

IN THE DISTRICT COURT 2, TAMALE
HELD ON TUESDAY 6TH JUNE, 2023
BEFORE HIS WORSHIP D. ANNAN ESQ.

SUIT NO. A2/04/23

BETWEEN

DAWUDA BABA

-

PLAINTIFF

AND

1. PASCAL YUSSIF

-

DEFENDANTS

2. ABDULAI ADAM

JUDGMENT

INTRODUCTION

1. This judgment relates to contract for the sale of land.

2. The plaintiff described himself as a herbal medicine practitioner and resident in Tamale. The 1st defendant is a teacher while the 2nd defendant is described as a surveyor. Both are resident in Tamale. On 17th October, 2022 the plaintiff through his lawyer issued a writ against the defendants, jointly and severally, for the following reliefs:

- a. An order setting aside the contract of sale entered into in April 2021 for two plots of land numbered 204 and 206, Sagnarigu Dungu Planning Scheme Block C, between the plaintiff and defendants.
 - b. Recovery of an amount of GHS137,000.00 being special damages plaintiff suffered from defendants regards the contract for sale of the said two plots.
 - c. Interest on the amount of GHS137,000.00 from April 2021 till date of final judgment at the current commercial bank rate.
 - d. General damages.
 - e. Costs.
3. The 1st defendant, on his part, disputed plaintiff's claim. The 2nd defendant was served with the writ via substituted service, but he failed to attend court or file any process in response to plaintiff's claim. I shall deal with 2nd defendant's non-attendance in court or failure to file any process in response to plaintiff's claim later in this judgment.
4. The plaintiff and the 1st defendant filed their respective witness statements. The case of either party is detailed below.

PLAINTIFF'S CASE

5. Plaintiff's case is that he earlier bought an uncompleted house from 1st defendant sometime in 2020, without any complications. So, on or about April 2021, the 1st defendant informed him about two plots of land available for sale at Sagnarigu. He averred that the 1st defendant described the two plots as belonging to late Sagnarigu Chief's family and that the area had been earmarked for a hospital project which fits perfectly to plaintiff's business and interest. As a result, plaintiff and his colleague, Bernard Okyere (PW1) together with the 1st defendant visited the plots. He added that 1st defendant indicated that each plot was GHS70,000.00 but parties agreed on GHS135,000.00 for the plots. Plaintiff added that 1st defendant later visited his office and took the GHS135,000.00 in cash. He averred that 1st defendant also took his ID Card for the land documents. However, when the documents were presented by 1st defendant, he found out it did not include the allocation papers and also the statutory declaration bore the name of 2nd defendant as the one transferring ownership. Plaintiff stated that when 1st defendant took the money, he engaged a surveyor and erected pillars on the said plots with his (plaintiff's) number inscribed on them. Plaintiff contended that when 1st defendant had erected the pillars, three days later, one Nana called saying that the said plots belongs to him. Plaintiff claims that in attempts to get 1st defendant to resolve the issue, he and PW1 met 1st defendant at Industrial Area, Tamale where 1st defendant then introduced 2nd defendant as the one who received the money. The defendants then assured them of getting the allocation papers. Plaintiff averred that he paid an additional GHS200.00 to defendants and they took him to one Abdulai Mba, described as the son of the former chief of Sagnarigu for the allocation papers. The palace, however, indicated that it could not assist since plaintiff did not have an allocation paper. Plaintiff stated that he then demanded for the return of his money, but 1st defendant caused his lawyers to write saying that he (1st

defendant) merely introduced plaintiff to 2nd defendant for the sale and that he (1st defendant) is not liable, rather the 2nd defendant is.

6. To plaintiff, defendants have perpetuated fraud against him. He set out the particulars of fraud at paragraph 18 of his summary of claim. In sum, plaintiff argues that the defendants issuing the statutory declaration and site plan knew very well that 2nd defendant had no title to the said plots and also involving Abdulai Mba to get them the allocation papers were mere pretences to defraud him. Plaintiff added that he reported the matter to the police, but he is yet to receive a positive feedback, hence this present action.

