

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

SUIT NO.
A2/28/2019

DANIEL LARYEA ----- PLAINTIFF
COMMUNITY 4, TEMA

VRS

PATIENCE KOOMSON ----- DEFENDANT
NEW LAND, AFIENYA

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

JUDGMENT

On the 2nd 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¢240.00 being outstanding balance of money Defendant owes.

- b. Interest on the GH¢240.00 from October 2018 till final date of judgment and cost.

The Defendant denied liability and filed her Affidavit in Opposition on 21st March 2019, after unsuccessful attempt at settlement at the Court Connected Alternative Dispute Resolution (CCADR).

THE CASE OF THE PLAINTIFF

In his evidence, it is the Plaintiff's case that he is a businessman and knows the Defendant who is a trader. That sometime in October 2015, the Defendant informed him that she had a deep freezer for sale so he expressed interest in same and they agreed on a purchase price of GH¢800.00. The Plaintiff continued that he made payment of GH¢340.00 as initial deposit and later indicated that he was no longer interested in purchasing the item so he requested that the Defendant should refund the money he paid to her, to him. That the Defendant however refunded GH¢100.00 out of the GH¢340.00 leaving an outstanding balance of GH¢240.00. According to the Plaintiff, the Defendant has failed or neglected to pay the outstanding balance despite persistent demands he has made for her to pay him his money. He concluded that the Defendant will not pay the outstanding balance unless she is compelled by this honourable Court to do so.

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

THE CASE OF THE DEFENDANT

In her affidavit in opposition to the affidavit in support of the Writ of Summons, the Defendant stated that she was very much opposed to the claim of the Plaintiff. That the Plaintiff wanted to buy a deep freezer from her at a price of GH¢1,000.00 and deposited GH¢240.00. That the Plaintiff started eating banku from her on credit amounting to GH¢120.00; and that the amount left with her is GH¢120.00. She continued that the freezer is still there which she even brought it to Court on her first appearance in Court. According to the Defendant, the Plaintiff has to pay her the balance of GH¢880.00 to pick the freezer which is still with her. She therefore prayed the Court to order the Plaintiff to pay her the balance of GH¢880.00 to pick up the freezer.

Let me put it on record that the instant case suffered series of adjournments at the instance of the parties because although the Court had made the parties attempt amicable settlement at the CCADR but were unsuccessful, before the hearing and in the course of the hearing the parties pleaded for time to attempt settlement again, on about three occasions which were unsuccessful. In addition to that the Defendant did not attend Court on several occasions despite being aware of the Court sittings.

The Defendant led evidence in chief in open Court by relying on her Witness statement filed on 6th May 2019, however, she did not avail herself to be cross examined by counsel for the Plaintiff, after counsel asked her only one question and sealed her mouth for continuation of the cross examination. In view of that, the evidence of the Defendant was expunged from the records by the Court, upon an application by counsel for Plaintiff.

Refer: section 62(2) of the Evidence Act, 1975 (NRCD 323)

A party has himself to blame for failing to attend Court when there is evidence that he has been served or was aware of the Court sitting, for he cannot complain of not being heard by the Court.

In the case of *Republic v. Court of Appeal, Accra Ex Parte East Dadekotopon Development Trust, Civil Motion No J5/39/2015, dated 30- 07-15, SC Unreported*, it was held that:

“There could not be a breach of the rules of the audi alteram partem rule, when it is clear from the fa

Adinyira JSC also in the case of *Nana Ampofo Kyei Barfour v. Justmoh Construction Co. Ltd. & Others [2017] 113 G.M.J. 118 at pages 128-129* restated the principle in these words:

“In the plethora of cases cited by counsel for the Plaintiff for example, Republic v. High Court (Fast Track Division) Accra; Ex parte State Housing Co. Ltd. (No. 2) (Koranten-Amoako Interested Party) [2009] SCGLR 185; Republic v. High Court (Human Rights Division) Accra, Ex parte Akita (Mancell-Egala & Attorney-General – Interested Parties) [2010] SCGLR 374 at page 379; where the Supreme Court held the principle of the audi alteram partem rule was inapplicable; it was clearly evident, on the face of the record that the party complaining of a breach of his/her right to be heard, was present in Court on the day the case was adjourned for hearing or was served with hearing notice but chose not to be present either by himself or counsel to be heard on the due date.”

