IN THE HIGH COURT OF JUSTICE SESSION HELD AT SEFWI WIAWSO IN THE WESTERN NORTH REGION ON THURSDAY THE 24TH DAY OF NOVEMBER 2022 BEFORE HIS LORDSHIP JUSTICE KWAME AMOAKO

SUIT NO: - E1/14/2016

LAWRENCE YAW NTAADU - PLAINTIFF

VS.

STEPHEN BOAKYE - DEFENDANT

PER THE LAWFUL ATTORNEY

SAMUEL BULU

Parties present

Barimah Agyekum-Hinneh for the Plaintiff present

Counsel for the Defendant (Nana Obiri Boahen) absent

JUDGMENT

The brief facts giving rise to this action are that, the parties agreed that Hotel Mercillina, belonging to the Plaintiff be transferred or sold to the Defendant at a total cost of GH¢150,000.00. The Defendant made a total part payment of GH¢40,000.00 leaving an outstanding balance of GH¢110,000.00 to be paid on or before 31st December 2014. The agreement, which was subsequently reduced into writing dated 22nd April 2014,

contained a clause that entitled the Plaintiff to review the transaction upon failure of the Defendant to pay the outstanding purchase balance by the 31st December 2014 deadline. The Defendant, after making the total part payment of GH¢40,000.00 to the Plaintiff, took possession of the hotel, which he has been operating under the name Hotel Obaapa.

Claiming *inter alia* that the Defendant failed to pay the outstanding balance within the stipulated time, the Plaintiff, on 23rd December 2015, filed a Writ of Summons together with a Statement of Claim against the Defendant claiming the following reliefs:-

i) An order for recovery of possession of the building which is being run as Hotel Obaapa by the Defendant which said hotel Defendant agreed with Plaintiff to buy but could not pay the full cost;

ii) An order directed at the Defendant to account for the period that the Defendant has operated the hotel, i.e. from 22/04/2014 to date of recovery of possession and Defendant's deposit paid therefrom;

iii) An order that Defendant pays for the items/properties destroyed whilst operating the said hotel;

iv) An order of injunction to restrain the Defendant, his agents, assigns, etc. from further operations at the said hotel;

v) Further order or orders as to this Court may deem fit.

The Plaintiff stated in paragraph 15 of his Statement of Claim that he initiated an action against the Defendant in Suit No. E12/10/15 titled *"Lawrence Yaw Ntaadu v Stephen Boakye"* at the High Court, Sefwi Wiawso for certain reliefs but had to discontinue it for certain reasons.

On 3rd February 2016, the Defendant filed a Statement of Defence. In paragraph 15 of the Statement of Defence, the Defendant particularized an abuse of legal process on the grounds that Suit No. E12/10/15 had not been officially discontinued and as a result, the present Suit cannot be instituted and same ought to be struck out *in limine*. Also, in paragraph 19 of the Statement of Defence, the Defendant stated 'Particulars of Fraudulent Practice' on the grounds that whilst the Plaintiff used documents over the hotel to secure a loan facility from the Agricultural Development Bank (ADB) which loan has not been retired, the Plaintiff wants to receive the remaining amount, and that, without retiring his indebtedness to the ADB, there is every possibility that ADB will sell the hotel which, according to the Defendant, is his property now.

On 7th June 2016, this Court, differently constituted, and presided over by His Lordship Justice G. A. Kwasi-Kumah set down the following issues for trial:

(i) Whether the Defendant has failed to pay the full cost for Mercillina Hotel.

(ii) Whether the Plaintiff could review the transaction if the Defendant failed to make full payment on or before December 31, 2014.

(iii) Whether the present action constitutes an abuse of the legal process by virtue of the discontinuation of an earlier action.

(iv) Whether or not Plaintiff, by this action is a clear attempt to perpetrate fraud on the Defendant.

(v) Whether fraud vitiates the transaction (i.e. whether the whole transaction constitutes fraud).

(vi) Whether the Plaintiff is entitled to his claim or any at all.

