IN THE HIGH COURT OF JUSTICE HELD AT KUMASI IN THE ASHANTI REGION THIS WEDNESDAY THE 20TH DAY OF DECEMBER, 2023 BY HIS LORDSHIP JUSTICE FREDERICK TETTEH

SUIT NO. C2/64/16

KWABENA AYINNEH

VRS

1. **UNION SAVINGS AND LOANS CO. LTD**
2. **MR. FRANK**
3. **MAD. LINDA, MANAGER**

JUDGMENT:

The Plaintiff issued a writ of summons and statement of claim on the 25th August, 2016, claiming the following reliefs against the Defendants herein jointly and severally;

a. Fifty Thousand Ghana Cedis (GH c 50,000.00) being general damages for loss occasioned to Plaintiff's business as a direct result of unlawful lock out of Plaintiff from his shop at the Kumasi Central Market on several occasions as well as the general use of violence and threats to scare away Plaintiff's customers from his shop by the 1st Defendant, the 2nd and 3rd Defendants and their goons from the beginning of May 2016 to date.

b. GH c 21,000.00 special damages for loss of sales and profits.

c. An order of perpetual injunction restraining the Defendants from in anyway unlawfully locking the Plaintiff's shop or doing any acts that will disrupt Plaintiff's trading activity or going to Plaintiffs shop as a group or as individuals to threaten or in any way disrupt Plaintiff's trading activity.

d. Costs including Solicitors costs.

The writ of summons and statement of claim was served on the Defendants on the 26th August, 2016. The Defendants entered appearance through their lawyers K.A. Asante-Krobea, Sekyere & Associates. The Defendants then filed their statement of defence and counterclaim on the 24th October, 2016. It is important to

add at this stage that, after the parties had filed their respective witness statements and documents that they were minded to rely on, the Plaintiff abandoned the case. Accordingly, his claim is struck out for want of prosecution. The Defendants were then called upon to open their defence, which they did on the 18th October, 2023.

In their statement of defence, the Defendants averred that, the Plaintiff was on the 5th October, 2015, granted a loan facility of Fifty Thousand Ghana Cedis (GH c 50,000.00) and an overdraft facility of Twenty Thousand Cedis (GH c 20,000.00) at an interest rate of 4.5% and 4.7% a month respectively for a period of 12 months. According to the Defendants, the Plaintiff secured the repayment of the two facilities with stock in his shop, property numbered BK 132, Barekese Zongo and Plot No. 27 Block C Agogoso Bremang in the Ashanti Region and executed a deed of mortgage to that effect. The Defendants averred that, the Plaintiff has defaulted in the repayment of the loan facility despite persistent demands made on him. They added that, the total indebtedness of the Plaintiff as at the 30th July, 2016 was Forty-Nine Thousand Seven Hundred and Fifty-Five Ghana Cedis Eighteen Pesewas (GH c 49,700.18). The Defendants added that, as a loan officer, the 2nd Defendant only went to the Plaintiff's shop to demand payment of his debt. The Defendants accordingly counterclaimed as follows;

a. An order for the recovery of the sum of was Forty-Nine Thousand Seven Hundred and Fifty-Five Ghana Cedis Eighteen Pesewas (GH c 49,700.18), being the total indebtedness of the Defendant from the loan facility granted by the Plaintiff Bank.

b. Interest on the said sum of Forty-Nine Thousand Seven Hundred and Fifty-Five Ghana Cedis Eighteen Pesewas (GH c 49,700.18) at an interest rate of 4.5% a month from November, 2016 till date of final payment.

ALTERNATIVELY

c. An order for the judicial sale of properties numbered BK 132, Barekese Zongo and Plot 27 Block C Agogoso Bremang in the Ashanti Region.

In their bid to prove their claim for the reliefs on their counterclaim, the Defendants' testimony through Mohammed Zakaria was in essence a narration of what was contained in Defendants' statement of defence and counterclaim. The Defendants relied on the documents tendered in evidence by DW 1 in support of their counterclaim. The Defendants tendered in evidence, exhibits '1', '2' '3' and '4', representing, a copy of the offer of credit facility, an executed mortgage deed in

respect of two properties of the Plaintiff, a copy of the Plaintiff's statement of account and a copy of the Plaintiff's loan status report. Having perused the exhibits, I have no basis to doubt their authenticity. In the circumstances, I wholly rely on the exhibits tendered in evidence by the Plaintiff through his attorney, in proof of its case.

It is important to add that, the Plaintiff was served severally by way of substituted service yet failed to appear in court to prosecute his claim. After the Defendants were called upon to open its defence, all processes including court's notes and proceedings were served on the Plaintiff by way of substituted service. He still failed to appear to cross examine the Defendants DW 1 when he adduced evidence for and on behalf of the Defendants.

