IN THE CIRCUIT COURT ONE HELD AT ACCRA ON THURSDAY, 20TH OF APRIL 2022, BEFORE HER HONOUR AFIA OWUSUAA APPIAH (MRS) CIRCUIT COURT JUDGE

C2/165/2022

SUMAILA OSMAN **PLAINTIFF**

V

MARTIN AWUKU **DEFENDANT**

JUDGMENT

On 1/7/2022, Plaintiff caused his counsel to issue a writ of summons with its accompanying statement of claim against Defendant herein praying for the following reliefs;

1. An order for the immediate and full settlement of GHc18.100)Eighteen Thousand one Hundred Ghana Cedis.
2. Interest on the said amount from March 2022 until the date of final payment.
3. Damages for breach of contract.
4. Cost including legal fees.

Defendant upon service of the writ on him caused his solicitors to enter appearance but failed to file a statement of defence within the stipulate time. On 4th of October, 2022 the court on an application by Plaintiff, and on the strength of Order 13 r 5, entered final judgment in default of defence in respect of relief 1 and 2, awarded cost assessed at 10% of relief (1). In respect relief 3, the court entered interlocutory judgment and Plaintiff ordered to file witness statement for final determination of same.

Defendant was in court during the hearing of Plaintiff's evidence but elected not to cross-examine Plaintiff on his evidence.

It is trite learning that where a witness testifies and the opponent consciously fails or refuses to cross-examine the witness, the court may consider the evidence as admitted by the opponent. In the case of **Takoradi Flour Mills v Samir [2002-2006] SCGLR 882, Ansah JSC referred to the case of Tutu v Gogo (Civil Appeal No. 25/67 dated 28th April, 1969, Unreported but digested in 1969 CC 76)** Ollenu JA stated " in law, where evidence is led by a party and that evidence is not challenged by his opponent in cross-examination and the opponent did not tender evidence to the contrary, the facts deposed to in the evidence are deemed to have been admitted by the party against whom its led, and must be accepted by the court."

It is to be noted that, the failure of the Defendant to cross examine the Plaintiff on the evidence or challenge same either in cross examination or by contrary evidence did not exonerate the Plaintiff from proving her case to the required standard.

The Standard of proof in civil case such as the present action is proof on the preponderance of probabilities. This is Statutory and has received countless blessing from the Courts of this land in a plethora of authorities. See sections 11(4) and 12 of the Evidence Act, 1975, NRCD 323. Section 12(2) of Act 323 which defines 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.* And in Section 14 of the Evidence Act, it is provided that "except as provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting".

This has always been the position of the law. As stated in the case of **FAIBI VS. STATE HOTELS LTD [1968] GLR 411**, the onus in law lies on the party who would lose if no evidence were led in the case and where some

evidence were led, it lay on the one who would lose if no further evidence were led.

Plaintiff's evidence in on oath is that he is a tanker driver who supply to persons in need of water for their business and was engaged by Defendant to supply him with trips of water using his tanker. After supplying Defendant with forty-six(46) trips of water at a total cost of GHC18,100, Defendant refused to pay the total bill to him. Subsequently, he caused his solicitors to write to Defendant on 20/6/2022 demanding the payment of the amount owed but Defendant was failed to make payment. Plaintiff contended that as a result of Defendant's failure to pay the debt, he could not longer finance my operations such as payment for the water at the point of supply to the tanker drivers as well as maintaining the tanker he used to deliver the water. He stated that it took him two months to arrange for a loan to carry out maintenance on his vehicle which had been parked for al the time. Plaintiff contended that his loss of income would be in the region of GHC12,000 and GHC1,500 per week. He therefore prayed the court to order Defendant to make payment of these amounts to him.

General damages are at large and are considered to be the direct natural or probable consequence of the action complained of. The Supreme Court in the case of **ROYAL DUTCH AIRLINES (KLM) AND ANOTHER v. FARMEX LTD[1989-90] 2 GLR 623** held, On the measure of damages for breach of contract, the principle adopted by the courts was restitution in integrum, ie if the plaintiff has suffered damage not too remote, he must, as far as money could do it, be restored to the position he would have been in, had that particular damage not occurred. What was required to put the plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost" The Supreme Court in the case of **KLAH V. PHOENIX INSURANCE CO. [2012] 2 SCGLR 1139**, speaking through

Akoto-Bamfo JSC held inter alia at page 1152 as follows " general damages arise by inference of law and therefore does not need to be proved by evidence." In the case of **DELMAS AGENCY GHANA LTD V FOOD DISTRIBUTORS INTERNATIONAL LTD [2007-2008] SCGLR 748 at page 760**. It was held at holding 4 that " special damages are distinct from general damages. General damages is such as the law will presume to be the natural or probable consequence of the defendant's act. It arises by inference of the law and therefore need not be proved by evidence. The law implies general damage in every infringement of an absolute right. The **catch** is that only **nominal damages** are awarded. Where the Plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate." This presupposes that there must be an established breach from which damage naturally arises and necessitate monetary compensation for that damage.

Per the unchallenged evidence of Plaintiff, his contract with Defendant was one of supply of water to Defendant and payment of the cost of same by defendant. There is no contract between parties for the amount owed by Defendant to Plaintiff to be used for maintenance of Plaintiff's vehicle out of which a direct damage would result by Defendant's failure to make payment on time to Plaintiff. Admitted Plaintiff would or would not have used the money owed him by Defendant to repair his vehicle when same had maintenance problems. But the loss of income and the inability of Plaintiff to maintain his truck on time does not flow directly from Defendant's failure to pay the debt owed on time. Accordingly, Plaintiff's claim for general damages fails and same is dismissed.

Conclusion

Interlocutory judgment entered in favour of Plaintiff against Defendant in respect of relief 3 is hereby rescinded as plaintiff failed to establish same. The

court having awarded cost to be assessed at 10% of the principal sum on there shall be no further order as to cost.

PLAINTIFF PRESENT

DEFENDANT PRESENT

MR CORNILIUS VITO FOR PLAINTIFF PRESENT

H/H AFIA OWUSUAA APPIAH (MRS)
CIRCUIT COURT JUDGE