IN THE CIRCUIT COURT OF JUSTICE HELD AT DENU ON THURSDAY THE 31ST DAY OF OCTOBER, 2022 BEFORE HIS HONOUR JOSEPH OFOSU BEHOME-THE CIRCUIT COURT JUDGE

SUIT NO. E2/01/2022

NYADANU JUSTICE …….. …… PLAINTIFF

VRS:

HAMORABI AGBODO ……... …… DEFENDANT

PARTIES …… …… PRESENT

J U D G M E N T

The parties have presented to me for resolution by the use of the techniques of substantive and procedural Law, a dispute that arose from a seeming contract by which Plaintiff supplied building materials to the Defendant on credit.

It is common cause that Defendant has not managed to pay even a fraction of the value of goods supplied him since 2018. The Defendant sought to raise doubt as to how much he is to pay but the evidence established the outstanding debt to be clear and unambiguous.

The issues raised for my determination include:

a) Whether or not the Plaintiff sold building materials to the Defendant to the tune of GH¢62,532.00.

b) Whether or not Defendant promised the Plaintiff to pay back the said GH62,532.00 a few weeks later.

c) Whether or not payment is to be made in respect of the current prices of goods supplied.

The cogency of the contentions of the parties in respect of the issues raised will be self-evident at the close of the trial.

PLAINTIFF'S RELIEFS

The Plaintiff claims against the Defendant herein are as follows:

1. An order for recovery of the amount of GH¢62,532.00 being building materials purchased from the Plaintiff from 12th November, 2018 to 12th January, 2019 which the Defendant has deliberately failed to pay despite repeated demands up to date.
2. An order compelling the Defendant to pay the current price of the items Defendant purchased from the Plaintiff.
3. General damages for hardship, deceit, breach of promise and or contract and inconveniences.
4. Cost.
5. Any other reliefs(s) found due by the Court.

PLAINTIFF'S CASE

The pleaded case of the Plaintiff is that he is a Businessman who deals in Building materials and the owner of N.D. Justice Enterprise and that the Defendant is a Clearing Agent at Aflao Border.

Plaintiff asseverates that the Defendant from 12th November, 2018 to 12th January, 2019 came to his Enterprise and bought some Building Materials on credit per the attached list of items consisting of the various dates, old and new prices stated on it for the perusal of the Court.

LIST OF BUILDING MATERIALS PURCHASED BY THE DEFENDANT FROM PLAINTIFF

NO.	DATE	ITEM CEMENT	OLD UNIT PRICE	TOTAL
1.	12-11-2018	600 BAGS	GH¢30.00	995 BAGS
2.	10-12-2018	100 "	"	-
3.	12-12-2018	15 "	"	-
4.	14-01-2019	100 "	"	-
5.	16-01-2019	60 "	"	-
6.	25-01-2019	60 "	"	-
7.	06-02-2019	30 "	"	-
8.	16-02-2019	30 "	"	-
				GH¢29,850.00

NO.	DATE	ITEM IRON ROD	OLD UNIT PRICE	TOTAL
1.	12-11-2018	12mm 200 8mm 150	GH¢27.05 GH¢7.00	GH¢5,500.00 GH¢1,050.00
2.	17-11-2018	14mm 30P	GH¢37.00	GH¢1,110.00
3.	02-12-2018	B/W 2 Coils	GH¢50.00	GH¢ 100.00

4.	**29-01-2019**	**12mm 300P** **8mm 250P** **14mm 6P** **B/W 4 Coils**	**GH¢27.05** **GH¢7.00** **GH¢37.00** **GH¢50.00**	**GH¢8,250.00** **GH¢1,750.00** **GH¢ 222.00** **GH¢ 200.00**
				GH¢17,882.00

NO.	**DATE**	**ITEM** **SAND**	**OLD** **UNIT PRICE**	**TOTAL**
1.	**12-11-2018**	**14 trips**	**GH¢250.00**	**26 trips**
2.	**17-11-2018**	**2 "**	**"**	**-**
3.	**19-11-2018**	**3 "**	**"**	**-**
4.	**02-01-2019**	**2 "**	**"**	**-**
5.	**16-01-2019**	**1 "**	**"**	**-**
6.	**22-02-2019**	**2 "**	**"**	**-**
7.	**09-03-2019**	**1 "**	**"**	**-**
8.	**01-04-2019**	**1 "**	**"**	**-**
26 trips				**GH¢6,500.00**

NO.	**DATE**	**ITEM** **GRAVE** **DUST**	**OLD** **UNIT PRICE**	**TOTAL**
1.	**12-11-2018**	**4 trips** **(Single axel)**	**GH¢900.00**	**GH¢3,600.00**