7. Plaintiff tendered in evidence the following exhibits:

Exhibits A and A1– Call records between plaintiff and 1st defendant

Exhibit B – Copy of the Statutory Declaration

Exhibit C – Copy of the Site Plan

Exhibit D – Demand Notice from 1st defendant's lawyers.

Plaintiff's witness

8. Bernard Okyere, PW1, indicated that he is the co-worker who was present and part of the discussions between the 1st defendant and the plaintiff leading to the purchase of the plots. He added that he cashed out the money from the bank and same was given to the 1st defendant in his presence. He averred, however, that he does not know the 2nd defendant save when the issues started and 1st defendant gave out 2nd defendant's contact number. He was also present when plaintiff reported the matter to the police.

Subpoenaed witness

9. Plaintiff also caused to be subpoenaed the police investigator, Samuel Agyapong, of the Tamale District Police to tender a copy of 1st defendant's investigative cautioned statement. The said statement was marked as Exhibit E.

DEFENDANTS' CASE

1st defendant

10. 1st defendant testified that 2nd defendant is a surveyor with the Lands Commission and that sometime in 2021 when the traditional rulers of Sagnarigu decided to rezone parts of Dungu they engaged 2nd defendant to do the rezoning. 1st defendant explained that when 2nd defendant came to the site, he had no place to keep his work tools so 2nd defendant kept his work tools with him since he (1st defendant) lived closed to the work site. 1st defendant added that after 2nd defendant had completed his work, 2nd defendant informed him that the traditional rulers had gifted him (2nd defendant) with 4 plots of land and that he was selling plots numbers 204 and 206, i.e. the plots in issue. 1st defendant averred that since he had dealt with plaintiff earlier regarding the uncompleted building, he informed the plaintiff about the offer. He added that plaintiff showed interest and they (plaintiff, PW1 and himself) visited the property. 1st defendant averred that after the visit, plaintiff engaged 2nd defendant and concluded on GHS135,000.00 for the two plots.

11. 1st defendant stated further that when plaintiff raised the negotiated amount, the plaintiff paid the money to 2nd defendant and 2nd defendant acknowledged receipt. He stated further that 2nd defendant then prepared a statutory declaration, marked as Exhibit 1 (similar to Exhibit B) and the site plan, marked as Exhibit 2 (similar to Exhibit C). 1st defendant added that he assisted plaintiff to erect corner pillars on the land. He

stated that he was also the caretaker of the land since the plots were close to his residence. However, three days after erecting the pillars, plaintiff complained that someone had claimed ownership of the said plots. As a result, he informed plaintiff to report the matter to the chief palace. At the chief palace, they were informed that attempts to reach the 2nd defendants were unsuccessful. 1st defendant stated that an emissary of the chief palace later informed him that 2nd defendant had called. So he went to the plaintiff's office with the said emissary, and PW1 then took 2nd defendant's contact and on reaching 2nd defendant, 2nd defendant pleaded for time to resolve the issues indicating that he was on a short course and had also lost his earlier phone and changed his number. 1st defendant averred that on 2nd July, 2022, two months after they had spoken with 2nd defendant, plaintiff reported the matter to the police and that he was invited for questioning. He then sent a copy of the invitation letter to 2nd defendant and 2nd defendant assured him that he would return the next day to settle the issue. On 4th July, 2022 the defendants, plaintiff and PW1 met at the police station. At the police station, the investigator took a statement to which 1st defendant contends that he was not allowed to write it himself and also was forced to thumbprint it. However, when the police sought 2nd defendant to take his statement, 2nd defendant could not to be found. 1st defendant stated that after he was granted bail, the plaintiff and the police kept harassing him with threats of being arrested and detained. As a result, he caused his lawyers to write to plaintiff and the police to cease any further harassment. Copy of the said letter was tendered and marked as Exhibit 3.

12. In short, 1st defendant contends that he only advertised the sale of the plots on behalf of the 2nd defendant and that if plaintiff was desirous of his claim, he should pursue the 2nd defendant but not him. 1st defendant did not call any witness.

