

**IN THE DISTRICT COURT ASOKWA HELD ON MONDAY, 31ST OCTOBER, 2023
BEFORE HIS WORSHIP JOSEPH YENNUBAN KUNSONG, ESQ. DISTRICT
MAGISTRATE.**

SUIT NO. AR/AO/DC2/118/2022

**YAW OWUSU SUING PER HIS LAWFUL ATTORNEY.
PLAINTIFF
OPPONG SABESTIAN OF H/NO. PLOT 21 BLOCK 5,
SOKOBAN NEW SITE-KUMASI**

VRS

**MERCY OSEI TUTU
DEFENDANT
PRINCE OSEI TUTU
BOTH OF H/NO PLOT 21 PLOT 5
SOKOBAN-KUMASI.**

PARTIES	–	PRESENT
CLEMENT MARFO, ESQ, COUNSEL FOR THE PLAINTIFF	–	PRESENT
KINGSLEY BONSU KYERETWIE, COUNSEL FOR THE DEFENDANT	–	PRESENT

J U D G M E N T

The Plaintiff on the 5th November, 2021 filed a Writ of Summons against the Defendant for the following reliefs;

- (a) Unlawful Damage of assorted items worth Thirty-Nine Thousand, Four Hundred Ghana Cedis (GHC 39,400.00)*
- (b) The payment of the specific value of the damage (Thirty-Nine Thousand Four Hundred Ghana Cedis (GHC 39,400.00) caused by the Defendants*
- (c) Damages.*
- (d) Cost including legal fees.*

CASE FOR THE PLAINTIFF

The Attorney Sebastian Oppong testified on behalf of the Plaintiff and told the court that he knows the parties and that the Plaintiff's father personally acquired the building plot No. 21, block 5 Sokoban, New site. The Attorney further told the court that Plaintiff's father gifted a portion of the disputed plot 21 block 5 to the Plaintiff.

The Attorney also told court that Plaintiff paid "aseda" of one thousand cedis (GHC 1,000.00) and a bottle of schnapps to the late father in the presence of a witness. The Plaintiff Attorney continued with his testimony that after paying the aseda, quickly constructed a two (2) bedroom flat on the said plot gifted him by his late father and furnished same with furniture before living for the United States of America where he is currently residing. The Attorney intimated that, while the Plaintiff was in the USA, he was informed about the demise of his father and he came down only to realise that all his belongings including living room sofa- GHC 7,000.00, Microwave- GHC 1,000.00, Table Top fridge-GHC 3,000.00, Car jack- 5,000.00, King size Bed- GHC 5,000.00, Queen size Bed- GHC 8,000.00, Step down (3) GHC 1,500.00, two ceiling Fans (2) GHC 800.00, Two ice- GHC 1,600.00, Double Wooden Bed- GHC 1,500.00 and Brand New Wall Air Condition- GHC 5,000.00 all valued Thirty-Nine Thousand, four hundred Ghana Cedis (GHC 39,400.00) had been brought out from the two bedroom flat he built and lived in.

The Attorney further intimated that all the properties got damaged and he reported the case of causing damage to the Police at Asokwa who after initial investigations advised that the case was more civil and as such should be brought to the Court. The Attorney concluded his testimony that the act of the Defendants is unlawful and that the defendants intentionally threw the items away from the two-bed room flat where same are exposed to the unfavourable weather.

The Plaintiff tendered photographs of the damaged properties marked **EXHIBIT ONE (1) SERIES** in support of his claims.

CASE FOR THE DEFENDANT

The 1st Defendant, Mercy Osei Tutu, stated in her evidence that she knows the Plaintiff who is a son of her late husband Isaac Osei Tutu and that before Plaintiff married his second wife in 2015, he requested for a room from her late husband to keep his belongings and a room from their eight-bedroom matrimonial home was given to him. According to 1st Defendant, this matrimonial home was built by her late husband without any form of support from the Plaintiff. 1st Defendant also stated that in January, 2020, her husband's health deteriorated as a result Plaintiff's belongings were brought out to the hall and the room was rented out to a tenant to raise money to take care of the medical bills.

