JUDGMENT OF HER WORSHIP AMA ADOMAKO-KWAKYE (MS.), MAGISTRATE, DISTRICT COURT '2', KANESHIE, SITTING AT THE FORMER STOOL LANDS BOUNDARIES SETTLEMENT COMMISSION OFFICES NEAR WORKERS' COLLEGE, ACCRA DATED 1ST AUGUST, 2023.

SUIT NO. A2/032/23

MOHAMMED GHAZI SAMI HABBOUSHI
22 APLAKU STREET **::** **PLAINTIFF**
ABOSSEY OKAI

VRS.

1. **DELTA MICROFINANCE LTD**
   KOJO BRUCE HOUSE
   ADABRAKA

:: **DEFENDANTS**

2. **GLADYS AYENSU**
   KOJO BRUCE HOUSE
   ADABRAKA

JUDGMENT

Introduction

The Plaintiff caused the issuance of a Writ of Summons on 23rd August, 2022 praying this Court for the following reliefs:

a. *An order directed at the Defendants for the immediate payment of $37,353.3 or its equivalent in Ghana cedis being unpaid rent as at August 16, 2022;*

b. *An order against the Defendants to give vacant possession of the rented property to the Plaintiff;*

c. *Interest accrued on the $37,353.3 till date of final payment;*

d. *General damages; and*

e. *Legal cost*

The Defendants were duly served with all processes filed in the suit, with the 2nd Defendant served by substituted service, but they failed to appear in Court and as such, the Court proceeded with the matter. Where a party fails to attend Court to defend a claim that has been brought against him, he cannot later assert that he was not given a hearing or that the audi alteram partem rule has been breached. In **The Republic v High Court (Fast Track Division); Ex parte State Housing Co Ltd. (No. 2) (Koranten-Amoako Interested Party) (2009) SCGLR 185**, the Supreme Court held at page 190 that a party who disables himself from being heard cannot later turn around and accuse the adjudicator of breaching the rules of natural justice. See also the case of **The Republic v. Court of Appeal, Accra; Ex parte East Dadekotopon Development Trust and Another [2015] DLSC 3207**.

Under **Order 25 Rule 1(2)(a) of the District Court Rules, 2009 (C.I. 59)**, where an action is called for trial and the Defendant fails to attend, the Plaintiff would be allowed to prove his claim. The Defendants had the opportunity to come to Court to cross examine the Plaintiff's witness and to adduce evidence but they elected not to be present to challenge the Plaintiff's claim by their conduct of not appearing in Court. The Defendants can therefore not raise at any point that the door of justice was shut to him. It was held in the case of **Mence Mensah v E. Asiama [2011] 38 GMJ 174 SC** that: *"It is a salubrious principle of our jurisdiction that a*

litigant should have the opportunity of being heard, of telling his side of the story, of being free to present evidence and argument to buttress his case; but it is also settled law and dictates of common sense require also that once these opportunities have been extended to the litigant but the litigant decides not to avail himself of them within the period of the trial, he would not, on judicial considerations, be permitted to come later and plead for the reactivating of the very opportunities he declined to embrace."

See also **Poku v Poku [2007-2008] SCGLR 996.** The Court on the strength of these authorities therefore proceeded to hear the Plaintiff prove his claim. Though the Defendants did not appear before the court to challenge the suit, the Plaintiff is not entitled to automatic grant of his claims just because the Defendants did not attend court. Plaintiff has to satisfy the burden of proof on him before the court will grant the reliefs he seeks.

Plaintiff's claim

The case of the Plaintiff is that he is the proprietary owner of the property described as Kojo Bruce House, which is the subject matter of the suit and the landlord to the Defendants. The 1st Defendant is a financial institution incorporated under the laws of Ghana and engages in short term credit facilities to the general public. The second Defendant on the other hand is the chairperson and the person in charge of the operations of the 1st Defendant.

Plaintiff asserted that the 1st Defendant through the 2nd Defendant rented a property from him where the 1st Defendant currently operates its microfinance business. He stated that the tenancy agreement was executed on 19th March, 2013 at a monthly rent of $1,500. Plaintiff further added that within the period of the tenancy, the accumulated unpaid rent of the Defendants was $49,804.43 as at 16th August, 2022. Despite 1st Defendant's indebtedness to Plaintiff, the former continues to occupy the property and has been in occupation for over twenty-two months; October 2020-August 2022, without paying rent as per the terms of the agreement. Plaintiff averred that the unpaid rent as at 16th August, 2022 was $32,861.25.

According to the Plaintiff, in 2021, the 1st Defendant's agent approached him and pleaded for a discount on the accumulated unpaid rent due to financial distress in which the company found itself. Plaintiff stated that he agreed and offered a discount of 25% to the 1st Defendant. It is Plaintiff's case that effecting the 25% discount on the outstanding rent of $49,804.43 will reduce the rent payable to $37,353.3. Plaintiff stated that all his efforts to get the Defendants to pay the amount owed have proven futile. Plaintiff further added that he has on several occasions called for meetings with the Defendants to have the matter settled but Defendants have refused to heed to his calls.

It is Plaintiff's case that he is no longer interested in renting out the property to the Defendants and thus wants the Defendants to vacate the property. He averred however that Defendants will not pay the outstanding rent and give vacant possession of the property unless ordered by this Honourable Court to do so. He thus instituted this action against the Defendants seeking for the reliefs stated supra.

Issue

The main issue for determination is whether or not the Defendants are in arrears of rent and therefore liable to be ejected from Plaintiff's property.

