IN THE CIRCUIT COURT "A", TEMA, HELD ON MONDAY, THE 5TH DAY OF JUNE, 2023, BEFORE HER HONOUR AGNES OPOKU-BARNIEH, CIRCUIT COURT JUDGE

SUIT NO. C11/97/17

FELICIA AMA AYESU ---- PLAINTIFF

VRS.

ZAKHEM CONSTRUCTION(GH) LTD --- DEFENDANT

PARTIES ABSENT

AKWESI OPOKU AGYEMAN, ESQ. FOR THE PLAINTIFF PRESENT

MACDONALD NII AYITEY OKAI, ESQ. FOR THE DEFENDANT PRESENT

JUDGMENT

FACTS

The plaintiff caused a writ of summons to issue against the defendant on 24th January, 2017. Per an amended writ of summons and statement of claim filed on 5th April, 2017, the plaintiff claimed against the defendant the following reliefs;

a. An order for the payment of the sum of US$ 9000 being rent arrears from January 2016-March 2017 with interest calculable at the prevailing commercial bank lending rates.
b. Recovery of possession of the four (4) bedroom premises located along the Accra-Tema Motorway, near the Animal Husbandry, close to the new Race Course.

c. Compensation for damages caused to the property as a result of the actions of the defendant
d. Damages for breach of contract.
e. Costs of litigation, including legal fees.

The plaintiff claims that she is the owner of a four (4) bedroom dwelling house located along the Accra-Tema Motorway, near the Animal Husbandry, close to the new Race Course. The plaintiff states that pursuant to a tenancy agreement concluded between herself and the defendant company, she let the property in issue to the defendant company for residential purposes at an agreed monthly rent of $600 effective August 1, 2011. The plaintiff further avers that the defendant has failed and refused to make the rental payments from January 2016-January 2017 and the total amount due and owing as rent arrears is US$7,800.

Additionally, the plaintiff claims that the Defendant company has failed to keep the house in good and tenantable repair and has refused to pay the rent arrears from the previous year or return the property into its previous kempt state. According to the plaintiff, the actions of the defendant company have laid the property to waste and maintains that part of the fence wall of the property is broken, having the potential to give access to unauthorized persons to trespass and undertake any unlawful activities on the property. Again, the house is overgrown with weeds and the compound is generally unkempt. The plaintiff states that several demands made on the defendant company to settle its indebtedness to her and keep the house in tenantable condition have proved futile. The plaintiff avers that the property has depreciated in its market value and may not be able to attract even a fraction

of the monthly rent charge due to the actions of the defendant company. The plaintiff avers that the actions of the defendant company to date indicate those of an entity unwilling to fulfil its contractual obligations. The plaintiff avers that unless compelled by the coercive powers of this Honourable Court, the Defendant company will continue in its blatant disregard for her right.

PROCEDURAL HISTORY

Before proceeding to determine the issue of damages, I deem it necessary to set out the procedural history based on the alleged procedural irregularities raised by Counsel for the defendant in his written address. On 27th April, 2017, this court, differently constituted entered judgment in default of appearance on the Plaintiff's reliefs **"A" and "B"** for the plaintiff to recover an amount of US$9,000 or its cedi equivalent being rent arrears from January 2016 to March 2017 with interest at the prevailing commercial bank rate from April 2017 till date of final payment and recovery of possession of the property in dispute. Additionally, the court granted leave for the plaintiff to lead evidence to prove reliefs **"C"** and **"D"**. Subsequent to that, on 24th January 2018, this court differently constituted granted an application for Garnishee Order Nisi directed at the Manager or any Senior Official of Ecobank Gh. And Access Bank to appear in court to be examined. Counsel for the defendant judgment debtor appeared in court on 15th March, 2018 and Counsel for the Plaintiff/Judgment Creditor prayed the court to rescind the Garnishee Order Nisi and for the parties be allowed to access the account.

