

IN THE CIRCUIT COURT HELD AT GOASO IN THE AHAFO REGION ON
THURSDAY THE 14TH DAY OF MARCH 2024 BEFORE HIS HONOUR
CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE

A2/63/2023

ABIBA AGYEKUM

PLAINTIFF

VRS.

DAVID OHENE DWOMOH

DEFENDANT

JUDGMENT

Plaintiff instituted the present action alleging that in October 2021 Defendant purchased from her 600 bags of ginger at a rate of GH¢235.00 per bag making the total of GH¢141,000.00 which Defendant was expected to pay to Plaintiff. Plaintiff avers that Defendant made a total payment of GH¢114,200.00 leaving a balance of GH¢26,800.00 and despite numerous requests for him to liquidate the debt, he has failed to do so. Consequently, Plaintiff seeks the recovery of an amount of GH¢26,800.00 with interest thereon from October 2021 till date of final payment as well as cost.

In his defence, Defendant indicated that 20 bags of the ginger were found rotten at the time of conveyance by him from Plaintiff's house and by the time he delivered the gingers to Adonko Factory in Kumasi, 10 more bags were also found not fit for purpose. Consequently, Defendant alleged that a total of 570 bags fit for purpose and he had paid GH¢114,200.00 to Plaintiff leaving only a balance of GH¢19,750.00. He further contended that he was not liable to pay this outstanding sum but rather one Nana Kwaku Marfo who stood in as a middleman between him and the Adonko Factory. He alleged that the said Nana Kwaku Marfo collected all monies from the Adonko Factory on his behalf and the sum outstanding was still in possession of Nana Kwaku Marfo.

At the close of pleadings this Court found that the sole issue for trial was whether or not Defendant was indebted to Plaintiff in the sum of GH¢26,800.00. However, in order to determine the central issue slated for resolution, the following sub-issues ought to be resolved;

- a. Whether or not out of the 600 bags of ginger supplied to Defendant, 30 bags of same were found rotten?
- b. If so, who bears the cost of such loss?
- c. Whether or not Nana Kwaku Marfo is indebted to Plaintiff? 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.”

Before proceeding, it must be noted that, the parties concede that the total bags of ginger which were supplied to the Defendant was 600 bags. The parties disagreement however relates to Defendant's assertion that out of the 600 bags of ginger, 30 bags were not fit for purpose. Since it was the Defendant who asserted that 30 bags of the ginger had gone bad, he bore the sole burden of proving same on the balance of probabilities especially when Plaintiff denied that same were rotten.

Surprisingly however, Defendant led no evidence to support his claims that 30 bags of the ginger were rotten. The closest he came to doing so was when he stated in paragraph 10 of his witness statement filed on the 5th of June 2023 as follows;

“That in my bid to help Plaintiff to sell her goods, I intervened by loading five hundred and eight bags that was in good condition into a truck to the Adonko Company in Kumasi”

It is not clear if Defendant intended to say that he loaded five hundred and eighty bags of ginger which were in good condition. However, going by paragraph 10 above quoted, one can rightly conclude that Defendant sought to allege that it was only 508 bags of ginger that were in good condition. In other words, Defendant sought to say that 92 bags of ginger were not in good condition. This assertion by Defendant is clearly at variance with his own pleadings and as such he cannot be deemed to have established his claims with regards to the alleged rotten bags of ginger. In the case of *Opanin Nantwi Ababio and Francis Manu Boateng V. Pastor Nana Adusei* (2018) JELR 65591 (SC) the

Supreme Court observed as follows;

“In effect the pleadings in a case form the basis of the respective case each party indicates it will establish by relevant evidence at the trial in order

to prove a cause of action or to show that the other party does not have a cause of action. That being the case, the evidence led at a trial must have the function or purpose of establishing the case that has been set out in the pleadings. If the evidence that is led is at variance with the pleadings, it cannot be held that the party has proved the case set out in his pleadings. He may by his evidence have succeeded in proving a case that he has not pleaded but a court cannot accept that case which is not pleaded as the duty of the court is to adjudicate upon the specific case in dispute set up by the pleadings”

Consequently, since Defendant had alleged that 30 bags of ginger were rotten, his duty was to prove that indeed 30 bags of ginger were rotten. However, in his testimony he sought to allege that 92 bags of ginger were not in good condition which is clearly at variance with his pleadings. Thus, Defendant had failed to establish the case he had initially put forth in his pleadings.