Also admitted as an issue for trial was one additional issue filed by the Defendant namely;

1) Whether or before the present action was mounted, Suit No. 12/10/2015 has effectively, effectually and legally completely been discontinued.

From the records, and as Counsel for the Plaintiff has rightly pointed out in his Address, issue (iii) and the additional issue filed by the Defendant have now become moot for determination since this Court, on 22nd July 2021 struck out the entire action in suit No. E2/10/2015 as discontinued, and cost of GH¢3,500.00 was awarded in favour of the Defendant in respect thereof.

On issues (iv) and (v) regarding perpetration of fraud on the Defendant, paragraph 20 of the Evidence in-chief (per the Witness Statement) of Samuel Buru, the Defendant's Attorney, provides as follows:

> "20. The Defendant was later told by the Branch Manager of the Agricultural Development Bank, Essam that the Plaintiff had already used the hotel as collateral to secure a loan facility from the bank."

First, and as Counsel for the Plaintiff has rightly stated in his Address, this piece of evidence is hearsay, which does not fall under any of the exceptions to the hearsay rule. Not being an exception to the general inadmissibility hearsay evidence rule therefore, this Court cannot give any significant weight to it.

Under cross-examination, the Defendant Attorney gave evidence on 16th December 2020 as follows:

> "Q: What is the name of the ADB branch Manager of Essam who you allege told the Defendant that the Plaintiff used the property in dispute as collateral to secure a loan?
>
> A: I do not know his name. Stephen Boakye my principal knows his name.
>
> Q: Did Stephen Boakye conduct an official search at ADB to ascertain this allegation?
>
> A: Yes, because he was a client there.
>
> Q: Do you have a copy of this alleged search report?
>
> A: I do not have.

Q: I put it to you that at no time material had the Plaintiff used the disputed property to secure a loan at the said bank?

A: He has."

In an attempt to explain why the Defendant was unable to produce any document in proof of the fraud perpetrated on him, Counsel for the Defendant provides in his Address as follows:

> "The Defendant posited further that his investigation at the ADB, Sefwi-Essam revealed that the plaintiff herein had used the original documents to the subject matter as collateral to access a loan facility from the bank. The bank manager confirmed same but on principles of confidentiality, the bank manager declined to furnish him (Defendant) further and better particulars as same will amount to an aberration to the rules and ethics of the bank."

From the records therefore, the Defendant failed to prove the alleged fraud perpetrated on him.

On issue (1), namely *Whether the Defendant has failed to pay the full cost for Mercillina Hotel*, evidence on record shows that the Defendant has not paid the full cost of Mercilina Hotel, now being operated under the name Hotel Obaapa.

Under cross-examination, the Defendant Attorney gave evidence on 16th December 2020 as follows:

"Q: Per Exhibit 1, Stephen Boakye undertook or promised to pay to the plaintiff remaining balance of GH¢110,000.00 on or before 31st December, 2014 without fail?

A: It is true.

Q: And the parties agreed further that failure of Boakye to pay the stipulated amount at the stipulated time, the plaintiff could review the transaction?

A: It is true.

Q: **Has your principal Stephen Boakye paid the GH¢110,000.00 to the plaintiff**?

A: **No**. After the contract had been executed, my brother was preparing to travel and the plaintiff was also represented by his uncle. We had discussion with the uncle. My brother returned from overseas to Ghana on 17th December 2014. He called the plaintiff's uncle to meet so that he can pay him the money. **Plaintiff's uncle postponed the meeting and they could not meet that is why the date elapsed**." [emphasis added]

Also, paragraphs 11, 14, 15 and 16 of the Evidence in-chief (per the Witness Statement) of G. C. Boampong (DW1) are as follows:

"11. That the Plaintiff said he was not going to accept the amount not because the amount outstanding was not correct but **the Defendant ought to have paid the amount on the 31st day of December 2014**".

"14. I asked the Plaintiff the way forward and he (Plaintiff) told me that he would now accept an amount of GH¢300,000.00 and not the original GH¢110,000.00 as agreed upon".

"15. That at the meeting, **my cousin offered to top it up with GH¢20,000.00 to take care of purported delay of payment for the nine days**".