On 11th March, 2019, Counsel for the Plaintiff Judgment Creditor informed the court that they attempted to settle the matter but settlement had broken down and indeed on record, there is no terms of settlement filed by the parties. The

Court adjourned the matter to 1st April, 2019 and on the said date, Counsel for the respondent informed the court that the default judgment debt in respect of which the Garnishee Order Nisi was issued had been paid and that they were in court in respect of damages and he had agreed with Counsel for the defendant to return on 30th May 2019. After four adjournments and the parties and their lawyers failing to appear in court, on 26th September, 2019, the court struck out the case for want of prosecution.

On 17th February, 2020, upon proof of hearing notice and Notice of Application to Relist served on the defendant company through its company secretary Georgina Nortey, the court re-listed the suit and ordered the plaintiff to file witness statement and serve it on the defendant for purposes of assessment of damages as earlier scheduled by this court. On 10th March, 2020, the witness statement together with hearing notice were served on the defendant company but the company failed to appear in court and the court granted leave to the plaintiff to lead evidence to prove her case for damages. After the plaintiff had testified, the court ordered and discharged her, the court then granted an adjournment for hearing notice to be issued and served on the defendant for plaintiff's witness to give evidence which on the next date, counsel for the defendant appeared in court.

Learned Counsel for the defendant has raised issues with service of processes before default judgment was entered when he claims the matter had been settled. Also, Counsel for the defendant, in his cross-examination of PW1 and in his written submission challenged the capacity of the plaintiff to commence the suit since the tenancy agreement was entered into between the plaintiff's witness and the defendant in a default judgment that the judgment creditor

has already executed by the defendant paying up the final judgment in default of defence. I am mindful that in this case, the parties have not joined issues since it is assessment of damages after default judgment. The late Justice Marful-Sau of blessed memory in his book, **A Practical Guide to Civil Procedure in Ghana,** states at page 46 that:

"Whenever, a defendant is served to appear for the assessment of damages or value of goods, he or she will be heard on the issue of damages only. In other words, the defendant in the circumstance, will not be allowed to dispute or challenge the merits of the judgment so entered, during the hearing for the assessment of damages. If the defendant has an issue with the judgment so entered, he has to take steps to set it aside.

In the instant case, this Court differently constituted entered judgment in default of appearance on 27th April 2017 and made a further order for the parties to appear on June 1, 2017 to prove damages. Till date, the defendant has not taken steps to set aside the default judgment after inordinate delay of six years. The defendant, therefore cannot come through the back door at the assessment of damages stage to attack the merits of the judgment entered by the court.

On the challenge to capacity, both lawyers addressed the issue which came out of cross-examination of PW1 in their respective written addresses. It is trite learning that the issue of capacity can be raised at any time even for the first time on appeal and the issue of capacity goes to the root of the action and a party whose capacity is challenged cannot be heard on the merit unless he proves that he has the requisite capacity. See the case of **Fosua & Adu-Poku v. Dufie (Dec'd) & Adu-Poku Mensah** [2009] SCGLR 310 holding 6. In the

instant case, the plaintiff states that she is the owner of the property rented to the defendant by PW1, her brother since she was outside the jurisdiction. The first plaintiff's witness has not challenged plaintiff's title to the property and says that he entered into the agreement on the express instructions of the plaintiff. In fact, the defendant's witness in his evidence in-chief acknowledged the plaintiff as the owner of the property and there was no challenge to the plaintiff's capacity in defendant's witness's evidence in-chief. The plaintiff having confirmed that PW1 acted on her behalf, and prepared to ratify the acts of PW1 and the defendant witness having acknowledged in his evidence in chief that it is the plaintiff who rented out the property in dispute, I find the challenge to capacity at the assessment of damages stage to be unfounded. Indeed, if Counsel for the defendant was of the firm conviction that the plaintiff had no capacity to commence the suit, he would have taken the necessary steps to have the default judgment set aside.

The court having dealt with the procedural hurdles raised by Counsel for the defendant, I will proceed to determine the issue of damages. The main issue for the consideration of the court therefore is whether or not the plaintiff is entitled to compensation for damages caused to the property let to the defendant.