1st Defendant further stated that, while the items were being removed, she had gone to Offinso to collect medicine for her sick husband as I had to devote all my time to provide care for him and that the renting out of the room became necessary due to the low income of her husband who was a pensioner. It is the case of the defendant that, the Plaintiff did not offer any form of support to her late husband and beyond that took away the only car used in transporting her husband to and from hospital making life extremely difficult and that her husband passed away on 25th March, 2020, as a result of litigation over the house, the funeral is yet to be performed.

Defendant intimated that after the one-week celebration, Plaintiff caused her arrest by the Asokwa Police accusing her of removing his belongings from the room earlier given to him. That two Police officers from Asokwa, the Plaintiff, one Cecilia Akuffo, Patricia and the 2nd defendant went to the house for inspection and after the inspection, Plaintiff confirmed that those items were his and that they were intact. Defendant further intimated that the Police dropped the prosecution of the case as a result Plaintiff threatened to harm her which matter was reported to the Police. Defendant concluded that just after the Police case, the defendant left for the United States of America and returned only to serve her with a writ of summons to appear before the court to answer allegations that she knew nothing about and that the

Plaintiff has nothing to claim from the Defendants. The defendant tendered the following Exhibits in support of her claims;

- A. AN ALLOCATION NOTE-EXHIBIT 1**
- B. COPY OF TENANCY AGREEMENT -EXHIBIT 2**
- C. COPY OF FUNERAL INVITATION-EXHIBIT 3**
- D. COPY OF POLICE REPORT-EXHIBIT 4**

EVIDENCE OF 2ND DEFENDANT.

2nd Defendant is called Prince Osei Tutu who is half-brother to Plaintiff and a son of the deceased Osei Tutu. 2nd Defendant stated that his late father built two separate houses made up of four (4) bedroom house and eight (8) bedroom house on the same compound at Sokoban. According to 2nd Defendant, his late father rented out the four 4 bedroom and the family members including the Plaintiff, the 1st Defendant, other siblings and he himself live in the 8-bedroom house.

2nd Defendant further told the Court that the Plaintiff mostly resides in the United States of America but lives in the family house at Sokoban where he has a room given him by their late father. 2nd Defendant also told Court that in 2018, Plaintiff who was not in good talking terms with their late father travelled to US.

According to 2nd Defendant his father got sick and needed money to take care of his medical bills but the Plaintiff did not offer any support due to the conflict between the two leading to the renting of the room occupied by Plaintiff to raise money to cater for medical bills. 2nd Defendant intimated that it was their late father who employed the services of some men to evacuate Plaintiffs' items from the room to give way for a tenant to occupy. 2nd Defendant further intimated that his father passed away in March, 2020 and when the Plaintiff came from the United States, reported 1st Defendant to the Police at ASOKWA, accusing her of removing his belongings from the room. It is the case of 2nd Defendant that the Police conducted an inspection of the items and Plaintiff confirmed that they were intact. It is further case of 2nd

Defendant that some weeks later Plaintiff threatened to kill the 1st defendant and he was arrested by the Police and after Police investigations left to the United States only to come back in November, 2021 to serve them with a writ of summons. 2nd defendant tendered the following exhibits to support his claims;

A. PHOTOGRAPH OF THE TWO HOUSES-EXHIBIT ONE (1) SERIES

EVIDENCE OF DW1

Lucy Owusu Nyarko is DW1 and also, a daughter to the 1st Defendant. In her testimony to this court, said that in 2019, while the 1st Defendant was away in offinso to secure medication for her late father, his late father asked her to look for someone to assist pack the belongings of the Plaintiff from the room he occupied because the room was to be rented out to someone. According to DW1, his father was in need of money to pay his medical bills and that she called two men to assist her late father evacuate those items from the room of the Plaintiff. She concluded her evidence that in her presence the Plaintiff's belongings were packed and moved to the hall of my father's house for safe keeping.

SUBMISSION BY COUNSEL FOR THE PLAINTIFF.

In his submission to the court, counsel argued that Plaintiff asserted that it was the 1st and 2nd defendants who threw out his belongings causing damage to same. Counsel for Plaintiff submitted that 1st defendant's claim that it was her late husband Isaac Osei Tutu who arranged for the Plaintiff's properties to be packed out is not true. It is also counsel's submission that 2nd Defendant in his testimony to the count stated that his late father rather hired some men to bring out the belongings of the Plaintiff to the hall, adding that the 2nd Defendant and DW1 did not call those guys to buttress their claim, hence same cannot be said to be true.

