

**IN THE DISTRICT COURT 2, TAMALE
HELD ON THURSDAY 22ND JUNE, 2023
BEFORE HIS WORSHIP D. ANNAN ESQ.**

SUIT NO. A2/22/23

BETWEEN

ADAMU IMORO

-

PLAINTIFF

AND

1. ADAMU YAKUBU

-

DEFENDANTS

2. HABIB @ BURGAR

JUDGMENT

INTRODUCTION

1. This judgment relates to contract, recovery of money.

2. The plaintiff is a businesswoman who trades under the name and style Damsakori Enterprise and is resident in Tamale. The 1st and 2nd defendants are wife and husband, respectively. 1st defendant described herself as trader while 2nd defendant stated that he is a plumber. Both are resident in Tamale.

3. On 12th December, 2022 the plaintiff took out this action against the defendants, jointly and severally, for the following reliefs:
 - a. Recovery of GHS176,640.00 being balance of total amount plaintiff paid to defendants for supply of assorted commodities, namely rice, tin tomatoes and oil, which defendants have failed to supply to plaintiff and also failed to refund the money to plaintiff.
 - b. Interest on the amount of GHS176,640.00 from 4th October, 2022 till date of final judgment at the current commercial bank rate.
 - c. General damages.
 - d. Costs.
4. The defendants on 19th December, 2022 pleaded not liable to plaintiff's claim. Parties were, therefore, ordered to file their respective witness statements. The case of either party is detailed below.

PLAINTIFF'S CASE

5. Plaintiff's case is that 1st defendant informed her that 2nd defendant could supply goods from Togo and Wouga for her trade. As a result, she gave defendants GHS310,000.00 for the supply of 1000bags of rice. However, defendants ended up supplying only 600bags of rice. Nonetheless, she gave defendants GHS93,000.00 for supply of an additional 300bags of rice. Plaintiff admits that defendants supplied 380bags of rice, leaving a balance of 320bags valued at GHS99,200.00. Again, plaintiff gave the defendants GHS70,000.00 for the supply of 146jericans of oil, but defendants supplied only 50jericans, leaving a balance of 96jericans valued at GHS46,080.00. Also, defendants took GHS55,000.00 for the supply of 500cartons of tin tomatoes but only supplied 250cartons, leaving a balance of 250cartons valued at GHS27,500.00. Similarly, plaintiff gave defendants GHS13,000.00 for the supply of 81 bags of rice (25kg), but only received 60bags leaving a balance of 21bags of rice valued at GHS3,3600.00. Lastly, plaintiff gave defendants GHS500.00 to defendants for the supply of a bag of sugar, but that was not supplied. In all, the cost of goods outstanding is GHS176,640.00 as at October, 2022 which defendants have failed to supply or refund. According to plaintiff, she reported the matter to the Lamashegu Divisional Police Station where 1st defendant admitted to the owing her. However, all attempts to get the goods or refund of the outstanding amount have proven futile, hence this present action.
6. During the trial, plaintiff sought to tender in evidence an audio recording of what transpired at the Gulkpegu Naa's palace and a transcription of the said recording, but same was objected to. The objection was upheld and the audio recording and transcription marked as Exhibits R and R1, respectively. Exhibit D, which is a copy of 1st defendant's signature was obtained when 1st defendant was under cross-examination.

Subpoenaed witness

7. Plaintiff caused to be subpoenaed the police investigator, No. 6721 D/Cpl. Minla Regina (PW1) of the Tamale Divisional Headquarters to give evidence on her behalf. PW1 tendered in evidence a copy of the summons on her to attend court as Exhibit A. She also tendered a copy of plaintiff's complaint and 1st defendant's investigative cautioned statement. The statements were marked as Exhibits B and C, respectively.

DEFENDANTS' CASE

1st defendant

8. 1st defendant's is that 2nd defendant has been wrongly joined to the suit as he never dealt with the plaintiff. She contended that sometime in 2022 when there was shortage of cooking oil, she had stock in trade and that it was rather the plaintiff who approached her and enquired how she (1st defendant) got her goods. She informed the plaintiff that she took goods from one Abaloo from Sakansi, Togo. 1st defendant contended that she has never met the said Abaloo, but only sends mobile money and the goods are supplied. Explaining this to plaintiff, she averred that the plaintiff agreed and dealt personally with the said Abaloo. According to 1st defendant, plaintiff informed her that Abaloo insisted that plaintiff sends her money through her. As a result, in one of the transactions where plaintiff was unable to raise the full cost for a container supply, she (1st defendant) added GHS300,000.00 to be sent to Abaloo with intend to have same shared when the goods arrive. 1st defendant added that Abaloo supplied the goods to her, but the stock was not up to. Nonetheless, Abaloo called her to demand that she and plaintiff to send an additional GHS70,000.00 for another container. 1st defendant indicated that she had stock but plaintiff went ahead to send the money. According to 1st defendant, the plaintiff continued sending money to Abaloo directly. In further response to plaintiff's claim, 1st defendant stated that the

