

IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON WEDNESDAY THE 12<sup>TH</sup>  
DAY OF OCTOBER, 2022 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS),  
DISTRICT MAGISTRATE

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SUIT NO. G/WJ/DG/A9/94/2019

MAMAH KAITAH

PLAINTIFF

VRS

HUSSEINI

DEFENDANT

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PARTIES: PARTIES ARE PRESENT.

LAWYERS FOR THE PARTIES ARE ABSENT.

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### JUDGMENT

Pursuant to the leave of the court granted on 19<sup>th</sup> May 2021, the plaintiff filed an amended writ of summons and statement of claim in the registry of this court on 25<sup>th</sup> May 2021 against the defendant for the following reliefs:

- a. An order for eviction of Defendant from the 2 bedroom in House No. 6 Lane 5, Awoshie - Onyinase, the Plaintiff's property
- b. An order for the recovery of rent due from April 2015 until the defendant vacates the property
- c. Costs

The defendant filed a statement of defence and counterclaimed against the plaintiff for the following reliefs;

1. All that piece or parcel of land situate, lying and being at No. 8 3<sup>rd</sup> lane Awoshie off Onyinase in Accra in the region aforesaid.

2. Perpetual injunction restraining the plaintiff, his agents, servants, licensees. Lessees etc. from having any dealings with or on the said property
3. General damages for trespass
4. Costs inclusive of litigation fees

### **THE PLAINTIFF'S CASE**

It is the plaintiff's case that he personally put the defendant in occupation of a single room in his property located and identified as House No. 6, Lane 5, Awoshie Onyinasi as a tenant in 2013.

It is the further case of the plaintiff that defendant had a relationship with his sister named Fati and through the said sister, defendant who was then living in the United States of America expressed an interest in acquiring a piece of land at Awoshie.

According to the plaintiff he initially declined the request of the defendant however upon persistent calls from the defendant he agreed to sell a piece of land within his premises to the defendant at an agreed sum of 45million old cedis which presently is equivalent to GHC4, 500.00

Plaintiff adds that defendant paid the said sum between three to four years through a series of money transfers and some correspondence at his direction.

Plaintiff informed the court that when defendant arrived in Ghana sometime in 2013, he showed him the piece of land that he defendant had bought from him. He tendered in evidence a picture of the land and same was admitted and marked as Exhibit A. He stated further that the parties agreed that defendant rents a single room in plaintiff's property whilst he constructs his own building on the piece of land he had acquired from Plaintiff.

Plaintiff further informed the court that defendant paid rent of GHC2, 500.00 for two years which was to commence in 2013 and expire in 2015. He stated that during the period

of the tenancy, the defendant without his consent carried out some structural works on his property and when he confronted him, he explained that the work was to solve a leakage in the roof of his room. Upon the explanation of the defendant, he agreed and supplied him with some building blocks and demanded that defendant provides him with receipts evidencing costs incurred for same to be used to offset his rent whilst he is in occupation of the property.

Plaintiff concluded that the defendant without his consent moved into an adjoining room and has since then failed or refused to pay rent to him after the expiration of his tenancy or move out of the property in spite of repeated demands hence the instant action.

Plaintiff called his son King Hassan Mohammed as PW1. He corroborated the story of the plaintiff and stated that sometime in April 2013, plaintiff informed him that he intends to put defendant in a single room which was part of a property he was constructing at House No.6 Lane 5 at Awoshie Onyinase. According to him, he later met the Defendant in the company of the Plaintiff and saw the defendant paying the sum of GHC2, 500.00 which he had placed in an envelope to the plaintiff. The said sum was the agreed rent for defendant's 2 years stay in the single room of Plaintiff. PW1 tendered pictures he took of the parties on the said date and same were admitted in evidence and marked as Exhibit B series.

PWI informed the court that about two years ago, he visited the rented property and found out that the defendant had moved into an adjoining room without the notice and permission of the plaintiff and as a result defendant now occupies two rooms instead of the single room rented out to him. He added that plaintiff told him that since the expiration of the tenancy in 2015, defendant has refused to pay rents even though he has occupied the property for five more years.