Finally, Counsel for the Plaintiff submitted that, the Defendants threw Plaintiffs properties out thereby causing damage but were only taking cover from the Plaintiff's

deceased father Isaac Osei Tutu, hence judgment should be entered in favour of the Plaintiff.

SUBMISSION BY COUNSEL FOR THE DEFENDANTS.

The main gravamen of Counsel for the Defendants is that the Attorney who represented the Plaintiff during the trial did not have the capacity to have testify on behalf of the Plaintiff. To that extend, evidence of the Attorney should be disregarded since the Attorney had no power of attorney to prosecute the matter for the Plaintiff. Counsel relied on the case of **NII KPOBI TETTEH TSURU III & 2 OTHERS VS AGRI-CATTLE & 4 OTHERS CIVIL APPEAL NO. J4 /15/2019 DELIVERED ON 18TH MARCH,2020** where the Supreme Court ruled that" A persons capacity to sue whether under a statute or rule of practice must be present and valid before the issuance of the writ of summons, else the writ of summons is a nullity.

Counsel for the Defendants submitted that relying on the standard of proof in civil proceedings being on the balance of probabilities come to conclusion that Defendants could not have been responsible for the removal of the Plaintiff's properties into the hall.

Counsel for the defendants submitted that the 1st and 2nd Defendants were consistent in their testimony to the court that it was the late Isaac Osei Tutu who engaged some people to remove the properties of Plaintiff from where they were and packed them in the hall.

Counsel also submitted that Plaintiff was not able to prove his claim that the cost of the damage was GHC 39,400.00 as Plaintiff did not produced any document or call any witness to corroborate what he told the court and to that extent, Plaintiff is not entitle to the claim as same failed to amply support same with the required evidential threshold.

Counsel concludes his submission relying on the case of **ATTORNEY GENERAL VS FAROE ATLANTIC COMPANY LTD [2001-2006] SCGLR WHERE DR. TWUM JSC**

(As he was then) held that general damages are such as the law will presume to be natural and probable consequences of a party's act. That Plaintiff has not provided the requisite evidence to link the Defendants to the unlawful damage allegedly caused to the Plaintiffs assorted items and as such it will be unfair to force the defendants to pay damages to the Plaintiff. Counsel therefore invited the court to dismiss the claims of the Plaintiff with a punitive cost of GHC 100,000.00

ISSUES:

At the close of the parties' respective evidence, the main issues that came up for determination by the Court are as follows;

1. *Whether or not the Plaintiff was gifted portion in House Numbered Plot 21, Block 5, Abrepo – Kokoban New site- Kumasi which he constructed two bed rooms.*
2. *Whether or not it was the defendants who caused damage to the assorted items belonging to the plaintiff for which they must pay damages.*
3. *Whether or not the Plaintiff is entitled to a recovery of the GHC39, 400.00 being the cost of damage caused by the defendants to the assorted items belonging to the Plaintiff.*
4. *Whether or not the plaintiff is entitled to the various reliefs sought*

ISSUE 1: WHETHER OR NOT THE PLAINTIFF WAS GIFTED PORTION IN HOUSE NUMBERED PLOT 21, BLOCK 5, ABREPO – KOKOBAN NEW SITE- KUMASI WHICH HE CONSTRUCTED TWO BED ROOMS.

In this issue, the court shall discuss three key areas, namely;

- i. *Standard of proof in civil litigation*
- ii. *Evidence against dead persons; and*

iii. *Proof of transfer of interest in land under the law.*

APPLICABLE LAW AND AUTHORITIES

The standard of proof in civil litigation, which requires proof on the balance of probabilities, hinges on the general principle that the party who alleges carries the burden of proof. The principle was opined in several authorities including the case of **Bank of West Africa Ltd. v. Ackun [1963] 1 GLR 176-182** and same applied in **Faibi v. State Hotels Corporation [1968] GLR 471-480**. In **Faibi's** case, Ollennu J.A, stated that the onus in law lay upon the party who would lose if no evidence was led in the case; and where some evidence had been led it lay on the party who would lose if no further evidence was led.

