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2/27/2023

FABRICE SAWADOGO
VS
SAMUEL NARH
JUDGEMENT

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HER WORSHIP SIRAN MAHAMA
DISTRICT MAGISTRATE
TEMA DISTRICT COURT '2'

**IN THE DISTRICT COURT 2, TEMA, SITTING ON THE 27TH DAY
OF FEBRUARY, 2023 BEFORE HER WORSHIP SIRAN MAHAMA,
THE DISTRICT MAGISTRATE.**

SUIT NO: A2/09/2023

FABRICE SAWADOGO V SAMUEL NARH

The brief facts of this matter from the statement of claim are as follows.

The Plaintiffs are self employed and they reside at Pokuase in the Greater Accra Region. The 1st Defendant is the owner of the 2nd Defendant Company, which is a registered company, doing business under the laws of Ghana. The 3rd Defendant is the brother of the 2nd Defendant who has taken over from him in the management of the 2nd Defendant Company, while he attends school. The Plaintiffs needed a plot of land to buy, and they were directed to the 1st Defendant's Office at Community 9, Tema. The Plaintiffs say, they were offered a Plot of land at Odumase, by the 1st Defendant, for GHS 14,000.00 in addition to GHS 2,000.00 being the cost of documentations of the plot of land; totaling GHS 16,000.00. Plaintiffs say Defendants issued them with two receipts, each dated 21/02/2022. After paying the aforementioned amount, Plaintiffs say that it came to their notice that the Defendants had not fully acquired the land yet and the owners of the lands were about to retrieve same from the Defendants. The 3rd Plaintiff says that he confronted the 1st Defendant who admitted the issue. The 3rd Plaintiff then demanded a refund of their money from the 1st Defendant to prevent any problems after the purchase. According to the 3rd Plaintiff, while demanding for a refund, the Defendants gave him an undertaking to effect allocation of their plots to them on or before 30th June 2022. However, this date elapsed, and the Defendants failed to deliver the plot of land to the Plaintiffs as promised. Consequently, the Plaintiffs instituted this action against the Defendants herein, to recover the money paid.

The Plaintiffs are seeking the following reliefs endorsed on the writ of summons;

1. An order directed at the Defendants for the recovery of GHS 16,000.00 being the money due to the Plaintiffs for a plot of land they cannot deliver and with interest from February 2022 to the final date of payment and cost.

The issues for the court to determine in this action are as follows;

1. Whether or not the Defendants herein are liable to pay an amount of GHS 16,000.00 being money paid by the Plaintiffs for a plot of land they could not deliver.
2. Whether or not the Defendants are liable to pay interest on the amount of GHS 16,000.00 paid by the Plaintiffs from February 2022 to the final date of payment.
3. Whether or not the Defendants herein are liable to pay cost to the Plaintiffs in this action.

Since this action was instituted, attempts made to serve Defendants in person failed. Due to that, this court granted an order for substituted service for all processes in this action to be served on the Defendants, herein, on the 7th of November 2022; pursuant to Order 4 rule 5 of the District Court Procedure Rules, 2009 (C.I. 59). Subsequently, Defendants have still failed to appear or file any affidavit in their defence. As held by the Supreme Court in the case of *Ankumah v City Investment Co. Ltd* [2007-2008] 1 SCGLR 1064; where a defendant, after several attempts, is finally served but fails to appear in court; the court is entitled to give a default judgement. The Supreme Court further stated that if a party fails to appear after notice of proceedings have been given to him, it would be justifiable to assume that he does not wish to be heard. This means that the 'audi alteram partem' rule provided for in Article 19(2) of the Constitution (1992), cannot be said to have been breached in such instances. Therefore, the Defendants herein are deemed to have been duly served, by this court, with all processes filed in this action; and this court shall proceed to enter Judgement in this matter accordingly.