It is the law that, a trial judge will undeniably not be in error to require a case to proceed in the absence of the Plaintiff and his Counsel, who had had notice of the trial date. See the case of Linda **Edzidor, Joshua Edzidor vs. Republic [2014] 70 GMJ page 87.** Having failed to appear in court to prosecute his claim and further failing to appear to cross examine DW 1 after numerous hearing notices and court's notes were served on him, this court decided to proceed against the Plaintiff by calling on the Defendants to prove their counterclaim. Further, in the case of **Republic vs. High Court (Human Right Division), Accra, Ex Parte Alerta (Mancell Egala & Attorney General, Interested Parties [2010] SCGLR 374 @ 383 -384,** the Supreme Court speaking through Brobbey JSC (as he then was) stated the law as follows:

> **"A person who had an opportunity to be heard but deliberately spurned it to satisfy his or her decision to boycott proceedings, cannot later complain of any procedural irregularity as the party would be deemed to have waived any irregularity thereof". See also the case of In Re Krah (deceased) and others vs. Osei Tutu & anor [1989-90] 1 GLR 638".**

In the instant case, I am of the considered view that, the Plaintiff was given the opportunity to be heard in this case, but he, in my view deliberately spurned the opportunity. It can obviously be inferred that, the Plaintiff do not have a defence to the Defendants' counterclaim. This court has no other alternative than to determine the Defendants' counterclaim to a finality.

The Supreme Court in the case of **Martin vrs. Barclays Bank GH. Ltd [2017-2018] 1 SCGLR page 800 held at page 803** in holding 3 of the head notes thus;

> **"the standard of proof in civil matters require the person who assumed the burden of producing evidence to lead such evidence as to enable the court to determine that he has established his case on a preponderance of probabilities".**

In civil proceedings, the standard of proof required to be met by either party seeking to discharge the legal burden is proof on a balance of probabilities. Section 12 (2) of the Evidence Act, NRCD 323 of 1975 defines balance of probabilities as; **"that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence".**

In the Supreme Court case of **Takoradi Flour Mills vs. Samir Faris (2005-2006) SCGLR 882** at holding 5, Ansah JSC stated as follows;

> **"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 NRCD 323, 1975. In assessing the balance of probabilities, all the evidence, be it that of the Plaintiff or 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..."**

Learning from Section 11(4) of the Evidence Act, NRCD 323 of 1975, the burden of producing evidence to prove the claims of the Plaintiff required the Plaintiff to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the Plaintiff's claim was more probable than its non-existence.

In the case of **Ackah vrs Pergah Transport (2011) 31 GMJ 174** the Supreme Court dealing with the principle of the burden of proof said:

> **"it is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility, short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of**

the party and material witnesses, admissible hearsay, documentary evidence and things (often described as real evidence) without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence".

From the above, when the Plaintiff discharged his burden with the documentary and other evidence he proffered, the evidentiary burden shifted to Defendants, to establish their alleged defence by the same evidentiary standards set by sections 10, 11, 12 and 14 of the Evidence Act. As stated in **Zabrama vrs Segbedzi (1991) 2 GLR page 221 at 246**, a person who makes an averment or assertion, which is denied by the opponent, has the burden to establish that the averment or assertion is true. And this burden is not discharged unless that person leads admissible and credible evidence from which the facts asserted can properly and safely be inferred.

The above discussed position of the law regarding burden of proof is as well applicable when the Defendant counterclaims. Where the Defendant makes a positive assertion in his counterclaim at the start of the trial, he bears the legal burden. At the same time, the Defendant bears the evidential burden to adduce evidence at the start of the trial in respect of his counterclaim.

In a nutshell if the Defendant fails to adduce sufficient evidence regarding his counterclaim, his counterclaim may be dismissed, and judgment may be given on the case as made by the Plaintiff, if he is able to adduce sufficient evidence in proof of his case. On the other hand, if the Plaintiff's case is not sufficiently proved to the satisfaction of the court, the court may as well dismiss the claim. See the case of **Sasu Bamfo vs. Sintim [2012] 1 SCGLR page 136.** In the case of **Aryeh &Akakpo vrs. Aya Iddrisu [2010] SCGLR page 891 at 901,** the Supreme Court held thus;

"a party who counterclaims bears the burden of proving his counterclaim on the preponderance of the probabilities and will not win on that issue only because the original claim failed. The party wins on the counterclaim on the strength of his own case and not on the weakness of his opponent's case".

