**CORAM: HER WORSHIP AMA ADOMAKO-KWAKYE (MS.), MAGISTRATE, DISTRICT COURT '2' KANESHIE SITTING AT THE FORMER STOOL LANDS BOUNDARIES SETTLEMENT COMMISSION OFFICES NEAR WORKERS' COLLEGE, ACCRA ON 29TH AUGUST, 2023.**

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**SUIT NO. A11/60/21**

**COMFORT N.A. ARYEETEY**
**H/NO. 16**
**GBAWE, ACCRA** :: **PLAINTIFF**

**VRS.**

**DAVID NSONOWAH**
**ACCRA** :: **DEFENDANT**

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## JUDGMENT

### Introduction

The Plaintiff herein instituted this action against the Defendant on 2nd February 2021 for the following reliefs:

a. Replacement value of the said vehicle.
b. General damages for loss of use of the vehicle.
c. Costs inclusive of legal fees.
d. Any other order that the Honourable Court may deem fit.

The Plaintiff's case is that she is the owner of a Toyota Camry vehicle with Registration Number GX 388-14 and Chassis number 4TIBE46K38U781042, which vehicle she gave to her son-in-law for him to act as its driver since she had been advised by her doctor to discontinue

driving. She averred that on 2nd February 2018, her son-in-law informed her of Defendant's interest in renting her vehicle and with her permission, the car was to be driven by her son-in-law's friend but the latter had an emergency and he therefore permitted the Defendant to drive the car himself since he indicated that he was a licensed driver. The Plaintiff averred that she was later informed that the vehicle had been involved in an accident and from police investigations, she got to know that the Defendant's license had expired three years prior to the accident and also that the accident was caused by another vehicle.

She stated that her insurers denied liability when she put in a claim for insurance due to the Defendant's expired license and she consequently informed Defendant who indicated that he would inform his lawyers for the matter to be resolved. She stated that the Defendant later informed her that he would pay the replacement value of the car, but for some time, she did not hear from him as he refused to answer her calls until she finally reached him one day and he said she could make a criminal case against him.

The Plaintiff averred that some days after the accident, her son-in-law accompanied the Defendant to her office and Defendant admitted that he was the one driving her vehicle during the accident and he promised to replace the vehicle. She stated that she was subsequently informed by her son-in-law that he had been told by the Defendant that he was shipping a vehicle to Ghana as replacement but to date, the Defendant had failed to do so and had the accident vehicle in his possession, making her incur transportation cost for her daily commute.

In his Statement of Defence filed on 12th April 2022, the Defendant averred that he did not know the Plaintiff and had had no discussion or transaction with her. He stated that the accident was caused by another vehicle and any liability or claims were to be borne by the insurers of the vehicle which caused the accident. He denied having in his possession the accident vehicle. The Defendant averred that he was not liable to any of the Plaintiff's reliefs,

stating further that the matter was with the police and the Attorney General's advice was yet to be issued.

**Issue**

From the claim and evidence adduced before this Court, the main issue this Court ought to determine is whether or not the Plaintiff has any claim against the Defendant. In discussing this issue, the Court would address if the Plaintiff has any cause of action against the Defendant.

**Evaluation of Evidence and Resolution of Issue**

It is trite that in civil cases, the general rule is that the party who in his/her pleadings or writ raises issues essential to the success of his/her case assumes the onus of proof. The one who alleges, whether a plaintiff or a defendant, assumes the initial burden of producing evidence. It is only when such a party has succeeded in producing evidence that the other party will be required to lead rebuttal evidence, if need be. Proof lies upon him who affirms or alleges, not upon him who denies since, by the nature of things, he who denies a fact cannot produce any proof. See **Sections 11(1) & (2), 12(2) and 14 of the Evidence Act, 1975 (NRCD 323)**; **Tagoe v. Accra Brewery [2016] 93 GMJ 103 S.C**; **Deliman Oil v. HFC Bank [2016] 92 GMJ 1 C.A.**

In the case of **Takoradi Flour Mills vs. Samir Faris [2005-2006] SCGLR 882**, the Supreme Court captured the trite position of the law relating to the burden of proof and stated as follows at page 900:

> *"To sum up this point, it is sufficient to state that this being a civil suit, the rules of evidence require that the Plaintiff produces sufficient evidence to make out his claim on a preponderance*

*of probabilities, as defined in Section 12(2) of the Evidence Decree, 1975 (NRCD 323). Our understanding of the rules in Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the Plaintiff or the defendant, must be considered and the party in whose favour the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favorable verdict."*

