

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 13TH NOVEMBER, 2023.

SUIT NO. A2/988/23

EVANS VUKEY

ABOSSEY OKAI

:: PLAINTIFF

ACCRA

VRS.

FOUAD DIP

:: DEFENDANT

LAPAZ, ACCRA

JUDGMENT

Introduction/Background

Per a Writ of Summons issued by the Plaintiff on 3rd July, 2023, the Plaintiff claimed against the Defendant for the following reliefs:

1. *An order for the immediate payment of GH¢15,000.00 being balance of supply of Toyota Land Cruiser body parts to Defendant;*
2. *Interest on the said amount until date of final judgment; and*
3. *Costs.*

Although the Plaintiff prayed for his suit to be placed on the undefended cause list as per his Writ of Summons and Affidavit in Support of claim, the affidavit filed without more, could not satisfactorily ground the Court placing the suit on same and as such the suit was placed on the general cause list, requiring the Plaintiff to lead evidence. It is the Plaintiff's case that he is a dealer in spare parts whereas the Defendant also deals in cars. According to Plaintiff, the Defendant had his number online and they built a business relationship where Plaintiff often sold his spare parts to the Defendant and based on the trust they developed in each other, no receipts were issued in their transactions.

It was the case of the Plaintiff that sometime in September 2021, the Defendant bought body parts of Toyota Land Cruiser 2018 model to a tune of GH¢25,000.00 on credit with a promise to pay GH¢ 10,000.00 the next day but he rather paid this amount in three days and promised to pay the outstanding balance of GH¢15,000.00 within fourteen days by which time he would have completed working on the car and received payment from his client. Plaintiff averred that Defendant reneged on his promise to pay and subsequently gave promises without fulfilling any which compelled Plaintiff to lodge a complaint with the Kaneshie Police Station in March 2022. At the Police Station, the Defendant promised to pay GH¢ 2,000.00 every fortnight yet reneged on this promise to pay as well and refused to pick calls from the police or Plaintiff.

According to Plaintiff, he went to Defendant's house one Sunday and was told he was asleep but a scene was caused which made the Lapaz police to show up and Defendant again promised to pay the amount he owed the Plaintiff but weeks later, Defendant visited the Plaintiff only to complain about the effect of Covid-19 on his business although he had completed the work and received payment. Plaintiff asserted that he caused his lawyers to write to the Defendant to demand the outstanding amount and Defendant's

lawyers replied, proposing to pay by instalment but Defendant has still not paid the outstanding balance of GH¢15,000.00, hence Plaintiff's resort to the Court machinery.

The Defendant was duly served with the Writ of Summons and Hearing Notice on 7th July 2023 per the Affidavit of Service on record. He was subsequently served with the Plaintiff's witness statement and another hearing notice on 22nd August 2023. Notwithstanding personal service of all these processes, the Defendant never appeared in Court and pursuant to **Order 25 Rule 1(2)(a) of the District Court Rules, 2009 (C.I. 59)**, the Plaintiff was permitted to prove his case. The Defendant had been afforded the opportunity to defend the suit or present his side of the matter but he chose not to be present to challenge Plaintiff's claim and his failure to avail himself of the opportunities afforded him effectively bars him from later pleading to have the same opportunity he declined to embrace reactivated. See the cases of **Mence Mensah v E. Asiamah [2011] 38 GMJ 174 SC, The Republic v. Court of Appeal, Accra; Ex parte East Dadekotopon Development Trust and Another [2015] DLSC 3207, The Republic v High Court (Fast Track Division); Ex parte State Housing Co Ltd. (No. 2) (Koranten-Amoako Interested Party) (2009) SCGLR 185 and Poku v Poku [2007-2008] SCGLR 996.**

Though the Defendant did not appear before the Court to challenge the suit, the Plaintiff is not entitled to automatic grant of his claims just because the Defendant did not attend court. Plaintiff has to satisfy the burden of proof on him before the Court will grant the reliefs he seeks.

Issue

The issue for determination by this Court is;

- i. Whether or not the Plaintiff is entitled to recover an amount of GH¢ 15,000.00 from the Defendant as being the balance for the supply of Toyota Land Cruiser body parts?

The issue of interest would be discussed as ancillary issue. Cost follows the event so the relief for costs would be granted or refused based on the Court's discretion.

Legal Analysis and Evaluation of Evidence

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 favourable 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 this claim on a balance of probabilities.

In his evidence in chief by way of Witness Statement filed on 14th August, 2023 and adopted by the Court on 11th September 2023, the Plaintiff testified by basically repeating all his depositions in his affidavit. He however went further by tendering in evidence two exhibits, Exhibits 'A' and 'B'. Although he had made reference to an Exhibit 'C', no such exhibit was tendered. From the evidence adduced before this court, it is clear that the parties entered into a contract of sale for the purchase of the body parts of Toyota Land Cruiser 2018 model to a tune of GH¢ 25,000.00. However, after the Plaintiff supplied the said goods to the Defendant, the latter has failed to perform his obligation of paying the purchase price in full.