JUDGEMENT ON ISSUE ONE (1)

In the instant case, the Plaintiffs seek to recover money expended due to an agreement to purchase land from the Defendants. On the 19th of April 2022, Defendants signed an undertaking with the 1st and 2nd Plaintiffs to prepare documentation and allocate a plot of land at Odumase to them, by 30th June 2022. This undertaking is marked Exhibit 'A'. However, according to the Plaintiffs, the Defendants have failed to honour the terms of the undertaking till date.

Considering that the land the Plaintiffs paid money to the Defendants for has not been given to the Plaintiffs; this court holds that the Defendants herein, have not incurred any loss upon entering this agreement, but rather gained a great benefit. In view of this, this court cannot close its eyes where a refusal to act has occasioned an unjust enrichment of another party to the contract. From the reliefs sought by Plaintiffs in this action, it is evident that the Plaintiffs want to be placed in the same position they would have been but for entry into the contract. This is known as the principle of restitution. This principle is to the effect that the parties to the contract should be placed in the situation they would be in if they hadn't entered the contract. In the case of *Lipkin Gorman v Karpnale Ltd* [1988] UKHL 12, the House of Lords gave formal recognition to the law of restitution as being separate to any element of contract law. It was held that the law of restitution is not based upon implied contract; rather it is based upon the principle that unjust enrichments must be reversed.

In view of this, a claim of restitution would lie against the Defendants to place the Plaintiffs in the exact position they would have been in but for the entry into the agreement. This is because the Defendants herein, have unjustly enriched themselves since they never performed their part of the bargain, by failing give the said plot of land to the Plaintiffs. Also, per Section 48(1) of the Lands Act, 2020 (Act 1036), it is provided that, 'an agreement with two or more persons jointly to pay money or to make a conveyance, or to do any other act relating to land, to those persons, or for the benefit of those persons, implies an obligation to pay the money or do the act to, or for, the benefit of the survivors of those persons.' Therefore, an order of restitution, in this case, should be granted to compel the Defendants to reimburse the Plaintiffs of all monies paid to them in the

Plaintiff's bid to perform their part of the agreement. According to the Plaintiffs herein; the relief sought is for the recovery of a sum of GHS 16,000.00 due and payable by virtue of an agreement for the sale of a plot of land by Defendants. From Exhibit 'B' filed, the 2nd Defendant Company issued two receipts jointly to 1st and 2nd Plaintiffs herein acknowledging receipt of an initial payment of GHS 14,000 (Receipt No: 0000679); and a final payment of GHS 2000 for barcode and documents for a plot of land at Odumase (Receipt No: 0000614). Also, per Exhibit 'A' attached the 2nd Defendant Company through the 1st Defendant, signed an undertaking with both 1st and 2nd Plaintiffs herein; requesting for a two (2) month extension ending 30th June 2022, to prepare documentation and allocation of one (1) plot of land which the Defendants failed to do. Therefore, considering Exhibits 'A' and 'B' attached, this court holds that the Defendants herein are liable to pay an amount of GHS 16,000.00; to 1st and 2nd Plaintiff herein, being money paid by the Plaintiffs for a plot of land they did not receive. It is hereby ordered that the Defendants herein shall pay an amount of GHS 16,000.00 to the 1st and 2nd Plaintiffs herein with immediate effect. Judgement is hereby entered in favour of Plaintiffs on the claim for recovery of GHS 16,000.00 from Defendants herein.

JUDGEMENT ON ISSUE TWO (2)

Generally, under common law, interest becomes payable to a creditor/lender when the parties agree per their financial dealings that interest should be paid. However, under the laws of Ghana, the courts have the power to award interest on sums claimed and found to be due, or as prescribed by statute. This can be found in *Delle & Delle v Owusu - Afriyie* [2005-2006] SCGLR 60 (holding 4); where the court held that "under the existing statutory regime in Ghana, the courts have the power to award interest on sums claimed and found to be due. Such interest is payable from the date on which the claim arose."