ISSUES FOR DETERMINATION

13. The issues borne out of the facts are:

- a. *Whether or not the 1st defendant fraudulently represented to the plaintiff regarding the sale?*
- b. *Whether or not the defendants are jointly and severally liable to plaintiff's claim?*

BURDEN OF PROOF

14. 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.

15. 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

16. Issue a, *whether or not the 1st defendant fraudulently represented to the plaintiff regarding the sale?* The law is that when a party alleges the commission of crime, say fraud, in a civil action, the standard of proof is the same as in a criminal action, which is proof beyond a reasonable doubt, see **Sasu Bamfo v Sintim [2012] SCGLR 136 at 138** and s. 13(1) of NRCD 323. "Fraud vitiates every conduct, an allegation of fraud if proven and sustained will wipe and sweep away everything in its trail as if the thing had never

existed”, see **Mass Projects Ltd (No. 2) v Standard Chartered Bank & Yoo Mart Ltd. (No. 2) [2013-2014] 1 SCGLR 309**. In a criminal matter, voluntary confessions have crystalised into sufficient evidence upon which a conviction may lie, see s. 120 of NRCD 323.

17. In a contract for the sale of land, one of the essential requirement is that the grantor must have capacity or that the land belongs to him. The principle is that you cannot give/transfer or purport to give/transfer what you do not have. Hence, the principle holds true that where the grantor lacks capacity, any conveyance is null and void. This in Latin is referred to as the *nemo dat quod non habet* principle, see the case **Sakodie v FKA Co. Ltd. [2009] SCGLR 64 at 70-78**. Hence, where a party alleges that he is acting on behalf of another, as in a principal-agent relationship, his actions shall be deemed as the actions of his principal, unless otherwise established. As such, an agent shall not be held personally liable when he acts within his mandate and the transaction is enforceable, see the cases **Universal Steam Navigation Co. Ltd. v James Mackenzie [1923] 129 LT 395** and **Boateng Asante v Scanship Ghana Limited [2014] DLSC 6394**. In effect, the law will enforce a contract of sale of land where it is established that there was proper transfer of interest, either by an agent or the principal himself. However, where such transfer is tainted with fraud, everything in its trail shall be null and void.
18. From the above, I shall be guided by the fact that the plaintiff is to establish beyond reasonable doubt that 1st defendant perpetrated fraud on him. According to plaintiff, he relied on the representations of 1st defendant in buying the plots, but it later turned out to be untrue. He stated that 1st defendant falsely represented to him into believing that the land in dispute were genuine plots for sale. In his particulars of fraud, plaintiff stated that 1st defendant:

- “a. falsely representing to me that the land in issue was the property of the family of the late chief of Sagnarigu and that the family was ready to demarcate the said land and sell to the public and that he could assist me to buy same.
- b. issuing me with a statutory declaration and the site plan when defendants knew very well that 2nd defendant has no title to pass the plots numbered 204 and 206 Sagnarigu Dungu Planning Scheme Block C to me.
- c. taking me to a son of the late chief of Sagnarigu on the pretence of getting me allocation paper when 1st defendant knew that the sale of the plots to me was not genuine.”

19. In support of the above contention, plaintiff caused to be tendered Exhibit E. It is important to point out here that in tendering of Exhibit E, the only objection raised by counsel for 1st defendant was that it was a photocopy. Counsel for defendant did not raise the issue that 1st defendant did not author or thumbprint Exhibit E. I hold that he had abandoned same. Now, in the said Exhibit E, 1st defendant admitted he was informed about the land by 2nd defendant. He then informed the plaintiff about the availability of the land as being sold by 2nd defendant. He also admitted that he collected the money, but gave same to 2nd defendant. He further admitted that he gave 2nd defendant the name, address and Voter's ID details of plaintiff for the land documents. He also presented the land documents of which the Statutory Declaration, Exhibit B or 1, was in the name of the 2nd defendant. In his evidence-in-chief, 1st defendant stated that it was the traditional rulers of Sagnarigu Dungu who decided to rezone parts of Dungu land and as such engaged 2nd defendant to do the rezoning. He explained that after the rezoning, the 2nd defendant informed him that he (2nd defendant) had been gifted parts of the land and that he should assist him (2nd defendant) to sell. Hence, he was simply acting as an agent of 2nd defendant. As his counsel puts it, 1st defendant was only advertising the sale on behalf of 2nd defendant.