Similarly, in **GIHOC Refrigeration & Household vs. Jean Hanna Assi (2005-2006) SCGLR 458**, the Supreme Court held that:

*"since the enactment therefore, except otherwise specified by statute, the standard of proof (the burden of persuasion) in all civil matters is by a preponderance of the probabilities based on a determination of whether or not the party with the burden of producing evidence on the issue has, on all the evidence, satisfied the judge of the probable existence of the fact in issue... Hence, by virtue of the provisions of NRCD 323, in all civil cases, judgement might be given in favour of a party on the preponderance of the probabilities..."*

The Plaintiff therefore had the onus of discharging the burden of producing sufficient evidence in respect of his claim for damages on a balance of probabilities.

In Plaintiff's evidence in chief by way of Witness Statement filed on 14th September, 2022. She stated that sometime in the year 2018, she gave her Toyota Camry vehicle to her son-in-law to be her driver as she had been advised by her doctor not to drive. She testified that her son-in-law enquired from her if she would permit her car to be rented out and she agreed on condition that he drives the vehicle himself, and that a third party could only drive the vehicle if that person had the requisite license.

According to the Plaintiff, on 2nd February 2018, her son-in-law informed her of Defendant's desire to rent her vehicle and since the son-in-law had a prior engagement, she allowed him to give the vehicle to his friend to drive it. She stated that the friend of her son-in-law also had an emergency and wanted to cancel the trip but the Defendant informed the son-in-law's

friend that he was a licensed driver and could drive the car, thus the vehicle was given to him. She further testified that her son-in-law informed her the next day that her vehicle had been involved in an accident and towed to the Suhum Police Station. She stated that Police investigations revealed that the Defendant's driver's license expired three years before the accident and also revealed that the accident was caused by the other vehicle. A copy of the expired license was tendered as Exhibit A and the Police Accident report as Exhibit B.

It was Plaintiff's evidence that she subsequently put in a claim for insurance with her insurers but they denied liability because the Defendant who was driving the car at the time of the accident had no valid license. She tendered in evidence a copy of a letter from her insurers as Exhibit C. She said that having informed Defendant of this development, the Defendant said he would inform his lawyer for the matter to be resolved and after some time, he informed her that he would pay the replacement value of the vehicle but he has failed to do so and has the accident vehicle with him whilst she incurs cost on transportation for her daily commute.

The Defendant also testified by relying on his witness statement filed on 20th September 2022. His evidence was that he previously did not know the Plaintiff as the owner of the vehicle in issue until this case arose. He testified that sometime in the year 2018, he contacted his friend known as Mike Osei to get him a car for him to travel to Suhum for a funeral, and the said friend brought the car to him at home. He stated that he went to the funeral with the car and on his way back, a vehicle which was overtaking another vehicle ran into the vehicle he was driving, causing an accident, and he was rushed to the Suhum Government Hospital where he was admitted and discharged the next day. He further stated that a Policeman came to take a statement from him and he was later informed that the matter had been referred to the Attorney General's office for advice.

The Defendant further testified that the driver who caused the accident admitted that the accident was his fault and indicated that upon receipt of the Attorney General's advice, he

would pay for the car. The Defendant stated that he only got to know that his license had expired after the accident but that the Plaintiff is not entitled to the reliefs she seeks as the accident was not caused by him.

In determining whether or not the Plaintiff has any claim against the Defendant, it is imperative for this Court to consider the position of the law on agency. This is because, from the facts and evidence adduced, it is evident that a principal and agent relationship existed between the Plaintiff and her son-in-law which relationship enabled the latter to deal with third parties in respect of her vehicle.

Agency refers to the legal relationship between a principal and an agent, where the agent acts on behalf of the principal. It is a fiduciary relationship which arises where a person (the principal), manifests assent to another person (an agent) that the agent should act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act. The law of agency enables a principal to elect and authorize his or her agent to deal with strangers (third parties) on his or her behalf, which relationship makes the agent owe a fiduciary duty to the principal. The Court in the case of **Pole v Leask (1863) All ER 535** succinctly explained the concept of agency when it held that:

*"No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or by placing another in a situation in which according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case, it is only by the will of the employer that an agency can be created"*

In Ghana, agency can be created in various ways. The relationship of principal and agent may be created through express or implied authority given by the principal to the agent (Actual Authority), customary or usual practices in a particular trade or business, ratification by the principal or by the operation of agency by estoppel. Thus, according to the case of **City Investment Company Ltd v. Mrs Juliana Adade and Others (2017) JELR 66131 (HC)**,

the court speaking through His Lordship Justice Eric Kyei Baffour held that: *"There are a number of ways agency can come into play including express or implied authority given by the principal to the agent to act. It is also trite that agency could also come into play by virtue of the agent doing what is customary or usual in a particular trade or business. Agency may also be operational by virtue of ratification by the principal and also by the operation of agency by estoppel under section 26 of the Evidence Act NRCD 323."* These are all valid ways in which agency can come into play.