NO.	DATE	ITEM CHIPPINGS	OLD UNIT PRICE	TOTAL
1.	**12-12-2018**	**1 Single**	**GH¢1,200.00**	**GH¢1,200.00**
2.	**12-01-2019**	**Semi-trailer**	**GH¢3,500.00**	**GH¢3,500.00**
				GH¢4,700.00

GRAND TOTAL - GH¢62,532.00

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(SGD)

NYADANU JUSTICE

Plaintiff says that on these dates mentioned, the Defendant approached him (Plaintiff) at the request to purchase those Building Materials on credit worth Sixth-Two Thousand, Five Hundred and Thirty-Two Ghana Cedis (GH¢62,532.00) with the reason that he has won contract awarded from the Ketu South Municipal Assembly to construct a toilet at Aflao and promised to pay later but failed to honour the said promise upon persistent demands.

That the Plaintiff avers that since then he has made several attempts for the payment of the amount owed by the Defendant but all demands did not yield appropriate response.

The Plaintiff further says that, the actions of the Defendant caused him a great hardship and has left him no other alternative than to resort to legal action to recover the total amount of Sixty-Two Thousand, Five Hundred and Thirty-Two Ghana Cedis (GH¢62,532.00) owed him by the Defendant and he is urging the Court to compel the Defendant to pay the current price of the items purchased from the Plaintiff.

The Plaintiff contends that the Defendant herein will not pay the said amount unless he is compelled by the Court.

DEFENDANT'S CASE

The Defendant filed his defence which is anchored on the fact that the agreement between them is premised on the payment by the Assembly to him subsequent to his payment to Plaintiff and that he is committed to payment on condition to the Assembly's payment.

He avers in paragraph 3 of his statement of Defence, "That the original agreement between the parties was not a simple contract of sale but an agreement to engage in a joint enterprise for a shared profit".

In furtherance, the Defendant avers that their agreement was to the effect that the Defendant will share the profits with the Plaintiff when the Ketu South Municipal Assembly paid the Defendant for carrying out the project.

Before considering the issues set down for trial, I will briefly layout what I consider to be the legal standard of proof that the parties; and Plaintiff in particular, had to meet in proving or disproving the claims presented.

BURDEN OF PROOF

Plaintiff's burden to produce evidence in support of its claims, the burden to persuade the Tribunal of fact with the evidence produced and the standard the evidence must satisfy to prove the claims, have been left out respectively in **Section 11, 10 and12 of the Evidence Act, 1975 (NRCD 323).** The rule was exquisitely laid out by **Ollenu J. in Majologbe vrs. Larbi (1959) GLR 190 at 192** as follows:

"Proof in Law is the establishment of fact by proper legal means; in other words, the establishment of an averment by admissible evidence. Where a party makes an averment and his averment is denied, he is unlikely to be held by the

Court to have sufficiently proved that averment by his merely going into the witness box, and repeating the averment on oath, if he does not adduce that corroborative evidence which (if his averment be true) is certain to exist".

The rule has been elucidated in numerous cases including; **Ackah vrs. Pergah Transport (2018) SCGLR 728 at 730; Yorkwa vrs. Duah (1992-1993) GBR 278 at 282; and Bogoso Gold Ltd Vrs. Ntrakwa (2011) 1 SCGLR 416.**

In casu, the Defendant did not counterclaim so he had no primary duty to prove or disprove anything. In **Brimping vrs. Bawuah (1994-1995) GBR 837 SC**, it was held;

"It was a well-settled principle of Law that a Defendant who counterclaimed assumed the same burden with respect to the counterclaim as the Plaintiff……"

See also: **Malm vrs. Lutterodt (1963) 1 GLR 1; Abbey vrs. Sykers (1992-1993), GBR 743, and Ricketts vrs. Addo (1975) 2 GLR.**

The Plaintiff who made the claims and allegations, assumed the burden of producing evidence **(section 11, NRCD 323**), which is of the capacity of persuading the Tribunal of fact **(section 10, NRCD 323)**, and of the standard stipulated by Law in Civil Cases, which is proof on preponderance of probabilities **(section 12 (1), NRCD 323).**

Where the Plaintiff was able to adduce evidence to meet its primary burden as above, the burden will shift onto the Defendant to adduce evidence to raise a reasonable doubt concerning the existence of the claims by the Plaintiff.