The issue now is, 1st defendant on presenting the land documents, it is seen that 2nd defendant is the one transferring the land to plaintiff. It turned out, however, that the land was not in the name of the 2nd defendant as alleged to have been gifted to 2nd defendant. 1st defendant in Exhibit E further stated that when a search was conducted it showed that the land belonged to Mr. Adani Andu, the late Chief of Sagnarigu. He added that when 2nd defendant was informed about the search, 2nd defendant pleaded for time to resolve it. When 1st defendant and plaintiff went to the chief palace for a resolution, the palace declined to assist because there was no allocation paper(s). Plaintiff is now saying that he is no longer interested and demanding for the return of his money due to the misrepresentations by 1st defendant.

20. From the evidence, it appears to me that at all material times, 1st defendant was acting for and on behalf of 2nd defendant. He took the details of plaintiff and gave same to 2nd defendant. However, the documents, particularly Exhibits B and 1, came in the name of 2nd defendant. It is clear that at the point of contacting the plaintiff, 1st defendant represented to the plaintiff that the land was being sold by 2nd defendant who had rezoned the Dungu lands and had been gifted 4plots. However, it turned out that the land had not been gifted to the 2nd defendant. It still remained in the name of the late Chief of Sagnarigu. If indeed the land had been gifted to the 2nd defendant, then the records should have reflected same, even before the sale to plaintiff. As 1st defendant puts it, the land was rezoned and it was 2nd defendant who worked on same. If so, how come after the rezoning and gift to 2nd defendant, the records still remained in the name of the late chief? Is 2nd defendant not described by 1st defendant as a surveyor with the Lands Commission? Has 2nd defendant not submitted his report, which includes his gift? Also, why is the palace declining to assist if indeed they gifted same to 2nd defendant? The *nemo dat quod non habet* principle therefore holds true, in that one cannot give or purport to give what he does not have. I find

that 1st defendant represented to the plaintiff that the land was in the name of the 2nd defendant, which turned out to be untrue. Again, 1st defendant knew the sale was not genuine that was why he took plaintiff to the palace under the pretence of resolving same. I, therefore, hold that the plaintiff was able to prove beyond reasonable doubt that 1st defendant misrepresented to him into believing that the sale of the land by 2nd defendant was genuine. In my opinion the said conveyance was fraudulent and that everything in its trail is null and void, see the cases of **Sasu Bamfo v Sintim, Mass Projects Ltd (No. 2) v Standard Chartered Bank & Yoo Mart Ltd. (No. 2)** and **Sakodie v FKA Co. Ltd. (supra)**. Also, since 1st defendant is an agent of a fraudulent transaction, he cannot seek to avoid liability.

Issue b

21. Having dealt with the issue a, issue b is, *whether or not the defendants are jointly and severally liable to plaintiff's claim?* Or. 9 rule 4 of the District Court (Civil Procedure) Rules, 2009 provides that:

- “(1) Where a person has a joint and several demand against a number of persons either as principals or sureties, that person may proceed against anyone or more of that number of persons severally, or jointly or jointly and severally.
- (2) Where a defendant claims contribution, indemnity, or other remedy or relief against another person, the defendant may apply for that person to be made a party to the suit.”

22. To be jointly and severally liable, the *Black's Law Dictionary (9th Edition)* explains that, “Liability may be apportioned either among two or more persons or to only one or a few selected members of a group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.” In short, it is the plaintiff who elects to proceed against anyone or both of the defendants.

