

**IN THE DISTRICT COURT 2, TAMALE
HELD ON WEDNESDAY 30TH NOVEMBER, 2022
BEFORE HIS WORSHIP D. ANNAN ESQ.**

SUIT NO: A1/61/22

BETWEEN

ALHASSAN IBRAHIM & 2 ORS.

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PLAINTIFFS

AND

AMADU & 2 ORS.

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DEFENDANTS

JUDGMENT

1. In this case, the 1st and 2nd plaintiffs are businessmen whereas 3rd plaintiff is a military officer. All the plaintiffs are into cattle rearing. The 1st defendant is described as a herdsman of 3rd defendant and also the father of 2nd defendant. 2nd defendant at the time of this incident was an employee or herdsman of 3rd defendant. 3rd defendant is a farmer and into cattle rearing.
2. On 10th March, 2022 plaintiffs took out a writ a summons against the defendants, jointly and severally, for the following reliefs:
 - a. Recovery of 12 cows belonging to plaintiff that 1st and 2nd defendants drove among 3rd defendant's herd and together the defendants converted without the knowledge and consent of the plaintiffs, IN THE ALTERNATIVE recovery of GHS50,000.00 being the estimated value of the 12 cows converted by the defendants.

- b. Interest on the amount of GHS50,000.00 from January 2022 till date of judgment at the prevailing commercial bank rate.
 - c. General damages
 - d. Costs including cost of litigation.
3. On 1st April, 2022 when this case was first called, only the 3rd defendant had filed a defence to plaintiffs' claim. Later, on 13th April, 2022 the 1st defendant also came to court and pleaded not liable to plaintiffs' claim. The 2nd defendant did not come to court or file any response to plaintiffs' claim. I shall deal with his absence or failure to respond to plaintiffs' claim later in this judgment.

PLAINTIFFS' CASE

4. 1st plaintiff gave evidence on behalf of 2nd and 3rd plaintiffs. According to him, sometime in January 2022 plaintiffs' 12 cows at a kraal at Gbanyamilli were taken out for grazing but strayed into 3rd defendant's cows. At that time 3rd defendant's cows were in the control of 2nd defendant. Plaintiff's representative averred that 2nd defendant herded the 12 strayed cows together with the herd of 3rd defendant to Kparigi Lana Yili, a neighbouring community. He added that when 2nd defendant reached the kraal of 3rd defendant, 1st and 3rd defendants decided to tie the 12 cows with ropes in anticipation that when the owner(s) of the 12 cows come they would hand them over. He stated further that the defendants failed to inform the chief or assemblyman about the 12 cows but decided to sell it. Plaintiffs contend that before the 12 cows were sold, they were seen among the 3rd defendant's herd at Kparigi Lana Yili which defendants admitted at a meeting before the chief of Kparigi Lana Yili. Plaintiffs tendered in evidence, Exhibit A being an audio recording of the discussion at the chief's place and Exhibit A1, a transcription of the audio. Plaintiffs claim that when the chief of Kparigi Lana Yili directed defendants to produce the 12 cows, defendants refused or neglected to do so. Again, when the matter was reported at the Savelugu Police station, the defendants admitted that 2nd defendant brought home the 12 cows, yet defendants have failed to produce/return the cows or pay its value. Hence, this present action.

DEFENDANTS' CASE

1st defendant

5. 1st defendant's evidence is simply that he has nothing to do with the 12 cows, save that 2nd defendant is his son.

2nd defendant

6. As indicated earlier, he failed to come to court or responded to plaintiffs' claim.

3rd defendant

7. 3rd defendant, on his part, admitted that only 2nd defendant is his herdsman, but presently he has dismissed him because of this incident. In his witness statement, he stated that he only saw 3 but not 12 cows. He added that when 2nd defendant came home with the cows, he instructed 2nd defendant to tie the cows with ropes as the normal practice. The next day when the cows were untied and herded for grazing, he again instructed the 2nd defendant to look out for the owner(s). 3rd defendant further stated that 2nd defendant came back from grazing with only his cattle, saying that he could not trace the other cows. When he prevailed on him to disclose the whereabouts of the cows, 2nd defendant maintained his story and not being satisfied with the story he dismissed him. He maintains that he is not personally liable for the 12 cows.

