**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE COURT OF APPEAL**
**ACCRA–GHANA**
**A.D. 2013**

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**CORAM:** OWUSU M., J.A. (PRESIDING)
DANQUAH I., J.A.
TORKORNOO G., J.A.

Suit No: **H1/148/12**
March 28, 2013

**NDK Financial Services Ltd.** ... **Plaintiff/Appellant**

**Vrs.**

1. **Ahaman Enterprise Ltd.** ... **Defendants/Respondents**
2. **Attorney General**
3. **Alex A. Aduko**
4. **Aduko Kyeremanteng**

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*Contract Law — Guarantee — Payment of proceeds of contract undertaken to be paid in joint names of plaintiff and 2nd defendant — Intention to create legal relation — Absence of consideration for promise — Whether undertaking enforceable against 2nd defendant.*

*Evidence — Judgment against weight of evidence — onus on appellant to demonstrate lapses complained of — Whether pieces of evidence if applied in appellant's favour would have changed decision in its favour*

## JUDGMENT

**MARIAMA OWUSU, J.A:**

The main issue for determination in this appeal is whether or not "an undertaking" by a party creates any legal obligation. In other words, is the undertaking enforceable against the 2nd defendant? The trial judge answered this question in the negative.

Dissatisfied with the decision of the trial judge, the plaintiff appealed to this Court on the following grounds:

1. *Part of the judgment dismissing the claim against 2nd defendant is against the weight of evidence.*
2. *The learned trial judge erred when she held that the undertaking by Ministry of Energy to pay proceeds of the haulage contract in the joint names of the plaintiff and the 1st Defendant Company was not binding and enforceable against 2nd defendant.*
3. *The learned trial judge erred when she held that the plaintiff could not claim the benefit of the undertaking to pay the proceeds of the haulage contract in the joint names of the plaintiff and the 1st defendant company.*
4. *Others grounds of appeal will be filed upon receipt of the certified record of proceedings.*

The relief sought from the Court of Appeal;

> *That part of judgment dismissing the claim against the 2nd defendant be set aside and judgment entered against the 2nd defendant.*

Before dealing with the arguments for and against this appeal, I will give a brief background of this case.

The plaintiff by its writ of summons claims against the defendants as follows;

1. *Jointly and severally against:*

   *[a]* *the 1st, 3rd 4th 5th and 6th defendants an order for recovery of the sum of GH¢1,008,833.70 being the balance due and owing as at March 31, 2009, on account of credit facilities extended to 1st defendant by plaintiff between 26th August 2005 and 28th April, 2006, repayment of which was secured by 3rd, 4th 5th and 6th defendants but payment of which they have failed to make good several demand notices notwithstanding.*

   *[b]* *Interest on the said sum of GH¢1,008,833.70 at the rate of 6.5% per month calculated at the close of each day and payable at the end of every month from 1st April 2009, up to and inclusive of date of final payment.*

   *[c]* *Costs.*

2. *Jointly and severally against:*

   *[a]* *Defendants the sum of GH¢286,250.52 being part of the debit balance due under the facilities granted to 1st defendant by plaintiff between 26th August, 2005 and 28th April 2006, which sum was secured together with other payments due 1st defendant by 2nd defendant but paid to 1st defendant on 6th January, 2009 as a result of collusion by defendants.*

   *[b]* *Costs.*

3. *An order upon;*

*[a] 2nd defendant to render accounts of all payments made to 1st defendant under contract awarded to 1st defendant by Ministry of Energy between 19th August, 2005, up to date of filing this suit.*

*[b] A consequential order that 2nd defendant shall pay to plaintiff all sums together with interest at the rate of 6.5% per month paid to 1st defendant by Ministry of Energy in contravention of letters of undertaking dated August 19, 2005, September 28, 2005, 13th October, 2005, February 2, 2006 and 27th April 2006 up to date of filing this suit.*

In the statement of claim that accompanied the plaintiff's writ of summons, the plaintiff avers among other things that, sometime in or about 2005, the Ministry of Energy awarded a contract for the haulage of several tones of Electricity High/Low Tension Poles and other Electrical Materials to designated locations in the country to 1st defendant company. 1st defendant accepted the offer. By a letter dated 18-8-2005, 1st defendant applied to plaintiff company for a credit facility in the sum of GH¢30,000.00 to enabled it execute the contract mentioned supra. As a condition for the approval of the facility, the plaintiff company requested 1st defendant to secure a guarantee from the Ministry of Energy that payment due under the contract of haulage would be made in the joint names of 1st defendant company and Plaintiff Company.

