**IN THE DISTRICT COURT HELD AT ASOKWA-KUMASI ON 23RD AUGUST, 2023, BEFORE HIS WORSHIP JOSEPH YENNUBAN KUNSONG, ESQ, DISTRICT MAGISTRATE**

SUIT NO: AR/AO/DC2/C2/87/23

BOAKYE WILBERFORCE - PLAINTIFF

H/NO. PLOT 4, 9 STREET

BUOKROM-NEW SITE, KUMASI

VS

ERIC DAIZIE- -DEFENDANT

BANTAMA- KUMASI

PLAINTIFF- PRESENT

DEFENDANTS- ABSENT

MARK OSEI AGYEMANG, ESQ FOR THE PLAINTIFF-PRESENT

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**J-U-D-G-M-E-N-T**

**INTRODUCTION**

This writ was issued from the Registry of this Court and filed on 10/01/2023, the Plaintiff claiming from the Defendants the following reliefs: -

a. Recovery of cash the sum of fifteen thousand Ghana cedis (GHC 15,000.00) being the purchase price of Matiz car with Registration number AS 7505-20 which said car the Defendants sold to the Plaintiff and the amount of money the Plaintiff spent on servicing the aforesaid car before using same.

ALTERNATIVELY

b. An order of the Court to compel the Defendants to release the aforesaid car with its necessary title documents to the Plaintiff to use same for his commercial purpose.
c. Legal cost and fees.
d. Any further order(s) as the Honorable Court deem fit to make.

The Defendants did not appear before the Honorable court to defend the action. In order to satisfy the audi alteram Pertem rule, the Court ordered the Defendants to be served with hearing notice which the Plaintiff honorably complied. However, Defendants never stepped in Court to defend the claims against them by the Plaintiff.

It is trite law that the law does not give room for an indolent litigant to play any how on the field of justice. The fact that the Defendants failed and/or refused to attend Court does not mean that the wheels of justice must stop to prevent the Court from proceeding with the matter. The suit had to proceed notwithstanding the absence of the Defendants.

Therefore, to prevent parties from embarking upon an act or omission where proceedings are likely to be stalled in court, the case of the Defendants were struck out on 3/07/23 paving the way for Plaintiff to have the opportunity to prove his claims in line with order ***25 rule 1 (2) (a) of the District Court Rules (2009), C.I 59.***

***Sub rule 1 (2) (a) (b) of order 25 of 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, subsection 2 (b) states 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 Counter Claim, if any.

Accordingly, order **25 *rule 1(2) of CI 59*** was applied on the case of ***Republic vs. High Court, (Human Rights Division) Accra. Ex-parte, Josephine Akita, (Mancell-Ega) 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 spurn that opportunity to satisfy his own decision to boycott proceedings cannot latter complain that the proceedings have proceeded without hearing him and then plead the audi alteram partem rule.*

The same principle espoused (supra) was elaborated in the Nigeria case of ***Newswatch Communications Ltd vs. Atta (2006) AII 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 carriageway in the context of both the Plaintiff and the Defendant or both the Appellant and Respondent. The Court must not invoke the principle in favor 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 refused or fails to take advantage of the fair hearing process created by the Court cannot come 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 out at his doorstep by the trial judge cannot complain that he was denied fair hearing "(Emphasis mine).*

Armed with the authorities and statutory provisions, on 3rd July, 2023, the Plaintiff was granted audience and she testified on oath to prove his claims for the case to progress.

**BREIF FACTS**

The Plaintiff is a commercial driver and resides at H/No. Plot 4, 9 street, Buokrom new site, Kumasi. The Defendants are both residents of Bantama, Kumasi. 2nd Defendant gave the subject matter car Daewoo Matiz number AS 7505-20 to the 1st Defendant to sell as the car was said to have developed fault. Plaintiff saw the car and expressed interest in same and after inspection bargained, settling at a price of GHC 10,000.00 which he paid in two installments of GHC 2,400.00 and GHC 7,500.00.