"16. The Plaintiff blatantly refused to accept the offer". [emphasis added]

Accordingly, this Court finds that the Defendant has not paid the full cost of Mercilina Hotel, now being operated under the name Hotel Obaapa. Indeed, from the records, the Defendant failed to pay the outstanding purchase balance of GH¢110,000.00 by the agreed deadline of 31st December 2014.

In an attempt to explain out why the Defendant failed to pay the outstanding amount before the deadline, Counsel for the Defendant provides in his Address as follows:

"The defendant desirous of settling the outstanding amount of one hundred and ten thousand Ghana cedis (GH¢110,000.00) before the deadline of 31st December 2014, called one Nana Ekyea Kwame II, an uncle to the plaintiff and one of the attorneys **to come along with the documents of the subject matter and take the remaining one hundred and ten thousand Ghana cedis (GH¢110,000.00)**. The said Nana Ekyea Kwame II told him (defendant) that he was busily engaged at the time, as the Omanhene of Sefwi-Wiawso Traditional Area had then invited all chiefs under his jurisdiction." [emphasis added]

It must be noted that in law, transfer of an interest in land involves two stages – the first stage being the contract stage under ***section 34 of the Lands Act, 2020 (Act 1036)*** and the second stage being the conveyancing stage ***under section 35 of Act 1036***.

Section 34 of Act 1036, the contract stage, provides as follows:

"**Contract for transfer**

34. A contract for the transfer of an interest in land is not enforceable if the contract is not

a) evidenced in writing, and
b) signed by
i) the person against whom the contract is to be proved; or
ii) a person who is authorized to sign on behalf of that person; or
c) exempt under section 36."

Section 35 of Act 1036, the conveyancing stage, also provides as follows:

"**Mode of transfer**

35. (1) A transfer of an interest in land other than a transfer specified in section 36, shall be in writing and signed by

a) the person making the transfer or the agent of that person duly authorized in writing; and
b) the person to whom the transfer is made or the agent of that person duly authorized in writing

(2) A transfer of an interest in land made in manner other than that provided in this section does not confer an interest on that person to whom the transfer is made."

As the Defendant has not, even as at now, paid full consideration for the hotel, the subject matter in this case, to conclude the contract stage for the transfer of interest in the said hotel, one wonders how the Defendant could use the presentation of the documents on the hotel (which relates to the conveyancing stage of the transfer) as a condition for payment of the remaining purchase price, let alone pass as a valid reason for the delay in payment of same!

On issue (ii), namely *Whether the Plaintiff could review the transaction if the Defendant failed to make full payment on or before December 31, 2014*, it will be useful to reproduce the concluding part of Exhibit 1 which is as follows:

"The Transferee/Stephen Boakye undertakes or promises to pay to the seller the remaining balance of GH¢110,000.00 on or before 31st December 2014 without

fail. Failure to pay it on the stipulated time the Transferor can review the transaction."

As earlier stated, the Defendant indeed failed to pay the outstanding purchase balance of GH¢110,000.00 by the agreed deadline of 31st December 2014. That being the case, the Plaintiff was entitled to review the agreement, as the principle of contract law is that parties are bound by their own agreement.

Exercising his right to review upon the failure of the Defendant to pay the remaining amount within the stipulated time, the Plaintiff reviewed the purchase price from the original GH¢150,000.00 to GH¢250,000.00. Paragraph 15 of the Evidence in-chief (per Witness Statement) of Augustine Frimpong alias Nana Frimpong PW1 provides as follows:

"15. **Plaintiff requested for upward review of the purchase price to two hundred and fifty thousand Ghana cedis (GH¢250,000.00) having regard to the failure of the defendant to abide by the terms of the 22/04/2014 agreement** whilst the defendant promised to pay a sum of one hundred and seventy thousand Ghana cedis (GH¢170,000.00). Defendant refused, failed and or neglected to pay and requested for a refund of the deposit paid and a further sum of forty thousand Ghana cedis (GH¢40,000.00) as interest to enable him to release the keys to the hotel to the plaintiff or plaintiff could take the matter to anywhere he liked." [emphasis added]