The Ministry of Energy accepted the condition to make the payment due the 1st defendant in the joint names of plaintiff and 1st

defendant by a letter dated 19-8-2005. Relying on the Ministry of Energy's letter dated 19-8-2005, the plaintiff company approved and disbursed the sum of GH¢30,000.00 to 1st defendant for a period of three [3] months on 26-8-2005, at an interest rate of 6.5% per month calculated at the close of each day and payable at the end of every month until date of final payment. Consequently, the plaintiff and 1st defendant duly executed a loan agreement to this effect. As a further security for the repayment of the facility together with accrued interest, 3rd and 4th defendants executed a deed of mortgage over their property situate at North-East Kwashieman, Accra in favour of the plaintiff company.

The 5th and 6th defendants also agreed to repay the facility together with accrued interest on the due date upon default of 1st defendant company by executing a deed of guarantee dated 26-8-2005. Between 29-9-2005 and 28-4-2006 the 1st defendant company applied for and was granted additional facilities in the total sum of GH¢340,000.00 at an interest rate of 6.5% per month calculated at the end of each day and payable at the end of every month until the date of final payment. Prior to the grant of the additional facilities mentioned supra, at the request of the plaintiff company through 1st defendant the Ministry of Energy agreed and guaranteed that it would pay the proceeds due 1st defendant company in the joint names of plaintiff company and 1st defendant company when same were due and payable.

It is the case of the plaintiff company that, by a letter dated 17-12-2008, the Ministry of Energy requested the Ministry of Finance and

Economic Planning to pay the sum of GH¢286,250.52 being proceeds due and payable under the haulage contract, to 1st defendant company without reference to the plaintiff in clear breach of the undertaking/guarantee issued to the plaintiff company. The 1st defendant company has also failed to pay the facilities granted to it by the plaintiff company even though the facilities are due. The plaintiff concluded that, as at 31-3-2009, 1st defendant company has made part payment leaving a balance of GH¢1,277,084.52 hence this action.

On receipt of plaintiff's writ of summons and statement of claim the 1st, 5th and 6th defendants reacted by filing their statement of defence. In particular, they aver that, the debt to the plaintiff has not been settled since Ministry of Energy had not made payments to the defendants or 1st defendant the earnings from the job undertaken for the Ministry and as such the defendants are in a similar embarrassment as the plaintiff. The defendants further aver that, there was mutual agreement to grant the facility to the 1st defendant although it was made clear to the plaintiff that it was entirely for the benefit of the Ministry of Energy, hence the assurance from the Ministry to guarantee and pay the proceeds from the contract jointly to 1st defendant and plaintiff. They concluded that, all the parties knew that the loans were being obtained for the 4th defendant to pay hence 1st, 5th and 6th defendants are entitled to contribution/indemnity from the Ministry represented by the 2nd defendant. They therefore maintained that they i.e. 1st, 5th and 6th the defendants are not liable to the plaintiff's claim.

On 24-7-2009, the plaintiff obtained interlocutory judgment against the 2nd defendant. Then on 4-9-2009, the plaintiff discontinued the suit against all the defendants with liberty. The plaintiff testified through its representative Mr. Ebenezer Aminarh, the head of produce division and was cross examined by counsel for 2nd defendant. The 2nd defendant also testified through Chris Anaglo a Senior Electrical Engineer and was cross examined.

At the end of the trial, judgment was entered in favour of the plaintiff against 1st and 3rd defendants jointly and severally in the sum of GH¢1,008,833.70 less GH¢141,395.20 (paid on 5-6-2009) plus interest at the agreed rate of 6.5% per month calculated at the close of each day and payable at the end of every month from 1-4-2009 till date of final payment. In respect of the claim against the 2nd defendant, the trial judge held as follow;

> ***"The issue to determine at this stage is whether the undertaking is enforceable against the 2nd defendant. The Ministry is described as a co guarantor of the facility in the agreement between the plaintiff and 1st defendant. According to Black's Law Dictionary 9th Edition, guarantee is to assume a surety ship obligation, to agree to answer for a debt or default, to promise that a contract or legal act will be duly carried out, to give security. As earlier discussed in this judgment, a contract of guarantee arises where a person agrees to satisfy the debt of another debtor when he fails to repay.***

***The question is whether it was intended that the Ministry would assume joint and several liabilities with 1st defendant for the repayment of the debt. In determining whether legal intentions were intended, the courts would ascertain whether the language of the document was apt to express a legal obligation. In the instant case can the language of the undertaking be equated with a guarantee? Was there a common appreciation by both parties that by the undertaking the Ministry was to assume the debt of 1st defendant should they default."***