I have considered the exhibits tendered in evidence by the Plaintiff to prove his claims against the Defendant. It is clear from Exhibit 'B', the letter dated 19th April, 2023 written

by Defendant's lawyer in response to Plaintiff's demand notice (Exhibit 'A') that the Defendant did indeed enter into an agreement with the Plaintiff to purchase body parts of Toyota Land Cruiser 2018 model worth GH₵ 25,000.00. From the said exhibit, Defendant acknowledged that he has been able to pay an amount of GH₵ 10,000.00 leaving an outstanding amount of GH₵15,000.00 to be paid. Defendant admitted his indebtedness and assured the Plaintiff through his lawyers to pay the outstanding sum. However, Defendant has failed to pay the amount owed to the Plaintiff. This piece of evidence amply supports Plaintiff's claims against the Defendant. The Defendant's admission of liability in Exhibit 'B' is clear and unequivocal. This Court therefore accepts same and finds as a fact which same is borne out of the evidence adduced that the Defendant is indebted to the Plaintiff in a sum GH₵ 15,000.00.

Plaintiff in his evidence further testified that aside the GH₵15,000.00 owed him by the Defendant, he lent Defendant an amount of GH₵1,200.00 to assist the Defendant to pay his workers. According to him, Defendant has failed to pay this money he borrowed from him as well. I must state that this vital piece of evidence is not borne out of any portion of the Plaintiff's claims before the Court as endorsed on his Writ of Summons and in his affidavit. He cannot therefore purport to amend his Writ of Summons by as it were, 'smuggling' this portion into his evidence. Quite apart, the Plaintiff did not lead any evidence to prove this alleged loan he gave to the Defendant. Mere assertions will therefore not suffice to entitle the Plaintiff to this claim for the alleged GH₵1,200.00.

On the issue of interest payable, the Court must avert her mind to the guidelines laid down by the courts. The Court in the case of **Standard Chartered Bank (Ghana) v Nelson [1999-2000] GLR 366** held that; *"interest may be awarded where: (i) by the custom or trade practice. Such interest is usually awarded on money clause upon proof of custom or trade practice: see Pappoe v Bank of British West Africa (1933) WACA 287; or (ii) by agreement in transactions*

between parties where such interest may become payable upon action brought after default: see Senedza v Djokoto [1991] 2 GLR 8; or (iii) interest charges arising out of contracts—actually stated or implied: see Kaas Fisheries Ltd v Barclays Bank Ltd [1989-90] GLR 1. In Royal Dutch Airlines (KLM) v Farmex Ltd [1989-90] 2 GLR 623 at 644-645, SC expressed himself thus: “Interest is normally awarded to the plaintiff where the defendant’s breach of contract has deprived him of the opportunity to work with the money to earn profit or income. The power of the courts to award interest is derived from section 98 of the Courts Act, 1971 (Act 372) and the Courts (Award of Interest) Instrument, 1984 (LI 1295) and the rate to be awarded is the bank rate prevailing at the time the order was made by the court.” (iv)By statute. Interest to be claimed under statute may arise under (a) the usury laws (Moneylenders Ordinance, Cap 176/(1951 Rev) or under LI 1295. In the case of Senedza v Djokoto (supra) Benin, J (as he then was) considered the application of LI 1295 to an action for the recovery of an interest-free loan which the defendant had subsequently defaulted in paying. At 87 of the report his lordship put the issue of the award of interest in graphic form when after dismissing the defendant’s counterclaim with costs he stated: “But thereafter when the defendant became in breach of the agreement to pay, it entitled the plaintiff to be awarded interest on the sum. Can he be awarded interest without putting in a claim for it? Yes, a court can award interest without any claim being made in the pleadings, more particularly when power has been given by a statute . . . The defendant’s breach of the agreement to pay as I said entitled the plaintiff to recover interest. Interest is awardable by virtue of the Courts (Award of Interest) Instrument 1984 L.I. 1295).”

The Plaintiff as part of his reliefs has prayed this Honourable Court to order interest on the outstanding amount to be paid by the Defendant. From the evidence adduced, the transaction took place in September 2021. It has been two years since the parties concluded the transaction and the Defendant has to this day not paid the amount due Plaintiff. This court is mindful of the fact that the Plaintiff could have used the money for something profitable and gained from same. Also, the value of the amount owed will not

be the same as the value of the money at the time the transaction was concluded. In view of the evidence adduced and the fact that the amount could have been put to other use and would not have the same value now, the Plaintiff would be entitled to be awarded interest on the money.