## **DEFENDANT'S CASE IN ANSWER**

Defendant's case is that in November 1999, he called the plaintiff and asked for his help in acquiring a property. It is the further case of the defendant that the plaintiff called him and informed him of a 6 bedroom structure with garage which was being offered for sale at a cost of 45 million old cedis. It is the further case of the defendant that he expressed interest in buying same and as a result he started paying the plaintiff in instalments which ended in February 2001. He tendered copies of western union money transfer receipts in evidence and same were admitted in evidence and marked as Exhibit 1 series.

He stated further that in October 2004, plaintiff requested for the sum of 28million old cedis to construct a gutter and fence. According to him, he paid the sum of 1.5million cedis monthly from 31<sup>st</sup> January 2005 and ended payments within a period of three years.

Defendant added that in December 2012, when he returned from the United States of America, he visited the plaintiff with his cousin on 26<sup>th</sup> December 2012 and the plaintiff escorted them to the site and pointed out the 6 bedroom and showed him a portion which he said was his and that the rest of the land belonged to the plaintiff.

Defendant informed the court that the plaintiff refused to hand over the title deeds of the property to him and asked him to go and do same himself. He concluded by stating that the portion of land given to him by the plaintiff measured 71 by 58 feet and that the subject matter of the litigation was not about rent but about the sale of a property which he has bought and paid for so he needed his land documents.

Defendant did not call any witness.

## **ISSUES SET DOWN FOR DETERMINATION BY THE COURT**

The following issues were set down for determination by the court;

1. Whether or not the plaintiff is entitled to recover rent from April 2015 to date from the defendant
2. Whether or not the plaintiff is entitled to an eviction order against the defendant?
3. Whether or not the defendant is entitled to all that piece or parcel of land situate, lying and being at No. 8 3<sup>rd</sup> lane Awoshie off Onyinase in Accra with a six bedroom house thereon.

### **BURDEN OF PROOF**

It is trite that in civil cases, proof is by a preponderance of probabilities.

In the case of *Ackah v Pergah Transport Ltd* [2010] SCGLR 728 at page 736, Sophia Adinyira JSC (as she then was) delivered herself as follows;

“It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail.”

This position of the law was re-echoed by Benin JSC in the case of *Aryee v Shell Ghana Ltd & Fraga Oil Ltd* [2017-2020] 1 SCGLR 721 at page 733 as follows;

“It must be pointed out that in every civil trial all what the law requires is proof by a preponderance of probabilities. See section 12 of the Evidence Act, 1975 (NRCD 323). The amount of evidence required to sustain the standard of proof would depend on the nature of the issue to be resolved.”

### **SHIFTING OF THE BURDEN OF PROOF**

The burden of proof may shift from the party who bore the primary duty to the other.

Section 14 of the Evidence Act, 1975 (NRCD 323) provides as follows;

Except as otherwise provided, 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.

In the case of *Re Ashalley Botwe Lands; Adjetey Agbosu v Kotey* [2003-2004] SCGLR 420, it was held as follows;

“It is trite learning that by the statutory provisions of the Evidence Decree 1975 (NRCD 323) the burden of producing evidence in a given case is not fixed but shifts from party to party at various stages of the trial depending on the issue(s) asserted.”

### **WRITTEN SUBMISSIONS OF THE PARTIES**

The plaintiff filed his written address as directed by the court on 29<sup>th</sup> July 2022 whilst the defendant filed his address on 7<sup>th</sup> October 2022. The court shall refer to the relevant portions of the addresses when necessary in resolving the issues set down for determination.

### **EVALUATION OF THE EVIDENCE ON RECORD AND THE DECISION OF THE COURT**

#### **ISSUE ONE**

The plaintiff from the evidence has asserted at paragraphs 2, 8 and 12 of his witness statement filed on 17<sup>th</sup> May 2021 that the subject matter of the dispute which he describes as house number 6, Lane 5, Awoshie Onyinasi is his personal property and that he personally put the defendant in the said property as his tenant for a two year term from 2013 to 2015 at a sum of GHC2, 500.00 for the period of the tenancy. He admitted that even though there was no written tenancy agreement between the parties, the defendant was his tenant.

PW1 corroborated the story of the plaintiff at paragraph 4 of his witness statement and tendered Exhibit B series being pictures of the plaintiff and the defendant with the said envelope which was said to contain the sum of GHC2,500.00 paid by the defendant to the plaintiff.