said Abaloo has bolted and that she has lost over GHS400,000.00. She argued she should not be sued, rather that both parties, i.e. herself and plaintiff, have suffered losses and that it was appropriate for parties to jointly pursue Abaloo, since Abaloo has frustrated their transactions. She added that there is no contract between herself and plaintiff for the supply of goods. Also, that 2nd defendant is not known to the above transactions. Lastly, she added that when this matter was reported to the police and the Gulkpe-Naa Palace, there was no merits in same and that she is surprised that plaintiff has come to this court.

2nd defendant

9. In a very short witness statement, 2nd defendant testified that he has no knowledge of the above transaction, save when 1st defendant informed him that parties (1st defendant and plaintiff) have sent monies to their supplier and the supplier had failed to deliver. He contended that he has been wrongly joined to the suit and that this court should strike out his name.

ISSUES FOR DETERMINATION

10. The issues borne out of the facts are:

- a. Whether or not the 2nd defendant is a proper party to this action?*
- b. Whether or not there exist a contract for supply of goods between plaintiff and the defendants?*
- c. Whether or not the defendants are jointly and severally liable to plaintiff's claim?*

BURDEN OF PROOF

11. It is essential to note that in civil cases, the general rule is that the party who in his pleadings or his writ raises issues essential to the success of his case assumes the onus of proof on the balance of probabilities. See the cases of **Faibi v State Hotels**

Corporation [1968] GLR 471 and In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors. [2003-2004] SCGLR 420. The Evidence Act, 1975 (NRCD 323) uses the expression “burden of persuasion” and in section 14 that expression has been defined as relating to, “...each fact the existence or non-existence of which is essential to the claim or defence he is asserting.” See also ss. 11(4) and 12(1) & (2) of NRCD 323.

12. It is when the claimant has established an assertion on the preponderance of probabilities that the burden shifts onto the other party, failing which an unfavourable ruling will be made against him, see s. 14 of NRCD 323 and the case of **Ababio v Akwasi III [1995-1996] GBR 774.**

ANALYSIS OF THE ISSUES

13. Before I proceed to analyse the issues, let me point out an issue that arose during the course of the trial. This was when the 1st defendant was under cross-examination. It regards the 1st defendant indicating that she was not the one who signed her witness statement. Below is what ensued:

“Q: You agree with me that your signature on your witness statement is not the same as what you have just signed in court?

A: Yes. My sister signed my witness statement because I was not there.”

14. The rules governing witness statement are provided for under Or. 26A of the District Court (Civil Procedure) Rules, 2009 (CI 59) as amended. Particularly Or. 26(A)(2) of CI 59 provides that, “For the purposes of this Order, a witness statement is a written statement *signed by a person who is required to give evidence in court* and contains the evidence which that person proposes to give at the trial.” In a situation where it turns out that the said statement had been admitted but was not signed by the witness, the court is to consider the probative value thereof, see ss. 51 and 52 of NRCD 323.

15. From the evidence, the 1st defendant indicated that she did not sign the said witness statement. However, she was led to identify same as hers and it was adopted as evidence-in-chief. She did not stipulate that it was signed at her direction or instruction. The document did not also indicate that it was signed for. This implies that she (1st defendant) did not depose to those facts. To this effect, I find her conduct as *mala fide* and that the said witness statement is of no probative value as far as this case is concerned, see ss. 51 and 52 of NRCD 323 and the case of **Abraham Nmai Adjei v Edwin Addo Quaye, Suit No. LD/0810/2016 dated 6th February, 2019 (unreported), HC**, per His Lordship K. A. Gyimah J.