The parties subsequently executed an agreement after the last payment. The 1st Defendant who executed the agreement released the subject matter to Plaintiff and promised that he would collect the documents on the car from 2nd Defendant and hand over same to Plaintiff. 1st Defendant however, failed/or refused to deliver on the promise made to Plaintiff leading to the present suit. During the trial, both 1st and 2nd Defendants refused and / or failed to appear before this Court to defend the action in spite of all the numerous hearing notices ordered which plaintiff complied.

**THE CASE FOR THE PLAINTIFF**

The Plaintiff gave evidence on oath and stated that, he is a Commercial driver at Bantama and resides at Buokrom new site, Kumasi. According to the Plaintiff, 1st Defendant is also a commercial driver at Bantama station and drives the car which is the subject matter of this suit for 2nd Defendant who is the car owner.

Plaintiff intimated that Defendants wanted to sell the car which is a Daewoo Matiz 3 and both parties bargained and arrived at a price of GHC 10,000.00. Plaintiff intimated further that, he paid Defendants 2,400.00 for the first installment and the remaining GHC 7,600.00 for the last installment. Plaintiff continued with his evidence that before he made the last payment, both parties agreed that the documents covering the car would be handed over to him. Plaintiff states that he executed an agreement at Suame

Police station with 1st Defendant who acted on behalf of the 2nd Defendant and same witnessed by Inspector S.K. Ofori which is marked as exhibit 'A'.

It is the further case of Plaintiff that whiles waiting for the documents on the car, he spent GHC 5,000.00 to service the car into a motorable condition. Plaintiff stated also that, after servicing the car, 2nd Defendant seized the car claiming that he is the owner of same. According to Plaintiff, the matter was reported to the Sentreso Police station where 2nd Defendant was arrested and he admitted having been authorized by 2st Defendant to sell the said car to Plaintiff. That 1st Defendant said even though he permitted 2nd Defendant to sell the car, 1st Defendant refused to give the money to him. Plaintiff added to his evidence that, 2nd Defendant caused the arrest of 1st Defendant and the car was impounded by the Police. That, at the police station, 2nd Defendant repeated that he authorized 1st Defendant to sell the car which is the subject matter to the Plaintiff. The Plaintiff contends that 1st defendant was subsequently arraigned before District Court at Twedie. However, 2nd Defendant failed to attend court to prove his case forcing the court to struct out the case against 1st Defendant for want of prosecution. Plaintiff further intimated that the car has since been retained by the Police, although 1st Defendant was discharged by the Court.

The Plaintiff concludes his evidence that the 2nd Defendant voluntarily permitted the 1st Defendant to sell the car to him and he the Plaintiff duly paid the amount agreed to the Defendants and that the subject matter car should be given him together with the title documents, hence the reliefs sought.

The Plaintiff tendered in evidence the following Exhibits without any objection:

Full payment receipt on the sale of Daewoo Matiz with Registration number AS 7505-20/ Sale agreement between Plaintiff and the 1st Defendant-EXHIBIT "A"

Court proceedings from the District Court, Twedie dated 29th June, 2022- EXHIBIT "B"

**ISSUE**

At the close of trial, the issue which fell for determination by the Court is whether or not Plaintiff is entitled to the reliefs he sought.

**APPLICABLE LAW**.

In all Civil Cases, the burden of producing evidence rest on the Plaintiff to convince the Court to rule in his favor on any allegation he makes.

***Section 11(1) and (4) of the Evidence Act, 1975 (NRCD 323)*** *Burden of producing evidence defined (1) for the purpose of this Act, the burden of producing evidence means the obligation of party to introduce sufficient evidence to avoid a ruling on the issue against that party.*

*11(4) In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.*

*It is trite law that for the Court to decide a case in one way or the other, the party who alleges must lead evidence to prove the allegations made.*

*12(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities".*

*"(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence".*

*Thus* **Section 14 of the Evidence Act, 1975 (NRCD 323***) provides as follows: -14. Allocation of burden of persuasion.*

*Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claims or defense that the party is asserting.*

*In reference to this principle of law,* ***Adwubeng vs. Domfeh [1996-97] SCGLR 660*** *held that the standard of proof in all Civil Cases is proof by preponderance of probabilities. The Principle was also applied in the case of* ***Yorkwa vs. Duah [1992-93] GLR 281****.*

*Further, in the Case of* ***Dzaisu and others vs. Ghana Breweries Ltd, [2007-2008]1SCGLR 539 at 545****, the Supreme Court per Adinyira Stated as follows: -*

*"It is a basic principle in law of evidence that the burden of persuasion in proving of facts essential to any claim lies on whoever is making the claim.*

Thus, in ***Continental Plastics Engineering Co. Ltd v. IMC Industries Technik GMBH [2009] SCGLR 298 at 306-307***, it was held that a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the facts he asserts can properly and safely be inferred.

