

**IN THE DISTRICT COURT HELD IN THE WESTERN REGION ON WEDNESDAY AT
AGONA NKWANTA ON THE 21ST DECEMBER 2022 BEFORE HIS WORSHIP SIDNEY
BRAIMAH DISTRICT MAGISTRATE**

WR/AA/DC/A2/89/2022

FALILATI LAWAL

VRS

REGINA ACQUAH

JUDGMENT

The plaintiff instituted the present action against the defendant by issuing the instant writ of summons with accompanying affidavit in support to place the suit under the undefended list pursuant to Order 8 rule 1 of District Court Rules, 2009.[C.I 59]. The indorsement on the writ of summons stated as follows:

“Relief sought

Plaintiffs claim the following reliefs:

(a) Order directed at defendant to refund an amount of Ghc28,800.00 being rent advance received from plaintiff but has failed to provide the key to store to store room to plaintiff, despite repeated demand“

Pursuant to Order 8 rule 3 of C.I 59, the defendant filed notice of intention to defend the suit with accompanying affidavit stating the grounds of his defence that plaintiff refused to

collect the amount claimed from her when she tendered same. The court proceeded to place the writ on the defendant list for the present trial.

In her evidence, plaintiff contended that she concluded agreement with defendant to rent her storeroom for Ghc28,800.00 at Ghc800.00 per month on 6/4/21. According to plaintiff, the defendant contended that she had reached agreement with the occupant of the store room in issue to give the rent advance paid to him in order to vacate the store in issue. The plaintiff asserted that defendant could not perform her obligation under the contract by representing to her that the occupant of the store room in issue had refused to accept the rent advance and that she would provide another store for plaintiff and counseled her exercise patience. Plaintiff again submitted that the parties thereafter agreed that defendant would deposit the rent advance in DW1's bank account and use it to pay the occupant of the store room in the event that he changes his mind. Thereafter, it became apparent to plaintiff over a period of over a year that defendant was misleading her. Plaintiff repudiated the agreement and claimed the money from her. The defendant failed to refund the money to plaintiff and PW1, her son on repeated demand; hence the present action against her.

On her part; defendant submitted that she concluded a contract to rent her store to plaintiff on the condition that the occupant of the store was willing to vacate same for the rent advance of Ghc28,800.00 paid by plaintiff. The defendant contended that plaintiff accompanied her and DW1 to one Fatawu, the occupant of the store and made the offer to him but he informed them that he had changed his mind and would not vacate the store. Plaintiff however implored her to keep the money in hope that Fatawu might change his mind. Defendant also agreed to deposit the money into DW1's bank account. The defendant submitted that the amount was withdrawn from DW1's bank account when plaintiff demanded the amount on her return from Nigeria but failed to come for it on the agreed date resulting in the money being lost in defendant's room. The defendant narrated the incident

to plaintiff and pleaded for time to pay the amount but plaintiff rejected her plea and instituted the present action against her.

On the facts in issue; the following issues are raised for determination:

1. Whether or not defendant breached the contract between the parties?
2. Whether or not the money was lost in defendant's room? And if so?
3. Whether or not defendant exercises reasonable degree of care to preserve the money in her possession?
4. Whether or not the plaintiff is entitled to her reliefs?

The rule of evidence is trite that a party who asserts a fact assumes the responsibility of proving the fact. Accordingly, the burden of producing evidence as well as the burden of persuasion is imposed on that party and the standard required is provided in sections **10, 11 and 12 of the Evidence Act 1975 [NRCD 323]**. The stated provisions have been enunciated by the Supreme Court in the past to be the nature and standard of proof in civil cases. One of such decision is the case of **ABABIO v. AKWASI IV [1994 – 1995] GBR 774**. See also **In OKUDZETO ABLAKWA (No. 2) vs. ATTORNEY GENERAL & ANOTHER [2012] 2 SCGLR 845 at page 867** where the court explained the law governing proof as follows:

“If a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation, which he fails to prove or establish. This rule is further buttressed by section 17 (b) which, emphasizes on the party on whom lies the duty to start leading evidence...”

In adjudicating a matter one way or the other; each party to the suit must adduce sufficient evidence on the facts and issues to be determined by the court in accordance with the prescribed statutory standards. **Section 14 of the Evidence Act 1975 (NRCD 323)** which regulates how the courts receive and evaluate evidence provides that.

“Except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting”

Per the rules of evidence stated above the burden of producing evidence in this suit lies on the Plaintiff because he assumes the burden to prove what he alleges against the defendants. This burden is discharged on the preponderance of probabilities which has been defined in **section 12(2) of the Evidence Act 1975 NRCD 323** as:

“that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence”.