When the Defendant was given the opportunity to cross examine PW1, he failed to cross examine him on this material evidence.

In **FORI V AYIREBI [1966] GLR 627**, it was held by the Supreme Court at page 647 as follows:

“The law is that where a party makes an averment and that averment is not denied, no issue is joined on that averment and no evidence need be led. Again when a party gives evidence of a material fact and is not cross examined upon it, he needs not call further evidence to that fact.”

This principle of law was re-echoed in **QUAGRAINE V ADAMS [1981] GLR 599, CA**, where it was held thus;

“Where a party makes an averment and his opponent fails to cross examine on it, the opponent will be deemed to have acknowledged sub silentio, that averment by the failure to cross examine”.

Applying the facts of the case to the law cited supra, I do find and hold that the defendant having failed to cross examine PW1 upon this material fact, he is deemed to have admitted the fact that he rented the single room of the plaintiff in April 2013 for a two year stay in the said room.

Accordingly, the plaintiff is entitled to recover rent from the Defendant at the sum of GHC1, 250.00 per year per room from the year 2015 to date.

## **ISSUE TWO**

It is trite that the Rent Act, 1963 (Act 220) is the law governing the recovery of possession of premises.

Section 17(1) of Act 220 provides as follows;

Subject to the provisions of subsection (2) of section 25 and of section 28, no order against a tenant for the recovery of the possession of or for the ejectment from any premises shall be made or given by the appropriate Rent Magistrate or any other judge of a court of competent jurisdiction in accordance with the provisions of any other enactment for the time being in force except in any of the following circumstances:-

- (a) Where any rent lawfully due from the tenant has not been paid or tendered within one month after the date on which it became lawfully due;

Applying the law cited supra to the facts of the present case, I find that the defendant having failed to pay the rent lawfully due since the year 2015, the plaintiff is entitled to repossess the two rooms currently being occupied by the defendant from him.

## **ISSUE THREE**

I now turn my attention to the counterclaim of the defendant.

With regard to the counterclaim of the defendant, it is trite that the defendant bears the same burden as a plaintiff in proving his counterclaim which is on the preponderance of probabilities as stated by the authorities cited supra.



In *Tetteh Ayaa Iddrisu v. Winfred Otuafo & Anor* [2010] SCGLR 818, the Supreme Court held as follows;

“A party who counterclaims bears the burden of proving his counterclaim on the preponderance of probabilities and will not win on that issue only because the original claim failed.”

*Ansah JSC in Joseph Akonu-Baffoe and 2 others v Lawrence Buaku and Another*, Civil Appeal No. J4/6/2012 emphasized the position of the law on counterclaim as follows;

“In essence, a defendant’s counterclaim is to be treated in the same way as the plaintiff’s case. The roles are reversed and the defendant as plaintiff in the counterclaim assumes the burden to prove his case.”

From the evidence before the court, the fact that the defendant (plaintiff in the counterclaim) paid the sum of 45million old cedis to the plaintiff (defendant in the counterclaim) via western union transfers was not in issue as both parties agree on this fact. Whilst plaintiff informed the court that the said money was to be used to purchase a plot of land, which said land has been duly purchased, it is the case of defendant that the said money was to be used to purchase a six bedroom house with garage.

What is in issue however is the purpose for which the said money was sent to the plaintiff.

At paragraphs 6, 7 and 8 of the statement of defence of the defendant filed on 31<sup>st</sup> March 2021, the defendant stated as follows;

“The plaintiff informed the defendant of a 6 bedroom structure with a garage which was then being offered for sale which the defendant expressed interest in same. The defendant agreed to purchase and the plaintiff agreed to sell and deliver the property to the defendant at a cost of 45million old cedis. Further in October 2004, the plaintiff called the

defendant and requested to construct a gutter and a wall which will cost 28million old cedis.”

Defendant repeated these averments in paragraphs 5 and 7 of his witness statement filed on 14<sup>th</sup> June 2021.

During cross examination of the plaintiff by the defendant, defendant’s story began to change as gleaned from the following exchanges;

Q: Is it true that you sold a piece of land to me

A: Yes

Q: How much did you sell the land to me?