That the primary burden on Plaintiff could shift onto Defendant who did not counterclaimed, is well provided by statute (**Section 14 NRCD 323)** and elucidated in cases including: **Bank of West Africa Ltd. vrs. Ackun (1963) 1 GLR 179.**

In **Re Ashaley Botwe Lands; Adjetey Agbosu vrs. Kotey (2003-2004) SCGLR 420,** it was held holding (5):

It is trite learning that by the statutory provisions of the Evidence Decree, 1975 (NRCD 323), the burden of producing evidence in any given case is not fixed, but shifts from party to party at various stages of the trial, depending upon the issues asserted "

At the close of pleadings, the following issues were set down for the determination of the Court:

A. Whether or not the Plaintiff sold building materials to the Defendant to the tune of GH¢62.532.00.
B. Whether or not Plaintiff is entitled to payment at the current market price plus profit or historical cost plus interest.
C. Whether or not the Defendant promised the Plaintiff to pay back the said GH¢62,532.00 weeks later.
D. Any other issues reasonably arising from the pleadings.

By the Legal configuration on the standard of proof laid out supra, the Plaintiff had the primary duty of producing evidence to the effect that it supplied goods worth GH¢62,532.00 or any other sum to the Defendant once the burden is discharged by the Plaintiff it behoved the Defendant to disprove the claim or have a ruling on that issue made against him.

Secondly, the Plaintiff had the primary duty to establish that it is entitled to payment of goods at the current prices or alternatively cost of good plus interest thereon to date. In the event that Plaintiff was able to discharge that burden, the Defendant had to prove that the Plaintiff is not so entitled.

ISSUE A: Whether or not the Plaintiff sold building materials worth GH¢62,532.00 to the Defendant.

At the close of the case, this issue turned out to be a virtual no-issue. The Defendant at paragraph 10 of his witness statement testified that "I am pleading with this Court that, I am committed to paying this amount and need time to go to Ghana First Company through the Municipal Assembly and appeal for payment of the work executed". Defendant did not also contest the quantum of materials supplied to him and the inherent bill.

In **Quagraine vrs. Adams (1981) GLR 599, CA**, it was held that where a party makes an averment and his opponent fails to cross-examine on it, the opponent will be deemed to have acknowledged, sub silentio that averment by the failure to cross-examine.

This is also part of what transpired between the Plaintiff and the Defendant on 12/07/2022.

Q. Did I not tell you that I will use my land in placement if they do not pay me.

A. You promised to sell the land and pay the money and not to replace the payment with the Land because I do not know if there are papers covering the land and therefore, I did not agree to the replacement.

Q. I am not disputing that your money is with me, am I?

A. Whenever I call you for the payment you get annoyed and that is why I summoned you before the Court.

Q. Have you heard from somewhere that Ghana First Company has paid me and I have refused to pay your money.

A. I have not but that was not the promise or agreement between us.

Q. I put it to you that if they were to have paid me, I would have paid you long time.

A. That was not the agreement between us, you said if you are not paid within six months, you would sell your property and pay me.

ISSUE B: Whether or not the Plaintiff is entitled to be paid for the building materials he supplied at the current prices or alternatively be paid the established debt of GH¢62.532.00 with interest from the accrued date.

Having established that the outstanding debt is GH¢62.532.00, the Court ought to determine whether Plaintiff is entitled to be paid for at prices of supplied items reigning at the market or the established debt with interest.

To be fair to both parties and to follow best trade practices and not to complicate computations payment must rather be by way of debt plus interest from date of sale.

What is interest?

"Interest" in our context, is the money paid or an agreed rate by a borrower on a loan, for the use of the money, or for delaying in paying back a loan, or the consideration for goods supplied or services rendered. According to the Blacks Law Dictionary (7 ed.p.366), interest is:

"Compensation fixed by agreement or allowed by Law for the use or detention of money, or the loss of money by one who is entitled to its use; especially; the amount owed to a lender in return for the use of borrowed money".

In casu, Plaintiff did not hand cash to the Defendant Even though interest is eligible, for the goods supplied is covered by the above definition, the exact interest at stake is "expectation interest", which the same dictionary (op.cit, pg. 885) defines as:

"The interest of a non- breaching party in being put in the position that would have resulted if the contract had been performed".

Basis for awarding interest

Even though interest is usually by way of contract, the Court has mandate to award interest in the absence of a specific contract in the context of "expectation interest".

In **Delle and Delle vrs. Owusu Afriyie (2005-2006) SCGLR 60**, it was held holding (4):

"Whilst it is true that at common Law interest was not payable on a debt or a loan in the absence of express agreement or a course of dealing or custom to that effect 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".