ANALYSIS

The principle of law is that he who alleges must prove. In civil cases the party who bears the burden of proof is required to lead sufficient evidence so that on all the evidence, a reasonable mind will find the existence of the fact alleged to be more probable than its non-existence. This is the foundation of the burden of proof in civil cases codified in **Sections 10, 11(1) and (4) and 12**

of the Evidence Act 1975 (NRCD 323). In the case of **Senanu v. SSNIT & Ors.** [2013-2015] 1 GLR 664 @ 674, the court held that:

"The law is now settled that in all civil matters, per sections 11(1) and (4) and 12 of the Evidence Act, 1975 (NRCD 323, a plaintiff to an action succeeds on the balance of probabilities or on preponderance of probabilities. And even though it is the totality of the evidence that ought to be considered in arriving at this position, it is also necessary to bear in mind that the principle that the plaintiff will succeed on the strength of case is still good law, for what it means is that, once it is plaintiff that is asserting that he has certain rights and that the said rights were infringed upon, then he should be capable of producing enough, cogent and admissible evidence to prove that…."

To prove her case, the plaintiff testified that she owns the property, the subject matter of the tenancy agreement in this case. The plaintiff states that in the year 2011, the defendant, a construction company expressed interest in renting the said property and she authorized her brother, PW1 to enter into a Tenancy Agreement on her behalf as she was outside the jurisdiction at the time. She further testified that sometime in the year 2017, she instituted the instant action against the defendant company for breach of the Tenancy Agreement concluded between them and the defendant company neither entered appearance nor filed a defence. She then obtained judgment in default of appearance against it on 27th April, 2017, for reliefs (a) and (b), for her to lead evidence to prove reliefs (c) and (d). After judgment was entered in her favour, it took the defendant company a year to comply with the order of the court to hand over vacant possession to her, making the defendant liable for rent arrears for another year, amounting to Cedi equivalent of US$7,200. The Honourable Court on January 24, 2018 granted an application for an Order for Garnishee nisi to issue. The defendant company subsequently settled its

indebtedness regarding the judgment debt but failed to pay for the damages and one year rent arrears as it had earlier promised.

The plaintiff further testified that the defendant company at the time of vacating the premises, left the property in a state of disuse and disrepair, leaving the fence wall of the property broken, thereby giving access to unauthorized persons to trespass and undertake unlawful activities in the property. In support, she tendered in evidence **Exhibit "B" series**. The defendant company left the property with weeds, providing a fertile breeding ground for reptiles and other dangerous animals. Due to the state of disrepair, the market value of the property has depreciated, the property not being in a state of good and tenantable care and that the company would not have rented the property in its current state. The defendant company was the first to rent the property and it saddens her that being a civil Engineering or Construction company it could subject the property to such disrepair. She caused a valuation to be prepared to determine the extent of damages and the valuation report was admitted and marked as **Exhibit "D".** The report states the market value of the property is Ninety-Four Thousand, Two Hundred and Sixty-Five Ghana Cedis (GH¢94,265) with its maintenance value as Sixty-Three Thousand, One Hundred and Fifty-Eight Ghana Cedis (GH¢63,158). Counsel for the defendant in his written address challenged the propriety of the plaintiff in tendering the report since she is not the author. Counsel for the plaintiff contends that the plaintiff commissioned a valuer to prepare the report, she is competent to tender same in evidence. The defendant failed to attend the trial to object to the admissibility of the valuation report and per **Section 6** of the NRCD 323, evidence not objected to is admissible barring a few exceptions. What remains is the consideration of the probative value of the report received in evidence