Kpegah JA (as he then was) restated the principle in **Zambrama v. Segbedzi (1991) 2 GLR 221** as follows:

"... 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 fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of that burden."

(See also **Continental Plastics v. IMC Technique GMBH (2009) SCGLR 298 at 307** Judgment by Georgina Woode CJ).

It is also provided under *section 11(4)* of the *Evidence Act, 1975 (NRCD 323)* as follows:

"In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence leaves a reasonable mind to conclude that the existence of the fact was more probable than its non-existence".

A party discharging the burden of proof must therefore, introduce evidence which is essential to that party's case as required under *section 14* of *(NRCD 323)* which provides:

“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 claim or defence that party is asserting.”

It is significant to note that the burden of persuasion usually rests on the same party who bears the evidential burden as was held in **Sumaila Bielbiel v. Adamu Dramani & AG [2012] SCGLR 370**. In that case, the court stated:

“Ordinarily, the burden of persuasion lies on the same party as bears the burden of producing evidence. However, depending upon the pleadings or what facts are admitted, the evidential burden can move to a defendant...”

EVELUATION OF THE EVIDENCE AND THE LAW

In the Plaintiff’s evidence, he stated that during the lifetime of his late father Isaac OseiTutu, the father gifted a portion of Plot Number 21 block 5, Sokoban new site to him and that after the gift, Plaintiff paid Aseda of one thousand Ghana cedis (GHC 1,000.00) and a bottle of schnapps to the late father in the presence of a witness. Plaintiff’s case is that after providing the Aseda, he quickly put up a two-bed room flat on the said portion of land gifted to him by his late father.

It is trite law that a gift in customary law need not be in writing but there are certain requirements for the making of a valid gift under customary law. In the case of **IN RE SUHYEN STOOL [2005-2006] SCGLR 424**, the Supreme Court laid down the following as the requirements for the making of a valid gift under customary law:

1. A clear intention to make a gift.
2. Publicity must be given to the making of the gift;
3. The gift must be accepted by the donee.

Furthermore, In the case of **GIWAH V. LADI [2013-2014] 2 SCGLR 1139**, the supreme Court held that with respect to the requirements for a valid gift under customary law, *“Customary gift of landed property must be offered and accepted and must be*

witnessed by someone other than the donor and the donee. Thus, to prove a customary gift, it was not sufficient to state barely that a gift was made. A party relying on a customary gift must show the occasion, if any, on which the gift was made, the date, the time if possible and the venue; and most importantly, in whose presence it was made.

In the instant case, Plaintiff barely told this Court that he was allocated a portion of plot 21 block 5 Sokoban where he put up a two-bedroom flat. There is no evidence regarding when the gift was made. The Plaintiff did not call any witnesses who witnessed such a gift to buttress the Plaintiff's claim that he paid GHC 1,000.00 and a bottle of schnapps to his late father.

It is not sufficient to make assertions without adducing evidence. A party making such assertions has to produce sufficient evidence to support the claim.

This principle was applied in the case of *NDK FINANCIAL SERVICE VS AHAMANG ENTERPRISE AND OTHERS [2021] UNREPORTED SC (02 JUNE, 2021) GBADEGBE JSC* held that "In the course of the proceedings, the respondent only asserted the existence of an amount in the sum of Ghc56,745.00 as outstanding under the judgment of the Court but unfortunately neither in the process before us nor in the Course of Cross-Examination of the referee was any attempt made to show that indeed, the said sum of money was outstanding. The mere assertion of the existence of the said outstanding amount is merely repeating what the applicant by the nature of its case is required to prove and cannot suffice to make us reach the view as provided in **SECTION 12 OF THE EVIDENCE ACT, 1975 (NRCD 323)** that the existence of the asserted fact" is more probable than it's non-existence"

In the case of *MAJOLAGBE VRS LARBI & OTHERS [1959] GLR AT 192*, it was held that "proof in law is the establishment of fact by proper legal means. Where a party makes an averment capable of proof in some positive way, for example producing documents, description of things, reference to other facts, instances or circumstances

and his averments are denied, he does not prove it merely by going into the box and repeating that averment on oath, or having it repeated on oath by his witnesses. He proves it by producing other evidence of facts and circumstance, from which the Court can be satisfied that what he avers is true.