Issue a

16. Issue a. *whether or not the 2nd defendant is a proper party to this action?* Capacity to maintain an action remains a cardinal hurdle that must be jumped if a party is to remain in a case. The law is trite that a party to an action must have capacity and that an objection to capacity of a party may be raised at any time, see **Sam Jonah v Duodo-Kumi [2003-2004] 1 SCGLR 50**. Where it is established that a party does not have capacity or is not a proper person to a suit, then there is no need to proceed with the matter against such party, see the cases of **Sarkodie v Boateng II [1982-83] 1 GLR 715 SC**, **Fosua & Adu Poku v Dufie (Dec'd) v Adu Poku Mensah [2009] SCGLR 310**, **Duah v Yorkwah [1992-1993] 1 GBR 278 CA**, **HFC Bank (Ghana) Ltd. v Abeka Suit No. J4/5/2018 dated 12th June, 2019**, **Kasseke Akoto Dugbartey Sappor & 2 Ors. v Very Rev. Solomon Dugbatey Sappor & 4 Ors. Suit No. J4/46/2020 dated 13th January 2021, SC (unreported)**.

17. Based on the above, the legal burden to establish that the 2nd defendant is not a proper party to this suit falls on the 2nd defendant, especially where he asserts that he is not

a proper party, see **Faibi v State Hotels Corporation. (supra)**. Failing which, an unfavourable ruling shall be entered against him, see **Ababio v Akwasi III (supra)**. Equally, the plaintiff has a legal burden to establish that the 2nd defendant is a proper party to this suit.

18. In the instant case, 2nd defendant contended that he is a plumber and did not participate in any of the transactions/activities between plaintiff and 1st defendant. He added that as husband to 1st defendant, he only got to know about this case when 1st defendant informed him that Abaloo has bolted with her business money.

19. Plaintiff, on her part, argued that the 2nd defendant is a proper party because he was informed anytime 1st defendant took money. Again, that on the initial request for goods, 1st defendant indicated to her that the 2nd defendant was to supply the said goods. Below is what ensued when plaintiff was under cross-examination:

“Q: You rather approached the 1st defendant and asked her where she has been buying cooking oil as there was a shortage of cooking oil sometime in 2022?

A: *It is not so. Because she told me that her husband only deals in rice, tin tomatoes and sugar. She does not deal in oil.*

Q: *It is never true that 1st defendant told you that her husband, 2nd defendant, will supply you anything?*

A: *She told me.*

Q: *Did you meet the 2nd defendant in person?*

A: *I did not meet the 2nd defendant, it was 1st defendant I was dealing directly with.*

Q: In fact, aside being the husband of 1st defendant, 2nd defendant has no hand in any business of 1st defendant, I am putting that to you?

A: He is involved. Because anytime she comes for the money, I ask her to call the husband for me for confirmation.”

20. When 2nd defendant was under cross-examination, this is what ensued:

“Q: *You agree with me that there was a dispute between the plaintiff and your wife about the transaction between her and the plaintiff, you are aware?*

A: *I am not aware.*

Q: Then you agree with me that the plaintiff reported the defendant and your very self to the Lamashegu Police?

A: I am not aware.

Q: You were at the Lamashegu Police Station concerning this matter, not so?

A: Yes. I was at my workshop when 1st defendant called me about the transaction between herself and the plaintiff and added that she gave her money to her supplier and the plaintiff also gave hers to the same supplier and that the supplier was not giving them their goods. So plaintiff called 1st defendant to the house for a discussion. So we got to the police station

before I realized what was going on. I never knew the plaintiff let alone to talk to her about her shop.

Q: You agree with me that plaintiff also summoned you and 1st defendant to the Gulkpegu palace?

A: No. it was my wife, 1st defendant, that the plaintiff summoned but I only accompanied 1st defendant to the palace.

Q: So how did you come to know that 1st defendant was summoned to the chief palace?

A: 1st defendant told me.

Q: *I am putting it to you that at every time material, you were notified by the plaintiff before the plaintiff advanced any money to 1st defendant?*

A: *I am not aware"*

21. From the above, it appears to me that the 2nd defendant was only joined to this suit because he followed his wife to the police or the chief palace, but not that there was any transaction to which he was involved. As plaintiff clearly pointed out, 2nd defendant was only informed when 1st defendant came for money. Plaintiff also failed to establish that 2nd defendant indeed took monies from her or that supplied her any goods. In effect, I come to the conclusion that the plaintiff failed to prove, on the balance of probabilities, that indeed the 2nd defendant was part of the transactions, see **Ababio v Akwasi III (supra)**. As such, the 2nd defendant is

improperly joined to this action. There is, therefore, no case against the 2nd defendant to which he is to be jointly and/or severally held accountable, see **Sarkodie v Boateng II (supra)** and Or. 9 rule 4(1) of CI 59.