Brobbey (J S C) in his book "PARCTICE AND PROCEDURE IN TRIAL COURTS AND TRIBUNALS OF GHANA identifies four bases for the award of interest. On the third basis which is relevant to this case, he states (op. cit, 416):

"The third basis for the award of interest had generally been taken to be this; A person who has unjustifiable kept money which properly ought to have gone to its owner should not in justice be permitted to benefit by having that money to his possession and additionally enjoying the use of it. It is the profit lost to the owner that is usually ordered to be paid back to him by way of interest. This conceived, the interest becomes some kind of compensation or damages for the wrongful withholding of another person's money".

In **Holland West Africa and Anor. vrs. Pan Africa Trading Co and Anor. (1976) 2GLR 179, it was held, holding (3):**

"If a breach of contract by a Defendant had deprived a Plaintiff of the use of a sum of money or other capital assets, the Defendant must be presumed to have agreed to pay interest for the period between the date when the cause of action arose and the date of judgment.

Also See: **Ghana Commercial Bank vrs. Binoo-Okai (1982-1983) GLR 74; Agyei vrs. Amegbe (1989-1990) 1 GLR** and **Royal Dutch Airlines (KLM) Vrs. Farmex Ltd (1989-1990) 2 GLR623.**

The evidence has established that Defendant failed or refused to pay for the building materials supplied him. By that default, the Plaintiff lost the expected use of the money that was due it. It lost the profit that it would have made, had the expected payment been made. In all events, the innocent Plaintiff must not suffer diminution in the expected payment by reason of Defendant's conduct.

I conclude therefore that Plaintiff is entitled to interest at the prevailing Bank Lending Rate on the sum of GH¢62,532.00 from the period of January, 2019 to the date of final payment.

ISSUE C: Whether or not there is a contract between the Plaintiff and the Defendant for the supply of the building materials.

A contract may be defined as an agreement between two (2) parties which is intended by them to have legal consequences. In order that a valid contract between the parties should come into existence certain essential requirements must be fulfilled.

They are:

1. The parties must have legal capacity to enter into contract.
2. One party must make a binding offer to the other and the offer must have been accepted.
3. The resulting agreement of the parties must have been a genuine one.
4. The contract must be supported by consideration.
5. In certain exceptional cases, the contract must have been made in a particular form.

A contract which does not comply with the above requirements may be void, voidable or unenforceable. Also, both parties must be of the same mind concerning all the terms of the offer and acceptance. The agreement of the parties must have been genuine or real one. There can be no such real agreement if, because of mistake, the parties have never really consented to the same thing. A mistake as to the identity of the subject matter is one where the parties enter into contract each believing that the contract referred to a different thing. This is known as mutual mistake

See the case of **RAFFLES VRS. WOCTLELHAUS**, where the subject matter of the contract was a cargoe of cotton described as being on board the SS. Peerless in the port of Bombay. Unknown to the parties there were two ships of the same name in the port, both having cargoes of cotton on board. The seller was thinking of the one which was due to leave latter, while buyer only knew of the ship which was due to sail earlier. The Court held that there was no contract.

A contract may be oral (parole) or written; even though written contracts are usually preferred these days for the purpose of avoidance of fraud. Unless a particular legislation requires a contract to be in writing, the parties are entitled to contract orally. The **Contract Act, 1960 (Act 25), Section 11** provided:

"Contracts need not be in writing except in certain cases subject to this Act, and to any other enactment, a contract whether made before or after the commencement of this Act, is not void or unenforceable by reason only that it is not in writing or that there is no memorandum or note of the contract in writing".

The only contracts that must be in writing are contract of guarantee (Sec. 14, Act 25), but that is not what we are confronted with in this case.

With our common Law and statute making it clear that a contract need not necessarily be in writing, it will be erroneous, in casu, to conclude that there was no contract between the parties by reason only of the absence of a note, memorandum or other written evidence as same. Where parole evidence establishes an enforceable contract, it will be recognized and enforced.

Defendant states in his statement of Defence at paragraph3, that "the original agreement between the parties was not simple contract of sale but agreement to engage in a joint enterprise for shared profit. In paragraph (4) four, he contends the agreement was to the effect that the Defendant

will share the profit with the Plaintiff when the Ketu South Municipal Assembly paid the Defendant for carrying out the project. However,

this is what the very same Defendant says in evidence in Court per paragraph 5 of his witness statement and same corroborated by his witness, DW1, David Sedewodzi.

"The said David Sedewodzi accompanied me to the Plaintiff's store at

Hatsukope where I pleaded with the Plaintiff to supply me with some building materials to undertake the said project and promised to pay back as soon as I

received payment from the Ghana First Company through Ketu South Municipal Assembly.