This therefore requires a party making assertions to produce such evidence in proof of the assertions, such that the Court is convinced, that the existence of the facts he asserts are more probable than their non-existence.

It is important to note that throughout the evidence of the Plaintiff, the Defendants were not in Court to cross-examination the Plaintiff and to give evidence to rebut the assertions of the Plaintiff despite numerous hearing notices including substituted service the Plaintiff caused same to be served on the Defendants.

Having waited without any hope of the Defendant appearing in Court to give evidence, this Court gave audience to the Plaintiff relying on ***Order 25 rule 1 (2) (a) (b) of the District Court rules, (2009), CI59.***

***Order 25 of C.I.59, 2009*** provides 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.

Commented [A1]:

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 Counter-claim if any.

***The principle in Order 25 of C.I. 59*** was applied in the case of ***Republic vs. High Court (Human Rights Division) Accra, Ex-parte, Josephine Akita, (Mancell-Ega) Attorney-General interested party (supra)***.

Similarly, in the Case of ***Republic vs. High Court (Human Rights) Division, Accra ex-part state Housing Company (No.2) [2009] SCGLR 374,*** it was held inter alia that where a Court gives a party an opportunity to state their side of the story and the party fail and /or refused to do so, the Court has the discretion to proceed and hear the case.

This same principal espoused (supra) was elaborated in the Nigerian case of ***Newswatch Communication Ltd vs. 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 Respondent. The Court must not invoke the principle in favor 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 refused 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 out at his doorstep by the trial judge cannot complain that he was denied fair hearing "(Emphasis mine…)*

In the above quotation, 'the party who is not up and doing refers to the Defendants in the instant suit who has failed and / or refused to attend Court in spite of all the hearing notices, ignored the Court to take his own decision not to attend court.

**EVALUATION AND ANALYSIS OF EVIDENCE.**

In the course of the trial, the Plaintiff adduced evidence to the effect that he bargained with the Defendants to buy their Daewoo Matiz 3 car and both parties arrived at a price of GHC 10,000.00 which Defendants have received the value. Plaintiff further gave evidence that the parties went ahead and executed an agreement evidencing the transaction. This, according to the Plaintiff was executed at the Suame Police Station and same witnessed by Inspector S. K. Ofori.

The plaintiff stated it was now left with the Defendants to transfer the title document to him only for the 2nd Defendant to seize the car claiming he has not received the value of the car from 1st Defendant although he 2nd Defendant authorized the 1st Defendant to dispose of the car to Plaintiff. Plaintiff collaborated this by making reference to EXHIBITS 'A' and 'B' in which 1st Defendant executed an agreement on behalf of 2nd Defendant with Plaintiff.

In EXHIBIT B too, 2nd Defendant confirmed that 1st Defendant admitted selling the car to Plaintiff but failed to hand over the proceeds to 2nd Defendant.

Both Defendants however refused/ or failed to attend court to rebut what the Plaintiff said, although every opportunity was given them to attend court to defend the action. It is trite law that a party who fails to attend court when given the opportunity to be heard but spurn that opportunity, he cannot turn round and say that he was not given the chance to be heard. That will not be fair to the court. See the case of ***The Republic vs. High Court (Human Rights Division) Accra, Ex-parte, Josephine Akita, (Mancell-Ega) Attorney-General interested party (supra)***

Plaintiff further gave evidence that when defendant failed to honor his obligation to transfer the said car, the Plaintiff made all efforts for Defendants to honor their promise but all efforts proved futile and that the 2nd Defendant subsequently seized the car with the reason that he has not receive the value of the said car from 1st Defendant.