The plaintiff's witness, Emmanuel Ayesu, testified that the plaintiff is the legal and equitable owner of the residential property located along the Tema Motorway, made up of Four (4) bedrooms. On July, 13, 2011, he entered into a tenancy agreement on behalf of the plaintiff with the defendant company in respect of the residential property with the consent of the plaintiff. According to his testimony, at the time the property was rented to it, the property had only recently been built, the defendant company being its first tenants/occupants. According to him, he is aware that after the plaintiff obtained default judgment against the defendant company, it did not yield possession of the property until sometime in 2018 when it handed over the keys to Plaintiff's lawyer. Again, the defendant company left the property in a very bad state, with the fence wall to the property broken in several sections, the whole property overgrown with weeds, damaged plumbing and electrical fittings, among others. Also, most of the fixtures and fittings in the property were damaged and broken. The plaintiff, despite having made several demands on the defendant company to pay rent outstanding and repair the damage and waste it has subjected the property to, has been met with deaf ears to all her entreaties. In support, PW1 tendered in evidence **Exhibit "E" and "E1"**. The plaintiff contracted a professional agency to conduct a thorough assessment of the damages and it presented its report to her. The defendant has ignored all attempts at fulfilling its contractual obligations and amicably settling the matter, even ignoring all requests to appear before the Honourable Court.

The defendant's witness, Richard Azubuga, testified on behalf of the company that the company rented the property in dispute in the year 2011 for its worker. The worker was in the property until the company informed the

plaintiff about their intention to vacate the property and that the worker had indeed vacated the property but had some of their personal effects in the property. The plaintiff did not make any attempt to take the keys and maintained that since their things are in the premises, they were still in possession and liable to pay rent which the company did not dispute.

The defendant's witness further testified that after they gave notice to quit, the plaintiff did not formally write to them and request them to ensure the property is in a tenantable repair, fix anything spoilt inside the property and also pay outstanding bills in terms of utilities before leaving the property. The plaintiff rather chose to sue in court without notice given to the defendant to remedy if any, issues on the property. The defendant's witness further testified that when the plaintiff obtained default judgment against them and caused the account to be garnisheed, they engaged a lawyer and negotiated settlement. During negotiations, they inspected the property and the agreement was for the defendant to paint the interior of the property, replace broken louver blades, a broken toilet, change the door handles and locks and also pay the rents outstanding. Based on that agreement, the garnishee order was rescinded to enable them access funds to pay the rent arrears.

The defendant then paid the rent arrears, painted minor portions of the rooms, changed the door handles and locks, replaced the broken louvre blades and did other petty renovations inside the property and promised to give money to the plaintiff to change one of the broken toilets when she was ready to move into the property.

The defendant's witness further testified that the plaintiff also complained about the broken fence wall and the cracks in the wall which they did not agree to repair because that is the responsibility of the plaintiff since they do not know the quality of the materials the plaintiff used in constructing the property. It was also natural consequences that led to the cracks in the fence wall. When the plaintiff complained about the compound not being neat, the defendant engaged someone to clean the compound by weeding the grass after the inside renovations were done. The defendant therefore finds the action taken by the plaintiff now after agreeing to take the rent arrears and also carry out the inside renovations of the property as unfortunate because the matter had been finally settled between the parties.

From the evidence led by the parties, the bone of contention between them is what is meant by tenantable repair and the extent of the liability of the defendant under the agreement. According to the Learned Author Sir Dennis Adjei JA, in his book, **Land Law, Practice and Conveyancing in Ghana 3rd Edition**, at page 243, states that a tenant who takes up possession covenants with the landlord to deliver up the premises at the time of vacating it in tenantable repair and if the tenant failed to do so, he may be sued by the landlord for damages. The learned author further states that the damages to be awarded for breach of covenant to keep the demised premises in tenantable repair is the cost of repair and it is special damage and the landlord must specially particularize and endorse it on the writ.

Thus, in an action for breach of covenant to keep a demised property in a tenantable condition at the end of the tenancy, a landlord must prove the damage caused to the property and the cost of putting the property in

tenantable condition. The term *"tenantable repair"* was defined in the case of **Ashley v. James Colledge (Cocoa) Ltd** [1961] GLR 469, where the court held that:

"tenantable repair" means no more than such repair as having regard to the age, character and locality of the house will make it reasonably fit for occupation by a reasonably-minded tenant of the class who will be likely to take it. Proudfoot v. Hart (1890) 25 Q.B.D. 42, cited. If such a person does not find the house unfit for habitation the covenant for "tenantable repair" has not been broken. As the defendants continued to occupy the house in spite of the alleged defects, the house was not unfit for habitation;"

Also, in the case of **Thome v. Barclays Bank** (DCO) [1976] 2GLR 126, the court held in its holding 1 that:

"the proper test to apply in determining whether a tenant was in breach of his covenant to repair was whether the tenant could deliver up premises of the same character as those which were demised."