In the instant case, Plaintiff aver that a portion of the land belonging to his late father was given to him and he quickly put up a two-bed room flat on the land. The Plaintiff did not produce any form of evidence to proof his claim except his bare claim that he paid '**ASEDA**' of **GHC 1,000.00** and a **bottle of schnapps** to his late father to conclude the transaction. The Plaintiff did not call any witness to testify to this claim. No date, time and venue were stated by the Plaintiff to support his claim on the gift.

Since the Plaintiff was not able to meet the requirements of a valid customary gift, the claim of the Plaintiff on this issue is not maintainable.

The 1st Defendant however, disputes the Plaintiff's evidence. She contends that the late husband Osei Tutu build the properties on plot No 21 block 5, Sokoban and allocated one room to the Plaintiff. This assertion was supported by the evidence of 2nd Defendant and DW1 who both testified on oath that Plaintiff was given one room to live in before he travelled to the United States of America.

The 1st Defendant further stated in her evidence that her late husband single-handedly financed the construction of the property without any form of support from the Plaintiff. These assertions by the 1st defendant were not controverted by the Plaintiff and no evidence was adduced by the Plaintiff to suggest that he put up two bedrooms flat on the disputed land. It must be noted that the Plaintiff called no witnesses nor tendered any documents to corroborate his evidence.

In fact, the only ground Plaintiff seems to defend is that he was gifted land by the late father Osei Tutu and he put up two bedrooms flat. "*Where is the said Osei Tutu to testify to confirm or deny the Plaintiff's case?*" In other words, the dead don't talk therefore, the

burden of proof shall, by default, fall on the Plaintiff. This will lead the court to discussion of issues of *evidence against dead persons*.

The guiding principles in evaluating evidence against dead persons was enunciated by Brett MR, in the case of **GARNETT, IN RE; GANDY MACAULY (1885) 31 CH D 1 AT 9**. In that case, it was stated;

"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive, he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be, first of all in a state of suspicion..."

My appreciation for this principle in **Garnet's** case is that, it is dangerous to accept assertions made against a dead person without close scrutiny, which is why in the instant suit the court hears the Plaintiff's assertion with a pinch of salt that the father gifted him land and he put up the two-bedroom flat which he claims ownership.

[See also the case of **MONDIAL VENEER (GH) LTD V. AMUAH GYEBU XV [2011] SCGLR 466** at page 475) Wood CJ cited with approval the case of **Garnett** (*supra*).

Abban JA, was confronted with a similar hurdle in **NANA KWAKU ASUBONTENG V. BETHEL PRAYER MINISTRY AND THE CHIEF REGISTRAR OF LANDS**. Lauding the Judgment of **BROWN V. QUASHIGAH [2003-2004] 2 SCGLR 930**, His Lordship in his lead Judgment, rejecting evidence against a dead person, stated;

"We think the trial judge discharged his duties creditably in assessing the evidence placed before him and did not fail to note in his assessment that the claim being made by the plaintiff was a claim against a deceased person and or his estates and therefore must be scrutinized with utmost suspicion since the other person is dead and his side of the story cannot be heard from him".

The law is trite as demonstrated in the catalogue of authorities cited (*supra*), that where a party makes an allegation against a dead person, the burden of proof always lies on

that party, be it the plaintiff or defendant to prove it and the standard of proof is quite a high one. This is so because a dead person cannot give evidence in proof or otherwise of evidence of the living party.

In the instant suit, since the Plaintiff alleged that he was gifted land by the late Isaac Osei Tutu, the burden of proof was placed on him. Unfortunately, however, he could not prove his case to the satisfaction of the court. In other words, the Plaintiff produced no documents as exhibits; nor called witnesses to substantiate his assertion or claim.

In the humble opinion of the court, since the burden of proof was on to the Plaintiff in his evidence against the deceased Osei Tutu, more was required of him to convince the court. Unfortunately, the Plaintiff could not discharge that duty satisfactorily to the court.

