IN THE DISTRICT COURT HELD AT DZODZE ON FRIDAY THE 13TH OF JANUARY,2023 BEFORE HIS WORSHIP NELSON DELASI AWUKU, DISTRICT MAGISTRATE.

Suit No. A11/07/22

PROPHET EMMANUEL TESSU	}	**PLAINTIFF**
VRS		
KODZO SAKAH	}	**DEFENDANT**

JUDGMENT

PARTIES

PLAINTIFF - PRESENT

DEFENDANT - PRESENT

INTRODUCTION/BACKGROUND:

Per a Writ of Summons and Statement of Claim filed on the 25th of November, 2021 and 5th May,2022 the Plaintiff prayed for the following reliefs;

a. *An order of the court directed at defendant to fix or replace the ignition key, front windscreen, side glasses, dash board, front seat, water tank, back bumper, front gates and front handles which the defendant removed from his Hyundai Grace No. GW6380-13.*
b. *Damages for keeping the plaintiff's vehicle for unreasonable duration of time.*
c. *Cost and any other orders as the court may deem fit.*

PLAINTIFF'S CASE

According to the Plaintiff, sometime in August, 2018 he handed over his vehicle Hyundai Grace Numbered GW 6380- 13 to the defendant for body works to be done on it at a cost of Eight Hundred Ghana Cedis (GH₵ 800.00).

The Plaintiff averred that he paid the amount charged for the work to be done but the defendant failed or refused to do the work despite persistent demands.

The plaintiff stated that there have been several attempts by him to have this matter settled but the defendant refused to abide by the directives to have the vehicle fixed.

The plaintiff stated that the defendant had abandoned his vehicle at his old workshop and had removed several parts of the vehicle.

The plaintiff stated that all efforts made by him for the defendant to fix the vehicle has yielded no positive results. Hence his current action.

DEFENDANT'S CASE

In his defence filed on 4th January, 2022 the defendant admitted that the plaintiff brought his Hyundai Grace Mini Bus with Registration number GW 6380-13 in August, 2018 for bodyworks but denied that the vehicle parts stated by the plaintiff were in his custody.

The Defendant stated that as part of his working practice, he removed the ignition key, front windscreen, side glasses with their frames, dash board, front seat, water tank, back bumper, and front gate with its handles and handed them over to the plaintiff for keeping prior to the commencement of work.

The Defendant admitted to agreeing with the plaintiff to pay an amount of GH₵ 800.00 as the charge for his workmanship but following a bargain by the plaintiff, it was agreed that he pays GH₵ 600.00 for the job out of which he paid an amount of GH₵ 450.00 as deposit.

The defendant denied that he failed to complete the work for the plaintiff and stated that it was the plaintiff's refusal or failure to release the parts earlier handed to him to keep for fixing that accounted for the delay in completing the work.

The Defendant stated that the parts listed in paragraph 7 of the plaintiff's statement of claim were the parts that were handed over to the plaintiff for safe keeping.

The defendant stated that, in the interest of peace, he purchased new parts despite the refusal by the plaintiff to make available the parts that were with him to fix the vehicle.

The Defendant prayed that the plaintiff's action be dismissed for lack of merit.

ISSUES

Having considered the case of the parties, the issues for determination by the court in this matter were set down as follows;

a. Whether or not there was an agreement between the parties for the defendant to do bodyworks on Hyundai Grace vehicle with registration number GW 6380-13 belonging to the plaintiff?
b. Whether the defendant breached the agreement with the plaintiff by failing to undertake the bodyworks on plaintiff's vehicle despite receiving payment?

THE LAW AND THIS CASE

Burden of Proof

The general rule in civil cases is that the party who in his/her pleadings or writ raises issues essential to the success of his/her case assumes the onus of proof. ***See Sections 11, 12 and 14 of the Evidence Act, 1975 (NRCD 323) as well as the cases of Takoradi Flour Mills vrs. Samir Faris [2005-2006] SCGLR 882 @ 900 and Gihoc Refrigeration & Household vrs. Jean Hanna Assi [2005-2006] SCGLR 458.***

The Plaintiff in this case had the burden to prove on a balance of probabilities that there was a valid agreement between himself and the defendant and that the agreement was breached by the defendant.

