

IN THE DISTRICT COURT 2, TAMALE HELD ON THURSDAY 7TH DECEMBER, 2023 BEFORE HIS WORSHIP D. ANNAN ESQ.

SUIT NO. A2/78/23

BETWEEN

YAKUBU SAYIBU

-

PLAINTIFF

AND

MEISUNA YAHAYA & ANOR.

-

DEFENDANTS

JUDGMENT

INTRODUCTION

1. The plaintiff described himself as a businessman. Defendants were described as siblings with 1st defendant owning a filling station in Tamale.
2. On 13th June, 2023 the plaintiff through his counsel instituted this present action against the defendants. Plaintiff seeks from the defendants, jointly and severally, the following reliefs:
 - “a. Recovery of an amount of GHS100,000.00 being loan taken from plaintiff by defendants and which they have failed to pay.
 - b. An amount of GHS307,000.00 being the balance of accrued interest on the principal loan.
 - c. Damages for breach of contract.
 - d. Costs including legal fees.”

3. Despite due service on the defendants, the defendants failed to attend court or filed any process in respect of plaintiff's claim. I shall deal with the effect of defendants' non-attendance in court or failure to file any process later in this judgment.
4. The court directed the plaintiff to file witness statement to which same was served on the defendants.

PLAINTIFF'S CASE

5. According to plaintiff, 1st defendant in April 2022 approached him through one Abdul Majeed Bawa for a loan of GHS100,000.00 at an interest rate of 25% payable within one month, i.e. from 5th April, 2022 to 5th May, 2022. He added that a statutory declaration was executed in which instrument a 3 bedroom house was used as a collateral. Copy of the said statutory declaration was tendered as Exhibit A. Plaintiff also tendered in evidence Exhibit B, which is the loan agreement between himself and the 1st defendant. Exhibit C is a copy of the Deposit Slip of the loan amount plaintiff paid to the 1st defendant. Plaintiff averred that as at 19th May, 2022 the 1st defendant had paid GHS18,000.00. He tendered a copy of the said payment as Exhibit D. He contended that as at the time of instituting this case, the loan plus interest stood at GHS407,000.00 (i.e. GHS100,000.00 as the principal and GHS307,000.00 as the interest). It is this amount that he has caused this action to be instituted.

DEFENDANTS' CASE

6. As earlier indicated, the defendants failed to attend court or filed any process in respect of the plaintiff's claim.

ISSUE TO BE DETERMINED

7. The issue borne out of the facts is *whether or not the defendants are jointly and severally liable to the plaintiff in the tune of GHS407,000.00, of which GHS100,000.00 is the principal and GHS307,000.00 is the interest?*

BURDEN OF PROOF

8. 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.
9. 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 ISSUE

10. As note earlier, the only issue herein is *whether or not the defendants are jointly and severally liable to the plaintiff in the tune of GHS407,000.00, of which GHS100,000.00 is the principal and GHS307,000.00 is the interest?*
11. The principle of jointly and severally liable is that liability may be apportioned either among two or more parties or to only one of the parties at the adversary’s discretion.

Thus, either liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties, see **Black's Law Dictionary, 9th Edition**. In effect, the plaintiff on succeeding in his claim may apportion liability to either all the defendants or to any of the defendants. The option is his.

12. Now, the law regarding the defendants' inaction 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 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**. See also the case of **Republic v. High Court (Fast Track Division); Ex-parte State Housing Co. Ltd. (No. 2) Koranten-Amoako Interested Party, [2009] SCGLR 185** where 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.”

13. From the above, the plaintiff is to prove his case from which this court can make deductions or findings. It is trite law that he who asserts must prove. In the case **Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lampety (No. 2) [2012] 2 SCGLR 845**, the Supreme Court in dealing with the onus of proof of an allegation held at page 867 as follows: “...What this rule literally means is that if a person goes to Court to make an allegation, *the onus is on him to lead evidence to prove that allegation,*

unless the allegation is admitted. *If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in Court if the case is based on an allegation which he fails to prove or establish.*" See also the often cited case of **Majolagbe v. Larbi [1959] GLR 190** per Ollennu J (as he then was) where the court held that, "...*He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true*".

14. Having heard the plaintiffs under oath and without any challenge from the defendant, I shall proceed as appropriate, see **Ex-parte State Housing Co. Ltd. (No. 2) (supra)**.
15. Let me first address the issue of defendants jointly and severally sued in this case. As stated earlier, it is only when a party wins his case against those jointly and severally sued that he can apportion liability to either all the judgment debtors or to only one of the judgment debtors.
16. From the evidence adduced by the plaintiff, the loan agreement, Exhibit B, was executed between himself and the 1st defendant. 2nd defendant was not part of the said agreement. The only instance that the 2nd defendant was mentioned was in respect of the Statutory Declaration, Exhibit A. Interestingly, Exhibit A was deposed to by 1st defendant. At paragraph 5, it states: "That I hereby release the said property (3-Bedroom House) to brother Mesuna Yussif to be used as a collateral against the said loan facility from Sayibu Yakubu of Plot No. 200, Block G, Sanarigu Dungu." Both Exhibits A and B were executed on 5th April, 2022. I am at a lost when plaintiff averred at paragraph 4 of his witness statement that, "I say that the 1st defendant however executed a statutory declaration in which said instrument he agreed to use his landed property to enable his brother the 2nd defendant to take the loan from the plaintiff...". It is clear from the evidence that it was 1st defendant who took the loan and the said

loan agreement has nothing whatsoever to do with 2nd defendant. How is it possible that 1st defendant will give his property to his brother to be used as collateral for a loan he (1st defendant) was taking? It simply doesn't add up or same was poorly drafted. In effect, I do not see why the 2nd defendant was made a party to this suit. I find that the 2nd defendant is wrongly sued and I so hold.

