

IN THE CIRCUIT COURT HELD AT CAPE COAST ON TUESDAY THE 16TH DAY
OF FEBRUARY, 2023 BEFORE HER HONOUR VERONIQUE PRABA TETTEH
(MRS.), CIRCUIT JUDGE

C11/09/2021

SAMUEL AGBASA

VRS

FELIX APPIAH HANSON

PHILIP YOUNG FOR PLAINTIFF

ENOCH M.K. DZAKPASU FOR DEFENDANT

JUDGMENT

On the 7th of September 2020, the plaintiff caused to be issued a writ and statement of claim against the defendant, in this court, seeking the following reliefs:

1. An order for the recovery of GH¢36,500 being financial assistance given to the defendant
2. Interest on the sum of GH¢36,500 at the present Bank of Ghana interest rate from May 2015 to the date of final payment.

At the close of pleadings the following issues were set down for trial:

1. Whether or not the defendant owes the plaintiff GH¢36,500
2. Whether or not the defendant paid GH¢2000 to the plaintiff's wife towards the liquidation of the debt owed to the plaintiff
3. Whether or not plaintiff is entitled to his claims
4. Whether the financial relationship between the parties is one where the plaintiff finances galamsey operations with the defendant having to pay off his indebtedness with gold supplies

5. Whether the plaintiff is trying to pin down other persons indebtedness against the defendant
6. Whether the defendant paid off plaintiff in their last transaction.

It goes without saying that proof of alleged facts in civil cases is on the preponderance of probabilities. It is the requisite degree of proof established by section 12(2) of the Evidence Act, 1975 NRCD 323. The section explains “preponderance of probabilities” to mean, to convince the court or tribunal that the existence of a fact is more probable than its non-existence. Preponderance of probability does not call for an exact measure of certainty as is seen in criminal cases where the degree of proof is beyond reasonable doubt. It was explained in *Bisi and others v Tabiri* 1987-88 1 GLR 360 as follows

“but probability denoted an element of doubt or uncertainty and recognized that where there are two choices, it was sufficient if the choice selected was more probable than the choice rejected.”

Thus where the trier of fact weighs the evidence of both parties and finds that one party’s evidence is weightier than the other, it was sufficient for the court come to a conclusion that the weightier evidence was more probable than the other.

See the cases also of *Boahen v Golden Age Company* [2021] GHASC 91 delivered on the 29th of July 2021 by the supreme court.

The case of *Zabrama v Segbedzi* decided in 1991, by the Supreme Court, lays down the burden of the party in satisfying the requisite degree of proof. It provides that

“a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred.”

The plaintiff being the one asserting the facts in this case, has the burden described above in *Zabrama v Segbedzi*, to produce evidence in establishing his case. Until he has led sufficient evidence to prove the defendant's indebtedness, he is not entitled to the reliefs he seeks. For the defendant while he does not generally have a burden of disproving the plaintiff's claim, he still has the burden of persuasion when it comes to matters he alleges which counter the case of the plaintiff or which might prove plaintiff's case to be untrue.

The crux of the plaintiff's case is that, the defendant borrowed a total of GH¢41,700 sometime in 2014 and had refused to pay it back. The only payment made by the defendant was GH¢5200 and this was after plaintiff had reported the case to the police. The plaintiff made his case through his own testimony and that of his three witnesses. With the exception of the plaintiff's wife, none of his witnesses claim to have been present when the defendant borrowed the money. They all declared that it was the plaintiff who informed them about the defendant's debt and testified that they had been involved at various stages of his attempt to recover his money.

The plaintiff and his witnesses again claim that the defendant admitted to the debt of GH¢41,700 existed but he attributed GH¢34,500 to a debt incurred between himself and two other business partners and as a result was not personally liable for its refund. The plaintiff's last witness testified that all the monies were given personally to the defendant and that she was present on some of the occasions when the defendant received the money and that on some of the occasions she was the one who handed it to him.