Further, per Order 28 r 7 of the District Court Rules, 2009 (C.I. 59)

- (1) The Court, at the time of giving judgement or making an order or anytime afterwards, may.

- (a) Direct the time within which a payment is to be made or another act done, and
 - (b) Order the payment of interest at the same rate as a High Court may order in circumstances.
- (2) The time for payment shall be reckoned from the date of the judgement or order or from some other point of time that the Court considers appropriate.

Also, as established in the case of *Ghana Commercial Bank v Bino - Okai* [1982-83] GLR 74 and discussed by Adede Ag CJ, in his judgement in the *Royal Dutch Airlines (KLM) v Farmex Ltd.* [1989 - 90] 2 GLR, page 636; A person who has unjustifiably kept money which properly ought to have gone to its owner should not in justice be permitted to benefit by having that money in his possession and additionally enjoying the use of it. This benefit shall be deemed as profit lost to the owner that is usually ordered to be paid back to him by way of interest. This interest now becomes some kind of compensation or damages for withholding another person's money wrongfully.

However, it was held in *Akoto v Gyamfi - Addo* [2005 - 2006] SCGLR 1018 that 'since interest is payable for unjustifiably keeping money belonging to another, if there is justification for keeping the money, interest is not payable.' It follows from this holding that the only basis upon which interest may not be payable on an amount established to be owed to the plaintiff in an action to recover same; is if the defendant is able to provide satisfactory justification to the court for keeping the plaintiff's money wrongfully.

From the above, in the determination of whether or not interest is payable to a creditor/lender, the courts must consider the following, in the absence of any enactment, instrument or agreement to the contrary.

- a. Whether or not there is a sum claimed and found to be due.
- b. Whether or not the said sum has been wrongfully withheld by the debtor/borrower.

- c. The amount of time for which the money has been wrongfully withheld, and
- d. Whether or not the debtor/borrower has any justification for wrongfully withholding the creditor/lender's money.

In the instant case, it has been established that the Defendants owe the Plaintiffs a principal amount of GHS 16,000.00 being money paid by the Plaintiffs for a plot of land at Odumase which Defendants could not deliver from February 2022 till date. Also, considering that the Defendants herein have failed to appear or file a defence in this matter; this court is of the view that the Defendants have not been able to give any satisfactory justification for withholding the Plaintiffs' money for the period specified.

The Court (Award of Interest and Post Judgement Interest) Rules, 2005 (CI 52), r1 also provides that;

"If a court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated;

- (a) at the bank rate prevailing at the time the order is made, and
- (b) at simple interest

but where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner; the court shall award that rate of calculated interest in that manner."

As established in the cases of *Erlanger v New Sombrero Phosphate Co. Ltd* (1878) 3 APP Case 1218 and *Clarke v Dickson* (1858) EB & E 148; even though the equitable principle is that restitution needs not be exact, or precise, it must be substantial. In view of this; since it has been established that the Defendants owe the Plaintiffs GHS 16,000.00 since February 2022 and failed to repay same at that time; thereby withholding that amount belonging to the Plaintiffs wrongfully; this court finds that, in the interest of justice, the Defendants shall be liable to pay the Plaintiffs interest accruing on the principal from February 2022 till 27th February 2023.

Therefore, this court orders that the Defendants in this action shall pay interest to the 1st and 2nd Plaintiff on the principal amount of GHS 16,000.00 owed and unpaid for a period of approximately twelve (12) months since February 2022 to 27th February 2023; at the prevailing Bank of Ghana interest rate; and in the absence of any agreement by parties to the contrary; with immediate effect.

JUDGEMENT is hereby given in favour of Plaintiffs on the second claim of this action.

JUDGEMENT ON ISSUE THREE (3)

In the interest of justice; it is hereby ordered that cost of GHS 1000 is awarded against Defendants herein to cover the cost incurred by Plaintiffs in instituting this action.

SGD
HER WORSHIP SIRAN MAHAMA
MAGISTRATE
27/02/2023