However, Counsel for the Plaintiff seems to transform this right of review exerised by the Plaintiff upon the failure of the Defendant to pay the remaining amount by the 31st December 2014 deadline, to one of rescission of contract. Proceeding on the tangent that the contract (or agreement) had been rescinded, Counsel for the Plaintiff argues that the

GH¢300,000.00 demanded by the Plaintiff amounted to a fresh offer and that the Defendant's top-up amount of GH¢20,000.00 amounted a to counter-offer which was rejected by the Plaintiff, whereupon Counsel came to a disturbing conclusion that there was no contract between the parties. Counsel argues in his Address, after quoting portions of the evidence of DW1, as follows:

> "The evidence of DW1 quoted above supports the Plaintiff's case that after the Defendant defaulted in paying at the stipulated time, the Plaintiff rescinded the contract and made a fresh offer. The Defendant also made a counter-offer which was rejected by the Plaintiff. Now, there being no contract between the Plaintiff and the Defendant, what are the options available to the parties…"

In this regard, paragraphs 5 and 6 of the Evidence-in-chief (per the Witness Statement) of PW2 (Nana Ekyea Kwame II) provide as follows:

> "5. In January 2015, the parties met in Kumasi and in my presence the defendant pleaded for time to pay the balance.
>
> 6. The plaintiff then requested for an upward review whilst defendant offered to pay one hundred and seventy thousand Ghana cedis (GH¢170,000.00) which was rejected by the plaintiff."

Counsel put across the Plaintiff's case strongly during further cross-examination of DW1 on 17th December 2021 as follows:

"Q: What the plaintiff told you in Kumasi on 9th January 2015 to wit he will accept GH¢300,000.00 was a fresh offer he made to the defendant?

A: It was a fresh offer because Boakye had told me that he Boakye was indebted to the plaintiff to the tune of GH¢110,000.00 and then he was going to pay same to the uncle of Ntaadu since Ntaadu himself was outside the jurisdiction and that I should accompany him and witness the transaction.

Q: Suggested, what the defendant said to the effect that he was going to top it up by GH¢20,000.00 Gh. Cedis was a new/another price the defendant proposed to give to the plaintiff?

A: That is not true. This is because Lawrence Ntaadu wanted to collect GH¢300,000.00 instead of GH¢110,000.00, the parties did not agree to the fact that Boakye pays GH¢300,000.00 to Ntaadu, so when I realized that the parties did not agree to the payment of GH¢300,000.00 by Boakye to Ntaadu, I again, realized that Boakye had an interest in the property and I advised Boakye to increase his offer, based on this Boakye made an enhanced offer by adding GH¢20,000.00 to the earlier offer. My Lord but Ntaadu to accept Boakye's enhanced offer, Boakye made a claim to Ntaadu that all monies which had been paid for the property should be paid back to him since he did not agree to Boakye's offer. My Lord, at this point, whether Ntaadu would pay or not we got up and did not continue with the matter. My Lord, after this, all that I heard subsequently was the institution of this action.

Q: Put, because the plaintiff refused to accept the defendant's proposal of GH¢20,000.00, in addition to GH¢110,000.00 making a total of GH¢130,000.00, there was no agreement or contract between the parties in respect of the disputed hotel?

A: My Lord, the agreement then would be the GH¢110,000.00 that we were about to pay."

From the records, the Plaintiff could review the agreement when the Defendant failed to pay the remaining purchase price within the stipulated time, which the Plaintiff did by pushing the purchase price to GH¢250,000.00 or GH¢300,000.00 from the original GH¢150,000.00 at the Kumasi meeting on 9th January 2015. The agreement (Exhibit 1) did not entitle the Plaintiff to rescind the contract upon failure of the Defendant to pay the remaining purchase price within the stipulated time.

