

IN THE CIRCUIT COURT HELD AT CAPE COAST ON TUESDAY THE 22ND
DAY OF NOVEMBER, 2022 BEFORE HER HONOUR VERONIQUE PRABA
TETTEH (MRS.), CIRCUIT JUDGE

C11/39/2021

PAPA PANYIN A.K.A EBENEZER RICHARD BROWN

VRS

EBOW KOBINA A.K.A FRANCIS RICHARD BROWN

JUDGMENT

The plaintiff's claim is for:

1. An order of the court directed at the defendant to render vacant possession of the room defendant is currently occupying at his residence as same has been allocated to plaintiff in their deceased fathers will or testament
2. An order of the court directed at the defendant to account for rent collected from twenty-two (22) rooms in House No. F32A/4 Kadadwen, Kotokuraba, Cape Coast
3. An order of Court to the effect that the beneficiary children of Kojo Asakorah (deceased) elect one of their kind to collect the rent in House No. F32A/4 on behalf of the beneficiary children and to account for his stewardship
4. An order of perpetual injunction restraining defendant from holding himself out as the absolute landlord of H/NO. F32A/4, Kadadwen, Kotokuraba, Cape Coast and to desist from further collecting rent of same.

The issues set out for determination were:

- a. Whether or not parties were partners in a transport business

- b. Whether or not the will and last testament of the parties' deceased father, defendant has any power or right to manage H/No. F32A/4, Kadadwen, Kotokuraba, Cape Coast.
- c. Whether or not the defendant has to render accounts of the proceeds accrued from the 22 rooms he has rented since 2003
- d. Whether or not the Defendant is entitled to his defence or any at all.

The additional issues filed by the defendant also set down were

- a. Whether or not per the will of the parties deceased father those rooms has been specifically shared out to named beneficiaries
- b. Whether or not during the life time of the parties deceased father power of attorney was given to the defendant by their deceased father to manage the house in dispute
- c. Whether or not nine (9) rooms or twenty two (22) rooms were rented out by the defendant and the proceeds used in maintaining the house

While these issues were set down on the 11th of January 2022 as the issues to be determined, the main issues that stood out during the trial was whether the defendant had authority to manage the properties of their late father and whether or not he should account for his stewardship for the period he had been in charge.

Before the commencement of the trial, the parties were referred to court connected ADR to attempt settlement. The parties were able to settle through court connected ADR the first relief of the plaintiff on the delivery to plaintiff of vacant possession of his room in house number F32A/4. The parties agreed that the defendant would hand over the room to the plaintiff by the 30th of April and this was done. The remaining issues on the collection of rent, giving account of the rent collection and the perpetual injunction remained for this court to determine.

The burden of proving a fact or group of facts lies on the party who seeks a favourable verdict on that issue. Section 11 of the Evidence Act NRCD 323, provides that to avoid a ruling against him, a party has the burden of introducing sufficient evidence to prove the facts alleged. The court in a civil case at the close of evidence, weighs the evidence provided and makes a favourable judgment for the party whose evidence was found weightier. The burden of persuasion is by the preponderance of probability, where the court being satisfied of the evidence finds that the alleged facts is more probable than its non-existence. Thus each party who makes an averment must produce sufficient evidence to establish that probability in the mind of the court.

See also the cases of *Kusi v Kusi Bonsu* 2010 SCGLR 60

Takoradi Flour Mills v Samir Faris 2005-06 SCGLR 882

The plaintiff gave evidence and did not call any witness in support of his case. The defendant also testified on his own and even though he had filed a witness statement for a witness, this witness statement was later withdrawn.

The plaintiff's case is that his father died and left behind 20 children including his mother's children who are 5 children. He claims that his father died testate and in the will he made, he bequeathed the Kotokuraba house numbered F32A/4 the subject matter of this suit to his mother and to her children that after her death the defendant has been in possession of the rooms and has refused to account for the rent he collects. The plaintiff sought to tender the will of his father but same was rejected. The cross examination of the plaintiff was unremarkable in that he basically denied all the assertions made by the defendant. An interesting point was his admission during his cross-examination that he had written to the tenants to pay their rent to him but they had refused. He also stated that 6 of the 22 rooms had been rented out contrary to his earlier claim that it was twenty two rooms that were rented out.

The defendant filed two witness statements on which he relied on. The first is dated 20th January 2022 and the supplementary witness statement filed with leave of the court is dated 7th April 2022. To the supplementary witness statement, the defendant attached several exhibits relating to the property in dispute. The defendant admits to being in charge of the property as claimed by the plaintiff. He however claims the rents received was used to assist family members and maintain the house. He tendered several exhibits showing pictures of the decrepit condition of the house as at the time he took over as well as receipts of building materials he had purchased to renovate the house. This evidence of the defendant was not sufficiently challenged as to its authenticity and truthfulness as regards the various receipts for building material and also hospital bills. I will therefore accept the documentary evidence as proof of his renovation of the property in dispute.

The evidence led by plaintiff in my opinion does not establish his reasons for why the defendant should hand over collection of the rent of the house as no allegation of mismanagement or improper behaviour of the defendant was alleged. From the plaintiff's evidence it is clear he is only interested in collecting the rent because he is the eldest. I do not find this to be a good enough reason to interfere by ordering the other siblings to choose a different person. In any case, such an order from this court might be impossible to execute and the court will not give orders that cannot be carried out.

On the issue of the rendering account of his stewardship I find the Supreme Court case of *Marfo v Adusei and others* [1961] 1 GLR 225 per Mills Odoi JJS to be particularly instructive. The court held that:

The proposition therefore is that, in the absence of any fiduciary relationship existing between parties an action for account cannot be maintained. Such an action can only succeed if a plaintiff has expressly stated facts showing not only that he is entitled to the account which he claims but also that a fiduciary relationship exists between him and the defendant as to make it clear that the

latter is an "accounting party." The statement must further show that the defendant has failed in his duty in that he has not rendered a proper or any account within a reasonable time after demand.

From the facts and the totality of the evidence led, the two parties are brothers from the same mother and father. The plaintiff is older while the defendant is younger. There is clearly a fiduciary relationship that exists between them regarding the defendant's stewardship of the property. In one breath the defendant claims he only took over administration of the house in 2017 and in another breath says he started to do so while his father was alive and had given him authority to do so. If that is the case, then the plaintiff's case that the defendant has been collecting the rents since 2003 is probable. The final question put to the defendant during his cross examination was the following.

Q.I put it to you that you have for many years administered the property of your father without the rightful power.

A.I have the power because my late father appointed me as administrator.

It is clear that the defendant from his own words has been administering or collecting rents from the property longer than 2017. In the face of this relief, plaintiff has shown that defendant is in charge of collecting rent. In this court defendant has also exhibited some aspects of his stewardship by tendering exhibits 1-3 series. However I believe that it is because defendant has not been completely forthcoming on his stewardship that this relief was included in this action. If even the defendant had been rendering account, same was not made known to this court. In view of *Marfo v Edusei* I will order the defendant to render account of his stewardship of the property and file same within 30 days of this court order commencing from the period of 2017.

As to who should manage the properties, the parties and their other siblings may decide to choose whomever they wish to manage same. It is not up to the court to appoint one.

The plaintiff's is thus only entitled to reliefs two of his reliefs in terms of an order of account. Relief one has already been agreed to and same is adopted as consent judgment of the court. The 3rd, 4th and 5th reliefs are however dismissed.

There will be no order as to costs.

(SGD)

H/H VERONIQUE PRABA TETTEH (MRS)

(CIRCUIT JUDGE)