

IN THE CIRCUIT COURT HELD AT GOASO IN THE AHAFO REGION ON  
FRIDAY THE 22<sup>ND</sup> DAY OF SEPTEMBER 2023 BEFORE HIS HONOUR  
CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE

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A2/25/2023

ANSAH FRANCIS

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PLAINTIFF

VRS.

**1. KELVIN DE-GRAFT**

**2. THOMAS BOAKYE**

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DEFENDANT

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JUDGMENT

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Plaintiff instituted the present action on the 11<sup>th</sup> of November 2022 simply seeking the recovery of an amount of GH¢13,856.00. His case was that he gave 1<sup>st</sup> Defendant vodafone credit cards worth GH¢15,856.00 which the latter was required to sell as an agent and account for the proceeds. Plaintiff alleges that 1<sup>st</sup> Defendant only accounted for an amount of GH¢2,000.00 without returning the remaining credit cards left unsold or if sold, its value in monetary terms hence the present action. 1<sup>st</sup> Defendant in his defence filed on the 4<sup>th</sup> of May 2023 basically admitted receiving the quantum vodafone credit cards from Plaintiff but indicated that he lost all the vodafone credit cards issued to him when he was involved in an accident and due to that he has been unable to repay Plaintiff in full save an amount of GH¢2,000.00 which he paid Plaintiff when criminal proceedings were instituted against him over the same matter. 1<sup>st</sup> Defendant however alleged that Plaintiff had seized his motorbike and demanded for same to be released to him. With regards to 2<sup>nd</sup> Defendant, Plaintiff joined him to the action on the sole ground that 2<sup>nd</sup> Defendant stood in

as guarantor for 1<sup>st</sup> Defendant when the latter was employed as a Direct Sales Agent and as such was also liable for losses incurred by 1<sup>st</sup> Defendant.

At the close of pleadings this court set down the following issues for trial;

1. Whether or not Defendants are indebted to Plaintiff in the sum of GH¢13,856.00?
2. Whether or not 1<sup>st</sup> Defendants motorbike is in Plaintiff's custody?

Under Section 11(1) and (4) and 12(1) & (2) of the Evidence Act, the burden of persuasion requires proof by preponderance of the probabilities. So that a party who asserts a position must do so to the degree of certainty of belief in the mind of the court of facts by which this court must be convinced of the existence of those facts as being more probable than otherwise. It is therefore trite learning that a party who comes to court must prove his case on the balance of probabilities. In that regard, the Supreme Court in the case of Bisi v. Tabiri alias Asare [1987-88] 1 GLR 360, stated that;

“The standard of proof required of a plaintiff in civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue. ...”

In Adwubeng vrs Domfeh [1996-97] SCGLR 660 this position was further crystallized when the Supreme Court observed:

“Section 11 (4) and 12 of the Evidence Decree [1975] NRCD

323 which came into force on 1st October 1979) have provided that the standard of proof in all civil actions was proof by preponderance of probabilities no exceptions were made.”

Despite the above listed issues, it became rather obvious that the fundamental issue was whether or not Defendants were liable to Plaintiff in the sum claimed. Given the fact that the 1<sup>st</sup> Defendant admitted the following facts;

- a. That a quantity of vodafone credit cards amounting to GH¢15,856.00 was given to 1<sup>st</sup> Defendant by Plaintiff.
- b. That an amount of GH¢2,000.00 was paid by him in part satisfaction of the sum due.

The obvious answer to the fundamental question would have been that Defendants were indeed liable to Plaintiff in the sum outstanding. Once there has been an admission of averments made by Plaintiff, Plaintiff bore no further burden to establish same. This is the position of the law and same has been supported in a myriad of case law. In *Fori vrs. Ayirebi* [1966]2 GLR 627 the Court held that, **“When a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment...”**. This holding was reiterated by the Supreme Court in the case of *Kusi & Kusi vrs. Bonsu* [2010] SCGLR 60 at 78-79 by Wood C.J (as she then was) who observed that, **“it is an elementary principle of law that in civil litigation, where no issue was joined as between parties on a specific question, issue or fact, no duty was cast on the party asserting it to lead evidence in proof of that fact or issue”**.

However, this Court is unable to arrive at the above conclusion owing to a fundamental issue that was raised by Defendant in the course of trial, particularly during the cross examination of Plaintiff.

Plaintiff was questioned by 1<sup>st</sup> Defendant as follows;

Q. I suggest to you that it is the company Lufix Enterprise Limited that has the authority to sue me and not you?

A. I am the one in charge of the Lufix Enterprise Limited branch of Goaso and I have the authority to bring this action against you.

Q. Furthermore, I was employed by Lufix Enterprise as evidenced in Exhibit A so you cannot sue me in your personal capacity? A. Not True. The above discourse obviously sought to challenge Plaintiff's capacity in initiating the present action. It is trite learning that the issue of capacity goes to the root of any matter and can be raised at any time and at any stage of proceedings. Thus even though same was not borne out expressly from the pleading of the parties, once raised under cross examination, the Court is bound to determine whether or not same is made out. In Emmanuel Kofi Mustapha V. Samuel Gyekyei & 3 ORS. (2016) JELR 68750 (CA) the Court of Appeal observed that;

"Capacity is the power, ability or authority that allows you to institute a legal action. One cannot institute any legal action unless you are clothed with that capacity to do so. Capacity to sue was a matter of law and could be raised by the party at any time of the proceedings even on appeal. It could also be raised by the court suo motu. Capacity is so fundamental and goes to the root of the case and however iron cast your case may be once you lack capacity the court cannot give you a hearing on the merits of the case. It's trite learning that a plaintiff who sues in a representative capacity but at the date of issue of the writ he is not clothed with such capacity the writ of summons and the statement of claim are null and void and incurably bad and it is immaterial that later during the course of the proceedings he acquired the capacity"

Consequently, this Court shall seek to determine whether or not Plaintiff has the requisite capacity to institute and maintain the present suit.

