IN THE DISTRICT COURT BECHEM HELD ON THURSDAY, 16TH MARCH, 2023 BEFORE HIS WORSHIP KORKOR ACHAW OWUSU, ESQ. DISTRICT MAGISTRATE

A1/23/2022

CLEMENT AKWASI BOADI

DWOMO

VRS.

NANA KYEAME KOFI DONKOR

DWOMO

J U D G M E N T

PARTIES PRESENT

On the 14th of April, 2022, the Plaintiff filed a Writ of Summons against the Defendant for the following reliefs:

(a) *A declaration that an agreement entered between the Plaintiff and the Defendant on 14th September, 2021 is binding the Defendant.*
(b) *An order of the court to compel the Defendant to abide by the said agreement.*
(c) *Cost.*

Before proceeding with the Judgment, it is paramount to provide a summary of the parties' respective evidence. And I begin in the order with the Plaintiff's first.

CASE OF THE PLAINTIFF

In his testimony, the Plaintiff stated that the Defendant is his landlord in a customary tenancy agreement, popularly known as *abunu*; on a parcel of land situate and lying at Dwomo. In the said agreement executed in January, 2014, the Plaintiff was to use eight (8) years to cultivate cocoa and share the farm after the agreed period. To seal the deal, the Plaintiff paid an amount of GHC2, 400.00 on demand by the Defendant.

A few months to the expiration of the eight years, the Defendant sent his son, one Yaw Oppong and about ten others to the farm and demarcated a portion of it for the Defendant to win sand.

Dissatisfied with Defendant's the action, the Plaintiff in the company of one Opanin Kwasi Owusu and some elders of the community; including the assemblywoman of Dwomo Electoral Area approached the Defendant to find out if indeed he was the one who sent people to demarcate the land for sand winning; which the Defendant admitted. So the assemblywoman asked the parties to produce their respective copies of the agreement to the transaction. The Defendant could not produce his copy claiming that he had misplaced it. However, the Plaintiff in subsequent days, produced his copy from his hometown Drobo.

At the following meeting when the Plaintiff's copy of the agreement was read and explained it was realised the parties had agreed to share the cocoa farm at the end of the eighth year, i.e. in January, 2022. However, the Defendant explained that he needed the portion of the farm to win sand to realise money for his medical treatment. After a prolonged argument, the Defendant then proposed that the Plaintiff should take all that portion with mature cocoa trees; while the Defendant would take the portion he had demarcated for sand winning. To that proposal, both parties agreed in the presence of

witnesses; and to further go to the Bechem District Court to execute a document to that effect the following day.

Later when the parties were set to go and execute the agreement, the Defendant changed his mind; and that he will no longer succumb to the new agreement they had reached at the previous meeting. In other words, he will rather share the portion with mature cocoa trees with the Plaintiff.

Subsequently upon a second thought, the Defendant rescinded his decision because he said he had already demarcated a portion of the land for sand winning but could not go with the Plaintiff to execute the agreement because he was indisposed. However, the Defendant asked the Plaintiff to go and prepare the document and bring it to him for signing/thumb printing. When the Plaintiff later brought the document, both parties and their respective witnesses made their respective marks thereto. In the face of the parties signing to the agreement, however, the Defendant persists sharing the Plaintiff's portion of the farm with him which the Plaintiff vehemently resisted resulting in the present action. In support of his case, the Plaintiff tendered in evidence *Exhibit "A"*, the parties' agreement.

PW1

PW1 is Kwasi Owusu. He testified in corroboration of the Plaintiff's evidence. According to PW1, he was at the meeting when the parties discussed about the new development in respect of the parties' earlier agreement. PW1 further told the court that other persons who were present included the assemblywoman of Dwomo Electoral Area; one Opanin Kwasi Addai; Abena Adufa and Yaa Sikayena, the Defendant's sisters as well as one Yaw Oppong, the Defendant's son.