Proof of transfer of interest in land under customary law concludes the discussion of the first issue. If it is later reduced into writing, it will still be recognised as a gift under customary gift and will be subject to the incidents of a gift under customary law.

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 favourable verdict".

Looking at the evidence in respect of the first issue, the court finds that the Plaintiff has not been able to prove his case. His evidence has not been corroborated by the evidence of any witness. The 1st Defendant however, has been able to prove her case to the satisfaction of the court. Equally self-crumbling punch is the Plaintiff's failure and/refusal to produce a *witness who was present when the gift was made by his late father*

Osei Tutu. On this issue therefore, on the balance of probabilities, the court finds the scale tilts in favour of the Defendants.

ISSUE 2: WHETHER OR NOT IT WAS THE DEFENDANTS WHO CAUSED DAMAGE TO THE ASSORTED ITEMS BELONGING TO THE PLAINTIFF FOR WHICH THEY MUST PAY DAMAGES.

One of the reliefs that Plaintiff is seeking before this court is that the defendants caused damage to the assorted house items belonging to the Plaintiff. In his pleadings and witness statement, the Plaintiff repeated the prayer. It is well-known that the law relating to standard of proof in all civil actions without exception is proof by preponderance of probabilities, having regard to *sections 11(4) and 12 of the Evidence Act 1975 (N.R.C.D 323)*. This means that the successful party must show that his claim is more probable than that of the other in line with *ADWUBENG V. DOMFEH [1996 – 97 SCGLR 660]*. In other words, a win in a suit for unlawful damage is not obtained on a silver platter; the party, in this case the Plaintiff herein, who so pleads must lead credible evidence to convince the court.

Thus, in *CONTINENTAL PLASTICS ENGINEERING CO. LTD. VS. IMC INDUSTRIES TECHNIK GMBH [200] 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.

In line with the statutory provisions and the case law *Vis-a Vis* the evidence in Court, the Plaintiff is challenged to proof his case against the Defendants.

In other words, the Plaintiff carries the burden of proving to the Court that the Defendants did indeed removed his belongings from the room and in the process caused damage to same for which they must pay for the damage caused. Besides, the Plaintiff has the burden to prove to the Court that he has evidence that it was the

defendants who exposed the personal belongings of the Plaintiff to the unfavourable weather.

On this issue the court will rely on the same principle in the case of *NDK FINANCIAL SERVICE VS. AHAMANG ENTERPRISE AND OTHERS* as well as the case of *MAJOLAGBE VS LARBI* (supra) to evaluate the evidence of the parties. The Plaintiff gave evidence to the court relying the witness statement filed with court where Plaintiff tendered to court the pictures of the belongings of Plaintiff at a place. The Plaintiff did not tender any other evidence which convinces the court that it was the defendants who removed the items from the room.

1st Defendant denied the assertion of the Plaintiff and stated that it was the late Osei Tutu who caused the Plaintiff's belongings to be removed to make the room available for a tenant.

1st Defendant tendered **EXHIBIT 1** which is a tenancy agreement between late **ISAAC OSEI TUTU** and the tenant **ULRICH BAFFOUR AWUAH-DAPAAH**. This tenancy agreement was not objected to by the Plaintiff's counsel during the trial. 1st Defendant also stated that when Plaintiff reported a case of causing damage against defendants to the Police, the investigators visited the scene of crime and initial investigations showed that the items allegedly damaged were intact and nothing had happened to the belongings of the Plaintiff.

The Plaintiff could not counter this assertion by 1st Defendant. Both 2nd Defendant and DW1 testified in support of the claim by the 1st Defendant's case stating that it was the late Osei Tutu who brought two people to remove the items of the Plaintiff from the room.

Plaintiff barely repeated what was contained in his pleadings without further adducing any evidence to support his claim but did not controvert what the 1st Defendant asserted.

In the case of *ECOBANK GHANA LIMITED VS ALUMINIUM ENTERPRISE LIMITED (J4/18/2020) [2020] UNREPORTED SC (13 MAY 2020)* the Supreme Court speaking through Prof Kotey JSC said “Damages is a sum of money claimed as compensation or awarded by a court as compensation to the plaintiff/claimant for harm, loss or injury suffered by the Plaintiff/claimant as a result of tortious act or breach of contract committed by the defendant or his agent. When a Plaintiff makes a claim for damages, the plaintiff or claimant is required under the law to provide evidence in support of the claim and to provide facts that would form the basis of assessment of the damages he will be entitled to”.