17. Now on the claim for the principal of GHS100,000 and interest of GHS307,000.00, Exhibit B states, "Respectfully, I Sayibu Yakubu has loaned an amount of GHS100,000.00 to Meisuna Yahaya with an agreed payment of Twenty-Five percent interest. This transaction will last within one month from today 5th April to 5th May, 2022. However, failure to pay back the money with interest within the stipulated time will have the collateral forfeited...." Plaintiff maintained that the 1st defendant had only paid GHS18,000.00 out of the said loan. To him, the outstanding debt at the time of filing this case is GHS407,000.00.

18. How did the plaintiff arrive at the said GHS407,000.00? From the above, the interest rate of 25% was applicable only for a month. Thereafter, no interest rate was agreed upon. What was to happen upon failure to pay the said loan plus interest by 5th May, 2022 was that the 1st defendant forfeits the collateral. It appears to me that the plaintiff simply calculated interest of 25% per month on the outstanding debt, thus having taken in consideration the GHS18,000.00 paid by 1st defendant on 19th May, 2022. This to me is outside the agreement, Exhibit B, and same is not applicable.

19. In calculating interest rate, this court is enjoined by the Court (Award of Interest and Post Judgment Interest) Rules, 2005 (CI 52). Rules 1 and 2 of CI 52 provide that:

"Rule 1: Order for Payment of Interest

If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated

(a) at the bank rate prevailing at the time the order is made, and

(b) at simple interest

but where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner the court shall award that rate of interest calculated in that manner."

Rule 2-Post Judgement interest

2(1) Subject to subrule (2) each judgement debt shall bear interest at the statutory interest rate from the date of delivery of the judgement up to the date of final payment.

(2) Where the transaction which results in the judgement debt

(a) contained in an instrument,

(b) evidenced in writing, or

(c) admitted by the parties

and the parties specify in the instrument, writing or admission the rate of interest which is chargeable on the debt and which is to run to the date of final payment, then that rate of interest shall be payable until the final payment." *Emphasis mine.*

20. Since no interest rate was agreed upon in Exhibit B, post failure, the 1st defendant forfeits his collateral, simpliciter. Should any interest be computed, then the applicable rate shall be prevailing bank rate calculated at simple interest, see also the case of **Sulley Dolley v Messers FND Investment (GH) Ltd. & Anor. [2021] DLSC 10766**. Thus, the initial GHS18,000.00 will be deducted from the amount due as at 19th May, 2022. That is, GHS125,000.00 (principal plus interest as at May, 2022) less the

GHS18,000.00. The balance will be GHS107,000.00 as at 20th May, 2022. Interest rate at the prevailing bank rate calculated at simple interest shall be computed on the GHS107,000.00 to the date of this judgment. Post judgment, interest rate shall also be prevailing bank rate till date of final payment, see also Rules 2(1) and 4(1) of CI 52. I so hold.

CONCLUSION

21. In effect, I hereby enter judgment in favour of the plaintiff against the 1st defendant as follows:

- a. 1st defendant forfeits the collateral used in securing the above loan. In the alternative, plaintiff to recover the amount of GHS107,000.00 being the amount outstanding as at May, 2022. Interest shall be paid on the said amount at the prevailing bank rate from 20th May, 2022 till date of final payment.
- b. Damages for breach of contract assessed at GHS5,000.00.
- c. Costs assessed at GHS5,000.00.

H/W D. ANNAN ESQ.

[MAGISTRATE]

REV. FR. ANTHONY SANTAHA ESQ. HOLDING THE BRIEF OF SYLVESTER ISANG
ESQ. FOR THE PLAINTIFF

DEFENDANTS ABSENT

References:

1. ss. 11(4) and 12(1) and (2) of 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. *In re West Coast Dyeing Industry Limited: Adams v Tandoh* [1984-86] 2 GLR 561, CA
6. *Ankumah v. City Investment Co. Ltd.* [2007-2008] 1 SCGLR 1068.
7. *Republic v. High Court (Fast Track Division); Ex-parte State Housing Co. Ltd. (No. 2) Koranten-Amoako Interested Party*, [2009] SCGLR 185
8. *Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lamptey (No. 2)* [2012] 2 SCGLR 845
9. *Majolagbe v. Larbi* [1959] GLR 190
10. *Sulley Dolley v Messers FND Investment (GH) Ltd. & Anor.* [2021] DLSC 10766.
11. *Rules 1, 2 and 4(1) of the Court (Award of Interest and Post Judgment Interest) Rules, 2005 (CI 52).*
12. *Black's Law Dictionary, 9th Edition*