Contract

In **Madina Shopping Mall Association v. Rosehill GH. Ltd [2012] 39 M.L.R.G 81 (SC)** it was held that, *"to be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties".*

Per **section 11 of the Contract Act, 1960 (Act 25)**, a contract is not void or unenforceable by reason only that it is not in writing or that there is no memorandum or note of the contract in writing.

The position of the law is that an oral contract not reduced into writing is binding nevertheless so long as there is clear evidence as to the essential terms and the actual intention of the of the parties. **See the case of Kobaku Associate v. Owusu [2006] 2 MLRG 228C.A at page 247 per Heward Mills J.**

ANALYSIS

Issue (a): Whether or not there was a valid agreement between the parties?

The case of the plaintiff is that he contracted the defendant to do bodyworks on his vehicle but despite paying the agreed amount for his services the defendant failed or refused to do the work despite several requests from him.

The defendant admitted the claim by the plaintiff to have contracted him to undertake the bodyworks but attributed the delay in completion of the work to plaintiff's refusal to handover the vehicle parts placed under his care to him.

The defendant stated further that the agreed amount to be paid as his workmanship was GHS 800.00 but was reduced to GHS 600.00 following the plaintiff's bargain and the plaintiff paid to him a deposit of GHS 450.00.

In the case of **Polimex (Polish Export & Import) Co. Ltd. v. B.B.C Builders & Engineers Co. Ltd. [1968] GLR 168 (HC),** it was held that the acceptance of part payment by a party to a contract constituted an affirmation of the contractual terms.

The admission by the defendant to the assertions by the plaintiff and the acknowledgement of receipt of the part payment therefore places the issue on the existence of an agreement between the parties beyond dispute.

Issue (b): Whether the agreement was breached by the defendant?

The plaintiff in his pleadings and evidence stated that he had paid the plaintiff for the service but the defendant failed to undertake the work.

The defendant denied this claim and attributed the delay in undertaking the bodyworks to the plaintiff's failure or refusal to make available the vehicle parts.

It was the case of the defendant that, for the sake of peace he procured another parts of the vehicle with his own money and fixed the vehicle. He tendered in evidence a copy of receipt covering the parts bought by him.

Section 14 of the Evidence Act, 1975 (NRCD 323) provides that, *"except as otherwise provided by law, unless it is shifted, a party has the burden of pursuation as to each fact the existence or non- existence of which is essential to the claim or defence he is asserting".* **See Bank of West Africa Ltd v. Ackun (1963) 1 GLR 176.**

Having admitted to receiving the vehicle and a deposit of payment for the agreed work, the burden shifted to the defendant who alleges that he gave the removed parts of the vehicle to the plaintiff to adduce evidence in support of that claim.

The defendant failed to provide evidence or called any witness to substantiate that claim but tendered into evidence an invoice on the parts he claimed to have bought personally to fix the vehicle. In effect, the defendant failed to prove the claim that he actually gave the parts to the plaintiff after removing them.

The agreement being unwritten did not disclose a specific date or duration for delivery by the defendant and this issue was also not addressed in the pleadings of any of the parties.

However, in the case of **Hasnem Enterprise Ltd v. IBM World Trade Corporation [1993-94] 1 GLR 172 (HC)** it was held that a contract indefinite as to time is determinable upon reasonable notice.

The invoice tendered by the defendant as evidence of the parts bought by him is dated 14th December, 2021, over two clear years from the date of agreement and three weeks from the date the writ was issued. Should that be relied upon as the time of acquisition of the parts, then it stands confirmed that as at the date of the commencement of this case by the plaintiff the parts had not been bought and the defendant had not done the work.

In **Ghana Ports and Harbours Authority v. Issoufou [1993-94] 1 GLR 24 (SC),** it was held that, even if a party to a contract is guilty of a fundamental breach, the contract would not be considered as having automatically come to an end.