With the instant case, the Plaintiff failed to provide facts and evidence regarding the claims that the Defendants caused damage to his belongings. The Plaintiff could not provide any document indicating the value of the items damaged and the extent of damage. On that basis, Plaintiff’s claim that the Defendants caused damage to his belongings is not proved.

Guided by these, the court finds it that the Plaintiff has to discharge that duty; that is, by leading cogent evidence to win the favour of the court if he so deserves.

The position of the law is that evidence which is conspicuously left unchallenged by a party is therefore, deemed to be admitted. [See **Fori v. Ayirebi [1966] GLR 627 S.C;** & **Quargraine v. Adams [1981] GLR 599, C.A;** cited with approval in **John Kofi Ampratwum v. Atta Sarpong & Kwaku Acquah [2006 JELR 66322 (CA)]**].

2nd Defendant testified that his late father put up two houses; one is four-bedrooms and the other is the main house with eight-bedrooms which Plaintiff was given one room to live in same. DW1 also testified that on a particular day, her mother being 1st Defendant went to Offinso and during her absence, late ISAAC Osei Tutu hired some people to remove the belongings of Plaintiff from his room to give way for rent.

Throughout the evidence of Plaintiff, these assertions by 1st Defendant and her witness were never controverted or challenged.

In my humble opinion, I see the Plaintiff not to have discharged his duty in proof of damage caused to the assorted items belonging to the Plaintiff for which compensation must be paid.

It is an undeniable principle of our law of evidence that when a party on whom a burden of persuasion is, produces evidence has done so, and it is not challenged, that party has no further obligation to adduce evidence on the issue in controversy. That is to state that the refusal of Counsel for the Plaintiff to controvert *Exhibit "1"* amounts to an implied admission of the evidence led against the Plaintiff. The authority to that proposition is **Rev Hanson Mettle & Anor v. Nana Asare & Anor [2019] JELR 107290 (HC)**. [See also the case of **Gifty Mawuenyega- Tehoda v. The Inspector General of Police [2017] JELR 65275 (HC)**]

An offshoot issue that arises here is whether the Defendant is entitled to the amount of GHC 39,400.00 he claims to be the value of the damaged items, Plaintiff failed to justify the damage. In the candid opinion of the court, to require the defendants to pay for items they did not cause damage to would be tantamount to *unjust enrichment of the Plaintiff*.

4. WHETHER OR NOT THE PLAINTIFF IS ENTITLED TO THE VARIOUS RELIEFS SOUGHT.

In discussing this issue, consideration will be given to the capacity of the Attorney to stand in for the Plaintiff as no power of Attorney was filed. Lack of capacity by a Plaintiff who initiated or prosecute an action renders the writ and all processes flowing therefrom a nullity.

In the course of his submission, counsel for the Defendants indicated that the Attorney did not have the capacity to represent the Plaintiff since no authority has been given to the Attorney. Capacity to bring and maintain the action remains a cardinal hurdle that must be jumped if either party is to remain in the case.

Black's Law Dictionary defines 'Capacity or standing as: A party's right to make a legal claim or seek judicial enforcement of a duty or right capacity... Thus, one's ability to appear in court to make a claim hinges on whether one is recognised in Law as having sufficient interest in any matter to seek a hearing on any particular issue.

In the case of **NII KPOBI TETTEH TSURU III & 2 OTHERS VS. AGRI-CATTLE & 4 OTHERS CIVIL APPEAL NO. J4 /15/2019 DELIVERED ON 18TH MARCH, 2020**, when the Supreme Court held among others that *"The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter it can be raised at any time even after judgment on appeal. Thus, a Plaintiff whose capacity is challenged needs to adduce credible evidence at the earliest opportunity to satisfy the Court that it had the requisite capacity to invoke the jurisdiction of the Court. If this is not done the entire proceedings founded on an action by the Plaintiff without capacity would be nullified should the fact of non-capacity be proved. Therefore, the effect of any primary barriers, such as want of capacity in the Plaintiff, or Appellant by the time it is due to re-hear the case remains relevant throughout the case. To hold otherwise would mean to gloss over an important issue as the capacity of the parties to maintain the action.*