Issues b and c

22. I shall now consider issues b and c together. Issues b and c are *whether not there exist a contract for supply of goods between plaintiff and the defendants and whether or not the defendants are jointly and severally liable to plaintiff's claim?* Since it has been established from issue a above that the 2nd defendant is not a proper party to this suit, then the outstanding issues to be determined are whether or not there exist a contract for supply of goods between the plaintiff and 1st defendant and whether or not the 1st defendant is liable to plaintiff's claim?

23. As earlier pointed out, he who asserts must prove. Now, with regard to proof of one's claim or allegation, the Supreme Court in the case **Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lamprey (No. 2) [2012] 2 SCGLR 845 at page 867** held as follows:

“...What this rule literally means is that 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.”

24. Let me also rehash what was stated in **Majolagbe v. Larbi [1959] GLR 190** regarding proof of an allegation. The learned judge, Ollenu J. (as he then was) stated at page 192 that, “where a party makes an averment capable of proof in some positive way...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". See also the case of **Klah v. Phoenix Insurance Company Limited** [2012] 2 SCGLR 1139.*

25. From the evidence, plaintiff established that she gave monies to 1st defendant for the supply of goods and that at the time of filing this suit the estimated value of goods yet to be supplied is GHS176,640.00. Breakdown of the said GHS176,640.00 is as follows:

No.	Item	Amount Given	Quantities Expected to be Supplied	Quantities Supplied	Quantities yet to be Supplied	Value of Quantities yet to be Supplied
1.	Rice	GHS310,000.00	1000bags	980bags		
2.	Rice	GHS93,000.00	300bags		320bags	GHS99,200.00
3.	Oil	GHS70,000.00	146jericans	50jericans	96jericans	GHS46,080.00
4.	Tin Tomatoes	GHS55,000.00	500cartons	250cartons	250cartons	GHS27,500.00
5.	Rice (25kg)	GHS13,000.00	81bags	60bags	21bags	GHS3,360.00
6.	Sugar	GHS500.00	1bag	Nil	1bag	GHS500.00
Total						GHS176,640.00

26. 1st Defendant, on her part, admitted to the above transactions during cross-examination, see the Record of Proceedings dated 6th April, 2023. Further, in Exhibit C, her investigative cautioned statement, 1st defendant admitted, "I agree to the fact that complainant gave me cash the sum I cannot recall *since I did business with her*

severally. ...Now I have to supply the complainant with some goods of rice, oil and tin tomatoes amounting to GHS176,640.00. I also gave the money to one Abaloo, a trader in Sankasi, who also buys the goods and sends me. He has refused to pick my calls for the past 2weeks now..." Also when PW1 was under cross-examination, this is what ensued:

"Q: She (1st defendant) also made it clear that in the event that she was unable to get the supplier, she would make good the outstanding items?

A: Yes

Q: And that she was only pleading for time?

A: Yes."

27. From the above, I have no hesitation at all in coming to the conclusion that there existed a contract between the plaintiff and the 1st defendant for the supply of goods. It was 1st defendant who took the monies from plaintiff. Plaintiff throughout her evidence maintained that she never dealt with the said Abaloo. As to the whereabouts of the said Abaloo, it is only the 1st defendant who can tell. At best, what is before this court is the transaction between the plaintiff and 1st defendant to which 1st defendant has failed to honour her obligations. To say that Abaloo has frustrated the said transaction, in my opinion, is farfetched/improbable. Also, as earlier established I find the evidence-in-chief of plaintiff to be of no probative value since she did not sign the said witness statement. Further, as counsel for 1st defendant rightly puts it, 1st defendant had made it clear that even in the event that she was unable to get the said Abaloo, she would make good the outstanding goods and that all that 1st

defendant was pleading for time. To this effect, I find that the 1st defendant is liable to plaintiff's claim.

28. Now, I shall touch briefly on plaintiff's claim for interest, damages and costs. Regarding interest, in the case **Royal Dutch Airlines (KLM) v. Farmex [1989-90] 2 GLR 623** the Supreme Court said at page 636 that:

"When a defendant keeps a plaintiff out of the use of his money, the plaintiffs are entitled to call upon the defendant to account to them for the use of this money, which is another way of saying that the plaintiffs are entitled to interest on the said money beyond the date of judgment to date of payment..."