The position of the law is that, the innocent party might either affirm the contract by treating it as still subsisting or he might treat it as finally and conclusively discharged and the consequences vary according to the choice he preferred.

If the innocent party took the first option and fully aware of the facts made it clear by words or acts, or even by silence that he refused to accept the breach as a discharge of the contract, the onus was effectively preserved, i.e. the contract remained in being for the future on both sides and each party had a right to sue for damages for past or future breaches. If the innocent party decided to opt that the contract be treated as discharged, his decision must be communicated to the party in default.

In this case, the plaintiff elected the first option by not accepting the breach as demonstrated by the actions of the defendant as discharge of the contract, which was the reason he kept calling on people to prevail upon the defendant to execute his obligations.

Whether plaintiff is entitled to his claim?

In his relief one, the plaintiff seeks for an order of the court directed at defendant to fix or replace the ignition key, front windscreen, side glasses, dash board, front seat, water

tank, back bumper, front gates and front handles which the defendant removed from his Hyundai Grace No. GW6380-13.

The nature of the relief amounts to the remedy of specific performance and as a general rule, specific performance will only be granted where damages will not adequately compensate the plaintiff.

In the case of **Redco Ltd. v. Sarpong [1991] 2 GLR 457, C.A.** the court held that, in contracts which were of such a nature that time became of the essence and a mere award of damages was not enough but there was ample evidence that the conditions set out in the contract to be fulfilled had all been or a substantial part had been fulfilled by a party, equity will entitle him to the equitable right of specific performance.

In this particular situation, it is the case of the defendant that the contract had been performed. To ascertain the facts, the court appointed an expert, Ernest Tengey, a welder in Dzodze Adagbledu to assess the vehicle and make a report to the court on his opinion about the state of the vehicle.

The report of the expert filed tendered on 16th November, 2022 indicated that all the parts of the vehicle mentioned by the plaintiff to have been removed were found to have been fixed and intact.

It was also observed that the defendant had used slightly used parts contrary to what he claimed to have been purchased in the invoice submitted but the slightly used parts in the opinion of the expert were of good quality.

These assertions were not challenged by any of the parties when the report was tendered. In effect the situation is that the parts having been already fixed, the court cannot grant the order in plaintiff's first relief.

Damages

The plaintiff in his second relief prayed for damages to be awarded against the defendant for keeping his vehicle for an unreasonable duration or time.

In principles of the law of contract, where a person puts up a conduct which demonstrates by implication that he is not willing to perform his side of an existing agreement, that person can be said to have repudiated the contract and the innocent party will be entitled to damages.

In the case of **JOSEPH VRS BOAKYE [1977] 2 GLR 392 C.A** it was held that, *"If one contracting party expressly or by conduct repudiated a contract, the other could either accept the repudiation and treat the contract as rescinded or refuse to do so, and regard the contract as still alive, so that his rights would fall to be determined when the time for performance arrives.*

Where a party accept the repudiation and treat the contract as rescinded, he comes under a duty to mitigate his losses and will be entitled to recover only such damages as he would have incurred if he had taken such reasonable steps in mitigation.

If a party elects not to rescind a contract but regard it as still alive, no duty to mitigate arises until the date fixed for performance arrives and the defendant still refuses to perform.

In the circumstance, the plaintiff when he came to the realization that the defendant was unwilling to perform and had despised all the attempts at settlement as he alleges could

have mitigated the damages by going for his vehicle especially when it is not the case that the defendant prevented him from doing so.

It was the observation of the court appointed expert that the vehicle although had been fixed, have had some parts corroded and still corroding due to the fact that it had been parked for quite some time.

The cause of the corrosion can be attributed to where the vehicle had been kept and it being stationery for a long time. Although the defendant cannot be absolved entirely from the factors that contributed to the current state of the vehicle, it is also the case that had the plaintiff acted in good time the damages could have been mitigated.

The court therefore orders that the court expert generates an estimated cost for replacement of the corroded parts identified in his report and furnish the parties with same. Both parties are to bear the cost generated for the corroded parts that need to be fixed equally.

Parties are to bear their own costs.

NELSON DELASI AWUKU

MAGISTRATE