PW1, emphasised that after reading the Plaintiff's copy of the agreement, the parties later agreed that the Plaintiff should take the portion of the farm with mature the cocoa trees; while the Defendant would also take the portion he had demarcated for sand winning. According to the PW1, the parties then executed an agreement which he (PW1) witnessed for the Plaintiff; while one Abena Adufa and Yaa Sikayena, the Plaintiff's sisters; and one Yaw Oppong, the Defendant's, son also witnessed for the Defendant.

CASE OF THE DEFENDANT

The Defendant testified that he and his two sisters, Abena Adufa and Yaa Sikayena, gave out land to the Plaintiff to cultivate cocoa and share it on *abunu* basis; which the parties executed an agreement to that effect. According to the Defendant, the terms of the agreement was that the Plaintiff would use eight (8) years for the cultivation of the cocoa; and at the end of the eighth year the parties would share the farm. In the course of time, the Defendant fell ill and needed money to treat himself. So one day some of his family members advised him to use the unused part of the disputed land to wind sand to raise money to treat himself.

Thus, one of the Defendant's nephew, one Yaw Mensah took the initiative and went to the disputed farm in the company of others to prospect the land for the sand winning. On their return from the farm, they informed the Defendant that the land was good for sand winning. However, when they went to the farm, they met the Plaintiff there who resisted the sand prospecting because that was not part of the parties' agreement.

In the evening of that day, the Plaintiff, in the company of the assemblywoman and some elders of the community approached the Defendant on what had transpired on the farm when his nephew and others went to prospect sand winning. The Defendant admitted sending people to the land for the prospecting because the eight year period on the

agreement had elapsed so he wanted to use his portion of the land to win sand to get money to treat himself. When the Defendant gave that explanation, the assemblywoman then asked for the parties' respective copies of their agreement for study. However, the Defendant said that he had misplaced his copy; but the Plaintiff promised to produce his copy later as he did not have it at that moment.

At the next meeting, when the Plaintiff produced his copy of the agreement, the assemblywoman caused the same read, and it was realised that it was left with about five (5) months to the maturity period. The Defendant further testified that even though he and those at the meeting pleaded with the Plaintiff to allow him wind sand to so that he will get money to treat my illness as five (5) months was just at the corner, the Plaintiff did not agree. Thus, one of the Defendant's nephew brought a proposal that the Plaintiff should take the part of the farm with mature cocoa trees while the Defendant uses the remaining part for the sand winning.

According to the Defendant the parties then agreed to the proposal; and further agreed to execute an agreement to that effect. However, because he was then not well, he asked the Plaintiff to prepare the agreement and bring it to him for signing. Subsequently, the Plaintiff brought a document for signing but the Defendant refused to sign it because as an illiterate, the Plaintiff failed to read the contents of the agreement to him. He added that the Plaintiff failed to read the contents to him because he (the Defendant) claimed that he is also an illiterate. After protracted argument, the Defendant together with his sisters as his witnesses thumb printed the agreement because the Plaintiff had promised to get someone to read the contents to him later.

About three (3) days later, the Plaintiff and his father went to the Defendant to thank him for making it possible for the Plaintiff own a cocoa farm. However, the Defendant told

them that he would not accept the agreement until the terms of it were read and explained to him. Therefore, on one occasion, the assemblywoman summoned the parties to a meeting at a beer bar where the agreement was read out. When it was read, according to the Defendant, he realized that the contents were not what the parties had agreed earlier so he will not agree; and insisted sharing the Plaintiff's portion of the farm with him. This brought about a misunderstanding between the parties leading to the instant suit. The Defendant concluded his evidence praying to the court to disregard *Exhibit "A"* and divide the cocoa farm equally between the parties.

DW1 is Honourable Beatrice Owusu-Ansah, the assemblywoman of Dwomo Electoral Area. In her evidence, DW1 testified she met the parties in the presence of other witnesses, where the Defendant admitted giving his parcel of land to the Plaintiff to cultivate cocoa on *abunu* basis. DW1 further testified the Defendant also admitted that Plaintiff would use eight (8) years to cultivate the cocoa. DW1 added that the Defendant explained to the gathering it was about six (6) months to the expiration of the eight years but he needed money to go to hospital for treatment. That was why he wanted to give out a portion of the disputed land to the sand winners so that he will get money.