In the instant case, the court has a duty to determine the state or the nature of the property taken by the defendant and the state the defendant vacated the property and whether the defendant complied with the obligation to put the property into a tenantable condition. From the evidence led by the witness of the defendant, there is no qualms about the fact that there were some damages to the property but the defendant maintains that its liability is limited to the interior of the property and that of the plaintiff is to the exterior of the property. Additionally, the defendant contends that it complied with its obligation after they had compromised the default judgment entered by the court. On the nature of the property taken, the evidence on record shows that the defendant company was the first occupant of the property. Per the Tenancy Agreement between the parties, the tenant agreed to complete the

building to enable occupation by carrying out the list works attached to the agreement in the following terms;

"installation of the wooden or plywood false ceiling all through the house, the painting of the in and out of the house residence including plastering and painting of the property fence fall, the construction of a septic tank to be located or surveyed after the site clearance, the electrical wiring works including the fixing of the entire sockets for the whole building, the installation of all wooden doors, the floor screeding and tiling, the second fix plumbing, utility supply to the residence and overhead tank (water and electricity), main gate by the fence wall to be supplied by landlord, laterite laying and compaction around the house."

The photographs, **Exhibit "B"** series also shows the condition of the exterior of the property with weedy compound and cracked walls. The plaintiff also commissioned an expert Annayart Consult to prepare **Exhibit "D**" dated 3rd July, 2019, admitted without objection which is the valuation report on the property in issue which estimates the market value of the property to be worth Ninety-Four Thousand, Two Hundred and Sixty-Five Ghana Cedis (GH¢94,265) and the cost of maintenance of the property to be Sixty-Three Thousand, One Hundred and Fifty-Eight Ghana Cedis (GH¢63,158.00). From page 11 of the report, the general condition at the time of the inspection disclosed major cracks on the wall and the floor, serious leakages in the roof which has caused part of the roof to deteriorate, part of the ear walls has also been broken down whilst most of the fittings like water closet and hand washing basing had also been damaged due to poor handlings. The compound and the outside of the property has also been over grown with weeds due to total neglect of the property for a period of time and the rate of depreciation was fixed at 25%.

In evaluating the report, it is worthy to note that the report is dated 3rd July, 2019, more than two years after the court had entered default judgment for the plaintiff to prove her claim for damages. From the evidence of the plaintiff and her witness, the defendant after the default judgment did not yield vacant possession until sometime in July 2018. Which means that the valuation was done a year after the defendant had yielded vacant possession of the property.

On the issue of whether or not the defendant is liable for all maintenance works to the property, the following ensued during cross-examination of PW1 by Counsel for the defendant.

Q: Look at Exhibit A, the appendix was things Zakhem was to do. Is that not so?

A: Yes, my Lord. But they did not provide the gate.

Q: Look at number 10 on the appendix "main gate" to be supplied by landlord.

A: Yes, My Lord.

Q: So, the US$500 that was paid to the landlord, are you saying that the landlord had no obligation to the outer of the property?

A: Yes, My Lord.

Q: I am putting it to you that the landlord has an obligation towards the outer and the tenant inner part of the property.

A: It is not true.

Q: The cracks in the wall, was it established that was as a result of the negligence of the defendant.

A: Yes, my Lord.

Q: How was that negligence established?

A: It was established because we handed the property to him without any crack.

Q: Are you aware that there is usual clause in tenancy agreements which is not contained in yours here fair wear and tear is acceptable?

A: No, my Lord.

