The second Defendant admitted that they indeed took the tools that the workers of the Plaintiff were using to construct the said gymnasium therefore the taking of the tools which were being used by the Plaintiff's workers for the said construction by the first and second Defendants is not in issue.

What is in issue is the kind of tools and the value of the said tools that were taken. The second Defendant told the Court that they did not take inventory of the tools when they took them and further stated that the tools they seized are with the first Defendant and the Plaintiff has refused to come for them. In as much as there is no inventory of the tools taken by the second Defendant and his men on the authority of first Defendant, the Plaintiff who is claiming for these items or in the alternative their value of USD125,000.00 did not also lead any evidence on these items or their value. There is no cogent evidence on record to establish the type of tools and the claim of USD125,000.00 being the value of the said tools. The Plaintiff did not lead any evidence to substantiate his claim of the said tools and their worth being USD125,000.00 that were seized or taken by the first Defendant acting through the second Defendant and his men.

Gbadegbe JSC in the case of *Sagoe v. SSNIT (2011) 30 GMJ 133; (2012) 52 GMJ 47* held:

“The party who asserts the affirmative of an issue has the incidence of the legal burden ...”

The burden of proof as explained above in this judgment in both statutory and case law clearly indicate that he who alleges has the burden of proof. With the Plaintiff's allegation of the tools his workers were using for the said construction valued USD125,000.00; and without Plaintiff adducing an iota of evidence to substantiate the said assertion, after same was denied by the first and second Defendants, I do hereby dismiss the allegation of the Plaintiff that the said tools are worth USD125,000.00 for want of evidence.

However considering the admission by the second Defendant that they took the tools which the workers of the Plaintiff were using to construct the said gymnasium, I hereby order the first and second Defendants to restore to the Plaintiff all the Plaintiff's tools which were taken by the workers of the first Defendant, forthwith.

6. Whether or not the Plaintiff is entitled to damages against the first and second Defendants for trespass.

It can be gathered from the above analysis and evidence on record that the Plaintiff actually breached the agreement to use the said land that was leased to him by the first Defendant for residential purposes only, when he decided to construct a gymnasium on the said property for commercial purpose and claimed he got permit from Ashaiman Municipal Assembly to construct the said gymnasium for commercial purposes. However the evidence on record indicates that the Ashaiman Municipal Assembly did not grant the Plaintiff permit to develop on the boundary fence wall.

From the evidence of second Defendant on one of their visits in community 22, the team including himself observed that the Plaintiff was still developing and all attempts to enter his house through the gate proved futile. Therefore, they had access to the property of the third Defendant and jumped over the boundary wall to seize the tools of the workers of Plaintiff and also punched holes in extent of four concrete building blocks to deter the Plaintiff from perpetuating the breach any further.

On the other hand, the agreement between the Plaintiff and the first Defendant does not have a provision for the remedy of breach of the clause iii of exhibit '4' which the Plaintiff breached. It is also not in dispute from the evidence on record that the second Defendant acting on the authority of the first Defendant entered the Plaintiff's property with his men where they took the working items of the Plaintiff to make him stop breaching the said agreement between the first Defendant and the Plaintiff.

The lease agreement between the Plaintiff and the first Defendant does not contain a forfeiture clause. The said lease offer which was accepted by the Plaintiff has no specific re-entry clause. See *section 29 (1) of NRCD 175*. With the exception of a usual covenant to pay rent which has an inherent proviso of re-entry, a breach of any covenant does not automatically entitle the landlord to exercise a right of re-entry. The covenant must be fortified by a forfeiture clause.

In their book *Ghana Land Law and Conveyancing, second Edition, B J Da Rocha and CHK Lodoh*, at 72 stated:

“A breach of a covenant by the lessee also gives rise to the lessor’s right to forfeit the lease. However, a breach of a covenant does not automatically entitle the lessor to forfeit the lease unless the lease expressly provides for forfeiture for a breach of the particular covenant. In Sackey v Ashong, the tenant covenanted to repair the leased premises. The covenant was not fortified by a forfeiture clause. In an action by the landlord to recover possession because of the tenant’s alleged breach of covenant to repair, it was held that in the absence of an express provision, a breach of a covenant to repair does not give the landlord a right to re-entry.”

Also in *Bassil v Said Raad [1957] 3 WALR, Ollennu J*, as he then was said as follows:

“Now at common law, there can be no forfeiture for breach of a covenant under a lease unless there is an express provision in the lease for re-entry...”

In the instant case, the lease agreement between the Plaintiff and the first Defendant does not contain any provision for re-entry therefore, no forfeiture can arise upon breach of the covenant. Hence, in the circumstances of the instant case, the first Defendant could not have exercised the right to re-enter the land without taking the appropriate legal steps to abate the continuous breach by the Plaintiff.