Legal Analysis

It is trite that in civil cases, the general rule 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. The one who alleges, be (s)he a plaintiff or a defendant, assumes the initial burden of producing evidence. It is only when (s)he has succeeded in producing evidence that the other party will be required to lead rebuttal evidence, if need be. Proof lies upon him who affirms or alleges, not upon him who denies since, by the nature of things, he who denies a fact cannot produce any proof. See the following:

Sections 11(1) & (2), 12(2) and 14 of the Evidence Act, 1975 (NRCD 323)

Takoradi Flour Mills vs. Samir Faris [2005-2006] SCGLR 882 @ 900

GIHOC Refrigeration & Household vs. Jean Hanna Assi (2005-2006) SCGLR 458

Tagoe v. Accra Brewery [2016] 93 GMJ 103 S.C

Deliman Oil v. HFC Bank [2016] 92 GMJ 1 C.A.

In the case of **Agbosu v Kotey; In Re Ashalley Botwe Lands [2003 – 2004] SCGLR 420** His Lordship Brobbey JSC on the burden of proof held as follows:

> *"The effect of sections 11(1) and 14 and similar sections in the Evidence Decree 1975 may be described as follows: A litigant who is a Defendant in a civil case does not need to prove anything. The Plaintiff who took the Defendant to court has to prove what he claims he is entitled to from the defendant... At the same time if the court has to make a determination of a fact or of an issue, and that determination depends on the evaluation of facts and evidence the defendant must realize that the determination cannot be made on nothing. If the defendant desires a determination to be made in his favour, then he has a duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour…"* See also **Tagoe v. Accra Brewery [2016] 93 GMJ 103 @ 123 S.C** per Benin, JSC.

The Plaintiff had the onus of discharging the burden of producing sufficient evidence in respect of his claims on a balance of probabilities. Since the Defendants did not appear to cross-examine the Plaintiff, one would argue that he has conceded and indeed, the law is that he has conceded. The principle has been stated in a plethora of judicial authorities. See **Kwanko v. Lebanon Society [2014] 70 GMJ 118 at 141-142, per Dzamefe JA; Aryeetey v. Brown [2006] 5 MLRG 160 at 164, CA; Amoah VI v. Okine & 4 Ors. [2014] 77 G.M.J. 124 at 142, S.C; and GPHA v. Nova Complex Ltd. [2007-2008] SCGLR 806 at holding 3**. It must be pointed out that the principle that unchallenged evidence amounts to an admission is not without exceptions.

To start with, the Supreme Court held in **Dzaisu v. Ghana Breweries Ltd [2007-2008] SCGLR 539** that the principle that when a party fails to cross examine on an issue, that issue would be ruled against him is not an inflexible rule. Also, in the case of **In Re Johnson (Decd); Donkor v. Prempeh [1975] 2 GLR 182**, the Court of Appeal held that it was not always the case that the failure to cross examine on material issues amounted to complete acceptance of the evidence which an adversary offered and that where the evidence was incredible or romancing in character, a Court of law was not bound to accept it on the ground that it had been impliedly acknowledged by the adversary against whom it was offered.

The Plaintiff himself did not have any witness statement filed to testify in the case personally. The law is certain that a party need not testify in person. See the cases of **Nyamekye v Ansah [1989-90] 2 GLR 152**; **Adjei fio v Mate Tesa [2012-2013] SCGLR 1537 @ holding 1** and **William Ashitey Armah v Hydrafoam Estate (Ghana) Ltd [2014] DLSC 3000**. A witness statement was filed on 29th March 2023 and had been headed "Witness Statement of Sami Habboushi for the Plaintiff". The said Sami Habboushi testified by relying on the witness statement filed.

The pertinent question as a preliminary matter is to find out in what capacity the said Sami Habboushi testified. He did not tender in evidence any Power of Attorney donated to him by the Plaintiff to clothe him with capacity to testify on his behalf. In the absence of that however, since the Plaintiff does not necessarily need to testify (either by himself or through an Attorney), the said Sami Habboushi could testify as a witness if he is able to show that he has personal knowledge of the matters he testified to. None of the paragraphs of his adopted witness statement pointed to this. I have also had a look at the Exhibit which was tendered and I do not see his name as a witness or that he played any role in the tenancy for which reason he would be able to testify about those matters. His evidence therefore clearly becomes hearsay evidence which by **Section 117 of the Evidence At 1975 (NRCD 323)** is inadmissible. None of the exceptions to the hearsay rule also avails him.

The Court has power to exclude the inadmissible evidence from the record. In the case of **Amoah v Arthur (1987-1988) 2 GLR 87,** the Court of Appeal noted as follows: *"It was the duty of the trial court to reject inadmissible evidence which has been received, with or without objection, during the trial when he came to consider his judgment; and if he failed to do so that evidence would be rejected on appeal, because it was the duty of the courts to arrive at decisions based on legal evidence only."* It will therefore be erroneous to accept the evidence of Sami Habboushi. Thus, on the strength of Section 8 of the Evidence Act, 1975 (NRCD 323) and the case of Amoah v Arthur *supra*, I reject same.

The Court having rejected the evidence of Sami Habboushi, the consequences flowing therefrom is that the Plaintiff has no evidence before the Court for same to be evaluated and as such the claim of the Plaintiff fails. The Court therefore strikes out the suit.

[SGD]
AMA ADOMAKO-KWAKYE (MS.)
(MAGISTRATE)

Counsel

Paul Parker Atitsogbui, Esq. for the Plaintiff

No legal representation for Defendants