The contract or agreement between the parties as per Exhibit 1 is still in force, and same has not been rescinded. Therefore, what took place at the Kumasi meeting on 9th January 2015 when the Plaintiff demanded GH¢300,000.00 and the Defendant offered to top-up the purchase price by GH¢20,000.00, to push it to GH¢170,000.00, were the review deliberations, which have still not been concluded as the parties have, even as at now, not been able to reach an agreement on the review. The issue of review therefore remains ***res nova***. What took place at the Kumasi meeting, cannot, by any stretch of imagination, be likened to offer and acceptance/rejection of offer/counter-offer in respect of another contract between the parties, in the face of a valid, un-rescinded, pending and binding agreement between the parties as per Exhibit 1, which this Court ought to give effect to.

In this regard, Counsel for the Defendant provides in his Address as follows:

> "Your Lordship, the gravamen of the Plaintiff's case is hinged on or premised on exhibit 1 (part payment receipt) which by logical extension also served as an agreement entered into by the parties herein.
>
> Your Lordship, the relevant portion of exhibit 1 reads to the effect that if the Defendant does not pay the outstanding amount of one hundred and ten thousand Ghana cedis (GH¢110,000.00) on or before 31/12/2014, the plaintiff shall reserve the right to REVIEW the sale agreement of the subject matter.
>
> Your Lordship, the word ***"REVIEW"*** does not connote rescission, repudiation and/or abrogation of contract of an agreement."

The ***Black's Law Dictionary*** (9th edition) defines the word "review" as:

> "Consideration, inspection, or re-examination of a subject or a thing."

The Dictionary goes on to define the word "revision" as:

> "A re-examination or careful review for correction or improvement."

In sharp contrast, the same Dictionary defines the word "rescind" as:

> "To abrogate or cancel (a contract) unilaterally or by agreement."

Christine Dowuona-Hammond explains the term "rescission" in her book, ***The Law of Contract in Ghana*** 2011 at pages 234-235 as follows:

> "Rescission consists in the setting aside of the contract. The aim of the Court in granting the remedy of rescission is to cancel the contract and to restore the parties as far as possible, to the position they were in before the contract was made. The Courts upon rescission of the contract attempt achieve *'restitution in intergram'* ".

From Exhibit 1, the parties' agreement is to the effect that, the Plaintiff could only 'review' the agreement upon failure of the Defendant to pay the remaining amount within the stipulated time – from the wording of the said agreement, it is clear that the Plaintiff could review the agreement unilaterally. However, the agreement did not grant the Plaintiff any right to rescind the agreement unilaterally upon failure of the Defendant to pay the remaining amount within the stipulated time.

It must be said however that, even though there has been no unilateral rescission of the agreement in this case, the parties herein could, by agreement, validly rescind the agreement, even though there was no such clause in their agreement (Exhibit 1). The law is that, with the exception of few instances such as agreement to do an illegality, agreement to submit to jurisdiction of a Court or tribunal where the Court or tribunal does not have one, etc., parties can agree to do virtually anything under the sun regarding their agreed terms – they can add to their agreed terms, they can subtract

from their agreed terms, they can even set aside their own agreed terms entirely and substitute same with completely different terms. In fact, by agreement of the parties, the parties can submit their case to an arbitration even where there is no arbitration clause in their agreement or even after a Court of competent jurisdiction has delivered its final judgment in the case: see the case of ***Horizon Technologies International Limited*** [1992] 1 All ER 469 PC. In the case of ***Amoako Atta II & Others v Osei Kofi II & Others (No. 2)*** [1962] 1 GLR 384, it was held that parties are entitled at their own choice to submit a dispute to arbitration even after a judgment of the Supreme Court, the highest Court of the land, and that the award of the arbitration will supersede the judgment, and be binding on the parties. Indeed, by agreement of the parties, the parties can even submit their dispute to a second arbitration after an arbitration award in the first instance: see ***Sebeh v Sekyim*** [1965] GLR 329.

The parties in the instant case however could not reach any rescission by agreement. It appears that there was some attempt at rescission by agreement but this could not materialize as the parties did not agree on the terms of the rescission.