ISSUE

8. The issues borne out of the facts are:

- a. *Whether or not the strayed cows were 12 in number?*
- b. *Whether or not defendants are jointly and severally liable for the 12 cows?*

BURDEN OF PROOF

9. In civil cases, the law is that he who asserts usually has the burden of proving his case on the preponderance of probabilities and he proves it by providing sufficient evidence in accordance with sections 11(4) and 12 of the Evidence Act, 1975 [NRCD 323]. See also the case of **Sakordie v FKA Company Limited [2009] SCGLR 65**, where the Supreme Court held that

“...the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads to a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.”

10. In effect, the burden of proving any particular averment is on the one who made it. It is when the claimant has established an allegation on the preponderance of probabilities that the burden shifts onto the other party, failing which an unfavourable ruling will be made against him. The court in **Ababio v Akwasi III [1995-1996] GBR 774** succinctly puts it as follows:

“...it is the party who raises in his pleadings an issue essential of success of his case who assumes the burden of proving it. The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue the plaintiff leads some evidence to prove his claim. If the defendant succeeds in doing this he wins, if not he loses on that particular issue.”

ANALYSIS OF THE ISSUES

Issue a

11. Whether or not *the strayed cows were 12 in number*? It is important to point out that where a party goes to Court to make an allegation, the onus is on him to lead evidence to prove that allegation, *unless that allegation is admitted*, see the case **Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lampsey (No. 2) [2012] 2 SCGLR 845**.

12. The law is also that the trial court has to decide which set of facts or whose version of the facts or which parties should be believed or disbelieved, i.e. which of the varying or conflicting versions of the parties' stories, facts or evidence is credible, see **Ntim v Essien [2001-2002] SCGLR 451**.

13. In the instant case, plaintiffs' claim that their strayed cows were 12 in number. 3rd defendant indicated that he saw only 3. From the evidence, plaintiffs stated in their particulars of claim at paragraphs 2 and 3 as follows:

"2. The plaintiffs aver that sometime January this year (2022) their 12 cows with their kraal at Gbanyamli were taken out for grazing and strayed into 3rd defendant's cattle under the care of the 1st and 2nd defendants who are 3rd defendant's herdsmen then in control in the field by the 2nd defendant.

3. The plaintiffs aver that 2nd defendant then herded the 12 strayed cows together with the herd of 3rd defendant's cattle to Kparigi Lana Yili, a neighbouring community."

14. The 3rd defendant, through his counsel, responded to the above pleadings at paragraphs 3 and 4 in his statement of defence as follows:

"3. Paragraph 2 is admitted, except to say that it was only 2nd defendant who was 3rd defendant's Fulani herdsman.

4. Paragraph 3 is admitted."

15. From the above, the 3rd defendant clearly admitted that plaintiffs' cows were 12, without more. If indeed there was an exception, same would have been stated similar to that of paragraph 3 of his statement of defence. I, therefore, find the subsequent introduction of the 3 cows in his witness statement as an afterthought. Nothing was said in any of the other pleadings, save the witness statement. Hence, on the authority of **Ntim v Essien (supra)**, I find the evidence of plaintiffs more credible. Further on the authority of **Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lamprey (No. 2)** (supra), the admission of the 3rd defendant was definite hence no

need for further evidence in proof of same. I so hold that the number of cows in contention is 12 but not 3.

Issue b.