According to DW1, though the Defendant's explanation was convincing; the Plaintiff would not agree; and insisted that the subject matter farm be shared in accordance with the terms of the agreement. So the Defendant said if that was the case, the Plaintiff should take the portion of the land with mature cocoa trees; so that he will also take the portion he had demarcated for sand winning. At the end of the day the parties agreed that Defendant's proposal.

DW2 described himself as Martin Addai, the committee chairman of Dwomo West Electoral Area. His corroborated the Defendant's evidence that the maturity date of the

agreement was some six (6) months away; however, the Defendant explained that he needed to use a portion of the subject matter for sand winning in order to use the proceeds for his medical treatment but the Plaintiff did and insisted the parties had to wait till the expiration of the eight-year period before the farm could be shared.

According to DW2, after a long deliberation over the matter, one Yaw Mensah the Defendant's nephew, who feared the Defendant might die from his ill-health, proposed that the Plaintiff should take the portion of the cocoa farm he had cultivated so that the Defendant would also take the portion he had prospected to wind sand. DW2 told the court that both parties settled on that proposal. The following day, the Defendant's son Kwasi Amankwah headed a delegation appointed by the assemblywoman to visit the disputed farm to see the extent of work the Plaintiff had done. When they got to the farm, an altercation ensued between the Defendant and a member of the delegation truncating the inspection.

Issue

At the close of the parties' respective evidence, the main issue that came up for determination by the court was:

Whether or not the Defendant, an illiterate, is bound by the agreement, Exhibit "A", executed on 14th September, 2021 between the parties herein in respect of the disputed land.

APPLICABLE LAW AND AUTHORITIES

This issue comes directly within the purview of *Illiterates' Protection Act, 1912 (Cap 262).* The mischief for which the *Illiterates' Protection Act, 1912 (Cap 262)*, was enacted was to protect the illiterates from a fraudulent document made against Illiterates by unscrupulous opponents and their fraudulent claims. In other words, those who might

want to take advantage of others' illiteracy and bind them to an executed document detrimental to illiterates' interests, were prevented from those acts.

Thus *per* the evidence of the Defendant, he imputed that the Plaintiff deceived him into signing *Exhibit "A"*. In fact, what is central in the Defendant's argument is that the contents of *Exhibit "A"* were not read to him before he thumb printed. The Defendant therefore pleads *non est factum* which literally means*: "not his deed"*, particularly where he is an illiterate.

In fact, reasoning with *Cap 262* at a glance, the Defendant has a case which demands the attention of this court. Thus, *section 4* of *Cap 262* specifically enjoins that any person writing a letter or other document for an illiterate to read and explain the document to the illiterate before he executes it by making his signature or touching the pen to make his mark; and the writer is further bound to write his full name and address on the document.

Citing such a proposition stated *supra*, the Supreme Court in the case of **Duodo & Others v. Adomako & Adomako [2012] 1 SCGLR 198**, held as follows:-

".....The clear object of the Illiterates' Protection Act, 1912 (Cap 262), was to protect the illiterates for whom a document was made against unscrupulous opponents and their fraudulent claims, i.e. those who might want to take advantage of their illiteracy to bind them to an executed document detrimental to their interests".

The import of the *section 4* of *Cap 262* is that before an executed document can bind an illiterate person, the same ought to have been read and explained to him.

However, a further reading of **Duodo & Others** *(supra)* flipped the coin and stated:

".... at the same time, the Act could not and must not be permitted to be used as a subterfuge or cloak by illiterates against innocent persons. Conversely, notwithstanding the absence of a jurat,

the illiterate person, who had fully appreciated the full contents of the freely-executed document, but has feigned ignorance about the contents of the disputed document, so as to escape legal responsibilities arising from such conduct, would not obtain relief".

