IN THE CIRCUIT COURT OF JUSTICE HELD IN HO, VOLTA REGION ON TUESDAY, THE 4TH DAY OF APRIL 2023 BEFORE HIS HONOUR FELIX DATSOMOR, ESQUIRE, CIRCUIT COURT JUDGE

SUIT NO. C2/5/2022

BETWEEN

ADANUTY GODFRIED — ***PLAINTIFF***

[SUING PER HIS LAWFUL ATTORNEY AZIDOKU MAWULI]

AND

1. **JUSTICE KWABLA BOTSYOE**
   [OF AKOEFE-AVENUI]

2. **JOSHUA BUATSI** — ***DEFENDANTS***
   [OF HO]

J U D G M E N T

The plaintiff herein approached the civil altar of this court by a writ of summons issued against the defendants jointly and severally seeking the following reliefs:

a) *An order for the recovery of GH¢39,402.84 being the outstanding balance of a loss first defendant incurred at plaintiff's chemical shop which second defendant guaranteed to liquidate.*

b) *An order of interest on the said amount of GH¢39,402.84 from 29th October 2021 at the prevailing bank rate until the end of final payment.*

c) *General damages for inconveniences caused to the plaintiff.*

The writ of summons was accompanied by a statement of claim issued together with it on 18 November 2021 in which the plaintiff had spelt out the factual situation that led to the instant suit.

The defendants filed their notice of entry of appearance on 24 November 2021 and followed same with their statement of defence on 10 December 2021. In the said statement of defence, the defendants detailed out the grounds upon which they implore the court to dismiss the case of the plaintiff as having been brought in bad faith. Pursuant to the rules of court particularly Order 11 rule 3(1) of the High Court (Civil Procedure) Rules, 2004 (CI 47), the plaintiff upon receipt of the statement of defence filed a reply to the statement of defence on 21 December 2021.

Since the instant suit is a civil case and carries with it the same evidential burden as every other civil case, the plaintiff is required by section 11(1) of the Evidence Act, 1975 (NRCD 323) to adduce admissible, cogent and credible evidence in support of the reliefs sought. See: ***First Eye Ltd v. Jehovah God See Me Herbal Shop & Others [2013-2015] 1 GLR 101.*** Suffice it to say that the defendants in the instant suit did not file any counterclaim, and therefore did not assume any such burden of proof.

From the pleadings filed by the parties, the plaintiff set out a couple of issues for the determination of the court. The said issues were adopted by the court as issues set down for determination. They were:

1. *Whether or not the plaintiff is the owner of Vision Chemical Shop.*
2. *Whether or not the first defendant was employed as a shop attendant at the said shop?*

3. *Whether or not there was shortfalls which the first defendant admitted liabilities of and promised to pay which said promise was guaranteed by the second defendant.*

4. *Whether or not the first defendant made part-payment of GHc500 to the plaintiff.*

5. *Whether or not the first defendant used part of the shortfalls or shortages to buy two motorbikes.*

The parties were thereafter made to exhaust all the pre-trial protocols regarding the suit by filing their witness statements, pretrial checklists and all documents they intend to rely on at the trial. The plaintiff prosecuted his case through his lawful attorney, Azidoku Mawuli, and thus filed witness statement for the said attorney as well as two other witnesses whereas the defendants filed witness statements for themselves but none for a witness. In effect, whereas the plaintiff called two witnesses to testify in support of his case, the defendants testified in person but they did not call any witness. I must however observe at this point that the mere fact that the plaintiff called two witnesses but the defendants called none does not imply that the plaintiff must automatically have victory in this case. In law witnesses are weighed and not counted....

Before I venture into resolving the main issue between the parties herein, I need to observe at this juncture that this is an action inter parties and the law is that in an action inter parties, the duty of the court is limited to defining the rights and obligations of only the adverse parties in the light of the claim, the evidence presented and the existing law. *See:* ***Grumah v. Iddrisu [2013-2014] 1 SCGLR 413 at 427*** *per Georgina Wood, CJ (as she then was).*

