

**IN THE TDC DISTRICT COURT HELD AT TEMA ON FRIDAY THE 14<sup>TH</sup>**  
**DAY OF JULY 2023 BEFORE HER HONOUR AKOSUA ANOKYEWAA**  
**ADJEPONG (MRS.), CIRCUIT COURT JUDGE, SITTING AS AN**  
**ADDITIONAL MAGISTRATE**

**SUIT          **NO.****  
**A2/27/2019**

**DANIEL LARYEA AMARTEY**          -----          **PLAINTIFF**  
**H/NO. A33**  
**COMMUNITY 4, TEMA**

**VRS**

**KOJO MENSAH**                          -----          **DEFENDANT**  
**NEW LAND, TEMA**

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**PARTIES:**  **PLAINTIFF PRESENT**  
                  **DEFENDANT ABSENT**

**COUNSEL:**  **EMMANUEL KYEI YANKSON, ESQ. HOLDING THE BRIEF OF**  
**ERIC**  
                  **ASUMAN-ADU, ESQ. FOR THE PLAINTIFF PRESENT**  
                  **K. N. ADOMAKO-ACHEAMPONG, ESQ. FOR DEFENDANT**  
                  **ABSENT**

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**JUDGMENT**

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On the 2<sup>nd</sup> day of January 2019, the Plaintiff herein, caused a Writ of Summons to be issued in this Court against the Defendant claiming the following reliefs:

- a. Recovery of GH¢1,500.00 being money Defendant owes Plaintiff.

- b. Interest on the GH¢1,500.00 from 13<sup>th</sup> June 2015 till final date of judgment.
- c. Cost.

The Defendant denied liability and filed his Statement of Defence on 21<sup>st</sup> March 2019, after the parties attempted settlement at the Court Connected Alternative Dispute Resolution (CCADR) but were unsuccessful.

#### THE CASE OF THE PLAINTIFF

The Plaintiff averred in his Statement of Claim that he is a businessman and lives at Tema whilst the Defendant deals in the sales of land and lives at Newland at Afienya. He continued that the Defendant agreed to sell a piece or parcel of land to him at the cost of GH¢10,000.00 which land is located at Newland Afienya. That on 13<sup>th</sup> June 2015 he made a part payment of GH¢1,500.00 to Defendant who took him to the site to show him the land. The Plaintiff continued that he went to the land only to realize that the land has been encroached upon by someone who has deposited stones and sand unto the land to claim ownership. That the Defendant failed to give him a site plan of the land. According to the Plaintiff, he demanded for a refund of the part payment of GH¢1,500.00 which amount the Defendant failed to pay in spite of several demands since 13<sup>th</sup> July 2015 until the Defendant's conduct and behavior was reported to the police at Main Harbour on three occasions for an assistance but he blatantly refused to pay or refund the GH¢1,500.00 to him. He concluded that the Defendant has shown a clear intention not to pay the said amount to him unless compelled by this honourable Court to do so. He therefore claimed per the reliefs endorsed on the Writ of Summons.

The Plaintiff in his evidence in chief told the Court that the Defendant informed him that he had a parcel of land situate at Newland, Afiencya which he wanted to sell to him at a cost of GH¢10,000.00 so he agreed to purchase the said plot of land at the said price and made part payment of GH¢1,500.00 to the Defendant on 13<sup>th</sup> June 2015. That the Defendant took him to the site and showed him the land then he requested for a site plan from the Defendant but he failed to give him same. That he subsequently visited the land in dispute and discovered that the land has been encroached by someone who had deposited sand and stones on the land seeking to claim ownership. According to the Plaintiff the said person in possession is developing same with lightning speed. He tendered in evidence exhibit 'A' being a photograph of a land with wall on it to that effect. The Plaintiff further repeated his assertions in his pleading and contended that he is entitled to all his reliefs endorsed on his Writ of Summons and Statement of Claim.

The Plaintiff did not call witness and thereafter closed his case.

#### THE CASE OF THE DEFENDANT

The Defendant stated in his evidence in Court that he agreed to sell a piece or parcel of land to the Plaintiff at a cost of GH¢10,000.00 at Newland, Afiencya. That the Plaintiff made part payment of GH¢1,500.00 to him and he took him to the site to show the land to him. That the Plaintiff needs to pay all the purchase price of the land for him to be vested with the title of the land. That the Plaintiff later demanded his money from him alleging that the land he showed him has been encroached upon by someone. That the Plaintiff reported him to the police and was invited to the police station but after explaining to the police they saw no

substance in Plaintiff's claim and struck the case out. The Defendant concluded that the land sold to the Plaintiff is lying there undisturbed by anybody and nobody is laying claim to it as alleged by the Plaintiff. That the land is free from all encumbrances and that the Plaintiff needs to pay up the balance and be vested with the ownership of the land.