Therefore, in the absence of any provision in the lease agreement to support the trespass onto the Plaintiff's property, the first and second Defendants did as unlawfully as they ought to have taken a more appropriate legal steps to prevent the Plaintiff from his continued breach of the said agreement.

I accordingly find from the evidence on record that the Plaintiff is entitled to damages for trespass against the first and second Defendants under the circumstances of the instant case.

7. Whether or not the third Defendant is entitled to general damages against the Plaintiff.

In the case of *Ankomah v. City Investment Co. Ltd [2012] SCGLR 1123* it was held that where the claimant succeeds in proving both the subject matter and the value, he is entitled to be awarded the value he claims. But when he succeeds in proving only the subject matter but fails to prove the value of the subject matter, the claimant is not to be denied any compensation. Thus the claimant is to be entitled to general damages.

Also in the case of *Delmas Agency Ghana Limited v. Food Distributors International Limited [2007-2008] SCGLR 748*, the Supreme Court held that an award of general damages is such as the law would presume to be the natural or probable consequence of the Defendant's act. It arises by inference of the law and therefore need not be proved by evidence. The law implies general damages in every infringement of an absolute right.

In the instant case, the third Defendant being a Plaintiff in his counterclaim of general damages against the Plaintiff herein, makes the Plaintiff a defendant in the said counterclaim.

The third Defendant in his pleading stated that by virtue of the Plaintiff's conduct he stands to suffer potential losses and damage to his property and that the conduct of the Plaintiff puts his life and that of his family at risk by the failure to adhere to the strict provisions of the National Building Regulations, 1996 (LI 1630).

In his evidence before the Court, the third Defendant told the Court that the said construction activities damaged aspects of the electronic fence affixed on the common fence wall. That the said construction activities by the Plaintiff has put him and his family in great torment as they now fear for their lives, limbs and integrity of their property due to the refusal or neglect of the Plaintiff to abide by the strict rules of the National Building Regulations.

The Plaintiff denied the claims of the third Defendant in his Reply. However the evidence on record clearly indicates that the Plaintiff was constructing on the said common fence wall. The Plaintiff admitted under cross examination that there is no space between his boundary wall and that of the third Defendant, as he stated that there is no where he will say there is a space because he is just working on the boundary. The evidence on record indicates that the Plaintiff was constructing on the common boundary fence wall he shares with the third defendant, as the Plaintiff admitted this fact under cross examination.

From the admission of the Plaintiff that he is working on the boundary wall between his property and that of the third Defendant, the subject matter is proven in the sense that, the said common wall was affected including the third Defendant's electric fence on the

wall as the construction on the said common wall cannot go on without same affecting the electric fence on it.

The third Defendant could not prove by way of special damages how much the wall and his damaged electric fence cost however, since the evidence on record indicates that the Plaintiff worked on the said common wall and on the balance of probabilities, this affected the electric fence of the third Defendant because Plaintiff's construction on the common fence wall which had an electric fence affixed to it, will certainly affect the said electric fence and its security implications on the third Defendant. Considering the findings above from the evidence on record that, the construction works carried out by Plaintiff is in violation of the National Building Regulations and that in the absence of the requisite permit and authorization from the appropriate institution(s), the Plaintiff cannot develop on the said common boundary fence wall, together with the above analysis and applying the principles and authorities on general damages to the facts of the instant case, the third Defendant in the circumstances shall be entitled to general damages against the Plaintiff.

CONCLUSION

The Plaintiff prayed for an order directed at the first and second Defendants to restore to the Plaintiff all of his items which were taken by the workers of the first Defendant or in the alternative to pay the assessed value of the said items; an order directed at the first and second Defendants to repair his wall which was broken by the workers of the first Defendant or in the alternative an order for the first and second Defendants to pay the cost of repairing the said wall; a declaration that he is entitled to raise his fence wall; an order restraining the third Defendant from interfering with the construction of his said

wall; damages against the first and second Defendants for trespass, cost including legal fees and any other relief or order the Honourable Court may deem fit in his favour.

From the evidence on record, the Plaintiff did not adduce any evidence before this Court on the cost of repairs or the extent of damage that was caused to the said wall. The Court cannot make a determination from nothing as there is not sufficient evidence on record on the said claim by the Plaintiff.

Relying on the authorities cited above and the findings of this Court from the evidence on record, the first and second Defendants therefore, trespassed onto the Plaintiff's property in their quest to stop him from constructing the said gymnasium for commercial purpose. Consequently the Plaintiff is entitled to damages for trespass. From the analysis supra, and the entire evidence on record the Plaintiff is not entitled to his remaining reliefs save the order for the first and second defendants to return the Plaintiff's working tools they took from his workers to him; as the evidence on record do not support the grant of his remaining reliefs.