I recall that in ***Owusu v. Tabiri & Another [1987-88] 1 GLR 287 (holding 2)***, the point was made that he who asserts must prove and must win his case on the strength of his own case and not on the weakness of the defence. This implies that the plaintiff

who made assertions in proof of the reliefs sought assumed the burden of proof. The burden would be discharged if the plaintiff led evidence to persuade the tribunal of fact that what he asserts is more probable than not. In other words, the plaintiff was obliged to prove his case by preponderance of probabilities as required by section 11(4) of the Evidence Act, 1975 (NRCD 323). A plaintiff however has no duty to prove his case with arithmetic exactness or beyond reasonable doubt. In explaining the standard of proof, it was held in ***Bisi v. Tabiri & Anor [1987-88] 1 GLR 360 (holding 2), SC,*** as follows:

> *"The standard of proof required of a plaintiff in a civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue. The demand for strict proof… had however never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle…"*

In ***Sagoe & Others v. Social Security And National Insurance Trust (SSNIT) [2012] 2 SCGLR 1093,*** it was stated that "proof by a preponderance of probabilities within the context of the burden of proof as stated in section 12(2) of the Evidence Act, 1975 (NRCD 323), simply means weightier or superior evidence".

In the case of the defendant, the law is that in a claim made by a plaintiff, there is no onus on the defendant to disprove the claim so that however unsatisfactory or conflicting the defendant's evidence may be, it cannot avail the plaintiff. The evidence of the defence only becomes important if it can upset the balance of probabilities which the plaintiff's evidence might have created in the plaintiff's favour or if it tends to corroborate the plaintiff's evidence or tends to show that evidence led on behalf of the plaintiff was true. See: ***Barima Gyamfi & Anor v. Ama Badu [1963] 2 GLR 596.*** Moreover, in the case of ***In Re Ashalley Botwe Lands; Adjetey Agbosu & Ors v. Kotey & Ors [2003-2004] SCGLR 420 at 465,*** it was held thus:

> *"A litigant who is a defendant in a civil case does not need to prove anything; the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has the duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of the evidence before the court, which may turn out to be only the evidence of the plaintiff. If the court chooses to believe the only evidence on record, the plaintiff may win and the defendant may lose. Such loss may be brought about by default on the part of the defendant."*

The background facts leading to the instant suit are that the plaintiff was the owner of Vision Chemical Shop located at Bame in the Volta Region in which the first defendant worked as a shop attendant having been employed as such on 24 February 2020. The first defendant started work at the said shop on 2 March 2020. In the process of time, two different stock takings were carried out at the shop, the first on 1 December 2020 and the second on 2 April 2021. During the said stock-taking exercises, some monies could not be accounted for. The sum of money which could not be accounted for during the first stock taking exercise was GH¢5,869.68 whereas an amount of GH¢18,473.74 could not be accounted for during the second stock-taking exercise. The first defendant admitted liability and promised to defray the said amounts by means of payments by instalment. The first defendant undertook to pay GH¢1000 each month till the total sum unaccounted for was fully liquidated. According to the plaintiff's attorney, the second defendant stood as guarantor for the first defendant on the said promise. On 20 August 2021 as well as on 29 October 2020, an audit was

conducted at the shop and some shortfalls were detected. Whereas an amount of GH¢1,277.20 was detected as a shortfall during the 20 August 2021 audit exercise, an amount of GH¢14,282.22 was detected as a shortfall on 29 October 2020 thereby bringing down the sum of shortfalls detected during both audit exercises to GH¢39,902.84. However, the first defendant paid only GH¢500 out of the total sum of GH¢39,902.84. The plaintiff's attorney accused the first defendant of using parts of the proceeds from the shop to buy two motorbikes to the detriment of the plaintiff thereby accounting for the said shortfalls which were detected during the audit exercises. Several attempts were made for the first defendant to settle his indebtedness but he failed and/or refused to do so. According to the plaintiff's attorney, the outcome of each stock-taking was handed over to the first defendant before he was put in charge of the shop to work as the attendant. He added that the first defendant was present when the stock-taking was conducted before the shop was eventually handed over to him. After some time when some goods had been sold in the shop, the first stocktaking was done whereat goods worth GH¢5,869.68 could not be accounted for and the first defendant admitted that figure and the second defendant guaranteed payment of same by the first defendant. Even though the plaintiff alleged that the first defendant had bought two motorbikes with part of the proceeds from the shop, he however stated unequivocally under cross-examination that he himself saw only one motorbike and that he saw it when the first defendant brought same to his place one evening.