A: 45 million. Today GHC4,500.00

Q: I am putting it to you that you also took 28million and you said you were going to use that money to construct a gutter for me

A: That is not true

Q: I am putting it to you that you said you will construct a wall and gutter on the land you sold to me

A: That is not true

Q: I am putting it to you that the amount you took from me, you did not sell a plot of land to me but a plot measuring 58 feet by 71 feet with a building with 6 rooms on it at a cost of 74 million cedis which I paid in 2001 in 9 instalments

A: It is not true. He wanted to buy a land and not a house. The land is close to my second house and the land is still available today.

From the exchanges, the defendant mentions for the first time that he paid the sum of 74 million cedis to the plaintiff.

Under cross examination, the following is what the defendant had to say;

Q: Mr. Hussein, you paid 45million old cedis to the plaintiff is that not so?

A: That is so

Q: And this was between the year 2000 and 2001 is that not correct?

A: That is correct

Q: You have claimed that the said payment was for a six bedroom structure is that correct?

A: My lord, that is not correct. It was the plaintiff who built on the land up to window level. When I bought the land, he estimated how much he had spent so far on the building and that was 45 million old cedis. Plaintiff brought the estimates and I paid him 45million old cedis.

The above exchanges show clearly that the defendant's evidence on oath clearly contradicts the averments in his pleadings.

In *Odupong v The Republic* [1992-1993] 3 GBR 1028 – 1048 CA, Brobbey J.A (as he then was) delivered himself as follows;

“The law is now settled that a person whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn is not worthy of credit and his evidence cannot be regarded as being of any probative value in the light of his previous contradictory statement unless he is able to give a reasonable explanation for the contradiction.”

Applying the law cited supra to the present case, I find that the defendant is not worthy of credit and will as a result not place any probative value on his evidence before this court.

At paragraph 7 of the statement of defence, defendant stated that he agreed to purchase and the plaintiff agreed to sell and deliver property to the defendant at a cost of 45million cedis. The defendant never pleaded how the said purchase agreement for a six bedroom structure with garage was made between himself and the defendant and although his assertion was vehemently denied by the plaintiff, he did not lead any evidence to ascertain the veracity of his assertion.

In *Majolagbe v Larbi* [1959] GLR 190-195, Ollenu J held as follows;

“Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances from which the court can be satisfied that what he avers is true.”

In the case of *Zabrama v. Segbedzi* [1991] 2 GLR 221 at 224, the Court of Appeal held as follows;

A person who makes an averment or assertion which is denied by his opponent has the burden to establish that his averment is true and he does not discharge this burden unless he leads admissible and credible evidence from which the facts or facts he asserts can be properly and safely inferred.”

At paragraphs 9 and 10 of defendant’s witness statement, he stated as follows;

“In December 2012, when I returned from the United States, I visited the plaintiff with my cousin on 26<sup>th</sup> December 2012. The plaintiff escorted **my cousin and me to the site and pointed where the 6 bedroom was and showed me a portion which he said was mine and that the rest of the land belongs to him.** (Emphasis is mine)

Even though the defendant mentioned that his cousin was present when the plaintiff escorted him to a site and pointed where the six bedroom was and showed him his portion, surprisingly the defendant failed to call his cousin who is a material witness to testify in court. It is also unclear why the plaintiff would point out where the six bedroom was and show him portions which belonged to the defendant and say that the rest of the land belongs to him. Is the defendant now laying claims to a portion of a six bedroom house or the entire six bedroom house? This is certainly unclear. It is also unclear what defendant meant by “ that the rest of the land belongs to him”.

On the totality of the evidence before this court, I find that the defendant has not been able to prove his counterclaim on the balance of probabilities and as a result his claim fails and same is dismissed.

### **DECISION**

1. The plaintiff is entitled to recover from the defendant rent for two rooms at a rent of GHC1,250.00 per room from 2015 to the date of full and final payment.
2. The plaintiff is entitled to recover his property from the defendant forthwith. Accordingly, the defendant is ordered to yield up vacant possession to the plaintiff and vacate from the property of the plaintiff on or before 31<sup>st</sup> October 2022
3. The Defendant is ordered to pay utility bills outstanding if any prior to vacating from plaintiff's property.
4. Defendant's counterclaim fails and same is dismissed
5. Costs of GHC5, 000.00 is awarded in favour of the plaintiff against the defendant.

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H/W RUBY

NTIRI OPOKU (MRS.)

(DISTRICT MAGISTRATE)