In other words, where a witness can provide any evidence to demonstrate that a defendant who claims to be illiterate but constructively knew and understood the contents of the documents in issue before he thumb printed or signed, the issue must be settled in favour of his opponent.

Adding his voice to the second leg of the proposition in the **Duodo** case, His Lordship S. A. Brobbey his book, PRACTICE & PROCEDURE IN THE TRIAL COURTS & TRIBUNALS OF GHANA, (2nd Ed. pp. 327 & 328), noted that where both parties to an agreement are illiterates, the court should not restrict itself to words used in the document to determine the true nature of the transaction. Rather, it is the substance, not the form, which must be considered.

Supporting this position in a mortgage suit, the Learned Judge cited **Manu v. Emeruwa [1971] 1 GLR 442** where it was held that despite words evidencing a transaction which gave the superficial impression that a mortgage was created, the parties really intended to create a pledge and so their relations should be governed by a pledge.

Further **Adae v. Eyiah [1972] 2 GLR 358** held that where parties are illiterates or semi-literates, it is better to get to the true intention of the parties not by following strictly the language used in the document but by looking at the evidence as a whole, the situation of the parties and also the surrounding circumstances.

I think the above propositions by the Learned Author and Judge should be the way to go as far the cases for the parties are concerned. And the court shall do so in the evaluation of the evidence.

Evaluation of the parties' evidence

From the parties' respective evidence, there are no two ways about the fact that the parties had agreed on sharing the subject matter cocoa farm on *abunu* basis. In other words, the parties herein had agreed that the subject matter cocoa farm would be shared on *abunu* basis after eight years of cultivation.

For clarity, an *abunu* system of sharing the subject matter in the instant suit was that the parties would divide the cocoa farm into two equal parts on or after the eighth year of cultivation.

It should be noted that this system of farming practice is not an innovation in the customary law tenancies. Customarily, landowners give out their lands to tenants to grow food or cash crops; and at the end of an agreed period the parties share the farm on either *abunu* or *abusa* basis depending on the nature of the agreement.

Thus, the Supreme Court discussed this customary law in respect of agricultural tenancies in the case of **Lamptey alias Nkpa v. Families [1989 -90] 1 GLR** as follows:

"A landlord will not admit a tenant-farmer on to his land without first discussing and settling the conditions and the terms of entry. Abusa and abunu are mere terms, i.e. names given to any arrangement between parties whereby in the case of abusa one side gets one-third and the other party gets two-thirds of a subject matter; whilst in the case of abunu the subject matter is split equally between the parties. It does not matter what the subject matter was or which party got which share. On application to farm tenancies, the subject matter might be either the harvest or its cash value; or the physical farm itself at an agreed stage of development, such as when the crops had been planted or were mature or before harvest.... ."

In effect, the present position is that there is no inflexibility about customary law tenancies and effect should be given to what the parties agreed. The parties may agree that they may divide the land and the crops into two equal parts immediately after the

cultivation or before maturity. (See Dennis Dominic Adjei's book: LAND LAW, PRACTICE AND CONVEYANCING IN GHANA (pp. 228 -229).

It must be stated that *per* the evidence adduced, the parties had amply demonstrated their initial appreciation of the *abunu* concept and kept within the bounds of the agreement to share the disputed cocoa farm at the end of the eighth year. This was corroborated by the evidence of DW2 when he stated that he was present at the meeting when one Yaw Mensah the Defendant's nephew, said that he feared the Defendant might die from his illness so, the Plaintiff should take the portion of the cocoa farm he had cultivated so that the Defendant would take the portion he had prospected to wind sand, which both parties agreed.

It is also significant to state that earlier DW1 had testified that the Defendant had agreed that the Plaintiff should take the portion of the land with mature cocoa trees; so that the Defendant will also take the portion he wanted to use for sand winning. And at the end of the day the parties agreed the Defendant's proposal.