The first defendant took a contrary stance to the case of the plaintiff stating that though he was the shop attendant at Vision Chemical Shop at Bame, when the routine audits were conducted at the said shop, the findings of the exercise were not disclosed to him immediately. According to him, it took seven months before his attention was drawn to the said shortfalls complained of. He also said that he was not in agreement with the total amount stated as constituting the said shortfalls detected at the shop. However he made efforts to pay a total amount of GH¢1,500 as part-payment thereof. That notwithstanding, he took the stance that he did not steal any of the proceeds from

the shop to buy any motor bike as alleged. He explained that it was a lotto number a friend gave him which his staked and fortunately won that he used part of the proceeds to purchase the said motorbike. Even that, the first defendant stated that the motorbike he bought was only one and not two as alleged by the plaintiff's attorney. He expressed stun at the said shortfalls that where recorded against him but disclosed that he made an undertaking to pay same due to the pressure the plaintiff was subjecting him to. He admitted that he also swore an affidavit to pay the said shortfalls due to the pressure the plaintiff was putting him through and that he was even taking steps to liquidate the outstanding debts ostensibly before the suit was issued out against him.

On the part of the second defendant, he testified that the first defendant was his cousin and that he was aware that the first defendant was the shop attendant at Vision Chemical Shop at Bame having been engaged as such by the plaintiff. He also testified that he was aware of the first shortfall that was recorded against the first defendant but not the second, third and fourth. He explained that his attention was drawn to the fact that some audits were carried out at the shop and some shortfalls were detected but expressed his shock as to why the shortfalls run into such huge sum charged against the first defendant. The first defendant also said that he gathered from the first defendant that he (first defendant) was given a lotto number by his friend which he eventually won when he staked same and that part of the proceeds from the said game was what he used to buy the motorbike. He was quite resolute that the first defendant bought only one motorbike and not two. According to him, the first defendant undertook to pay the debts charged against him all in a bid to avoid embarrassment and that was why the first defendant swore to the affidavit to pay and he (second defendant) also guaranteed for him. The second defendant also stated that the first defendant made part-payment of GH¢1,500 to the plaintiff and that various steps were set in motion to defray the outstanding debt.

PW1 Kenneth Gota claims to be the auditor engaged by the plaintiff to undertake audit work at his chemical shop located at Bame. He said he knew the pleaintiff as the owner of the shop and the first defendant as the shop attendant. According to him, he carried out three audits at Vision Chemical Shop at Bame. He gave the dates of the audit inspection at the said shop as 1 December 2020 and 2 April 2021. According to him, after the audit by one Madam Leticia Djaba, she discovered a shortfall with some goods unaccounted for all amounting to GH¢5,869.68 during the first stocktaking. This implies that it was that said Madam Leticia Djaba who conducted the first stocktaking. However, he (PW1) was the one who conducted the second audit. He said he discovered a short fall of GH¢18,473.74. Aside that, it appears PW1 conducted two additional audits, the first being on 20 August 2020 and the second being on 29 October 2020. He disclosed that these two audits recorded shortfalls with goods unaccounted for valued at GH¢1,277.20 and GH¢14,282.22 respectively. Therefore by implication, the total amount of shortfalls detected during those three audits or stocktaking exercises amounted to GH¢39,902.84. He added that all these shortfalls were duly communicated to the first defendant and that after the audit, the first defendant swore an affidavit to settle the funds he had embezzled and same was duly guaranteed by the second defendant. He also said that the first defendant even wrote and signed an undertaking in respect of the settlement of the debt but failed to fulfill his promise.

When asked to demonstrate how he came about the figure of GH¢18,473.74 as being the shortfalls discovered during the audit, PW1 said that particular figure was realized from goods and cash unaccounted. He however could not give the breakdown of the said figure. What was quite intriguing to me was the fact that PW1 was not a professional auditor. It was also clear that the second defendant was not part of the audit that was conducted and thus all issues that arose out of the audit were obviously not brought to his attention despite the fact that he was the one who stood as a guarantor for the first defendant before he was employed as the shop attendant.