Even if it is argued that Defendant, in paragraph 10 of his witness statement, had sought to say that 580 bags of ginger were good condition, this meant that it was only 20 bags of ginger which were allegedly not in good condition, which is again is at variance with Defendant’s pleadings, particularly paragraphs 4 and 5 of his Statement of Defence filed on the 3rd of March 2023. This Court accordingly holds that, Defendant failed to establish that indeed 30 bags of ginger were rotten. By virtue of this holding, one can rightly conclude that the 600 bags of ginger supplied to Defendant were fit for purpose and I so hold.

Since the parties conceded by their pleadings that the cost of a bag of ginger was GH¢235.00 by simple computation and arithmetic, Defendant became indebted to Plaintiff to a total sum of GH¢141,000.00 right from the day the 600 bags of ginger were supplied to him.

Plaintiff however averred that, Defendant managed to liquidate a substantial portion of this debt by installments to a tune of GH¢114,200.00 leaving a balance

of GH¢26,800.00. On his part however, Defendant alleged that any sum left outstanding was to be paid to Plaintiff by one Nana Kwaku Marfo and not him. According to his pleadings the sum left to be paid by the said Nana Kwaku Marfo to Plaintiff was GH¢19,750.00, however in his evidence in chief, Defendant alleged that the sum to be paid by the said Nana Kwaku Marfo was GH¢22,100.00. These figures thrown about by Defendant do not in anyway enure to his benefit owing to their inconsistency. In the course of this judgment the actual sum outstanding and owed to Plaintiff shall be determined by the Court.

The issue which however is of concern to the Court presently is whether or not the said Nana Kwaku Marfo is the true debtor of Plaintiff rather than the Defendant. A determination of this issue would ultimately resolve the issue as to whether Defendant is liable to Plaintiff or not.

Again, since it was Defendant who was putting forth this proposition, it behooved upon him to lead such evidence necessary to establish the fact that it was Nana Kwaku Marfo who was in fact indebted to Plaintiff and not him (Defendant). Consequently, Defendant testified in paragraphs 10, 11 and 12 of his witness statement filed on the 5th of June 2023 as follows;

“10. That in my bid to help Plaintiff to sell her goods, I intervened by loading five hundred and eight bags that was in good condition into a truck to the Adonko Company in Kumasi.

11. That at the Company premises I engaged the services of a middleman to the knowledge of the Plaintiff to assist in selling the goods to the company.

12. That the said middleman by name Nana Kwaku Marfo used his name to cover all the transactions relating to the consignment”.

What can be gleaned from the above testimony is that, it was Defendant himself who engaged the services of the said Nana Kwaku Marfo to serve as a middle man between him and the

Company. Clearly from his own words, Plaintiff had no hand in the engagement of the said Nana Kwaku Marfo. In fact, no evidence was led by Defendant to suggest that he engaged the services of the said Nana Kwaku Marfo at the behest or instruction of Plaintiff. It therefore becomes very obvious that Nana Kwaku Marfo was more of an agent to Defendant than Plaintiff. According to the American Restatement of the Law of Agency (3rd edn, 2006, para 1.01), agency is the fiduciary relationship that arises when one person (a „principal“) manifests assent to another person (an „agent“) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests or otherwise consents so to act. [See: Yaw Kyei V. Henrietta Dei Nikoi (2017) JELR 108683 (HC)]. As an agent it was the duty of the said Nana Kwaku Marfo to assist Defendant, his Principal, with all matters relating to the consignment of ginger brought to the company by Defendant which the latter had earlier obtained from Plaintiff. These matters which Nana Kwaku Marfo was to assist Defendant with included, but was not limited to, the receipt of monies from the Adonko Company for the supply of the consignment of ginger .

Nana Kwaku Marfo appeared to have executed this task perfectly for it was the case of Defendant that, Nana Kwaku Marfo managed to receive all payments due in respect of the consignment of ginger. This fact was confirmed by Nana Kwabena Sarfo Kantanka (Dw1) when he stated at paragraph 13 of his witness statement filed on the 20th of October 2023 that when Nana Kwaku Marfo was questioned, “he confirmed receipt of all monies pertaining to the parties” ginger and further promised to refund same in oneweek time”(sic). Having received the monies from the Adonko Company, and being an agent of Defendant, it was naturally expected and incumbent upon the said Nana Kwaku Marfo to deliver all monies he received from the Adonko Company to Defendant for onward transmission to Plaintiff. How it appears the said Nana Kwaku Marfo did not

give Defendant all the monies he was paid by the Adonko company as shall be seen later in this judgment.