In the case of **EDMUND ASANTE APPIAH V MADAM KATE AMPONSAH ALIAS YAA MANSA [2009] 7 GMJ 75 CITED IN THE CASE OF MOHAMMED MORU V. MOHAMMED HOSEIN [2013-2014] SCGLR 363 BAFFOE- BONNIE JSC**, held that, Since no one signed the power of attorney as a witness in line with the requirements of **SECTION 12 OF THE POWER OF ATTORNEY ACT, 1998 (ACT 458)**, same is invalid to that extent and it could not have provided legitimate basis on which Nana Twum Barimah could have prosecuted the case on behalf of the appellant. In effect, the evidence given by Nana Twum Barimah was inadmissible to the extent that he had no capacity to testify as he did. In the face of this reality, the appellant was left in a situation as if no one represented him and his case thus reduced to mere pleadings filed on his behalf. In fact, even before considering the merits of the case, want of capacity alone was sufficient for the appellant to have lost the case.

In **HUSSEY VS EDAH [1992-93] PART 4, GBR 1703 AT 1774 HAYFRON-BEJAMIN JSC**, “A power of Attorney was defined as a formal document by which one person, usually called the Principal or donor, divests to another, usually called the attorney or donee, authority to represent him or act in his stead or for certain purposes spelt out in the document.

In the instant case, the Attorney did mention that he was representing the Plaintiff as Attorney but did not file any power of Attorney to be clothed with the capacity to prosecute the case on behalf of the Plaintiff. No power of Attorney was filed to give capacity to the Attorney to represent the Plaintiff.

During cross-examination of the Plaintiff's Attorney by Counsel for the Defendants, the Attorney confirms through cross-examination that he is in court on the authority of the Plaintiff Yaw Owusu. This was what transpired between the Attorney and Counsel for the Defendants.

Q: Mr. Opong Sebastian, you are here on the authority of Mr. Yaw Owusu.

A: Yes.

Q: You want this court to believe that it is the said Yaw Owusu who authorised you to institute this action.

A: yes

The Attorney in spite of his positive responses to the questions posed by Counsel for the Defendants failed to produce any evidence to support his answer. Counsel for the Plaintiff in his written address filed on 15/09/2023 did not say anything regarding the issue of capacity raised by counsel for the Defendants to controvert what was said about his client's capacity despite having been served with the written address of Defendants filed on 16th August, 2023.

This court will uphold Counsel for the Defendant's submission that the Attorney did not have the capacity to represent the Plaintiff in this matter and on that basis any

evidence given by the Attorney is of no legal effect and should be regarded as inadmissible.

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 VS 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 favourable verdict.

This court having considered the submissions by both Counsels is of the considered opinion that the Plaintiff was not able to prove his case and that the Defendants were consistent with their case and were able to prove their case on the balance of probabilities. Granted that the Plaintiff’s case was proved on the balance of probabilities, Plaintiff’s case would still have suffered set back due to lack of the capacity of the Attorney whose evidence is considered as inadmissible and the Plaintiff would have been as though he was not represented at all.

CONCLUSION.

This Court having considered the various statutes and case law as well the evidence adduced by the parties during the trial, is of the kind opinion that the Plaintiff has not been able to prove his claims on the balance of probabilities and to that extend the court finds the Plaintiff unsuccessful in this suit. Defendants were however, able to prove their case on the balance of probabilities and therefore successful in this suit.

DECISION

This Court therefore hold that the Plaintiff’s reliefs 1, 2, 3 and 4 are not proven and accordingly enter judgment in favour of the 1st & 2nd Defendants against the

Plaintiff. As incidental to the cost of defending the suit, this court will award a cost of
GHC 4,000.00 against Plaintiff in favour of the 1st and 2nd Defendants.

H/W JOSEPH YENNUBAN KUNSONG

DISTRICT MAGISTRATE COURT

ASOKWA-KUMASI

DATE: 31ST OCTOBER, 2023