The Plaintiff produced evidence which is EXHIBIT A to show to the court that indeed he had an agreement with the Defendants to but the Daewoo Matiz 3 car. The duty of the Court is to enforce legal obligations of the parties. See the case of……. In the instant case the Defendants wanted to sell their car, the subject matter. Plaintiff saw same and expressed interest and later bargained the price which parties settled at GHC 10,000.00 which was paid to the 1st Defendant who was at the time agent for the Principle, the 2nd Defendant.

***Section 25(1) of the Evidence Act, 1975 (NRCD 323)*** provides that the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest. In ***Fosuah and Adu-Adu vs. Dufie (Deceased) and Adu Adu Poku Mensah [2009] SCGLR 310***, it was held that: "it was settled law that documentary evidence should prevail over oral evidence". The Plaintiff produced exhibit A which is the sale agreement. This document was not challenged since Defendants failed to appear before court to defend the action.

***Further, section 26 of the Evidence Act, 1975 (NRCD 323***; provides for estoppel by conduct. This is the rule whereby a person by his conduct or words knowingly induces another to believe in the existence of a state of things, and if in that belief the latter acts to his detriment, the former will be prevented from setting up against the latter a different state of things as existing at the relevant time. The court thinks that 1st Defendant signed exhibits A on behalf of the 2nd Defendant. It beats one's imagination why the Defendants would receive GHC 10,000.00 from the Plaintiff and turn round to seized the car. If 2nd Defendant had any any case with the 1st Defendant, why would he report a case at Sentreso Police station and refused to attend court when the 2nd Defendant was charged for court.

In ***Richmond Boamah Berimah vs. Albert Nanor, Janet Opoku and Pastor Dan Cato [2021] DLSC 10829 at page 29*** per Prof. Mensa-Bonsu, JSC held that "Equity would find it unconscionable that a person should benefit from having created the wrong impression, on which a party may have acted to his or her detriment, and then pulling back when the logical result of that impression created a consequence the party found inconvenience. After the execution of the sale agreement which was suppose to seal the deal, Defendants failed to deliver on their promise as the 2nd Defendant turned round and seized the car which he had authorized his agent to sell for him.

After a careful study of the evidence by the Plaintiff, the Court observed that Defendants actually sold the Daewoo Matiz 3 number AS-7505-2020 to Plaintiff in the ordinary cause of business. When the matter was taken to Twedie court, 2nd Defendant who was the complainant failed to attend court compelling the court to strike out the case for want of Prosecution and accused was accordingly discharged. The Court finds that when the suit commenced, defendants were notified about the pendency of the suit but they elected not to attend which is their own choice.

The Plaintiff bought the car based on the conduct of the Defendants and to that extend, Defendants cannot turn and seize the car depriving Plaintiff of what is due him. See the case of ***Richmond Boamah Berimah vs Albert Nanor, Janet Opoku and Pastor Cato (supra)***

In the case of ***Quargraine vs. Adams [1981] GLR 599,*** it was held that evidence unchallenged or uncontroverted by the opposing party who had opportunity to do so shall be deemed to have admitted. The same principle was applied in the case of ***Ayea-Djamson vs. Duagbor [1989-90] GLR 223, SC***.

The impression this Court gathered from the evidence of the Plaintiff is that all efforts made by the Plaintiff to get the title documents from the Defendants were not successful.

As can be gleaned from the facts of this case, Defendants were fully aware of their obligation to the Plaintiff but elected to be silent on that, even though they had notice of the action in Court. It is deemed that Defendants admitted the claims made by the Plaintiff and to that extend be presumed not to have any defence to the claims.

In the case of ***Vasquez vs. Quarshie [1968] GLR 62*** where Amissah J.A. sitting as an additional High Court judge stated in holding (3) of the headnotes as follows:

"a Court making a decision in case where a party did not appear because he had not been notified would be doing an act which was a nullity on the ground of absence of jurisdiction. But with the instant action, the Defendants are fully aware of the pendency of the matter but elected not to attend Court to defend themselves. The Court has a mandate to provide neutral ground for fair hearing but the Court has no such obligation to compel a party to take advantage of the opportunity. See the case of ***Newswatch Communications Ltd vs Atta (supra).***

In another case of ***Republic vs. Court of Appeal and Thomford, Exparte Ghana Chartered Instituted of Bankers [2011] 2 SCGLR 94***, the Supreme Court referred to its resent decision that non-compliance with the audi alteram partem rule would result in nullity. The Defendants in this case had full knowledge of the pendency of the matter before the Court but on their own choose not to attend Court. It is purely their own doing.