Paragraph 15 of the Evidence in-chief (per Witness Statement) of Augustine Frimpong alias Nana Frimpong PW1 provides as follows:

> "15. Plaintiff requested for upward review of the purchase price to two hundred and fifty thousand Ghana cedis (GH¢250,000.00) having regard to the failure of the defendant to abide by the terms of the 22/04/2014 agreement whilst the defendant promised to pay a sum of one hundred and seventy thousand Ghana cedis (GH¢170,000.00). **Defendant refused, failed and or neglected to pay and requested for a refund of the deposit paid and a further sum of forty thousand Ghana cedis (GH¢40,000.00) as interest to enable him to release the keys to the**

hotel to the plaintiff or plaintiff could take the matter to anywhere he liked." [emphasis added]

Also, under cross-examination, PW2 gave evidence on 28th February 2018 as follows:

"Q: The defendant intimated at the meeting that **plaintiff should pay back the amount he had paid so far**?
A: **He said so**; plaintiff in turn said since he had used the facility, they should sit down and take account.

Q: The defendant went further to add that he **had incurred expenses in renovating the subject matter and fixed air conditioners to the hotel**?

A: That is not correct. Plaintiff told defendant **that if he had incurred any expenses, he should get in touch with Mr. Frimpong (PW1)** – supervisor to work out the details. **He failed to do so and instead travelled outside**." [emphasis added]

From the records therefore, the parties failed to mutually rescind the agreement.

On issue (ii) therefore, it is concluded that, upon the failure of the Defendant to pay the remaining amount within the stipulated time, the Plaintiff had the right to review the agreement, which right he exercised; but he did not have the right to unilaterally rescind the agreement.

What has been listed as issue (vi) namely, *Whether the Plaintiff is entitled to his claim or any at all*, is actually the relief being sought by the Plaintiff in this action.

In ***Dalex Finance and Leasing Company Ltd. v Ebenezer Denzel Amanor and 2 Ors*** [2021] 172 GMJ 256 @ 304 SC per Pwamang JSC, the Supreme Court stated as follows:

> "We take this opportunity to deprecate the emerging wrong practice where in setting down issues for trial in a civil case, 'whether or not the Plaintiff is entitled to her claim' is put down as an issue for trial. The whole trial is aimed at determining whether or not the Plaintiff is entitled to the reliefs claimed so how can that be a distinct issue? This practice is a product of lazy work and a stop must be put to it."

In the instant suit, the Plaintiff is seeking, *inter alia*, an order for recovery of possession of the property in question.

On the relief being sought by the Plaintiff in this action, Counsel for the Defendant provides in his Address as follows:

> "Your Lordship, the ***"REVIEW"*** does not connote suing the Defendant herein for a recovery of the subject matter when same is not explicitly expressed on **Exhibit 1**."

As stated hereinbefore, once the agreement between the parties, as per Exhibit 1, is still pending, which agreement is currently at the review stage ***res nova***, an order for recovery of possession and the ancillary reliefs such as order for account, etc. are simply not available. Those orders would be available only if the agreement between the parties, as per Exhibit 1, had been rescinded or otherwise given no effect, and the Court

is called upon to restore the parties to the position they were in before the agreement was entered into, i. e. their pre-agreement status.

On the totality of the evidence in this case, what this Court ought to do in the interest of justice and fairness, is to give effect to Exhibit 1, the agreement between the parties, as it ought to have been reviewed when the Defendant failed to pay the remaining amount within the stipulated time.

On the face of it, Exhibit 1, duly signed by the parities herein qualifies as a valid contract for transfer of interest in the hotel, the subject matter in this case, and same is enforceable under ***section 34 of the Lands Act, 2020 (Act 1036)***, including its review clause upon failure of the Defendant to pay the remaining purchase price before or by the agreed deadline.
Paragraph 15 of the Evidence in-chief (per Witness Statement) of Augustine Frimpong alias Nana Frimpong PW1 provides as follows:

> "15. Plaintiff requested for upward review of the purchase price to **two hundred and fifty thousand Ghana cedis (GH¢250,000.00)** having regard to the failure of the defendant to abide by the terms of the 22/04/2014 agreement…" [emphasis added]

And, Counsel put across his case strongly during further cross-examination of DW1 on 17th December 2021 as follows:

> "Q: What the plaintiff told you in Kumasi on 9th January 2015 to wit he will accept **GH¢300,000.00** was a fresh offer he made to the defendant?