After quoting Exhibit D the first undertaking, the trial judge continued her judgment as follows;

***"It would be observed that in the letter, the Ministry stated that the directive on joint payment would only be changed on the instructions of 1st defendant. See Exhibits D and K***

***Does the use of the words such as guarantee and obligation mean that the parties intended to create legal relation?***

***The position of the law is that in commercial transactions a promise made without consideration, is not intended to have contractual effect unless the contrary is proved. The onus was on the plaintiff to show that the undertaking was intended to make the Ministry jointly and severally liable for 1st defendant's***

***indebtedness. Nothing in the evidence adduced at the trial shows that the letter was intended to be a contractual promise to plaintiff. From the testimony of the plaintiff's representative, and by their own pleadings, the representation was made to 1st defendant and was to assure plaintiff that as and when payment was due, they would be paid.***

***Such a representation is what is described in Paget's Law of Banking 12th Ed by Mark Hap good QC at page702 as "a letter of comfort". It gives assurance of payment to the creditor. According to the book, such a representation is not intended to be legally binding but to give rise to a moral responsibility only, unless the contrary is shown.***

***Where as in Exhibit Z the Ministry undertook to make payment in the joint names of the plaintiff and 1st defendant and not to vary or waive same without the consent of both parties in writing, it is my view that the Ministry was in breach of this representation when it changed the directive and made payments under the haulage contract to persons other than plaintiff without recourse to plaintiff. However as earlier discussed in the absence of consideration for the promise, the representation can best be described as assurance of payment, not intended to be binding. Plaintiff has no claim against 2nd defendant in contract. I accordingly dismiss the case against the 2nd defendant together with***

***all the reliefs endorsed on the writ of summons as relief 2. Where as in the instant case, the Ministry has made full payment under the contract to 1st defendant and the evidence shows that the payments were made to other financial institutions on the instructions of 1st defendant, I find no justifiable reason to accede to plaintiff's prayer".***

With all due respect to the trial judge we do not share her view that the undertaking contained in Exhibit D is "a letter of comfort", not intended to be legally binding on Ministry of Energy, but only give rise to moral responsibility only unless shown otherwise. I will quote the relevant portions of Exhibits C, D, DD and V to see whether the parties intended to create a legal relation. Exhibit D is a letter from Ministry of Energy to the Managing Director, Ahaman Enterprises Ltd (1st defendant) and copied to The Chief Executive, NDK Financial Services Ltd, Accra dated 19-8-2005. It reads;

"Dear Sir,

**NATIONAL ELECTRIFICATION SCHEME – PAYMENT OF HAULAGE**

***We refer to your letter dated 18th August, 2005 requesting that future payments under the above project should be jointly in the names of Ahaman Enterprises Ltd/NDK Financial Services Ltd.***

***It is our understanding that this is in connection with a facility they are offering to enable you discharge your obligations under the contract with us.***

***We hereby undertake and guarantee that payment for the above order in the amount of ¢500 million when due will be made in the joint names of Ahaman Enterprises Ltd/NDK Financial Services Ltd.***

***We also confirm that the above is the only acceptable means for the payment of the haulage executed and that the obligation of payment in the above joint names remains our responsibility*** (the emphasis is mine).

***We note that this directive cannot be revoked, waived or altered without your written consent".***

Before then the 1st defendant in Exhibit C wrote to the Ministry of Energy requesting it to give an undertaking that payments of monies due under the haulage contract would be made in the joint names of plaintiff and 1st defendant. This letter is dated 18-8-2005 and copied to the plaintiff (NDK Financial Services Ltd). It reads;

"Dear Sir,

**PAYMENT FOR CONTACT EXECUTED**

**RE: HAULAGE BILLS**

***We refer to the above order and wish to confirm the involvement of NDK FINANCIAL SERVICES LTD in the above order.***

***We would be grateful if you could guarantee and confirm to NDK Financial Services Ltd, in writing, that payment for the above contract due, will be in the joint names of AHAMAN ENTERPRISES LTD/NDK FINANCIAL SERVICES LTD, stating the amount and the proposed date(s) of payment.***

***Please also indicate that this directive cannot be revoked, waived or altered without the prior consent of NDK Financial Services Limited*** (the emphasis is mine).

It was in response to Exhibit C that the Ministry of Energy wrote Exhibit D quoted supra.