I found the evidence of the first and second witnesses of plaintiff, Paul Bansah and Adam Osman, were very material to the case. These witnesses claimed to have had extensive knowledge of the dealings between the parties regarding the plaintiff's

demand for his money. Paul Bansah for his part was informed and accompanied the plaintiff to demand his money from the defendant on several occasions. He was also friends with the defendant and accompanied him to see the plaintiff when the plaintiff caused an excavator to be seized. He also accompanied the plaintiff to Cape coast also in the company of the defendant to see Age about the debt owed. He was also present at the police station and could speak to the several demands made by the plaintiff. Counsel for the defendant did attempt to discredit his credibility by saying that it was because he owed the plaintiff that he was giving false evidence. I did not find this to be so, particularly as the defendant's wife in her cross examination testified and admitted that the defendant had worked with Age and Nana Fynn.

Adams Osman also testified that the defendant had been business partners with Age and Nana Fynn and that he had performed customary rites on the mining site before they commenced their mining operations. He also testified to the defendant and Age informing him about the plaintiff's seizure of their excavator and pleading with him and Paul Bansah to accompany them to see the plaintiff to beg for its release. They also went with plaintiff to Age's house at Kwawprow and at that meeting Age had admitted that the money had been borrowed by the defendant for their business. He also promised to meet Nana Fynn and defendant so they could repay the plaintiff.

The plaintiff' and his witnesses' evidence was clearly contradictory to the defendant's evidence that he dealt with Age. The witnesses of the plaintiff stated several times that the plaintiff denied ever dealing with Age personally and insisted that it was the defendant who took the money from him. He also made it clear whenever the defendant brought up Age that he did not know Age and did not want to have anything to do with him concerning repayment of the debt.

The defendant's case is that, it is Samuel Agyatse (also known as Age) and Nana Fynn who owe the plaintiff and that he was informed by plaintiff of this debt. The defendant stated in paragraph 16 and 17 of his witness statement as follows:

“that my insight is that one Samuel Agyatse Bartels deceased and one Emmanuel Fynn dealt with the plaintiff at the blindside of the defendant.

It is unclear what the defendant means “by his blindside” as he failed to elaborate on this fact. He continued:

That the defendant says at one point in time, Samuel Agyatse Bartels and Emmanuel had abandoned the galamsey business as Samuel Agyatse Bartels had his two excavators burnt by the government Security Task Force widely known as “Operation Vanguard” in 2017 or 2018.

The defendant continues to deflect any personal responsibility for the debt, by adding that he confronted Age about the debt to plaintiff and Age admitted it. Age also agreed to pay the debt of GH¢10,000 and decided to pledge his car to plaintiff while he repaid the debt through monthly installments of GH¢1,000. The question that arises is why would Age admit to the defendant that he owed the plaintiff and agree to pay GH¢10,000. It is my opinion that, that admission by Age establishes that an amount of GH¢34,500 was borrowed from the plaintiff and his part of the debt was what he agreed to pay.

I also find the defendant's statement in paragraph 16 and 17 to be an admission of knowledge of the debt of GH¢34,500 the plaintiff claims. This is because there is a distinction between the figures GH¢34,500 and the GH¢7,200 admitted to by the defendant. While he denies that he took GH¢34,500 from the plaintiff, he insists it is a

debt owed by Nana Fynn and Age. The plaintiff has also consistently shown that he never dealt with Age or Nana Fynn and that he dealt only with the defendant.

The defendant called two witnesses to testify on his behalf; his wife and a friend. The defendant's wife denied that her husband owed an amount of GH¢36,500. She insisted that the defendant, as a meticulous business man, would not incur such a debt without her being present to witness it.

The evidence of the defendant's wife shed more light on the relationship between the defendant Age and Nana Fynn. She stated that

"They came to Baase and said they needed a site to work. They came with a document signed by the chief of Hemang. The chief directed them to come and look for someone with land/site. They should show that person the document given by the chief of Hemang so that the person would give them the land to work. When they brought the document, my husband gave them the land and that is how I got to know them."

Under cross examination she was asked

Q. these two persons came to mine gold on the land your husband gave to them not so?

A. Yes

I find her answers are corroborative of the evidence given by the plaintiff and his first two witnesses. Even though her evidence was not detailed, her admission that the three persons worked on the land provided by the defendant is corroborative of the plaintiff's case. The witnesses had both testified that when they visited Age in Cape Coast, he informed them he, Nana Fynn and the defendant were engaged in the mining business. His contribution to the business was the equipment, i.e. the excavator; Nana Fynn provided the documents and the defendant provided the land. In the face of this corroboration I accept and find that the defendant was engaged in a business venture

with Age and Nana Fynn as claimed by the plaintiff. See the case of *Osei Yaw and Another v Domfe* 1965 GLR 418 on the corroboration of the evidence of an opponent's case by his witness. I find that the defendant was in business with Age and Nana Fynn.

