

IN THE DISTRICT COURT 2, TAMALE
HELD ON MONDAY 26TH SEPTEMBER, 2022
BEFORE HIS WORSHIP D. ANNAN ESQ. MAGISTRATE

SUIT NO. A2/73/22

BETWEEN

MOHAMMED SAEED NASAGRI - PLAINTIFF

AND

1. TAMINU MOHAMMED - DEFENDANTS

2. ERNEST KWAME OBENG

JUDGMENT

INTRODUCTION

1. The plaintiff describes himself as a businessman who is into construction. The 1st Defendant describes himself as an errand boy of 2nd Defendant. 2nd Defendant is the Director of Research at the Ministry of Roads and Highways.
2. On 25th July, 2022 the plaintiff took out a writ of summons against the Defendants for the following reliefs:
 - a. Recovery of GH50,000.00 being amount of money Defendants borrowed from Plaintiff;

- b. Interest on the said sum from 1st October, 2020 till date of final payment;
 - c. Damages for breach of contract; and
 - d. Any other reliefs the Honourable Court may deem fit and just.
- 3. On 11th August, 2022 when the case was called the 1st Defendant who had been duly served with the writ did not come to Court or filed any response to Plaintiff's claim. Service of the writ on the 2nd Defendant was, however, irregular since it was served through the 1st Defendant. The Court adjourned the matter to 24th August, 2022 for the 2nd Defendant to be properly served and advised the Plaintiff to put its house in order, thus to consider placing the case on the undefended list. The Plaintiff chose to serve hearing notice on Defendants.
- 4. On 24th August, 2022, although there was due service of the writ and hearing notice on the 2nd Defendant and hearing notice on the 1st Defendant, it was only the 1st Defendant who was in Court. At the time the case was called, counsel for plaintiff was not in Court but the 1st Defendant pleaded not liable to Plaintiff's claim. When counsel for Plaintiff entered to the Court at 8:49am, he was surprised to hear that the 1st Defendant pleaded not liable. He said that the 1st Defendant had indeed paid GH25,000.00 of Plaintiff's claim, so he wondered why the 1st Defendant would come to Court and say otherwise. Based on this information, the plea was retaken. This time around, 1st Defendant pleaded liable to claim a, but insisted he was not liable to claims b and c.
- 5. This Court then set down the case to hear the parties on claim b. However, the evidence turned on its head.

PLAINTIFF CASE

6. Plaintiff in his Statement of Claim states that sometime in September 2020, the 2nd Defendant approached him through 1st Defendant for an amount of GH50,000.00 to be repaid within a month of receipt of same. He added that 1st Defendant personally guaranteed to pay the said amount if 2nd Defendant defaulted. When 2nd Defendant defaulted, Plaintiff states that 1st Defendant has reneged on his promise, despite several demands to get him repay the money.
7. As a result of the non-payment by the Defendants, Plaintiff caused his lawyers to issue a demand notice to the Defendants in April 2022. Yet, Defendants have failed to pay. Hence this present action.

1ST DEFENDANT'S CASE

8. As noted earlier, 1st Defendant pleaded liable to claim a, but insisted that he was not liable to claims b and c. In his evidence-in-chief, he states briefly that Plaintiff gave him the GH50,000.00 to be given to 2nd Defendant to facilitate payment of some construction work he, the plaintiff, had done for the Ministry of Roads and Highways. Unfortunately, payment of the construction work has not been paid. 1st Defendant adds that when he was served with the writ, he informed plaintiff's lawyer that 2nd Defendant could not readily raise the GH50,000.00 but he was able to arrange GH25,000.00 and paid same into the lawyer's account. He states further that he and the 2nd Defendant have assured the plaintiff to repay the money, but needed some more time. He maintained that because he did not borrow the money for himself, he was not liable to pay interest and damages to the Plaintiff.

ISSUES FOR DETERMINATION

9. The issues borne out of the facts are:

- a. Whether or not the agreement between the parties can be enforced by this Court?
- b. Whether or not Defendants are jointly and severally liable to Plaintiff's claim?

ANALYSIS OF THE ISSUE

10. With issue a, *whether or not the agreement between the parties can be enforced by this Court*, it is trite law that before a contract can be enforced, it should be valid. An invalid contract, particularly one that is against public policy does not deserve the blessings of a Court. Lord Mansfield in **Holman v. Johnson (1775) 1 Cowp. 341 at 343** had this to say:

“The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.”

11. The question that rather plays on the mind of the Court is whether the Court can suo motu raise the issue of illegality on grounds of public policy. Thus, from the evidence in the instant case, was the GH50,000.00 given as a “bribe” to facilitate the non-payment of some construction work done by the Plaintiff? His Lordship Amissah JA (as he then was) in the case **Ramia v Chiavelli & Anor. [1967] GLR 737-744**, held as follows:

“... The Courts would decline to aid a plaintiff to an illegal contract even if the Defendant was equally in the wrong. *The Court would itself take notice of any illegality upon which the plaintiff was suing if it appeared on the face of the contract or from evidence adduced by either party*; but nothing debarred the Defendant from raising it in his pleadings and before the plaintiff had given any hint of it.”