Again when approval was given to the loan the 1st defendant applied for, the plaintiff insisted of an undertaking from the Ministry of Energy. See paragraph 6 of Exhibit E under the heading, SECURITY. It reads;

**SECURITY**

1. ***Mortgage over landed property at North East Kwashieman in the name of Mr. and Mrs. Peter Agbezudor***
2. ***Letter of Undertaking from Ministry of Energy dated August 19, 2005 for joint payment of ¢500 million owed Ahaman Enterprises Limited.***

If the parties did not intend to create a legal relation, why did they go that length to insert the undertaking in their letters?

The word "undertaking" is defined in Chambers Dictionary, New Edition as;

> *"a duty, responsibility or task undertaken promise or guarantee". Similarly the word guarantee is defined in the same dictionary as";*
>
> *1 a. " a formal agreement, (usu) in writing, that a product, service etc will conform to specified standards for a particular period of time; b. a document that records this kind of agreement. 2 an assurance that something will have a specified outcome, condition, etc 3 law an agreement (usu) backed up by some kind of collateral, under which one person, the guarantor becomes liable for a debt or default of another".*

From the definitions quoted supra, the guarantor becomes liable for the debt or default of another. This makes business sense. Secondly, a court of equity will not permit a defaulting party to take advantage of its own negligent act or default or a court of conscience will never allow a man to profit by his own fraud. Better still no man should be permitted to take advantage of his own wrong. See the Court of Appeal cases of **Republic vs. Kumasi Traditional Council; Ex parte Opoku Agyeman 11 [1977] 1 GLR 360; Mahama vs. Soli [1977] 1 GLR 215, 237 and Ndoley vs. Iddrisu [1979] GLR 559, 565**. These cases were cited with

approval in the Supreme Court case of **ATTIEH VS. KOGLEX [GH] LTD [2001-2002] SCGLR 936, 944.**

From the record of appeal, the official from Ministry of Energy, Mr. Chris Anaglo admitted that Ministry of Energy gave an undertaking to make payments due the defendant in the joint names of AHAMAN/NDK FINANCIAL SERVICES LTD and in fact went ahead to make some payments in the joint names of the plaintiff and 1st defendant. See the evidence 1st defendant's witness Chris Anaglo at page 91 of the record of appeal. He said;

**Q.** *"Yes there was a special mode of payment*

**A.** *What was it?*

**Q.** *There was a Memorandum of Understanding between the Ministry of Energy and Ahaman Enterprises Limited that when payments are due, cheques will be written in the joint name of Ahaman Enterprises Limited and NDK Financial Services.*

**Q.** *So did you pay all cheque as contained in the MOU?*

**A.** *Yes my Lord, most payment were made in the joint name of Ahaman Enterprises Ltd and NDK Financial Services Ltd but some were not made in the joint name of Ahaman Enterprises Ltd and NDK Financial Services Ltd because besides the Memorandum of Understanding between the Ministry of Energy and Ahaman Enterprises Ltd that*

*payments due Ahaman should be made in the joint name of Ahaman Enterprises Ltd and NDK Financial Services and other financial institutions which also gave facilities to Ahaman under the same contract".*

From the evidence of the official of Ministry of Energy, the Ministry gave an undertaking to effect payment on the haulage contract in the joint name of Ahaman and NDK Financial Services when same become due. Exhibits DD and DD1 confirmed this. Therefore when the official from Ministry of Energy admitted in cross examination that they made some payments of money under the haulage contract to Ahaman Enterprise alone, the Ministry was in breach of the undertaking to make payments in the joint names of Ahaman Enterprises Ltd and NDK Financial Services Ltd. The trial judge in her judgment made a finding of a fact that the Ministry of Energy was in breach of the undertaking but held that since the plaintiff did not provide consideration for the contract it cannot claim any benefit from it. This position is not tenable. **The Contracts Act, 1960 [ACT 25], section 10** thereof deals with the law on consideration and it provides as follows;

*"A promise is not invalid as a contract by reason only that the consideration for the promise is supplied by a person other than the promisee".*

Having come to the conclusion that the Ministry of Energy breached the undertaking to pay all monies owed and due to 1st defendant

under the haulage contract in the joint names of plaintiff and 1st defendant, is the plaintiff entitled to the reliefs claimed?