Despite the fact that Defendant was to receive monies from Nana Kwaku Marfo for onward transmission to Plaintiff, Defendant nevertheless strongly contended that all the monies received by Nana Kwaku Marfo from the Adonko Company were directly paid to Plaintiff. This assertion is however not supported by Defendant's own pleadings for he states in paragraph 6 and 7 of his Statement of Defence filed on the 3rd of March 2023 as follows; "6. The Defendant further says that the said 570 bags of ginger were supplied to the Adonko Factory through a middleman by name Nana Kwaku Marfo he used his name at the Factory to register the money and use same name for the collection of the money on behalf of the Defendant.

7. The Defendant says that he has paid to the Plaintiff cash of GH¢114,200.00 leaving balance of GH¢19,750.00 and not the amount being claimed".

The above pleadings confirm the fact that monies received by the said Nana Kwaku Marfo from the Company were paid to Defendant who in turn transmitted same to Plaintiff. It is therefore not true that all monies paid to Plaintiff were paid directly to her by Nana Kwaku Marfo as Defendant sought to allege. It became very apparent therefore that Defendant made this assertion in a bid to create an impression that Nana Kwaku Marfo was not his agent so as to escape any liability but he woefully failed in that attempt.

From the foregoing, this Court makes the following findings;

- i. That Nana Kwaku Marfo was the agent of Defendant.
- ii. That the Adonko company paid Nana Kwaku Marfo all monies due for the supply of the ginger consignment.

- iii. That Nana Kwaku Marfo paid an amount of GH¢114,200.00 to Defendant leaving an outstanding sum.
- iv. That Defendant upon receipt of the said GH¢114,200.00 transmitted same to Plaintiff.

The question then is, how much money is outstanding for which Nana Kwaku Marfo failed to give same to Defendant for onward transmission to Plaintiff? This is answered by simple arithmetic as discussed hereinafter.

As noted earlier, Defendant failed to establish his assertion that 30 bags out of the 600 bags of ginger he received was not fit for purpose. Consequently, this suggests that Plaintiff supplied Defendant with 600 bags of ginger which were fit for purpose at the cost of GH¢235.00 per bag. Which meant that the total cost of the transaction was GH¢141,000.00. It is further not in dispute that Defendant has paid GH¢114,200.00 leaving an outstanding sum of GH¢26,800.00. It is therefore the finding of the Court that the sum outstanding which Nana Kwaku Marfo failed to give Defendant was GH¢26,800.00, nothing more nothing less.

Now, if Nana Kwaku Marfo was the one who failed to give Defendant this outstanding sum, is Defendant nevertheless liable to Plaintiff in the sum of GH¢26,800.00 which she is claiming? The answer to this question is in the affirmative owing to the simple fact that, Nana Kwaku Marfo was an agent of Defendant and as an agent, his actions generally bind his principal, the Defendant. Consequently, if Defendant's agent had failed to follow through on his mandate, the effect of his failure should not be visited upon innocent third parties such as the Plaintiff.

I do not know why Defendant did not deal directly with the Adonko Company but having decided to engage the services of the said Nana Kwaku Marfo to act on his behalf, Defendant had ultimately assumed all the risks attached to that agency. Hence the failure by Nana Kwaku Marfo to pay to Defendant the sum

of GH¢26,800.00 made Defendant directly liable to Plaintiff for the said sum due to the omission by his agent.

In conclusion, this Court finds that Plaintiff is entitled to all her claims and accordingly enters judgment in her favour as follows;

- a. It is ordered that the Defendant shall pay to Plaintiff the sum of GH¢26,800.00.
- b. It is further ordered that Defendant shall pay to Plaintiff interest on the sum of GH¢26,800.00 calculated at the prevailing commercial rate starting from the October 2021 till date of judgment.
- c. Cost of of GH¢4,000.00 is awarded against Defendant.

SGD
H/H CHARLES KWASI ACHEAMPONG ESQ.
CIRCUIT COURT JUDGE – GOASO