Order 25 rule 1(2) (a) of the District Court Rules, 2009 (C.I. 59), provides that:

“Where the Plaintiff attends and the Defendant fails to attend, dismiss the counterclaim, if any, and allow the Plaintiff to prove the claim”

Relying on the above reasons and authorities, and further considering that the Defendant was present in Court on the day the case was adjourned for continuation of the hearing but chose not to be present either by herself or counsel to be heard on the due date, the Court proceeded to close the hearing since the Plaintiff had earlier closed his case.

The legal issue to be determined is whether or not the Plaintiff is entitled to the reliefs endorsed on the Writ of Summons.

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.”

This was reiterated by Amissah JA in the consolidated case of *Ricketts & Another v. Addo & Others and Ricketts v. Borbor & Others [1975] 2 GLR 158-169, C.A.*, when the learned judge stated that:

“... the burden of persuasion which a Plaintiff has to satisfy in every case is no more than proof on a balance of probabilities”.

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”.

Notwithstanding the fact that the evidence the Defendant led in open Court was expunged from the records as explained above, the Defendant had earlier filed an affidavit in opposition to the affidavit in support of the Writ of Summons. Given that an affidavit evidence is also accepted as an evidence in a matter, the Court evaluated same together with the Plaintiff's evidence on record to determine the instant case.

I have examined the Defendant's affidavit in opposition with the view to establishing whether or not any jurisdictional issue or other crucial reasonable legal defence has been raised by the Defendant, however I find none as I am unable to attach any probative value to the said affidavit in opposition given the fact that the Defendant having filed Witness Statement as ordered by the Court and further relied on same as her evidence in chief, failed to attend Court to be cross examined both on her evidence in chief and affidavit evidence.

The Plaintiff testified that he made payment of GH¢340.00 as deposit to the Defendant to purchase a deep freezer from her which he decided not to buy the said item again so he requested for a refund of his money but the Defendant paid GH¢100.00 and failed to pay the remaining GH¢240.00. The Defendant's response per her affidavit evidence was that the Plaintiff wanted to buy a deep freezer from her at a price of GH¢1,000.00 and deposited GH¢240.00 but he ate banku from her on credit to the tune of GH¢120.00.

Under cross examination of the Plaintiff by the Defendant on 24th September 2020, the Plaintiff maintained his position and explained how come the Defendant is owing her. Therefore from the processes and evidence on record it is not in doubt that the Plaintiff had his GH¢240.00 with the Defendant.

However the Defendant failed to appear before the Court to be subjected to cross examination as to her defence that the Plaintiff bought banku from her on credit amounting to GH¢120.00. As stated supra, the Court is unable to attach any weight and credibility to the defence of the Defendant raised in the affidavit evidence, given her unavailability to be cross examined on same.

It needs to be reiterated here that this matter being a civil action, the burden of proof on the Plaintiff is nothing more than proof on the preponderance of probabilities.

In the absence of concrete evidence on record against the claim of the Plaintiff, I do hereby find that the Plaintiff is entitled to his reliefs as endorsed on the Writ of Summons.

I accordingly enter judgment for the Plaintiff against the Defendant as follows:

1. Recovery of GH¢240.00 being outstanding balance of money Defendant owes the Plaintiff.
2. Interest on the said GH¢240.00 at the prevailing commercial bank rate from October 2018 to date of judgment.
3. I assess costs of this action at GH¢800.00 against the Defendant in favour of the Plaintiff, having considered the conduct of the Defendant in the proceedings which caused undue delay in the proceedings.

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