Counsel for the defendant also questioned why the plaintiff had failed to do anything about the debt for so long. I believe the answer lies in the evidence of the plaintiff. Not only did he make constant demands but at one time he seized the excavator defendant was using to work and in 2018 he reported the case at the police station. I do not find this delay as proof of defendant's case.

Exhibit 1 tendered by the defendant was the undertaking made in May 2018. In the undertaking, the defendant states in paragraph 1 the following:

"I Felix Appiah Hanson, today 21st May 2018, do state that my three acres cocoa farm which lies at Baase near the Pra River is collateral for the amount of GH¢7,200 collected from Mr Samuel Agbasa."

It is also the defendant's case that this undertaken is proof of his total indebtedness to the plaintiff as at 2018. He insists he only collected GH¢7,200 from the plaintiff, which is why the undertaking spoke to the repayment of only that amount. And that the police case made by the plaintiff was only in respect of GH¢7,200 and not GH¢41,700 as claimed by the plaintiff. The defendant's second witness testified to the events at the police station and insisted that the plaintiff only reported the debt of GH¢7,200 to the police. He also maintained that the plaintiff's wife had agreed that the defendant had previously paid GH¢2,000 to her.

The police case played quite a major role in this case, as the defendant particularly relied on Exhibit 1 as proof of the entire debt outstanding between him and the plaintiff. The plaintiff also maintained that he made a report of the debt of GH¢41,700 at the

police station but the defendant denied it and would only insist on paying GH¢7,200 since he claimed the GH¢34,500 debt was for a partnership business. It is also clear that at the police station there was a challenge of the figure of GH¢7,200. It was however resolved hence Exhibit 1 when defendant conceded to owing GH¢7,200.

Counsel for the defendant, in his address, raised two issues that I will address briefly. The first is that the plaintiff should have called the police to testify if indeed the report made by the plaintiff was for the debt of GH¢41,700 or for only GH¢7,200. I do not find that the plaintiff's failure to produce the police investigator as a witness was fatal to his Case. While the evidence might have helped resolve the debt reported, the main issue in dispute is whether the defendant is indebted to that amount if at all and not the amount reported to police.

In any case, I am satisfied that the plaintiff made a claim for GH¢41,700 in 2018 but the defendant would only agree to owing GH¢7,200 hence the figure indicated in the undertaking. It is also clear to me that the defendant has always denied personally owing the plaintiff the amount of GH¢34,500.

On the issue of the GH¢2,000, which also arose at the police station, the defendant claims he had already made the payment to the plaintiff's wife, I do not find it to be so per the defendant's own admission in Exhibit 1. This admission was made after the plaintiff's wife had been called and she had clarified that the GH¢2,000 earlier paid by defendant was for the purchase of items from her shop. I find that at the time of making Exhibit 1, the plaintiff had conceded to owing that GH¢2,000. Having admitted to owing the GH¢7,200 in May 2018, he is estopped by his own undertaken from denying that amount.

The final question to be determined is whether the defendant is liable to the whole of the GH¢34,500 collected from the plaintiff since it was for the business he ran with Age

and Nana Fynn. In as much as it was the defendant who collected the monies from the plaintiff he is liable to refund the whole sum to him. The admission by Age to receiving the money and promising to pay it back does not inure to the defendant's benefit since he did not collect it from the plaintiff. At any point during the trial, the defendant could have sought leave to include Age or Nana Fynn as defendants to the trial but he failed to do so. I am satisfied the defendant collected GH¢34,500 from the plaintiff. He is therefore ordered to refund the amount of GH¢36,500 to the plaintiff together with interest to be calculated at the current bank rate from 7/9/2020, the date of the plaintiff's institution of this action, till the date of full and final payment. This date is because the plaintiff failed to lead evidence as to the exact time the defendant was supposed to have paid the money.

(SGD)

H/H VERONIQUE PRABA TETTEH (MRS)

(CIRCUIT JUDGE)