In the respectful view of the Court the evidence adduced in this case by Plaintiff in support of his claim for the title documents covering Daewoo Matiz 3 number AS-7505-2020 or the recovery of the sum GHc15, 000.00 being Defendants' indebtedness to the Plaintiff met the required evidential standard and as such the case of the Plaintiff is proved. Plaintiff proved to the Court that Defendants sold the car to him and he paid the agreed price of GHC 10,000.00 which is not in dispute and which both Defendants admitted in exhibits A and B, that is the sale agreement and the Court proceedings from the District Court, Twedie.

The Court expected the Defendants knowing fully well that they were indebted to the Plaintiff would save themselves by heeding to the summons of the Court. In the respectful view of the Court in the circumstances, once defendants had notice of the litigation regarding the amount in dispute or the subject matter, ignores the Court processes, and not enter appearance to defend was their own making.

Since the defendants had notice but failed to participate in the trial in Court, they cannot raise any issue of irregularity in the proceedings because they were offered every opportunity to be heard but they declined, see the case of ***Republic vs. High Court, Accra, ex-parte All gate [2007-2008]2 SCGLR 1041***, The Plaintiff has convinced this Court to its satisfaction that he is entitled to the reliefs brought before this Honorable court.

Base on the numerous authorities including statutes and case law cited above, a person who deliberately spurns the opportunity to be heard cannot rely on the audi alteram partem rule and accuse an adjudicator of breaching the rules of natural justice and in direct reference, this court.

Under the circumstances, this Court noting the deliberate refusal/failure of Defendants to participate in the Court proceedings, despite notice to them and the Court proceedings consider the case on its merits and making the appropriate pronouncements, Defendants cannot ever say that the judgment pronounced in this suit was obtained fraudulently.

To sum up, a party who is aware of the hearing of a case, but willfully elects to stay away out of his own decision could not complain that he was not given the opportunity to be heard. He can only appeal on the merits of the judgment.

In civil proceedings, the rules of evidence require parties to make out their claims on a balance of probabilities. Thus, in the case of ***Takoradi Flour Mills v. Samir Faris (2005/2006) SCGLR 882 at 900,*** the court commented on 'balance of probabilities' as follows:

"... in assessing the balance of probabilities, all the evidence, be it that of the Plaintiff or the Defendant must be considered and the party in whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favorable verdict". In the instant case, the Plaintiff succeeds on the merits of his case since Defendants were not in court to challenge the evidence of the Plaintiff.

***DECISION.***

This Court holds that the Plaintiff's reliefs as to recovery of the sum of GHC 15,000.00 being Defendant's indebtedness to the Plaintiff successful.

The standard of proof in Civil Case including debt recovery is proof on the balance of probabilities which Plaintiff succeeded.

***Section 11(4) and 12 (1) of the Evidence Act, 1975 (Act 323***) and the decision of the Supreme Court in ***Adwubeng vs. Domfeh [1996-97] SCGLR 65, Asante Appiah vs. Amponsah [2009] SCGLR 90, Yaa Kwasi vs. Arhin Davies [2007-2008] SCGLR*** are emphatic on that.

1. I) The 1st and 2nd Defendants are ordered to pay GHC 15,000.00 to the Plaintiff with the accrued interest at current Commercial Bank rate calculated from 13th April, 2022 till date of final payment.

Or

II) the Defendants are ordered to release and hand over the title documents on Daewoo Matiz-3 car with Registration Number AS 7505-20 to the Plaintiff.

2. The court further give order that the Station Officer of Sentreso Police Station is to release Daewoo Matiz 3 car with Registration Number AS 7505-20 to BOAKYE WILBERFORCE, the Plaintiff in this matter.

3. The Court hereby award cost of GHC 3,000.00 against Defendants in favor of the Plaintiff..

**H/W JOSEPH YENNUBAN KUNSONG, ESQ.**

**MAGISTRATE**

**ASOKWA DISTRICT COURT 2.**

**23RD AUGUST, 2023.**