A counterclaim is a separate and independent action with the burden of proof no different from the Plaintiff's legal burden. In the case of *Op. Kwasi Asamoah v. Kwadwo Appea (2003-04) SCGLR 226 at 246*, it was held that:

"The position with regards to proof of the Defendant's case was that since they made a counterclaim, they assumed the same onus of proof as lay on the Plaintiff."

Reference is also made to the case of *Nii Odoi Kwao Asumang & 2 Ors v. William Sowah Charwey & 14 Ors (2014) 75 GMJ 108 at 135*.

The first and second Defendants counterclaimed for a declaration that Plaintiff has breached the term of the agreement between first Defendant and the Plaintiff to use the land for residential purpose only. An order for the demolition of the new building which is intended for commercial purpose which is in breach of the terms of the grant of the land.

From the above analysis and considering the entire evidence on record, I find that the first and second Defendants have been able to prove their claim of the Plaintiff's breach of the agreement between Plaintiff and first Defendant on a balance of probabilities; and therefore are entitled to their declaratory relief. The Court is unable to order for demolition of the said construction as same was not part of the agreement between Plaintiff and first Defendant as being the consequence of such breach. The first Defendant would have to take the necessary legal step as provided in *Act 936* in dealing with constructions without permit.

The third Defendant also counterclaimed for a declaration that the current construction works being carried out by the Plaintiff are wrongful, illegal and in contravention of the National Building Regulations 1996 (LI 1630), an order of perpetual injunction restraining the Plaintiff, his agents, privies and assigns from carrying out construction works within the property occupied by the Plaintiff which are in contravention of the National Building Regulations 1996 (LI 1630), an order to restore damage done to the common boundary fence wall and the electric fence by the Plaintiff's illegal acts of construction, general damages for distress caused by the Plaintiff, costs including legal fees and any other order or orders that this Court deems fit.

From the evidence before this Court and the foregoing analysis, the third Defendants could not lead satisfactory evidence that he is entitled to the entire reliefs contained in his counterclaim. From the evidence on record, the third Defendant on a balance of probabilities, is entitled to general damages against the Plaintiff for the Plaintiff's construction on the common fence wall between them which had third Defendant's electric fence wall on same; and restoration of the damage done to the common fence wall as well as the electric fence on the said common fence wall.

Flowing from the above analysis, there is a finding by this Court that the construction works carried out by Plaintiff is in violation of the National Building Regulations. However, it is the Assembly under which the said construction falls that has the capacity to seek the said declaratory relief being sought by the third Defendant. It is the Assembly that has the power to take steps and do the needful under *section 106 of Act 936* as set out above in this judgment. Likewise it is the Assembly that has the capacity to seek an injunction order under *LI 1630*. Therefore the third Defendant after making a complaint to the Ashaiman Municipal Assembly ought to have joined the said Assembly to the suit to seek such reliefs and also ensured they did the needful as required of them under the relevant laws. Accordingly the Court is unable to grant such declaratory relief and injunction order in favour of the third Defendant.

The Court of Appeal applying the principle held in the case of *Fordjour v. Kaakyire [2015] 85 GMJ 61* when His Lordship Ayebi J.A. espoused:

"It has to be noted that the Court determines the merits of every case based on legally proven evidence at the trial and not mere allegations or assertions in the pleadings".

On the basis of the entire evidence before this Court and the findings above, I hereby find on the preponderance of probabilities that all the parties herein have been able to partly discharge the burden placed on them to prove their respective cases.

In the circumstances, I hereby enter judgment as follows:

1. I hereby order the first and second Defendants to restore to the Plaintiff all of the Plaintiff's items which were taken by the workers of the first Defendant, forthwith.
2. I award an amount of GH¢1,000.00 in favour of the Plaintiff against the first and second Defendants as damages for trespass.
3. I hereby declare that Plaintiff has breached the term of the agreement between first Defendant and the Plaintiff to use the land for residential purpose only.
4. The Plaintiff is ordered to restore the damage done to the common boundary fence wall between his property and the third Defendant's property when he sought to develop on same and is further ordered to restore the electric fence on said common fence wall.
5. I award an amount of GH¢2,000.00 in favour of the third Defendant against the Plaintiff as general damages.
6. Considering the circumstances of the instant case, and the fact that each party succeeded in part, I believe it will be prudent for the parties to bear their own costs and so I will make no order as to costs.

H/H AKOSUA A. ADJEPONG (MRS)
(CIRCUIT COURT JUDGE)