In fact, these pieces of evidence coming from the Defendant's own witnesses, DW1 and DW2 corroborate the evidence of the Plaintiff that indeed the parties agreed to share the disputed farm in accordance with the terms of *Exhibit "A"*. The law is that where the evidence of one party on an issue in a suit was corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stood uncorroborated even by his own witnesses, as in the instant case, a court ought not to accept the uncorroborated version in preference to the corroborated one, unless for some good reason (which must appear on the face of the judgment), the court found the corroborated version incredible or impossible. Reference to this authority is the case of **Lt. Col. Isaac Owusu Twum Ampofo v. Adelaide Twum Ampofo [2015] 66376 (CA)**.

This corroboration of evidence by the Plaintiff convinces the court that, in fact; and indeed, the parties freely agreed to enter into executing *Exhibit "A"*. That is to say, what the parties agreed in respect of sharing the subject matter cocoa farm was exactly what was reduced into *Exhibit "A"*.

It is also in evidence by the Plaintiff which the same was not challenged that the Defendant as well as some principal members of his family thumb printed *Exhibit "A"*; , while his biological son, Yaw Oppong also signed it. This amply shows that the Defendant knew the contents of *Exhibit "A"* prior to its execution; and understood the same before he thumb printed it. Therefore, the court shall reject the Defendant's plea of *non est factum.*

It is trite law that ordinarily, save for fraud and misrepresentation, a party of full age and understanding is bound by the terms of a document that he signs; and the court would be reluctant to interfere in that transaction. [See *section 25* of the *Evidence Act, 1975 (NRCD 323)*]; and the decision in **Street v. Mountford [1985] AC 809** cited in **Inusah v. DHL Worldwide Express [1992] 1 GLR 207**].

It should quickly be added that this Judgment would be complete without commenting on standard of proof in civil suits.

In civil litigations, the burden of proof is always put on the plaintiff to satisfy the court on a balance of probabilities. Where the defendant has not counterclaimed and the plaintiff has not been able to make out a sufficient case against the defendant, then the plaintiff's claims would be dismissed. Whenever a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating and assessing the case of the defendant, just as it was used in evaluating and assessing the case of the plaintiff against the defendant. (See the case of **Jass Co. Ltd. v. Appau [2009] SCGLR 265**).

What then is the principle of *balance of probabilities*? This question was answered in the case of **Takoradi Flour Mills v. Samir Faris [2005-2006] SCGLR 882 at 900**. In that case, the Law Lords held:

"… in assessing the balance of probabilities, all the evidence, be it that of the plaintiff or the defendant, must be considered and the party in whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict".

This principle applied to the evidence of the parties in the instant suit would lay the matter to rest. From observations by the court, the Plaintiff's evidence is to the effect that they, together with the assemblywoman, PW1; DW1 and DW2, met on the modified agreement between the parties, that is, *Exhibit "A"*; and that they agreed to execute the document. It is also established that indeed both parties, including their respective witnesses, made their marks to the document.

What is quite exciting to note is that when the Defendant thumb printed *Exhibit "A"*, his biological sisters, Abena Adufa and Yaa Sikayena who are principal members of the Defendant's family; as well as his biological son, Yaw Oppong witnessed for the Defendant. The court therefore, finds it surprising to hear the Defendant pleading *non est factum,* that the document is not his deed. This Defendant's denial that *Exhibit "A"* was read to him; and therefore was aware of the contents thereof before he thumb printed is a clear case of damage control, particularly where he realised that his own witnesses have testified against him.

Therefore, on the basis of the Plaintiff successfully proving his case against the Defendant, the court shall reject the Defendant's plea of *non est factum*. Accordingly, Judgment is entered against the Defendant in favour of the Plaintiff with the following orders:

(a) *That the Defendant is bound by the agreement, Exhibit "A", entered between the parties on 14th September, 2021.*

*(b) That Cost of **Ten Thousand Ghana Cedis (GHC10, 000.00)** awarded against the Defendant for the Plaintiff.*

.....SGD.....

H/W KORKOR ACHAW OWUSU, ESQ.

DISTRICT MAGISTRATE COURT

BECHEM – AHAFO REGION

DATE: 16TH MARCH, 2023.