Agency arising out of agreement will always be consensual but it need not be contractual. It may be gratuitous. It is therefore sufficient if there is consent by the principal to the exercise by the agent of authority on behalf of the principal. If the principal has given prior consent to the agent acting on his behalf, then the agent can be said to have actual authority. Thus, in **Freeman & Lockyer v Buckhurst Part Properties Ltd [1964] 2 QB 480**, it was held that; "An actual authority is a legal relationship between the principal and the agent created by a consensual agreement to which they alone are parties"

The general principle of law is that the agent will only be entitled to indemnity from the principal if he acts within the scope of his actual authority. However, if the agents act outside the scope of his authority, he may be liable to his principal for breach of an implied warranty of authority. An agent cannot have actual authority when he exceeds an express limit on his authority or when he does something his principal has expressly prohibited. In the case of **Arhin v. Kisiwaa (1978) JELR 66335 (HC)**, it was held that an agent who acts outside the scope of and in breach of her agency becomes directly liable to the plaintiff. In this case, the defendant sold tickets that were not lawfully allotted to her by the director, thereby breaching her authority. The Court stated that the defendant is liable to the plaintiff based on breach of warranty of authority. See also the cases of **Dalex Finance and Leasing Company Ltd. v. Ebenezer Denzel Amanor & Others (2021) JELR 107271 (SC)** and **Yaw Kyei v. Henrietta Dei Nikoi (2017) JELR 108683 (HC)**.

It is important at this stage to point out that there is Disclosed agency and Undisclosed agency. A disclosed principal is one whose existence the third party is aware of at the time of contracting with the agent. If the name of the principal is known to the third party, then the principal is described as a named principal. If the name of the principal is unknown to the third party, then the principal is an unnamed principal. Here, his existence is known but not his name. It is important to note that an agent who acts on behalf of a disclosed principal cannot be held liable for the acts or omissions of the principal, unless there is an express agreement to the contrary. This principle was established in the case of **Oliver Akpene Baku v. Cynthia Amoah and First Turn Services (2017) JELR 69004 (HC).**

However, if the third party is unaware of the existence of the principal at the time he contracted with the agent, that is, where the third party thinks that the agent is contracting on his own behalf and not for someone else, the principal is said to be Undisclosed. In the case of **Montgomerie v United Kingdom Mutual Steamship Association (1891) 1 QB 370**, the court held that where a person contracts as an agent for a principal, the contract is that of the principal and not that of the agent; and is prima facie, at common law the only person who may sue and be sued.

The general rule is that the agent is not a party to the contract made on behalf of his disclosed principal. However, the mere fact that a person acts as an agent does not preclude him from being liable to the third party. Thus, in the case of **Lewis v Nicholson (1852) 18 QB 503**, the Court held that even though the agent was not liable to be sued as a principal, he was liable for damages occasioned by the absence of authority. The agent may therefore be liable for breach of warranty of authority, liable for fraud and in an action of deceit.

From the evidence adduced before this court, Plaintiff testified that sometime in the year 2018, she gave her Toyota Camry vehicle to her son-in-law to be her driver and the said son-in-law enquired from her if she would permit her car to be rented out which she agreed on the condition that he drives the vehicle himself, and that a third party could only drive the

vehicle if that person had the requisite license. The son-in-law therefore became Plaintiff's agent by Plaintiff's will. Plaintiff manifested this will orally and by her conduct of placing her son-in-law in a position in which according to ordinary rules of law, her son-in-law is understood to represent and act for her who has so placed him.