The Defendant did not call witness and closed his case thereafter.

*The legal issues to be determined are:*

1. *Whether the land Defendant sold to the Plaintiff has been encroached upon and being developed; or same is available and undisturbed by anybody.*
2. *Whether or not the Plaintiff is entitled to the reliefs endorsed on the Writ of Summons.*

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.*

**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”.*

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.”*

In the case of *Fosua & Adu-Poku v. Adu-Poku Mensah-Ansah [2009] SCGLR 310,* the Supreme Court held that where the Plaintiff is able to produce sufficient evidence to prove his case then the onus shifts to the Defendant to lead evidence that would tilt the balance of probabilities in his favour. This principle is found in Section 14 of the Evidence Act, supra, which provides as follows:

*“Except as otherwise provided by law, unless 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 that party is asserting.”*

Also, in the case of *In Re: Ashalley Botwe lands; Adjetey Agbosu and Others v. Kotey and Others (2003-04) SCGLR 420*, Brobbey JSC interpreted section 11(1) of the Evidence Decree 1975 (N.R.C.D 323) at pages 464 to 465 and held 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 the determination depends on evaluation of facts and evidence, the Defendant must realize that the determination cannot be made on nothing. If the Defendant desires the determination to be made in his favour, then he has the 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....”*

I shall now examine and evaluate the evidence adduced by the Plaintiff in support of his case and the Defendant’s defence within the context of the prescribed standard of proof as provided under *sections 10 – 14 of the Evidence Act, 1975 (NRCD 323)*.

The Plaintiff in his Statement of Claim stated that the Defendant agreed to sell a piece or parcel of land to him at the cost of GH¢10,000.00 and on 13<sup>th</sup> June 2015 he made a part payment of GH¢1,500.00 to Defendant who took him to the site to show him the land. That he subsequently went to the land and realized that same had been encroached upon by someone who has deposited stones and sand unto

it to claim ownership. That he demanded for a refund of the part payment of GH¢1,500.00 but the Defendant failed to pay.

The Defendant denied the Plaintiff's assertion that there is another person on the land and developing same and stated that the land is lying there undisturbed by anybody as nobody is laying claim to it.

The Defendant having denied the assertion of the Plaintiff that the land is being developed by another person, the Plaintiff had a burden to establish his averment. In his evidence before the Court, the Plaintiff tendered exhibit 'A' which is a photograph of a land with wall on it dated 15<sup>th</sup> August 2015. Counsel for Defendant in cross examining the Plaintiff told him that exhibit 'A' does not make any reference to the land, as there is no endorsement at the back so it is not the land in question. The Plaintiff however maintained his position under cross examination that, that is the land. That after taking the money the Defendant told him that there is a small dispute on it but he will make sure he gives it to him.

From the evidence on record the Plaintiff was able to lead some evidence to support his claims on the balance of probabilities, by tendering a photograph of the said land, as he maintained his position during the trial that, that was the land and it was being developed by another person. The Defendant also asserted in his defence and evidence that, the land sold to the Plaintiff is lying there undisturbed by anybody. The onus therefore shifted to the Defendant to lead evidence that would tilt the balance of probabilities in his favour by adducing evidence to establish the assertion in his defence.

In the case of *Bank of West Africa Ltd. v. Ackun* [1963] 1 GLR 176-182, S.C., Sarkodee-Addo JSC stated:

*“... The party who in his pleadings raises an issue essential to the success of his case assumes the burden of proof ...”*

The Defendant having made the assertion in his defence that the land he sold to the Plaintiff is lying there undisturbed by anybody assumed the burden to prove same after that assertion was denied by the Plaintiff. Nonetheless, the Defendant could not discharge this burden.

In the course of the proceedings, on 13<sup>th</sup> May 2020, the Court upon an application by the Defendant, ordered the appointment of a neutral licensed surveyor to visit the locus in question to assist in the identification of the land in issue. However, as at 3<sup>rd</sup> August 2022, counsel for Plaintiff submitted to the Court that the orders made by this Court with regards to the survey instructions were not complied with, by the Defendant even though the Plaintiff complied with his part. He therefore prayed the Court to vacate the said order. In view of the fact that the said order was given upon an application by the Defendant and considering that the Defendant had failed to comply with same and further to that, neither the Defendant nor his lawyer attended Court notwithstanding proof of service on the Defendant, the Court vacated the said order given on 13<sup>th</sup> May 2020.

