

**IN THE CIRCUIT COURT OF GHANA HELD IN ACCRA ON TUESDAY, 13TH DAY
OF DECEMBER 2022 BEFORE HIS HONOUR KWABENA KODUA OBIRI-
YEBOAH, CIRCUIT COURT JUDGE.**

C2/115/2022

ZXZ COMPANY LTD

VRS

EMMANUEL OMARI

JUDGEMENT

The Plaintiff per Writ of Summons and Statement of Claim issued from the registry of this Court against the defendant, dated 16/03/22 claiming the following:

- a. An order for the recovery of the liquidated sum of One hundred Seventeen Thousand, Nine Hundred Ghana Cedis (GHC 117,900.00) as the outstanding amount due and payable for phones supplied to the defendant, from the date of delivery/receipt of the goods with interest at the commercial bank rate till date of final payment.
- b. Cost including Lawyer fees.
- c. Any other order or orders as this Honourable Court may deem fit.

The Defendant also filed appearance and statement of defence on the same day 10/05/2022 denying the claims made by the Plaintiff.

The Plaintiff did not file a reply but after close of pleadings filed application for directions.

At the application for directions hearing, the following two issues were set down for trial:

- a. Whether or not the outstanding amount owed by Defendant to Plaintiff as at 27th day of January 2022 was One Hundred and Seventeen Thousand, Nine Hundred Ghana Cedis (GHC 117,900).
- b. Whether or not the Plaintiff is entitled to any and/or all of its (Plaintiff's) reliefs against the defendant.

On the 08/07/22, the suit was called before the Court and parties were present and Case Management Conference (CMC) was conducted for both the plaintiff and the defendant, and the suit was adjourned for hearing.

The hearing of the case eventually started on the 2nd of August 2022 and the plaintiff company spoke through the attorney, Michael Okine. The witness relied on his witness statement that was before the court and also tendered exhibits A-H which were admitted into evidence without any objection by the defendant. The exhibits were the power of attorney donated to the witness, the invoices and the waybill of the items sent to the defendant, copies of letters exchanged between the solicitors of the parties. Therefore, the witness statement and the exhibits were adopted as the evidence in chief of the witness. Cross examination of the witness was started by the counsel for the defendant.

In the cause of the trial of the case, before Counsel will finish the cross examination of the witness, counsel brought an application for amendment of statement of defence which was moved on the 23rd of August 2022. The application was granted, and the defendant was ordered to file the amended statement of defence within seven days for the proceedings to continue.

From the records of the courts, the said amended statement of defence was not filed by the defendant and after a number of adjournments, hearing notice was ordered to be served on the defendant for the case to continue. On the 29th day of November 2022 Counsel for plaintiff submitted that hearing notice has been served on the defendant, but

the defendant and the lawyer were absent. Counsel submitted further that it should be assumed they have waived their right to be heard and therefore they wanted proceedings to continue and prayed that the witness is discharged as they do not have any re-examination to do.

The witness was discharged by the court, and the plaintiff announced the end of their case and prayed for the case to be adjourned, hearing notice to be served for the defendant to open his defence before the court. The defendant and Counsel again failed to appear before the court even though they were served with hearing notice. The case of the defendant was then closed, and suit was adjourned for judgment.

The plaintiff attorney testimony as a witness before the court was that the defendant is a businessman who operates under the name and style of Omari Phones and accessories in Accra. The witness stated that in March 2021, the defendant procured some goods from the plaintiff which are captured under the invoices he tendered before the court. He said the items were duly delivered to the defendant who signed per the waybill/delivery notes to confirm receipt of the items listed in the invoices.

The witness said the initial amount owed by the Defendant was Two Hundred and Sixty-One Thousand, Eight Hundred and Fifty Ghana Cedis (GHC 261,850) and the defendant made part payment for the goods supplied by issuing three (3) separate cheques as payment for the balance due on the goods supplied. The Defendant promised to pay cash on a later date to retrieve the issued cheques from the plaintiff as was the Defendant's usual custom. The witness said the defendant however failed to bring cash to retrieve the three cheques he had issued and deposited with the company despite several follow-ups.

The witness said as of 19th October 2021, an amount of One Hundred and Thirty-Two Thousand, Nine Hundred Ghana Cedis were in arrears. The witness said on 11th November 2021 the defendant admitted in a letter the outstanding debt and made

proposal to defray the debt. The defendant then made payment of GHC 10,000 on 8th January 2022 and GHC 5000 on 27th January 2022 leaving the total amount outstanding to One Hundred and Seventeen Thousand Nine Hundred Ghana Cedis (GHC117,900).