16. Issue b, *whether or not defendants are jointly and severally liable?* This issue has two elements, thus either all the defendants or only the 3rd defendant is vicariously liable, if any.
17. The principle of jointly and severally liable is that, liability may be apportioned either among two or more parties or to only one of the parties at the adversary's discretion. Thus, either liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties, see **Black's Law Dictionary, 9th Edition**.
18. To be vicariously liable, means that the supervisory party (employer) bears for the actionable conduct of a subordinate (employee) based on the relationship between the two parties. In **Yortuhor v Brako & Anor. [1989-90] 2 GLR 429**, the court held that "a master was only liable where the servant was acting in the course of his employment. If he was going out of his way against his master's implied commands, ...the master would be liable; but if he was going on a frolic of his own without being at all on his master's business, the master would not be liable". In effect, an employer whose employee commits a tort may be liable in his own right for negligence in hiring or supervising the employee, see also **Black's Law Dictionary, 9th Edition**.
19. In the instant case, plaintiffs sued the defendants jointly and severally for the 12 cows. They contend that defendants have failed to return the 12 cows or pay GHS50,000.00 being the estimated value of the 12 cows.

20. The 1st defendant argues that he has nothing to do with the 12 cows, save that 2nd defendant is his biological son.
21. 2nd defendant, who is in the thick of this incident, did not come to court or file any response to plaintiffs' claim. Now, concerning his non-attendance in court or failure to file a response to plaintiffs' claim, it is well established that where a party fails to appear in court after due service on him, he is said to have deliberately failed to take advantage of the opportunity given him to be heard. The audi alteram partem rule cannot be said to have been breached. See the case of **Ankumah v. City Investment Co. Ltd. [2007-2008] 1 SCGLR 1068**. Also in the case of **Republic v. High Court (Fast Track Division); Ex-parte State Housing Co. Ltd. (No. 2) Koranten-Amoako Interested Party, [2009] SCGLR 185** Wood JSC (as she then was) had this to say at page 190, "A party who disables himself or herself from being heard in any proceedings cannot later turn round and accuse an adjudicator of having breached the rules of natural justice." In effect, a judgment is entered against him upon proof of the other party's claim.
22. The 3rd defendant disputes plaintiffs' claim and adds that he is not personally liable. In his evidence, he lamented that when 2nd defendant came back from grazing without trace of the other cows, he prevailed on him to disclose the whereabouts of the cows but 2nd defendant maintained his story and not being satisfied with the story he dismissed him. It is important to also note that 3rd defendant denied 1st defendant as his herdsman.

23. From the above, I find the 1st defendant not liable, since there was no sufficient evidence implicating him. Regarding the 3rd defendant, the law is that he is liable for his employee's tort for negligence in supervising him. He chose to dismiss the 2nd defendant thinking that that should absolve him from liability. Certainly not! I, therefore, find the 3rd defendant vicariously liable based on his relationship with the 2nd defendant. It is not out of place to enter judgment against the 2nd defendant based on the authority of **Ankumah v City Investment Co. Ltd. (supra)**, since he can tell the whereabouts, if any, of the said 12 cows. In effect, I hold the 2nd and 3rd jointly and severally liable.

CONCLUSION

24. In sum, I hereby enter judgment in favour of the plaintiffs to recover from the 2nd and 3rd defendants, jointly and severally, the 12 cows or the sum of GHS50,000.00 being the estimated cost of the 12 cows. Also, I award interest at the prevailing commercial bank rate to be paid on the amount of GHS50,000.00 from January 2022 till date of this judgment.

25. Costs of GHS10,000.00 is awarded against the 2nd and 3rd defendants, jointly and severally, in favour of the plaintiffs.

H/W D. ANNAN ESQ.

[MAGISTRATE]

SYLVESTER ISANG ES Q. FOR THE PLAINTIFFS

SHEIKH-ARIF ABDULLAH ESQ. FOR THE 3RD DEFENDANT

1ST DEFENDANT APPEARED IN PERSON

2ND DEFENDANT ABSENT

References:

1. *sections 11(4) and 12 of the Evidence Act, 1975 [NRCD 323]*
2. *Sakordie v FKA Company Limited [2009] SCGLR 65*
3. *Ababio v Akwasi III [1995-1996] GBR 774*
4. *Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lamptey (No. 2) [2012] 2 SCGLR 845*
5. *Ntim v Essien [2001-2002] SCGLR 451*
6. *Yortuhor v Brako & Anor. [1989-90] 2 GLR 429,*
7. *Black's Law Dictionary, 9th Edition.*