A prayer has also been made for cost. The policy rationale behind the institution of costs in litigation has been judicially articulated in **SCOA Motors v Koranteng [1967] GLR 263**, where Azu Crabbe JA (as he then was) said; *"The real object of awarding costs is to recoup a plaintiff who had successfully established his right to maintain the litigation which he had commenced or the defendant who had been wrongly dragged into court and harassed with litigation."* In order not to frustrate the policy rationale behind the award of costs in litigation it is of paramount importance this Court takes the question of costs seriously to ensure that justice is done to the parties not only in respect of the merit of the issues but also with regard to expenses incurred by them in the prosecution of the case.

It is the duty of the Court to conduct or cause to be conducted a thorough inquiry into the expenses incurred by the parties and use it as a guide in awarding costs bearing in mind that unreasonable and unnecessary expenses are not to be countenanced. The court must exercise its discretion in a judicial manner and this requires that all relevant factors should be taken into consideration and impartially adjudicated upon in fairness to the parties involved in accordance with reason and justice and not according to a feeling of hostility or sympathy.

The guidelines for the award of costs has been provided for in the case of **Erskine v. Erskine [1984-86] 1 GLR 249-255** where Twumasi J (as he then was) succinctly stated that; *"...I have arrived at a few factors or guidelines for the award of costs and these are: (1) the fact that a party has unduly delayed the trial by causing unnecessary adjournments: Guardian Assurance Co, Ltd. v Khayat Trading Store [1972] 2 GLR 48, CA; (2) costs should normally bear*

a relationship to the trial and its incidents and not to the measure of damages awarded. Since costs are in the discretion of the court and the law requires that such discretion should be exercised reasonably..., Guardian Assurance Co, Ltd. v Khayat Trading Store (supra); (3) the fact that the point which forms the main basis of the judgment or decision was raised not by counsel but by the court: Asamoah v Koufu (1958) 3 WALR 315; (4) costs must neither be excessive nor ridiculously low but must be reasonable having regard to the circumstances of the case: Bank of Ghana v Nyarko [1973] 2 GLR 265, CA and Sasraku v David [1959] GLR 7, CA; (5) a party can, in the discretion of the court exercised judicially, that is to say by giving sufficient and good reasons, be deprived of his costs in exceptional cases, otherwise a successful party is always entitled to costs: London Welsh Estates Ltd. v Philip (1931) 100 LJKB 449, for instance if [p.255] the court is satisfied that the conduct of the party has involved the defeated party unnecessarily in the expense of litigation; (6) insolvency or impecuniosity of a defeated plaintiff is not a sufficient ground upon which a court can deprive a successful defendant of his costs, nor is the insolvency or impecuniosity of a defeated defendant a good ground for depriving a successful plaintiff of his costs: Amalgamated Press Ltd. v Independent Press Ltd. [1960] GLR 113; and (7) where each party is only partially successful, eg. where a plaintiff is successful on his claim and the defendant is also successful on his counterclaim, costs are apportioned proportionately in terms of the issues and incidents in each action or where appropriate each party bears his own costs: Gariba v Ibrahimah (1951) 13 WACA 171."

Order 7 Rule 1(1) of C.I. 59 also provides that costs in a suit is at the discretion of the Court and the Court may after hearing the parties award costs it considers just. The Court considers the peculiar circumstances of each case in arriving at the quantum of costs such as amount of expenses incurred by the party or his lawyer, amount of Court fees paid, length and complexity of proceedings, conduct of parties and/or their lawyers during proceedings, length of trial, number of witnesses. The Court must be fair to both parties in awarding cost. See: **Bank of Ghana v Nyarko (1973) 2 GLR 265, GATCO Chempharam**

v Pharmadex Gh. Ltd. (1999-2000) 2 GLR 262 @ 275, Neuseite Meditek and Konsult vs. United Bank for Africa (Gh) Ltd. [2021] DLCA 10755

Relying on these authorities cited *supra*, and having regard to the circumstances of this case, I award costs of GH¢ 2,000.00 in favour of Plaintiff against Defendant.

Conclusion

Having regard to the totality of the evidence adduced and based on the evaluation of the evidence done *supra*, this Court finds that the Plaintiff has been able to discharge the burden of proof on him and accordingly holds as follows:

- a. The Plaintiff is entitled to recover from the Defendant the sum of Fifteen Thousand Hundred Ghana Cedis (GH¢ 15,000.00) being the balance for the supply of Toyota Land Cruiser body parts;**
- b. The Plaintiff is entitled to recover interest on the amount in a. *supra* at the prevailing commercial bank rate from October 2021 to the date of final payment;**
- c. Cost of GH¢ 2,000.00 is awarded against the Defendant for the Plaintiff.**

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