In the instant action, it is undisputable from the evidence on record that the Plaintiff paid an amount of GH¢1,500.00 to the Defendant. The Defendant's defence is that exhibit 'A' is not the land he sold to the Plaintiff and brought an application for the Court to visit locus and further appoint a surveyor to use the site plan to ascertain whether or not the land is being developed by another person. The Plaintiff having produced a photograph of a developing land and maintained during the trial that, that was the land the Defendant sold to him, the



burden shifted to the Defendant to prove his assertion in his defence that the land he sold to the Plaintiff is lying there undisturbed by anybody. The Defendant however could not discharge this burden and he blatantly refused to comply with the Court's order to enable him establish his assertion after he made an application to the Court for the said order. The Defendant could not substantiate his assertion even though the Court afforded him the opportunity to do so.

Having made the point above, I am fortified in holding that the land which the Defendant purported to sell to the Plaintiff is as shown in the photograph exhibited by the Plaintiff. I find from the evidence on record that the land which the Defendant purported to sell to the Plaintiff has been encumbered by another person suggesting that the Defendant failed to ensure the land he purported to sell to the Plaintiff was a vacant land.

The Plaintiff's case is that he wants a refund of the part payment he made to the Defendant since the land Defendant sold to him is being developed by someone else. From the evidence on record, it is not in dispute that the Plaintiff made part payment of GH¢1,500.00 to the Defendant. The Defendant stated under cross examination that the said GH¢1,500.00 was not for the purchase of the land but for the land documentation for him to do a search at Lands Commission to verify whether the documents are genuine and the land he is talking about is true. However he never pleaded this material fact and did not also state it in his evidence in chief but brought it up under cross examination. I therefore deem this as an afterthought by the Defendant that the GH¢1,500.00 Plaintiff paid was not for the purchase of the land but for the land documentation. Whatever it is, there is no doubt from the evidence on record that the Plaintiff paid an amount

of GH¢1,500.00 to the Defendant in relation to a parcel of land he wanted to buy from the Defendant.

In **Klah v. Phoenix Insurance Company Ltd [2012] 2 SCGLR 1139**, it was held that:

*“where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to other facts, instances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances from which the Court can be satisfied that what he avers is true”. See also: **Majolagbe vrs Larbi (1959) GLR 190** on proof in law.*

The Defendant asserted that the land he sold to the Plaintiff was available and undisturbed but he could not lead sufficient evidence to prove that after Plaintiff vehemently denied that allegation and tendered a photograph of the said land with a wall on it. Therefore, the Defendant did not help his case even after the Court granted him an order to enable him establish his assertion in his defence. Merely repeating his averment on oath does not discharge the burden on him.

In the case of **Boakye v. Asamoah [1974] 1 GLR 38 at 45**, the Court held that:

*“legal or persuasive burden is borne by the party who would lose the issue if he does not produce sufficient evidence to establish the facts to the requisite standard*

*imposed under section 10 of the Evidence Act, 1975 NRCD 323 that is, by a preponderance of probabilities."*

The Defendant assumed the burden of proof by virtue of the assertion in his defence; consequently the legal or persuasive burden was borne by the Defendant and was thus required to prove to the Court that the said land he sold to the Plaintiff was available and undisturbed by anybody therefore the Plaintiff needed to pay up the balance and be vested with ownership of the property. This, the Defendant could not discharge because he did not lead sufficient evidence regarding same except repeating his averments on oath.

On the other hand, the Plaintiff was able to persuade the Court with his evidence on record as it is not in doubt that the Plaintiff paid an amount of GH¢1,500.00 to the Defendant.

On the basis of the evidence before me, I accordingly find that the Plaintiff has been able to prove his case on the balance of probabilities that the Defendant owes him the money he is claiming. The burden at this point shifted to the Defendant to prove by a balance of probability that the Plaintiff is not entitled to his claim because the land for which he took Plaintiff's money is available and undisturbed by anybody being his defence but no such proof was established.

For the foregoing reasons, I find that the Plaintiff is entitled to the reliefs endorsed on the Writ of Summons. In the circumstances, I enter judgment in favour of the Plaintiff against the Defendant as follows:

1. Recovery of GH¢1,500.00 being money Defendant owes Plaintiff.
2. Interest on the said GH¢1,500.00 at the prevailing commercial bank rate from July 2015 to date of judgment.

3. I award costs of GH¢2,000.00 against the Defendant in favour of the Plaintiff, considering the conduct of the Defendant in the proceedings which caused undue delay in the proceedings.

**H/H AKOSUA A. ADJEPONG**

**(MRS)**

**(CIRCUIT COURT JUDGE)**