12. Further, His Lordship Amissah JA in the aforementioned case quoted Lord Haldane L.C. in the case, **North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd. [1914] A.C. 461**, as follows:

"... , if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the Defendant raise the question of illegality."

13. From the above, it is clear that the Court can suo motu raise the issue of illegality and to resolve same considering the pleadings or evidence adduced. A warning, however, is given by Burrough J. in the case of **Richardson v. Mellish [1824] 130 E.R. 294** when he stated that:

"That public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you."

14. In a more recent case of **City and Country Waste Limited v. Accra Metropolitan Assembly [2007-2008] 1 SCGLR 409 at 435-438**, Date-Bah JSC (as he then was) in explaining what the Court has to do regarding illegal contracts, had this to say:

"...In the English case law, the illegality of a contract has been held to be an effective defence to even a restitutionary claim, unless the parties are not in pari delicto (or equally at fault). ... A review of the English case law reveals that, in assessing the fault of the parties, the law adopts a rather technical approach, according to which recovery is allowed only where a plaintiff can demonstrate that he or she was induced to enter into the illegal contract by the fraud, duress or oppression of the other party; or that he or she was ignorant of a

fact that rendered the contract illegal; or that he or she belonged to a vulnerable class protected by statute. [Emphasis mine]

15. His Lordship Date-Bah JSC further stated that in considering illegal contracts, the case should be determined on a case by case basis and to follow any rigid set of rules. He stated that:

“We do not think that we ought in this Court to be constrained excessively by the weight of the English case law in finding a just outcome in this case. Rather, we are encouraged to develop Ghanaian law in this area by some of the ideas contained in the English Law Commission’s Consultation Paper No. 154 on Illegal Transactions: The Effect of Illegality on Contracts and Trusts. This Consultative Paper, after an extensive and erudite review of the complex English law in the area, concludes as follows (at p. 91):

‘We have said that we believe that there is a continued need for some doctrine of illegality in relation to illegal contracts and that, in certain circumstances, it is right that the law should deny the plaintiff his or her standard rights and remedies. However, we have also explained how, in some situations, we believe that the plaintiff is being unduly penalized by the present rules. This injustice would seem to be the inevitable result of the application of a strict set of rules to a wide variety of circumstances, including cases where the illegality involved may be minor, may be wholly or largely the fault of the Defendant, or may be merely incidental to the contract in question. We consider that the best means of overcoming this injustice is to replace the present strict rules with a discretionary approach under which the Courts would be able to take into account such relevant issues as the seriousness of the illegality involved, whether the

plaintiff was aware of the illegality, and the purpose of the rule which renders the contract illegal. The adoption of some type of discretionary approach has the support of the vast majority of academic commentators in this area; and it is the approach which has been followed in those jurisdictions where legislation has been implemented. Moreover, we have not been able to devise a new enlightened regime of “rules” that would provide satisfactory answers to all disputes involving illegal contracts. In our view, a balancing of various factors is required so that, put quite simply, the law on illegal contracts does not lend itself to a regime of rules.’

We have decided to adopt this structured discretionary approach to the resolution of issues arising from illegality of contracts. The approach is to be fleshed out on a case by case basis.” [Emphasis mine]

16. With the above guidance of the Supreme Court, the issue to be considered is whether the agreement between the parties can be enforced? Was the money given as bribe in facilitation of payments yet to be received by the Plaintiff for works done for the Ministry of Roads and Highways?

17. From the evidence, plaintiff states he does not know the 2nd Defendant. Also, he does not know the purpose of lending the money, except to say that it was a personal thing between the Defendants. No agreement was signed. He claims that it was 1st Defendant who approached him for the money and also guaranteed to repay the money if 2nd Defendant failed to pay. A curious mind like mine will ask, so Plaintiff just gave out GH50,000.00 to someone (i.e. 2nd Defendant) that he does not know, simply because 1st Defendant guaranteed to repay? This question indeed is a mouthful.

18. A critical look at the evidence prove otherwise. This is what happened when Plaintiff gave evidence-in-chief and was cross-examined.

Evidence-in-chief of Plaintiff:

“Q: Do you also know the second Defendant?”

A: No.”

Cross-examination of Plaintiff by 1st Defendant:

“Q: Are you not the one who called me and asked that I should talk to 2nd Defendant to help pay you for the construction that you did?”

A: What you are saying is not true. Because the 2nd Defendant, he is a director of research at the Ministry of Roads and Highways and not close to any payment office.”

19. Clearly the above indicates that the Plaintiff knows the 2nd Defendant, that well.

Next, was the money given out to facilitate the non-payment of construction work of the Plaintiff? This is what ensued during cross-examination of Plaintiff:

“Q: Did I ask you to give me money to be given to another person?