In proof her case, plaintiff established by conclusive evidence that she paid Ghc28.800.00 to defendant to rent her store occupied by one Fatawu in the presence of DW1 as a witness. The evidence was again conclusive that defendant was not able to give possession of the store to plaintiff. The evidence is also patent that the inability of defendant to recover the store in issue from the said Fatawu was not due to the omission or act of the plaintiff. In that respect the defendant failed to perform her side of the contract by failure of consideration. In **Frafra v Boakye [1976] 2 GLR 336-337**, Annan J.A (as he then was) explained the Common Law principle of failure of consideration as follows:

“The rule stated in the books is that where money has been deposited or paid on a contract and before any benefit has been derived by the payer or any part of the contract has been performed by the other party, the consideration wholly fails, an action for money had and received may be maintained to recover the money so deposited or paid. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 at p. 48, H.L. Viscount Simon L.C. pointed out that:

‘When one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.’

The principle of failure of consideration stated above is based on what is just and reasonable. In *Quagraine v Adams* [1981] GLR 599, the court restated the principle with authority, when the court relied on the dictum by Lord Wright M.R in the case of *Brook’s Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 K.B. 534 at p. 545, C.A on the principles of unjust enrichment. It stated as follows:

"All the Court can say is what they ought as just and reasonable men to have decided as between themselves. The defendants would be unjustly benefited at the cost of the plaintiffs if the latter . . . should be left out of pocket by having to discharge what was the defendants' debt."

Applying the legal principles to the facts in issue; it can be discerned that plaintiff discharged her part of the agreement by paying the required rent advance to the defendant in compliance with the terms of contract and on reliance by plaintiff to secure a vacant store room to plaintiff. Having failed to recover possession of the store room in issue to the plaintiff on repeated promises, defendant breached the contract between the parties. Accordingly, it would be unjust and unreasonable for plaintiff to lose money for discharging her side of the bargain and where the defendant has not. Failure of consideration is a breach of a fundamental obligation or a condition in a contract.

In respect of her failure to refund the rent advance to plaintiff, the defendant asserted that when it became apparent to the parties and PW1 that Fatawu was unwilling to vacate the store the plaintiff repeatedly implored her to keep the money in hope the Fatawu might eventually vacate the store. The defendant further asserted that plaintiff went to Nigeria to perform the funeral of her late father and came back after four months. The defendant also

contended that on her return, plaintiff demanded the money from her and that she told plaintiff to come for it on Friday. The plaintiff did not come for the money on the Friday and on the following Monday, defendant realized that the money was missing in her room.

Plaintiff denied the assertions by defendant and countered that she gave the money to defendant on 6/4/21 and that when the defendant failed to deliver the store as promised and she impressed on her to exercise patience as she has a spare key to the store room and that she would give possession to her.

It is instructive to note that defendant voluntarily accepted the monies paid to her with the agreement that she would deposit same in a bank. I refer to the relevant cross-examination of plaintiff.

Q. You were preset when I accompanied my brother to give the money to the occupant of the store; one Fatawu.

A. Yes

Q. I gave the money to you but you refused to accept it and said that I should keep it so that if the store becomes available I use it to pay the rent,

A. It is not correct,

Q. You told my brother and I to keep the money because Fatawu might change his mind.

A. It is not correct.

Q. You told me the store is important to you because your old store is prone to flooding.

A. Yes

Q. I told you that I would give the money to my brother to deposit it into his account.

A. Yes.

On the record, the parties agreed that they money should be deposited at defendant's brother account. According to DW1, the money was deposited in his account until defendant asked him to withdraw same upon application by plaintiff to recover her money. Granted that defendant withdrew the money to give it back to plaintiff when she demanded same; plaintiff owes an implied duty akin to that of a bailee to ensure that the money in her

possession is reasonable safe. The defendant owes a duty to take reasonable care to keep and preserve the money. It also becomes the duty of defendant to exercise a degree of care reasonably be expected from a reasonable person in respect of her own money. If she failed to exercise that degree of care she had to pay for them when they were lost. (See The Proprietor; Mok Beer Bar v Gada [1979] GLR 35)

On the record, the court finds no evidence relating to any reasonable steps taken by defendant to safeguard the money allegedly in her possession. Indeed, the evidence is bereft of the circumstances through which the money became allegedly lost in defendant's room. One would have reasonably expected that such a loss of money would have been reported to the police to evidence with proof of the complaint made available to the court. The defendant nevertheless implied accepted liability to pay the amount and pleaded time to pay the amount. (See paragraph 17 of plaintiff's witness statement)

The court, on the facts grants the relief sought by plaintiff. The court orders defendant to refund Ghc28,800.00 to plaintiff. Cost of Ghc3000.00. Interest thereof shall be at the prevailing bank rate and same shall take effect from today until the entire amount is paid.

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HW Sidney Braimah
Magistrate.