IN THE DISTRICT COURT BECHEM HELD ON THURSDAY, 22ND MARCH, 2023 BEFORE HIS WORSHIP KORKOR ACHAW OWUSU, ESQ. DISTRICT MAGISTRATE

A6/08/2023

MONICA KWARTENG ADAM (SUING PER HER LAWFUL

ATTORNEY BRIGHT ATTA YEBOAH)

BECHEM

VRS

BENJAMIN ODURO

BECHEM

APPLICANT: ABSENT

APPLICANT'S ATTORNEY: PRESENT

RESPONDENT ABSENT

J U D G M E N T

The Applicant through her lawful attorney on the 13th January, 2023 filed an application for custody for one Jude Ohene Adam.

It is significant to mention that throughout the commencement of this application till Judgment delivered the Respondent never stepped in court.

Therefore, in order to fulfil the *audi alteram partem* rule, the court ordered the Respondent to be served, which order the Applicant through her lawful attorney honourably compiled with.

It should be noted that, with the service of application on the Respondent notwithstanding, he failed and/or refused to attend court and put up opposition, if any.

In fact, the law does not pamper recalcitrant litigants. That is, the fact that the Respondent failed and/or refused to attend court would not be a force disabling the court from proceeding with the matter. The application had to be heard at all cost.

The law is trite. In order to prevent parties from embarking upon an act or omission with the likelihood of stalling proceedings in court, *order 25 rule 1(2)(a)(b)* of the *Civil Procedure (2009), C.I. 59*, provides *inter alia*, that *where an action is called for trial and a party fails to attend, the trial court may where the plaintiff attends and the defendant fails to attend, allow the plaintiff to prove the claim. Similarly, where the defendant attends court but the plaintiff fails to do so, the court may dismiss the action and allow the defendant to prove the counterclaim, if any*.

In that regard, *order 25 rule (2)(a)* and *(b)* of *C.I. 59* was applied in the case of **Republic v. High Court, (Human Rights Division) Accra Ex parte, Josephine Akita, (Mancell-Egall, Attorney-General Interested Party) [2010] SCGLR 374**. In that case, the applicant invoked the *audi alteram partem rule* because judgment was entered against him for failing to attend court. In dismissing his application, the Supreme Court held that a party who had the opportunity to be heard but deliberately spurned that opportunity to satisfy his own decision to boycott proceedings cannot later complain that the proceedings have proceeded without hearing him and then plead in the aid of *audi alteram partem* rule.

This principle espoused *(supra)* was more elaborated in the Nigerian case of **Newswatch Communications Ltd v. Atta (2006) 1 All NLR at 224**, where it was stated;

"The constitutional principle of fair hearing is for both parties in the litigation. It is not only for one of the parties. In other words, fair hearing is not a one way traffic but a two way traffic in the sense that it must satisfy a double carriage way, in the context of both the plaintiff and the defendant or both the appellant and the respondent. The Court must not invoke the principle in favour of one of the parties to the disadvantage of the other party undeservedly.

That would not be justice ……it is the duty of the Court to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the Court to make sure that a party takes advantage of the atmosphere or environment by involving himself in the fair hearing of the case

A party who refuses or fails to take advantage of the fair hearing process created by the Court cannot turn round to accuse the Court of denying him fair hearing. That is not fair to the Court….. At that stage, the party who is not up and doing to take advantage of the fair hearing principle put at his doorstep by the trial judge cannot complain that he was denied fair hearing." (Emphasis mine).

In the quotation above, "the party who is not up and doing" refers to the Respondent in the case at hand.

Bracing the court's elbows with the authorities and the statutory provision, on 22nd March, 2023, the Applicant's attorney was granted audience. And for the purposes of appreciating the position of the court, producing the summary of the Applicant's evidence is paramount.

The witness testifying under a power of attorney by a power of attorney donated by Monica Kwarteng Adams, the Applicant herein gave his name as Benjamin Atta Yeboah. He testified that the Applicant is domiciled in Germany; and brought this application for custody of the subject child, Jude Ohene Adam.