According to 1<sup>st</sup> Defendant's line of questioning, he sought to allege that the proper entity which ought to have sued him was Lufix Enterprise Limited and

not Plaintiff in his personal capacity. What is Lufix Enterprise Limited and what is its business in this suit?

According to Exhibit A tendered by Plaintiff which bears the title „Lufix Enterprise Limited“ one observes the following description of the company;

“AUTHORISED VODAFONE KEY DISTRIBUTOR-BRONG AHAFO,  
GHANA”

By Exhibit A one further observes that 1<sup>st</sup> Defendant was employed by the said Lufix Enterprise Limited on the 20<sup>th</sup> of April 2021 and his employment was guaranteed by 2<sup>nd</sup> Defendant.

Plaintiff himself is an employee of the said Lufix Enterprise Limited for he averred in paragraph 1 of his Statement of Claim filed on the 11<sup>th</sup> of November 2022, that he is a “Sales Coordinator for Vodafone Ghana Limited, Goaso branch section Lufix Enterprise Limited”. From the above evidence therefore, the following conclusions can be made;

- a. Lufix Enterprise Limited is a limited liability company which operates as an authorized Vodafone key distributor within the region; and
- b. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are both employees of Lufix Enterprise Limited.

The question then is, to whom can the ownership of the Vodafone Credit Cards be attributed to? Can ownership be attributed to Plaintiff personally or to Lufix Enterprise Limited? This was however answered by Plaintiff at paragraph 4 of his Statement of Claim as follows;

“4. The Plaintiff says that the always gives Vodafone Credit Cards to the 1<sup>st</sup> Defendant to sell and return the proceeds after sales for Plaintiff to forward same to the Management of Vodafone”.

In other words, it was Plaintiff’s contention that the vodafone credit cards he gave to 1<sup>st</sup> Defendant did not belong to him personally but rather Vodafone Ghana Limited since ultimately he (Plaintiff) rendered accounts to Vodafone. It

follows therefore that, all proceeds and losses incurred from the sale of the vodafone credit cards are ultimately borne by Vodafone Ghana Limited and by extension Lufix Enterprise Limited since the latter was more or less the agent of Vodafone Ghana Limited.

In the instant suit therefore, since Plaintiff as an employee of Lufix Enterprise Limited had issued to 1<sup>st</sup> Defendant also an employee of Lufix Enterprise limited, a quantity of vodafone credit cards belonging to Vodafone Ghana Limited to the tune of GH¢15,856.00 and losses amounting to GH¢13,856.00 had been occasioned, the loss cannot be borne by or attributable to Plaintiff personally but rather Vodafone Ghana Limited and by extension Lufix Enterprise Limited as Plaintiff was a mere employee of the latter. Consequently, the proper person or entity who ought to have sue Defendants for any loss occasioned to it was either Vodafone Ghana Limited or Lufix Enterprise Limited being the agent of the Vodafone Ghana Limited. Plaintiff suffered no personal loss for which he had to issue the present writ in his personal capacity. Plaintiff therefore lacked capacity to have initiated the present action to recover monies which did not belong to him personally. In conclusion, it is holding of the Court that the proper person or entity to have sued ought to have been Lufix Enterprise Limited as agents of Vodafone Ghana Limited and not Plaintiff in his personal capacity. Since Plaintiff sued in his name his only option to maintain the action was to have procured a power of attorney from the said Lufix Enterprise Limited prior to the filing of the action which he failed to obtain. It is therefore the considered view of the court that the Plaintiff lacked requisite capacity to have instituted the present action against the Defendants. The effect of Plaintiff's lack of capacity was discussed in the case Republic v. High Court Accra Ex-Parte Aryeetey (Ankrah Interested Party) [2003-2004] SCGLR 398, where Kpegah JSC stated at page 405 of the report as follows:

“...if a party brings an action in a capacity, he does not have, the writ is a nullity and so are the proceedings and judgment founded on it. Any challenge to capacity therefore puts the validity of a writ in issue. It is a proposition familiar to all lawyers that the question of capacity, like a plea of limitation, is not concerned with the merits so that if the axe falls, then a defendant who is lucky enough to have the advantage of the unimpeachable defence of lack of capacity in his opponent, is entitled to insist upon his rights: see *Akrong v. Bulley* [1965] GLR 469 SC”.

In this case therefore, even though it would appear that on its merits Plaintiff has a good „winnable case, by virtue of his lack of capacity, his action must fail. Consequently, this suit is dismissed with cost of GH¢1,000.00 awarded against Plaintiff.

**SGD**

**H/H CHARLES KWASI ACHEAMPONG ESQ.**

**CIRCUIT COURT JUDGE – GOASO**