The cross-examination reproduced above shows that the defendant did not construct the wall and the plaintiff failed to show any overt act on the part of the defendant that caused the cracks in the walls. The defendant's witness further contends that for the wall cracks it was due to natural occurrences and not as a result of any damage caused by them. I agree with the position of the defendant that it is not liable for the cracks in the wall and leakages unless the plaintiff can show some overt acts on the part of the defendant that caused the cracks in the wall. Although in the tenancy agreement between the parties **Exhibit "A"**, the defendant was to carry out some works to complete the building for its occupation, construction of the wall is not contained in **Exhibit "A"**. Thus, in my considered opinion, the defendant cannot be held liable for the cracks in the wall that it did not construct and has not been established to have caused damage to but is liable for the damage caused to the interior and the unkempt state of the exterior since having regard to the nature of the property and the locality, no reasonable person will find it habitable.

The defendant's witness admitted under cross-examination by counsel for the plaintiff that damages were caused during the period of the tenancy but claims that the defendant carried out repairs but failed to produce any evidence of repairs carried out on the property in issue. Under cross-

examination, the following exchanges took place between DW1 and counsel for the plaintiff;

Q: *In paragraph 11 and 12 of your witness statement, you say that you made renovations to the property. Is that correct?*

A: *Yes my lord.*

Q: *This should mean that the company of the defendant caused damage to the property.*

A: *Yes, but with explanation. When our lawyer and plaintiff's lawyer met, they both visited the property and agreed that renovations should be made inside the property.*

Q: *In respect of those repairs that you claim to have made, do you have any evidence by way of receipts or photos to show the court?*

A: *I believe so my lord.*

Q: *But you have not provided these to the court.*

A: *Yes, my lord.*

Q: *The defendant was the first company to occupy the property. Is that correct?*

A: *Yes, my lord.*

The plaintiff therefore established that the defendant caused damage to the property during the period of the tenancy which the defendant has failed to repair. The plaintiff having established the damage to the property, the next consideration is the cost of the damage caused to the property. Learned Counsel for the plaintiff in his written address, argues that the plaintiff is entitled to the GH¢63,158.00 quoted as the cost of repairs and urges the Court to take judicial notice of the date of the report, 3rd July, 2019 and the

subsequent sharp rises in the cost of construction materials and make a fair, just and equitable award, together with interest from 2019 to date of final judgment due to the current inflationary trends. The contention of the defendant is that during attempts at settlement, they agreed to repair the damage to the interior which was done and the plaintiff is not entitled to damages. As indicated, the report **Exhibit "B"**, states the general cost of repairs which include those not occasioned by the defendant. PW1 under cross-examination stated that the plaintiff has renovated the property to put it in tenantable condition but the actual cost of the renovation is not in evidence. The plaintiff, in the circumstances is entitled to nominal damages against the defendant to put the property in tenantable repair.

In considering the inflationary trends as urged on the court by Counsel for the plaintiff, the court cannot also ignore the delay on the part of the plaintiff in proving damages since 27th April, 2017, when the court ordered the plaintiff to lead evidence for damages to be assessed and the matter was adjourned to 1st June 2017. On record, this situation led to the striking out of the suit for want of prosecution which was subsequently relisted. An assessment of damages after default judgment has taken well over six years and the defendant cannot bear the brunt of sharp increases in the prices of goods and services due to current economic situation. The court also notes that although the plaintiff claims both damages for breach of contract and compensation for damages to the property, the evidence and the address filed by Counsel for the plaintiff do not make a clear distinction between the two heads of the reliefs sought.

CONCLUSION

Consequently, pursuant to the judgment in default of appearance entered by the Court on 27th April, 2017, I will award an amount of Thirty Thousand

Ghana Cedis (GH¢30,000) as general damages for breach of the covenant to put the property in tenantable condition.

COSTS

Based on the oral submissions made by both Counsel for the plaintiff and the defendant, and having record to the considerations under Order 74 of the High Court (Civil Procedure) Rules, 2004(C.I. 47), the nature of the case (assessment of damages after default judgment) and expenses reasonably incurred, I will award cost of Five Thousand Ghana Cedis (GH¢5,000) against the defendant.

H/H AGNES OPOKU-BARNIEH

(CIRCUIT COURT JUDGE)