PW2 is Leticia Djaba whom PW1 mentioned in his testimony as being the one who undertook the first audit at the shop. She described herself as the Manageress of Ghana Water Credit Union in Ho. She is also the wife of the Plaintiff, Godfred Adanuty, the owner of Vision Chemical Shop at Bame. She also confirmed that about two years ago, the plaintiff employed the first defendant as a shop attendant in the chemical shop but before the first defendant commenced work, stocks were taken in the shop and the outcome of the said stocktaking were made available to the first defendant. She added that on 1 December 2020 and 2 April 2021 some routine audit works were carried out and some shortfalls of GH¢5,869.08 and GH¢18,473.74 were detected. She explained that the aim of the audit was to ascertain whether the drugs in the shop corresponded with the drugs on record, and also whether proper accounts were being rendered. According to her, the audit was carried out in the presence of the first defendant and the first defendant admitted the shortfalls and promised to settle it within a short period of time. She testified further that on 20 August and 29 October 2020, an audit was conducted and a short fall of GH¢1,277.20 and GH¢14,282.22 were detected respectively totalling GH¢39,902.84. PW1 also said that the first defendant made undertakings and also swore an affidavit to pay those debts and the second defendant stood as guarantor for the first defendant. According to her, the first defendant once approached her to give him money to purchase motorbike for commercial business but she directed him to the plaintiff. However, the first defendant later used the proceeds from the shop to buy two motorbikes which he has been using on commercial basis.

PW2 disclosed that she undertook only one audit and realized a shortfall of GH¢5,869.08 but there was a second audit team which came and conducted their own audit and detected a shortfall of GH¢18,473.74. What baffles my mind at this point has to do with the integrity of the audit conducted by PW2 judging from the fact that she happens to be the wife of the shop owner, the plaintiff in this case. Even the second audit conducted by the team she spoke about cannot pass without comment. I say so

because there is no evidence before me to show that the said team that conducted the second audit was made up of professional auditors or person(s) who have some training or skill in auditing so to speak. When the second defendant took PW2 on during cross-examination, he asked her whether her husband, the plaintiff, who happens to be the shop owner has accredited auditors or that anybody at all could be brought in to audit the shop. The answer that PW2 gave left much to be desired. She said that Kenneth Gota (PW1) is the one who audits their accounts for them and that she (PW2) also does that at times. It is the same PW1 who told the court quite frankly that he is not a professional auditor. How then can the court put any evidential weight on the audit findings that he made? The same reasoning applies to PW2 as well. As for PW2, her relation to the plaintiff as wife cast a huge slur on the integrity of the audit findings she made because she has a collateral interest in the audit exercise and so could not be a disinterested party to the audit findings.

I have had the privilege of sighting the various undertakings which the first defendant prepared in respect of the said losses that were realized from the various stocktaking that were conducted at the shop in question. Permit me to say that Exhibit "B" dated 17 May 2021 and Exhibit "C" dated 8 November 2021 form the basis of the preparation of Exhibit "D" which is a statutory declaration of a sort. It will thus be sufficient for me to consider only Exhibit "D" without the others because Exhibit "D" flows inexorably from Exhibits "B" and "C". In Exhibit "D", the first defendant made a couple of depositions so weighty that the court cannot gloss over them. In that document, the first defendant deposed that he had been employed as a shop attendant by Mr Godfried Adanuty for the past one year and that it is the said Godfred Adanuty who is the shop owner. According to him, the name of the shop is Vision Chemical Shop and that during two different stocktaking exercises supervised by the shop owner, Mr Godfred Adanuty, he (the first defendant) made losses of GH¢5,869.68 during the first stocktaking and GH¢18,473.74 during the second stocktaking totaling altogether GH¢24,343.42. He undertook in Exhibit "D" to make payments in

installments of GH¢1,000 every month for twenty-four months until he finishes paying the total sum involved. Out of the said total sum, he said he had even paid GH¢500 already. Exhibit "D" was a solemn declaration made by the first defendant and so I do not appreciate why he is now seeking to ruin the effect of the declaration he had earlier made in Exhibit "D". And in his testimony to the court, he made the court believe that he was put under enormous pressure from the plaintiff, the owner of the shop, to pay the said sum of money and that that is why he gave in and made those declarations as a result. What is agitating my mind is that Exhibit "D" was dated 18 May 2021, a day after Exhibit "B" was prepared. Therefore, if indeed the first defendant believed in his case that he was not responsible for those losses recorded during the stocktaking exercises, how then must he succumb to any form of pressure from the plaintiff to pay such a whooping sum of money? Is he not to be seen as changing the goalpost after having made the plaintiff believe that he was responsible for such losses and that it will not be out of place for him to defray the said debt? Section 26 of the Evidence Act, 1975 (NRCD 323) is apposite on this issue. It provides as follows:

On the basis of the foregoing provision of the law, I believe the first defendant cannot go back on his words and must thus not be afforded the assistance of the court in doing so. The primary duty of the court is to do justice to all manner of persons according to law and not according to one's whims and caprices.

Therefore, in answering the issues set down for determination supra, this is what the court has to say on the basis of the evidence put before it by the parties.

It is amply clear from the records that are plaintiff is the owner of Vision Chemical Shop. This finding resolves issue 1.

It was also clearly established from the evidence on record that the first defendant was indeed employed as a shop attendant at the said Vision Chemical Shop by the plaintiff.

The first defendant himself did not controvert that fact. This finding, without much ado, also settles issue 2 beyond controversy.

Issue 3 bothered on whether or not there were shortfalls recorded during the stocktaking exercises that were conducted at the shop which the first defendant admitted liability and promised to pay with the second defendant serving as a guarantor. Inasmuch as Exhibit "D" speaks positively to that issue thereby putting the issue beyond peradventure, I state without any fear of contradiction that there was no such agreement of guarantee on the part of the second defendant to pay the debt that the first defendant incurred. I say so because it was in Exhibit "D" that the first defendant made the deposition that the second defendant had guaranteed that he would pay the money. With regards to that kind of allegation, I find Exhibit "D" to be self-serving and thus cannot bind the second defendant. The second defendant is not a party to that agreement. If the said the position had been taken by the second defendant himself, then he could not be allowed to resile from it in the sense that he would have been caught up with section 26 of the Evidence Act and same would have operated against him. But in the absence of any such proof by way of documentary evidence, I am not inclined to accept that fact against the second defendant. Therefore, issue 3 would have to succeed in part only to the extent that there were shortfalls during the stocktaking exercises in which the first defendant admitted liability and promised to pay or defray the said debt to the plaintiff, the owner of the shop. This conclusion also answers issue 3.

In relation to issue 4 bothering on whether or not the first defendant made a part-payment of GH¢500 to the plaintiff, I am inclined to state without mincing words that the evidence shows quite clearly that the first defendant, following his admission of liability to pay the said amounts detected as shortfalls during the various stocktaking, took a step further by making an initial payment of GH¢500 perhaps as a sign of good faith. Flowing from this, issue 4 deserves to be dealt with in this simple manner without constipating the parties with too much diction.

Finally on issue 5, all I have to say is that though the first defendant agrees that he bought a motorbike, there was no cogent evidence put before the court suggesting that it was proceeds from the shop that the first defendant used to acquire the said motorbike and so it would only be fair to accept the case of the first defendant that he bought the motorbike out of his own resources. Be that as it may, whether it is the proceeds from the shop that the first defendant used to acquire the said motorbike or not, that is clearly immaterial. What is important is the fact that he himself had by his conduct or statement caused the plaintiff to believe that he was responsible for the shortages detected during the stock taking exercises and was prepared to defray those debts. I would therefore not waste too much time on this issue. I hereby dismiss same as lacking merit.

Based on the foregoing, judgment is accordingly entered in favour of the plaintiff to recover from the first defendant an amount of GH¢39,402.84 less the GH¢500 with interest to be calculated at the prevailing commercial bank rate from the date of the issuance of the writ of summons to the date of judgment. This order satisfies reliefs (a) and (b) endorsed on the writ of summons. Relief (c) is dismissed as lacking merit. Cost of GH¢1000 is awarded against the first defendant in favour of the plaintiff.

Having said so, may I also drum home the point that I did not find any cause of action against the second defendant on the basis of the foregoing discussions. Therefore, the plaintiff's case against the second defendant is accordingly dismissed.

(SGD)

H/H FELIX DATSOMOR

(CIRCUIT COURT JUDGE)

04-04-2023

PLAINTIFF APPEARS IN PERSON

DEFENDANTS APPEAR IN PERSON