The appellant is asking the Ministry of Energy to render accounts of all payments made to 1st defendant under the haulage contract from 19-8-2005, up to date of filing this suit and we so order. This Account is to be rendered by the current Chief Director and The Principal Accountant of the Ministry of Energy within twenty-one days [21] of this order. In coming to this conclusion we have noted that the appellant admits some of the payments were made in its name jointly with that of the 1st defendant. The controversy that culminated in the instant action arose because the Ministry of Energy paid some of the monies due under the haulage contract to the 1st defendant alone.

The Ministry of Energy has argued that, the contract was not for the benefit of the plaintiff. Our simply answer is that if the contract did not confer any benefit on the plaintiff why was the undertaking given and also copied to the appellant. Secondly why did the Ministry make some payments in the joint name of Ahaman Enterprise Limited and NDK Financial Services Limited? Thirdly we have held that a party should not be allowed to take advantage of its own default or breach. There is no merit in these arguements and they are hereby dismissed. This disposes off grounds 2 and 3.

This brings us to the 1st ground of appeal;

*The judgment is against the weight of evidence*

On this ground counsel for the appellant referred to the evidence adduced by 2nd defendant's witness and submitted that, it shows that the 2nd defendant breached the undertaking to pay the contract proceeds due the 1st defendant in the joint names of the appellant and the 1st defendant.

Our Supreme Court has held in a number of cases that where an appellant appeals on the ground that the judgment is against the weight of evidence, he is implying that there are certain pieces of evidence on record if applied in his favour would have changed the decision in his favour or certain pieces of evidence on record have been wrongly applied against him. The onus is on such an appellant to demonstrate the lapses he is complaining about. Additionally the appellate court would be under an obligation to examine the entire record of appeal to satisfy itself that a party's case was more probable than not. See the case of **ABBEY & OTHERS vs. ANTWI V [2010] SCGLR 17, 20.**

The Supreme Court in this case relied on its earlier decisions in cases like **TUAKWA vs. BOSOM [2001-2002] SCGLR 61, 65** and **DJIN vs. MUSAH BAAKO [2007-2008] 1 SCGLR 686**. So the question is, in this case, what are the pieces of evidence wrongly applied against the appellant or the pieces of evidence if applied in the appellant's favour would have changed the decision in its favour? From the record of appeal the Ministry of Energy gave undertakings to pay all contract proceeds under the haulage contract in the joint names of the appellant and 1st defendant. Exhibits D, K and V are clear on this. Then by Exhibit DD2,

payment of haulage contract proceeds in the sum of GH¢286,250.40 was made into the account of Ahaman Enterprises at Ecobank Ghana Limited on the instructions issued by the Ministry of Energy. If the Ministry of Energy had not acted in breach of the undertakings, the payment that went to Ecobank, SDC Investments and other financial institutions could have paid off the facilities granted the 1st defendant. If the trial judge had applied these pieces of evidence in the appellant's favour it would have given judgment in the appellant's favour.

This ground of appeal succeeds and same is hereby upheld.

From the plaintiff's writ of summons, it is also seeking a consequential order that 2nd defendant pay to it all sums together with interest at the rate of 6.5% per month paid to 1st defendant by Ministry of Energy in contravention of the letters of undertakings dated August 19, 2005, 22-9-2005, 13-10-2005, 2-2-2006, 27-4-2006 to date of filing this appeal. We will grant the appellant's prayer except to add that all the sums due under the haulage contract together with interest at 6.5% per month that were paid to the 1st defendant in contravention of the letters of undertakings after the Accounts had been rendered by the Ministry of Energy should be paid jointly by the 1st and 2nd defendants to the appellant.

This brings us to the issue of cost.

Looking at the peculiar circumstances of this case and taking into consideration the frustration the appellant has suffered in not being

paid the loan facility granted to the 1st defendant, the inconvenience of having to mount this suit and fight it to the appellate level, the delay occasioned in being paid the loan it granted the 1st defendant all because the 2nd defendant breached its undertakings to issue cheques in the joint names of the appellant and the 1st defendant, we would assess the cost of this proceedings at GH¢5,000 against the 2nd defendant.

Appeal succeeds accordingly.

*(Sgd.)*
**MARIAMA OWUSU**
***(JUSTICE OF APPEAL)***

**DANQUAH, J.A.** I agree

*(Sgd.)*
**IRENE C. DANQUAH**
***(JUSTICE OF APPEAL)***

***TORKORNOO, J.A.*** *I also agree*

*(Sgd.)*
***GERTRUDE TORKORNOO***
***(JUSTICE OF APPEAL)***

**COUNSEL:**

- ***Mrs. Ocquaye Nortey for Plaintiff/Appellant***
- ***The Attorney General for 2nd Defendant/Respondent***