23. Now, as earlier mentioned the 2nd defendant although duly served with the writ, he failed to come to court or file any process. Regarding failure to attend court, the law is that where a party fails to appear in court after due service on him, he is said to have deliberately failed to take advantage of the opportunity given him to be heard. The *audi alteram partem* rule cannot be said to have been breached. The court is, therefore, entitled to proceed with the trial to conclusion and make deductions, draw conclusions or make findings on the basis of the evidence adduced at the trial, see the cases of **In re West Coast Dyeing Industry Limited: Adams v Tandoh [1984-86] 2**

GLR 561, CA and **Ankumah v. City Investment Co. Ltd.** [2007-2008] 1 SCGLR 1068. In **Republic v. High Court (Fast Track Division); Ex-parte State Housing Co. Ltd. (No. 2) Koranten-Amoako Interested Party**, [2009] SCGLR 185 Wood JSC (as she then was) stated authoritatively at page 190 as follows:-

“A party who disables himself or herself from being heard in any proceedings cannot later turn round and accuse an adjudicator of having breached the rules of natural justice.”

24. From the above, 2nd defendant failed to take advantage of the opportunity given him to be heard. Therefore, I shall proceed against him. Having found that the 1st defendant who was acting for and on behalf of 2nd defendant, fraudulently represented to the plaintiff regarding the genuineness of the sale, I hold that the actions of 1st defendant reflect that of the 2nd defendant in perpetuating fraud on plaintiff. Hence, both parties are, jointly and severally, liable to plaintiff's claim.

25. Before I conclude, let me address an arithmetic error in the plaintiff's case. At paragraph 20 of his Summary of Claim, he pleaded as follows:

“Particulars of special damages

i.	Cost of two plots	...	GHS135,000.00
ii.	Cost for allocation paper	...	<u>GHS200.00</u>
	Total		<u>GHS137,000.00”</u>

26. Further to the above, in his evidence-in-chief, plaintiff testified that he gave the defendants GHS200.00 for the allocation papers, see paragraph 21 of his witness statement. It is, therefore, clear to this court that the plaintiff's claim should have

reflected GHS135,200.00 but not GHS137,000.00. The said GHS137,000.00 is an arithmetic error and I so hold.

CONCLUSION

27. I hereby enter judgment in favour of the plaintiff against the defendants, jointly and severally, for the following reliefs:

- a. That the contract of sale entered into in April 2021 for the two plots of land numbered 204 and 206, Sagnarigu Dungu Planning Scheme Block C is hereby set aside as null and void since same was tainted with fraud.
- b. Recovery of the amount of GHS135,200.00 since the said contract of sale was tainted with fraud.
- c. Interest on the amount of GHS135,200.00 from April 2021 till date of final judgment at the current commercial bank rate.
- d. General damages assessed at GHS20,000.00
- e. Costs assessed at GHS10,000.00.

H/W D. ANNAN ESQ.

[MAGISTRATE]

SYLVESTER ISANG ESQ. FOR THE PLAINTIFF

SHIEK ARIF-ABDULAH ESQ. FOR THE 1ST DEFENDANT

2ND DEFENDANT ABSENT

References:

1. ss.11(4), 12(2), 13(1), 14 and 120 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. *Sasu Bamfo v Sintim* [2012] SCGLR 136 at 138
6. *Sakodie v FKA Co. Ltd.* [2009] SCGLR 64 at 70-78
7. *Mass Projects Ltd (No. 2) v Standard Chartered Bank & Yoo Mart Ltd. (No. 2)* [2013-2014] 1 SCGLR 309
8. *Universal Steam Navigation Co. Ltd. v James Mackenie* [1923] 129 LT 395
9. *Boateng Asante v Scanship Ghana Limited* [2014] DLSC 6394
10. *In re West Coast Dyeing Industry Limited; Adams v Tandoh* [1984-86] 2 GLR 561, CA
11. *Ankumah v. City Investment Co. Ltd.* [2007-2008] 1 SCGLR 1068.
12. *Republic v. High Court (Fast Track Division); Ex-parte State Housing Co. Ltd. (No. 2) Koranten-Amoako Interested Party*, [2009] SCGLR 185
13. *Black's Law Dictionary* (9th Edition)