29. The power of the Courts in Ghana to award such interest has been re-enacted in rule 1 of CI 52 of the Court (Award of Interest and Post Judgment Interest) Rules, 2005. The language of CI 52 is very clear in its direction for courts to award only simple interest unless specific circumstances exist. To reiterate this point, CI 52 provides first for the application of prevailing bank rates at simple interest as the only manner in which a court can award interest on a judgment debt. It reads in Rule 1:

"Rule 1 - Order for payment of interest

1. If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated

a. at the bank rate prevailing at the time the order is made and

b. at simple interest."

30. From the evidence, since there was no agreement between the parties on nature of interest, period of application of the particular type of interest or quantum of interest, I shall apply interest at the prevailing bank rate in simple interest mode. Thus, I hold

that the interest rate chargeable on the debt GHS176,640.00 shall be calculated at the prevailing bank rate effective from the date of this judgment till date of final judgment.

31. On damages, the Supreme Court in **Delmas Agency Ghana Ltd v Food Distributors International Ltd. [2007-2008] SCGLR 748** held that:

“General damages is such as the law will presume to be the natural or probable consequence of the defendant’s act. It arises by inference of the law and therefore need not be proved by evidence. The law implies general damage in every infringement of an absolute right. The catch is that only nominal damages are awarded. Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate.”

32. In this instant case, what then the plaintiff is entitled to by way of general damages is for the court to award a reasonable sum, which I assess at GHS20,000.00.

33. Finally, I will now exercise my discretion under Or. 7 of CI 59 and award costs of GHS10,000.00 in favour of the Plaintiff.

CONCLUSION

34. In sum, I hereby enter judgment in favour of the plaintiff against the 1st defendant as follows:

- a. Recovery of GHS176,640.00 being balance of total amount plaintiff paid to defendant for supply of assorted commodities, namely rice, tin tomatoes and oil, which defendants have failed to supply the items to plaintiff and also failed to refund the money.

- b. Interest on the amount of GHS176,640.00 from 4th October, 2022 till date of final judgment at the current commercial bank rate.
- c. General damages assessed at GH20,000.00
- d. Costs of GHS10,000.00 is awarded in favour of the plaintiff.

H/W D. ANNAN ESQ.

[MAGISTRATE]

SYLVESTER ISANG ESQ. WITH SAMPSON B. LAMBONG ESQ. FOR THE PLAINTIFF
ABRAHAM N. DAMTAR ESQ. HOLDING THE BRIEF OF ALHAJI MOHAMMED
SHAIBU ABDUALLAI FOR THE DEFENDANT

References:

1. ss. 11(4), 12(1) & (2), 14, 51 and 52 of the Evidence Act, 1975 (NRCD 323)
2. *Faibi v State Hotels Corporation* [1968] GLR 471
3. *In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors.* [2003-2004] SCGLR 420
4. *Ababio v Akwasi III* [1995-1996] GBR 774
5. *Abraham Nmai Adjei v Edwin Addo Quaye*, Suit No. LD/0810/2016 dated 6th February, 2019 (unreported), HC,
6. *Sam Jonah v Duodo-Kumi* [2003-2004] 1 SCGLR 50
7. *Sarkodie v Boateng II* [1982-83] 1 GLR 715 SC, *Fosua & Adu Poku v Dufie (Dec'd) v Adu Poku Mensah* [2009] SCGLR 310, *Duah v Yorkwah* [1992-1993] 1 GBR 278 CA, *HFC Bank (Ghana) Ltd. v Abeka* Suit No. J4/5/2018 dated 12th June, 2019, *Kasseke Akoto Dugbartey Sappor & 2 Ors. v Very Rev. Solomon Dugbatey Sappor & 4 Ors.* Suit No. J4/46/2020 dated 13th January 2021, SC (unreported).

8. *Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lamptey (No. 2)* [2012] 2 SCGLR 845 at page 867
9. *Majolagbe v. Larbi* [1959] GLR 190
10. *Klah v. Phoenix Insurance Company Limited* [2012] 2 SCGLR 1139
11. *Royal Dutch Airlines (KLM) v. Farmex* [1989-90] 2 GLR 623
12. *Delmas Agency Ghana Ltd v Food Distributors International Ltd.* [2007-2008] SCGLR 748
13. *Rule 1 of the Court (Award of Interest and Post Judgment Interest) Rules, 2005* (CI 52)
14. *Ors. 7, 9 r 4(1), 26A r 2 of the District Court (Civil Procedure) Rules, 2009* (CI 59)