A: It was a fresh offer because Boakye had told me that he Boakye was indebted to the plaintiff to the tune of GH¢110,000.00 and then he was going to pay same to the uncle of Ntaadu since Ntaadu himself was outside the jurisdiction and that I should accompany him and witness the transaction." [emphasis added]

It is evident from the Plaintiff's evidence on record, per Exhibit E (Valuation Report), that the "Open Market Value" of the hotel, the subject matter in this case, stood at **GH¢259,000.00** as at 8th March 2010. From the records, the Defendant did not provide any counter valuation report on the hotel, the subject matter in this case.

Counsel for the Plaintiff provides in his Address as follows:

"According to the Plaintiff, the Defendant failed to pay the outstanding balance of GH¢110,000.00 by close of day 31st December 2014 and only pleaded for an extension of time to make the payment which said request he (Plaintiff) declined. The Plaintiff said he therefore commenced an action to recover the hotel in January 2015. **The Plaintiff tendered exhibit "E" which is a valuation report indicating that the actual value of the property was GH¢259,000.00** but not GH¢150,000.00 which he agreed to sell to the Defendant." [emphasis added]

Touching on Exhibit E (the Valuation Report), Counsel for the Defendant provides in his Address as follows:

"My Lord, it can be gleaned from the excepts of the cross examination of the plaintiff and PW1 that at all material times, the agreed price of the subject matter in dispute is one hundred and fifty thousand Ghana cedis (150,000.00). The vain attempt by the plaintiff to introduce a purported valuation report (**Exhibit "E"**)

to suggest a different price for the subject matter is legally not maintainable and same **remains self-serving document**." [emphasis added]

During further cross-examination of DW1 on 17th December 2021, DW1 gave evidence as follows:

"Q: What the plaintiff told you in Kumasi on 9th January 2015 to wit **he will accept GH¢300,000.00** was a fresh offer he made to the defendant?

A: It was a fresh offer because Boakye had told me that he Boakye was indebted to the plaintiff to the tune of GH¢110,000.00 and then he was going to pay same to the uncle of Ntaadu since Ntaadu himself was outside the jurisdiction and that I should accompany him and witness the transaction.

Q: Suggested, what the defendant said to the effect that he was going to top it up by GH¢20,000.00 Gh. Cedis was a new/another price the defendant proposed to give to the plaintiff?

A: That is not true. This is because **Lawrence Ntaadu wanted to collect GH¢300,000.00 instead of GH¢110,000.00**, the parties did not agree to the fact that Boakye pays GH¢300,000.00 to Ntaadu…"

Explaining the basis of the GH¢300,000.00 purchase price demanded by the Plaintiff during the review negotiations, Counsel for the Plaintiff provides in his Address as follows:

> "At this stage, the parties were into a new negotiation and it is not part of the duties of the Court to intervene as to how much a vendor should sell his property. In any event, the fresh offer of GH¢300,000.00 for the 15-bedroom hotel was reasonable and a true reflection of the market price. The Plaintiff tendered exhibit "E" which was the valuation report on the disputed property. The property was valued at GH¢259,000.00 at 8th March 2010. It is trite that **the value of immovable property appreciates with time. Therefore, the new value or price of GH¢300,000.00 as at January 2015 was reasonable, equitable, fair and justifiable**. It is worth noting that the **Defendant did not tender an alternative or a contrary valuation report** to suggest that the new price was astonished or unconscionable." [emphasis added]

From the records, no serious cross-examination was conducted on Exhibit E (the Valuation Report) to discredit that evidence, as the Defendant had already taken the position that Exhibit E was the Plaintiff's own self-serving document. The Defendant also failed to produce any valuation report in respect of the property in question to the contrary to contradict Exhibit E (the Valuation Report).

More importantly, the Defendant did not cross-examine the Plaintiff on the unreasonableness, unconscionability or outrageousness or otherwise of the Plaintiff's demand to review the purchase price to GH¢300,000.00.