In her evidence through her attorney, the Applicant testified that she and the Respondent entered into a relationship about fourteen (14) years ago. In the course of the relationship, the Applicant got pregnant and gave birth to the subject child.

According to the Applicant, since she got pregnant with the child to date, the Respondent has reneged on his fatherly responsibilities; and even left the jurisdiction for an unknown place. This situation has left the Applicant to single-handedly take care of the subject.

The Applicant, through her lawful attorney adds that the Respondent's irresponsible behaviour compelled her travel to Germany to seek greener pastures so that she will be able to make the wherewithal to properly care for the child.

Thus, before the Applicant left for Germany, she placed the subject child in the care of her elder sister who is now an old pensioner with meagre allowance; coupled with receding health condition. In that regard, the Applicant prays to the court to grant her custody of the subject to her to enable her process the necessary documentations for the child to join her in Germany.

to Germany nor refund the Plaintiff's cash the sum of GHC27, 000.00 (Twenty-Seven Thousand), paid to the 1st Defendant to process travelling documents to secure German Visa. Hence the instant suit. The Plaintiff's attorney tendered in evidence *Exhibit "A"*, power of attorney donated by the Plaintiff; and *Exhibit "B"*, an agreement between the parties that the 1st Defendant would send the Plaintiff to Germany.

APPLICABLE LAW AND AUTHORITIES

In civil trials, the burden of proof rests on the plaintiff. That is to say: *"He who alleges bears the burden of proof"*.

In the case of **Jass Company Ltd and Another v. Appau and Another [2009] SCGLR 265 at 270 and 271**, therefore, the Supreme Court unanimously in dismissing the appeal by

the plaintiffs/appellants from the judgment of the Court of Appeal and affirming the judgment of the trial High Court for declaration of title to a disputed land in favour of the defendants/respondents stated *per* Dotse JSC as follows;

"We wish to observe that the burden of proof is always put on the plaintiff to satisfy the Court on a balance of probabilities in cases like this. Thus, where in a situation, 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 claim would be dismissed". (See also **Odametey v. Clocuh [1989-90 1 GLR 15**, holding 1).

The instant application the Applicant is praying for custody of the subject child because she alleges that Respondent has reneged on his responsibilities as a father towards the subject child. By extension therefore, the principle that *he who alleges must prove it* as espoused in **Jass Company Ltd & Another** *(supra)* is applicable here too. That is, the Applicant is under legal obligation to prove that the Respondent has reneged his fatherly responsibilities to take care of the subject child. a breach of contract leading to the suit at hand.

Considering the evidence by the Applicant through her lawful attorney, the Respondent realising that the Applicant was pregnant for him packed bag and baggage and fled; and has not returned till date leaving the Applicant to her own fate.

At common law, a father is the natural guardian of his infant child and has a right to its custody. [See *Halsbury's Laws of England (3rd ed.) Vol. 21, pages 191-2, para. 425*]. That is, legal right of the father exists even against the mother. It is only in very special cases, for example, where the father by his own act or conduct proved himself unsuitable, or where the interest and welfare of the child so require, that the father would be deprived of custody. (See **In re Dankwa [1961] 1 GLR 352 – 353**)

In the instant application, the evidence by the Applicant suggests and the same is believed that the Respondent cannot be called a *father* properly so called. In other words, a man who runs away from his fatherly responsibilities is just a father by name; and not a father in deed to command respect. Thus, with the irresponsibility of the Respondent, this Tribunal has no moral or legal basis to hold a dissenting view from Aristotle's emphatic view that *Every human being has right to live; but not all has right to parentage.*

In that regard, the principle established in *order 25 rule 1(2)(a)(b)* of *C.I. 59*; and enlivened by the authorities of **Republic v. High Court, (Human Rights Division) Accra Ex parte, Josephine Akita**; and **Newswatch Communications Ltd**, *(supra)* shall lie. Accordingly, the Applicant's custody application shall be granted with recourse to *section 6* of the *Act 560*.

No order as to cost.

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H/W KORKOR ACHAW OWUSU, ESQ

DISTRICT MAGISTRATE

ASOKWA DISTRICT MAGISTRATE COURT (2)

DATED: 22ND MARCH, 2023.