DW1, also had this to say per paragraph 6 of his witness statement "There was a time the Defendant asked me to accompany him to the Plaintiff's store at Hatsukope and when we got there it was agreed verbally between the Plaintiff and the Defendant that the Plaintiff will be supplying building materials due the project of 20 seater (WC) at Aflao Border Lorry Park and after which the company pay through Ketu South Municipal Assembly, the Defendant will also pay same to Plaintiff.

Defendant in his pleadings (Defence) stated it was Joint Venture. However, per his evidence when he mounted the witness box, he abandoned the issue of Joint Ventureship with Plaintiff and set up or dwelt entirely on deferred payment.

Edward Wiredu JSC (as he then was) in **Ogbarmey Tetteh vrs. Ogbarmey Tetteh [1993-94] GLR 353 @ 395** expressed himself thus:

"The law as I understand it is that a party is bound by his pleadings and the acceptance in favour of a party of a case which is inconsistent with what he has put in and by his evidence is wrong and unjustified in law…" Appau JA (as he then was) in ***Doris Nyartey vrs. Christian Kumi [2012] 42 G.M.J. 182 @ 191*** in supporting the decision of the former Chief Justice had this to say: "A party cannot, in the course of hearing, put up a case contrary to or inconsistent with that which he himself had put forward in his pleadings.

The Plaintiff and his witnesses, PW1 and PW2 assert a different position.

Plaintiff avers, the Defendant approached him that he has won a contract to build a 20 seater toilet from the Ketu South Municipal Assembly

at Aflao and that the former should supply him with the building materials and that he will pay later. Plaintiff contends he was hesitant in so doing based upon his experience with the same Assembly and a client that he served but Defendant urge him to supply same with the promise that, he has lands and houses which he could sell to defray the debt if the Assembly did not pay on time.

Paragraph 8 of the Defendant's witness statement reads "When I realized that the payment by the Ghana First Company through the Municipal Assembly was delaying and because of the pressure put on me by the Plaintiff, I suggested to the Plaintiff my landed property at Gamadzra that I wanted to show this land to the Plaintiff if he is willing or interested in buying same in order to defray the amount owed the Plaintiff.

Various positions have been posited by PW1 and PW2 and Even Plaintiff himself: at one point it is said payment was agreed to be effected when the project reaches the lentil level; at another point 6 months from the start, all which had been denied by the Defendant.

It could be gleaned from the foregoing that no certain terms were agreed upon. It must be noted that both parties must be of the same mind concerning all the terms of the offer and acceptance. Where there is agreement on contract terms, there is said to be consensus ad idem (i.e. a meeting of the minds). Absent consensus there is no contract per **Anim J.A. (dissenting) in Addison vrs. A/S** cement Export **Limited (1973) GLR 151.** Therefore, in **S.A Turqui and Bros vrs. Lamptey "Ollenu J.** observed that "the minds of the parties were not ad idem. There is therefore no binding contract between the parties" contracting parties must agree on all m0aterial terms. Absent certainty on all material terms, there is no contract. In **short vrs. Moris,** there was no agreement between the parties relative to such crucial matter as the purchase price of land.

In **Asare vrs. Antwi (1975) 1 GLR 16, C.A**. the purchase price was not finalized, nor was the land identified. The Court of Appeal ruled that there was no contract and there could not be specific performance. In **Okai vrs. Ocansey (1992-93) 3 GLR, 1047, C.A**. The Court of Appeal declined to decree specific performance even though the respondent was in possession of the property, had made an advance payment to the Appellant.

The Court refused because essential terms had not been agreed upon, namely, the rent to be paid, commencement date, and duration of the lease.

In sum, there is no binding contract on Plaintiff to be paid after Defendant has been paid by the Assembly herein. The former is to be paid as pertains to normal business practice.

CONCLUSION:

BY COURT: Upon a perusal of the evidence in totality. Judgment is entered against the Defendant for Plaintiff the following reliefs:

1. The recovery of the amount of GH¢62,532.00 being the building materials purchased from Plaintiff from 12th November, 2018-12th December, 2019. Interest at the prevailing bank rate on the outstanding debt above.

YEAR	AMOUNT	INTEREST (32%)	TOTAL
Dec. 19-Nov.20	**GH¢62,532**	**GH¢20,010.00**	**GH¢82,542**
Dec.20-Nov. 21	**GH¢82,542**	**GH¢26,413.00**	**GH¢108,955**
Dec.21-Oct. 22	**GH¢108,955**	**GH¢31,960.00**	**GH¢140,915**
			GH¢140.915

2. **Cost is assessed at GH¢2,000.00.**

NB: This is the payment to be effected as per the date of judgment.

(SGD)

H/H JOSEPH OFOSU BEHOME

CIRCUIT COURT JUDGE