This was evident under cross examination of Plaintiff by Defendant. The following as happened under cross examination is worth reproducing;

> *Q. I put it to you that you are not into car rental business to rent your car out.*
>
> *A. That is so but I am a car owner and permission can be sought from me for my car to be used. I have permitted my son-in-law to use the car or be in charge of it.*

The Plaintiff (principal) thus elected and authorized her son-in-law (agent) to deal with third parties on her behalf in respect of her vehicle, which relationship makes the son-in-law owe a fiduciary duty to the Plaintiff. Since the Plaintiff gave her son-in-law prior consent to act on her behalf, the son-in-law therefore had actual authority. I must however point out that Plaintiff's authority was not without limits. From her evidence, she testified that she gave her consent and for that matter her authority with the condition that the son-in-law (agent) drives the vehicle himself or in the event where a third party is to drive, the third party must have a license. The effect of this condition is that when the son-in-law breaches this condition by renting the car to a third party who does not have a licence, the son-in-law will be acting outside the actual authority given to him by the Plaintiff and may be liable to the Plaintiff for a breach of an implied warranty of authority.

It was Plaintiff's (Principal) testimony that on 2nd February 2018, her son-in-law (Agent) informed her of Defendant's (Third party) desire to rent her vehicle and since the son-in-law had a prior engagement, she allowed him to give the vehicle to his friend to drive it. She stated that the friend of her son-in-law also had an emergency and wanted to cancel the trip but the Defendant informed the son-in-law's friend that he was a licensed driver and could drive the car, thus the vehicle was given to him. Defendant on the other hand testified that

he previously did not know the Plaintiff as the owner of the vehicle in issue until this case arose. This is what transpired under cross examination of Plaintiff by the Defendant;

> *Q. I put it to you that I have no car rental agreement with you and you have also not shown any such agreement to the court.*
>
> *A. That is correct because I do not rent cars. It is my son in law who rents the car. Defendant came to me in my office that he was the one in charge of the car during the accident and he would ensure it is repaired but he has failed to keep to his word.*

In the mind of the court, the son-in-law (Agent) should have ensured that the Defendant had a licence which was a prerequisite condition of the authority given to him by the Plaintiff if he wished to act within the scope of his agency. By doing so, he would have acted within the scope of the Plaintiff's authority and would have made the transaction that of his principal; the Plaintiff. Only then, would Plaintiff have been able to sue the Defendant (Third party). The son-in-law's (Agent) failure to act within the authority given to him by the Plaintiff (Principal) therefore did not make the transaction one authorised by the Plaintiff. In essence, Plaintiff was not a party to the contract made between the son-in-law and the Defendant because the son-in-law acted outside the scope of the authority given to him by the Plaintiff, his principal.

A cause of action refers to the legal basis or grounds on which a plaintiff brings a lawsuit against a defendant. It is essential for a plaintiff to have a valid cause of action in order to proceed with a legal action. If a plaintiff fails to establish a cause of action, the Court may dismiss the case. See the cases of **Irene Omaboe v. Sophia Laate (2016) JELR 107715 (HC)** and **SIC Insurance Company Ltd. v. Ivory Finance Company Ltd. & 4 others (2018) JELR 68857 (SC)**. In the case of **W.O.1. (Rtd) Kingsley Owusu v. Kofi Kwabia Agyekum & 2 Others (2019) JELR 107450 (HC)**, the Court emphasized that a cause of action consists of a set of facts that, if proven, would entitle one party to obtain a judgment against the other

party. The Court held that the plaintiff failed to disclose a cause of action as he did not claim ownership of the property and lacked the legal right to sue.

Based on these cases, it is clear that having a valid cause of action is crucial for a Plaintiff to proceed with a legal action. If a plaintiff fails to establish a cause of action against the specific person sued, the Court would dismiss the case. From the law of agency discussed by the Court, it is reasonable which same is borne out of the law for this Court to conclude that Plaintiff should have sued the driver of the other vehicle for the damages she is seeking since the evidence before this Court shows clearly that the accident was caused by that other driver. She could have sued her son-in-law as well (and/or his friend) for having acted outside the scope of authority. Since Plaintiff's son-in-law (Agent) acted outside the scope of the authority given to him by the Plaintiff (Principal), he made the contract his own. As it stands, there is therefore no privity of contract between the Plaintiff and the Defendant herein.

**Conclusion**

Having regard to the totality of the evidence adduced, the Court is of the considered view that the Plaintiff has no cause of action against the Defendant and the suit is accordingly dismissed.

Cost of GH₵ 5,000.00 is awarded for the Defendant against the Plaintiff.

**[SGD]**
**AMA ADOMAKO-KWAKYE (MS.)**
**(MAGISTRATE)**