The witness concluded by saying that all efforts to ensure that the Defendant pays the outstanding amount owed or return part of the goods delivered have proved futile and has caused untold hardship on the business of the plaintiff company and therefore claim against the defendant.

This was the evidence of the plaintiff that was before the court at the end of the trial as the defendant as indicated earlier did not avail himself before the court for the trial, refused to comply with the orders of the court and also refused to appear before the court to complete his cross examination. The plaintiff who brought the action had the responsibility to prove Its case by giving evidence and that is what was done by the plaintiff before the court.

In civil cases the plaintiff has a burden to prove his case by the preponderance of probabilities and this is indicated in sections 11(4) and 12(1) of the evidence Act 1975 (NRCD) 323. Section 11(4) provides that: "In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence." Section 12(1) also provides that: "except as otherwise provided by law, the burden of persuasion requires proof by preponderance of the probabilities". See the case of **Adwubeng v Domfeh (1996-97) SCGLR 660**

Also, the basic principle of proof in civil suits, a party whose positive assertions are denied by his opponent bears the onus of proof of those assertions. See: **Agbesi v Ghana Ports & Harbours Authority (2009) 20 MGLR 109 @ 137.**

Again, the right to be heard is an established common law principle. It is also an inalienable right which should not be taken away unless the rules of court permit it to be so. See **Republic v High Court, Accra Ex-parte Salloum & Others. (2012) 37 MLRG 34 SC**. In the case of **Ankumah vrs City Investment Co. Ltd (2007-2008) 2 SCGLR 1064** the Supreme Court held per Adinyira JSC at page 1076 as follows: "The trial Court therefore rightly adjourned the case for judgment. A Court is entitled to give a judgment in default as in the instant case, if the party fails to appear after notice of the proceedings has been given to him. For then, it would be justifiable to assume that he does not want to be heard". See the **Rep v Court of Appeal Ex Parte Eastern Alloy Co. Ltd 2007-08 SCGLR 371**

It is my humble view that since the defendant failed to comply with the orders of the court to file his amended statement of defence and failing to appear to further cross examine the plaintiff witness and absent when hearing notice was served on them for hearing, the defendant waived his right to be heard.

In a civil trial as in this case, the plaintiff will have to proof their case before the court. The position of the law is settled by a legion of authorities that, when a party makes an averment and the averment was not denied, no issue is joined, and no further evidence need to be led on that averment. Also, when a party had given evidence of a material fact and was not cross-examined upon it, he even need not call further evidence to establish that fact.

Fori v Ayerebi (1966) GLR 622 SC

Bonsu v Kusi (2010) 26 GMJ 20 SC

Looking at the case per the 2 issues that were set down by the court for determination, the plaintiff through the witness led evidence to prove their case and to demonstrate per the exhibits that the accused received the goods as they were supplied. The counsel for

the defendant started cross examination of the witness and he answered effectively to demonstrate the amount outstanding to the plaintiff. Again, during the cross examination, the defendant was not able to challenge the veracity of the evidence of the witness with any existing evidence of the defendant and hence the import of the witness evidence is acceptable before the court.

In this case as the plaintiff gave evidence, he tendered various exhibits which were all admitted without objection and the witness was able to demonstrate the goods that were supplied to the defendant company before the court with the exhibits of the invoices and the waybills. The witness was also able to demonstrate the total amount the defendant owed and the payment he made were deducted from the indebtedness to arrive at the GHC 117,900. Therefore, per issue (a) the court came to the conclusion that as of 27th January 2022 the defendant owed the plaintiff the said amount GHC 117,900.

The second issue, (b) is whether the plaintiff is entitled to any and or all of its (Plaintiff's) reliefs against the Defendant? From the reliefs of the plaintiff, the plaintiff is seeking an order for recovery of the outstanding indebtedness of the defendant and interest in addition to cost. The plaintiff has been able to prove that the defendant is owing the plaintiff the said amount and therefore the plaintiff is entitled to the reliefs seeking before the court including the interest and cost. See **KAMA Health Services v Unilever Ghana Ltd Civil Appeal No. J4/24/2013, 19th July 2013, Butt v Chapel Hill Properties and Another (2003-2004) 1 SCGLR 636**. Therefore, the two issues set down before the court for determination will be answered in the affirmative and resolve in favour of the plaintiff. I am of the humble opinion that the Plaintiff has proved its case before the court, as per the issues, set out before the court.

The plaintiff is therefore entitled to all the reliefs per the writ of summons before the court. Cost GHC 20,000 will be awarded in favour of the plaintiff.

SGD

**HIS HONOUR KWABENA KODUA OBIRI-YEBOAH,
CIRCUIT COURT JUDGE.**