Further, in the case of **Sasu Bamfo vrs. Sintim** supra, the Supreme Court, per Rose Owusu JSC (as she then was), held thus;

> **"A counterclaim is a different action in which the Defendant as a counterclaimant is the Plaintiff and the Plaintiff in the action becomes a Defendant.... Each of them bore the burden of proof and persuasion to prove conclusively, on the balance of probabilities that he was entitled to the reliefs claimed. Section 11(1) of the Evidence Act, 1975, (NRCD 323), enjoined the Defendant in his capacity as a Plaintiff in the counterclaim to introduce sufficient evidence to avoid a ruling on the issue against him".**

I have already stated in this judgment that the Plaintiff abandoned his claim after filing his witness statement in 2017. When the Defendants were called upon to prove their counterclaim, they did so on the 18th October, 2023. On the 18th October, 2023, when DW 1 had adduced evidence on behalf of the Defendants, this court ordered that a hearing notice and the day's proceedings be served on the Plaintiff by way of substituted service. This court further added that, if the Plaintiff failed to appear to cross examine DW 1, he will be deemed to have waived his right to cross examine and further proceed with the case in his absence. The Plaintiff was duly served with the hearing notice and the day's proceedings. He still failed to appear to cross examine the Defendants' DW 1. The case was then adjourned for judgment. From the above, it is obvious that, the Plaintiff was given the opportunity to cross examine the DW 1of Defendants but he spurned it.

Brobbey JSC (as he then was), stated in his book "Practice and Procedure in the Trial Courts & Tribunals of Ghana" at page 513 paragraph 1210., that;

> **"The objects of cross – examination are two told. First it is to weaken or nullify the opponent's case and secondly, it is to establish facts which are favourable to the cross examiner. In effect cross – examination aims at testing the accuracy of the witness's evidence and at giving the witness the chance to deal with the case of the cross examiner"**

Further, in the case of **Agbosu vrs. Kotey also known as In Re – Ashalley Botwe Lands (2003 – 2004) SCGLR 420 Wood J.S.C. (as she then was)** in her

lead opinion cited the case of **Mantey & Anor vrs. Botwe (1989 – 90) 1 GLR 479** and relied on the principle it established as follows:

> **"...where a party's testimony of a material fact was not challenged under cross – examination, the rule of implied admission for failure to deny by cross – examination would be applicable and the party need not call further evidence on that fact".**

In sum, if evidence is tendered and a party fails to cross examine so as to challenge its veracity, the party subject to some exceptions which in my view are inapplicable here would be deemed to have admitted the contents of the evidence. In the instant case, since the Plaintiff failed to cross examine DW 1, I find that, the Defendants have impliedly admitted the evidence of the Plaintiff.

It is worth adding that, regarding the evidential burden placed on a party, the correct proposition is that, a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred". See the case of case of **Zabrama vs Segbedzi [1991] 2 GLR page 221 per Kpegah JA**.

It must be added that, in the instant case, the burden of proof is on the Defendants to prove their counterclaim on the balance of probabilities. Having read through the evidence of the Defendants coupled with their exhibits, I am left in no doubt that the Defendants have proved their counterclaim on the balance of probabilities. Accordingly, I hereby enter judgment in favour of the Defendants on their counterclaim.

For the avoidance of doubt, the Defendants are entitled to claim the following reliefs from the Plaintiff;

a. An order for the recovery of the sum of was Forty-Nine Thousand Seven Hundred and Fifty-Five Ghana Cedis Eighteen Pesewas (GH c 49,700.18), being the total indebtedness of the Defendant from the loan facility granted by the Plaintiff Bank.

b. Interest on the said sum of Forty-Nine Thousand Seven Hundred and Fifty-Five Ghana Cedis Eighteen Pesewas (GH c 49,700.18) at an interest rate of 4.5% a month from November, 2016 till date of final payment.

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c. An order for the judicial sale of properties numbered BK 132, Barekese Zongo and Plot 27 Block C Agogoso Bremang in the Ashanti Region.

The policy rationale behind the institution of costs in litigation has been judicially pronounced on in **SCOA Motors v Koranteng [1967] GLR 263**, where Azu Crabbe JA (as he then was) said at page 273 of the report that:

> **"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".**

Further, in **Erskine v Erskine [1984-86] 1 GLR 249**, Twumasi J held that in awarding costs, courts must take all relevant factors into consideration, stating as follows:

> **"In order not to frustrate the policy rationale behind the award of costs in litigation it is of paramount importance that every court, superior or inferior, 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... 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 instant case has been in this court for at least 7 years as the writ was issued on the 25th August, 2016. The Defendants procured the services of Counsel. Several processes, including posting of court orders, hearing notices, and court's proceedings were posted by way of substituted service. The Defendants also filed a number of processes all at costs to them. The above was to enable the Defendants

prosecute their defence and counterclaim. In view of the above, I am minded to award costs of GH c 20,000.00 in favour of the Defendants.

SGD
H/L JUSTICE FREDERICK TETTEH
JUSTICE OF THE HIGH COURT

JUDY EDUSEI ESQ., FOR DEFENDANTS HOLDING THE BRIEF OF ASANTE KROBEA ESQ.

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