A: You never did, apart from this particular GH50,000.00.

Q: Is our relationship favourable such that I can ask you for such money?

A: I know you for some time and the time I know you, you were selling phones.

Q: I am putting to you that you had done some construction for the Ministry of Roads and Highways and was not being paid so you contacted me to help you get paid?

A: That is not the case.

Q: When you were giving the money to me, did you inform me that you were adding interest to it?

A: No, but because I gave you one month which I demanded that the money be returned in one month and it was not returned, next month September is 2 years exactly, the money has devalued.

Q: I am putting it to you that we did not give ourselves a period of 2 weeks or 1 month to repay the money?

A: When I gave the money Majeed was a witness and we agreed that one month.

Q: You did not lend me any money, you only gave me they said GH50,000.00 to facilitate the payment of your construction work?

A: I didn't give you the money to facilitate any payment, but I lent you the money to be given to 2nd Defendant.

20. Regarding the purpose of the money, this is what Plaintiff told the Court:

B/C: You said that the GH50,000.00 was given to 1st Defendant to be given to 2nd Defendant, not so?

A: That is correct.

Q: You also said in your statement of claim that it is the 1st Defendant who personally guaranteed to pay the said amount should the 2nd Defendant fail to pay, not so?

A: Yes.

Q: You also said this agreement was witnessed by one Majeed, not so?

A: Yes.

Q: Do you have any document that was signed because of this agreement?

A: No.

Q: What exactly did 1st Defendant tell you before you gave out the GH50,000.00?

A: The problem was that 1st Defendant informed me that 2nd Defendant was having an issue and I said that since I knew him and 2nd Defendant is his friend and the money can be paid within a month I will give out the money.

Q: Did 1st Defendant tell you the problem 2nd Defendant was having?

A: No. I did not go into it because that is personal between them."

21. Plaintiff did not call the said Majeed as witness. On the part of the 1st Defendant, he admits that he took the money but the money was meant to facilitate payment of some construction work the plaintiff had done for the Ministry of Roads and Highways. He insisted he was not liable to the claim of interest and damages. This is what also happened when he was under cross-examination:

"CoP: You actually took GH50,000.00 from the plaintiff, not so?

A: That is so.

Q: And the GH50,000 was meant to be given to 2nd Defendant?

A: That is so.

...

Q: I am suggesting to you that plaintiff is entitled to interest on the delayed repayment of the GH50,000.00?

A: No, because I did not borrow the money from him.

Q: I am putting it to you that plaintiff gave the GH50,000 to you on the understanding that you repay him in October 2020?

A: That is not true. The money was given to me by Plaintiff to be given to 2nd Defendant.

Q: I am putting it to you that before you defaulted in the repayment of the principal sum from October 2020 till date, the plaintiff is entitled to damages?

A: Plaintiff is not entitled to any damages, because I did not approach plaintiff for the money, rather plaintiff gave the money to me to facilitate the payment of his work.

Q: I am suggesting to you that your testimony that the said amount was meant for the facilitation of payment for a contract work carried out by the plaintiff is untruth?

A: I am being truthful.”

22. Considering the above evidence, I find the 1st Defendant more credible. See the case of **Ntim v Essien [2001-2002] SCGLR 451**. See also section 80(2) of the Evidence Act, 1975 (NRCD 323).

23. Now, the 2nd Defendant being a civil servant, the actions of parties herein will amount to acts of bribery and corruption, contrary to section 239 of Act 29. Therefore, the agreement between the parties herein sins against public policy on grounds of illegality.

24. Having come to the conclusion that the agreement between the parties is illegal, I have no hesitation at all in dismissing the claim of the Plaintiff, see **Ramia v Chiavelli & Anor (supra)**. It does not desire the blessings of this Court although 1st Defendant has paid or admitted to pay. Accordingly, plaintiff’s claim is hereby dismissed. Issue b, *whether or not Defendants are jointly and severally liable to Plaintiff’s claim* is therefore moot.

25. Lastly, this Court is enjoined to refer the actions of parties herein to the Attorney Generals’ for further investigation and prosecution in the offence of bribery and corruption, contrary to section 239 of Act 29. The Registrar of this Court to serve a copy of this judgment on the Attorney General, Tamale.

H/W D. ANNAN ESQ.

[MAGISTRATE]

ISAAC BORRITOR ESQ. FOR THE PLAINTIFF

1ST DEFENDANT APPEARED IN PERSON

2ND DEFENDANT ABSENT

Reference:

1. *Holman v. Johnson* (1775) 1 Cowp. 341 at 343
2. *Ramiah v. Chiavelli & Anor.* [1967] GLR 737-744
3. *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* [1914] A.C. 461
4. *Richardson v. Mellish* [1824] 130 E.R. 294
5. *City and Country Waste Limited v. Accra Metropolitan Assembly* [2007-2008] 1 SCGLR 409 at 435-438
6. section 80(2) of the Evidence Act, 1975 (NRCD 323)
7. section 239 of Act 29