The position of the law in Ghana is that failure of a party who is duly represented by Counsel to cross-examine a witness on a material fact amounts to the admission of that material fact: see the cases of ***Abdul Rahman v Baba Ladi*** Civil Appeal No. J4/36/2013, 29th July 2013; ***Wiafe v Kom*** [1973] 1 GLR 240; ***Gyan alias Amoah and Another v Dabrah*** [1974] 2 GLR 318 and ***Ghana Ports & Harbours Authority & Another v Nova Complex Ltd*** [2007-2008] GLR 806 per Woode C.J.

The Defendant accordingly failed to show that the Plaintiff's demand to review the purchase price from GH¢150,000.00 to GH¢300,000.00 was unreasonable, unconscionable or outrageous.

In fact, Exhibit 1, per its plain terms, indeed entitled the Plaintiff to review the agreement unilaterally and to any extent that he desired, of course, subject only to contract law doctrines regarding unreasonableness, unconscionability or outrageousness.

In ***Attisogbe v CFC Construction Co (WA) Ltd & Read*** [2005-2006] SCGLR 858, the Supreme Court circumscribed the ambit for the invocation of the doctrine of unconscionable bargain, per Date-Bah JSC, at pages 872-873 as follows:

> "In our opinion therefore, the Courts in Ghana have the right to set aside unconscionable any dealing, whether by contract or gift, where on account of the special disability of one of the parties, he or she is placed at a serious disadvantage in relation to the other. … Poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary: these are all circumstances which, in the right context, can justify the Court's intervention on the basis of the equitable principles embodied in the doctrine of unconscionable bargain."

It must be stated that none of the disabilities for the invocation of the doctrine of unconscionable bargain is applicable in the instant case, not even at the time the parties signed Exhibit 1. The Plaintiff's demand to review the purchase price from

GH¢150,000.00 to GH¢300,000.00 cannot also be said to be unreasonable or outrageous. Obviously, it is reasonable for the value of an immovable property valued at GH¢259,000.00 at 8th March 2010 to be reviewed to GH¢300,000.00 as at January 2015 given the notorious fact of the uncontrolled rises in the prices of building materials in this country, of which this Court takes Judicial Notice.

Defining the term "Judicial Notice" and giving an example to illustrate it, Justice S. A. Brobbey provides in his book, ***Essentials of the Ghana Law of Evidence*** 2014 at page 104 as follows:

> "By definition, judicial notice is an acceptance by a judicial tribunal of the truth of a fact without proof, on the ground that it is within the tribunal's own knowledge. … A typical example will be when a party sets out to prove that the sun rises from the east and sets in the west. … Is there any point in wasting time to look into or investigate things which are of such notoriety that everyone can be presumed to know?"

It is also significant to note that, Exhibit E (the Valuation Report) describes property in question as comprising a main building and an outhouse, and gives the accommodation details of the property as follows:

MAIN BUILDING

10 Bedrooms with required sanitary facilities

1 Bar Store

1 Store

2 Bar Offices

1 Bar Living Area

1 Living Room

Circulatory Areas to facilitate free movement

OUTHOUSE

4 Bedrooms

Circulatory Areas to facilitate free movement

A reviewed value of GH¢300,000.00 (as at January 2015) of the property in question as described in Exhibit E above obviously cannot be said to be unreasonable, unconscionable or outrageous.

It is established on record, and same is also well noted by this Court, that the Defendant has been in undisturbed possession of the hotel, the subject matter in this case, since April 2014, operating same at a profit.

The Defendant's Attorney gave evidence under cross-examination on 16th December 2020 as follows:

> "Q: You and your principal took possession, control and management of the disputed property since April, 2014.
>
> A: It is true."

In the absence of any evidence on record to the contrary, this Court deems it reasonable and fit under the circumstance that, the agreement between the parties, as per Exhibit 1, be reviewed at GH¢300,000.00 purchase price (i. e. from GH¢150,000.00 to GH¢300,000.00). From the records, the Defendant has already paid GH¢40,000.00 of this reviewed purchase price, leaving an outstanding balance of GH¢260,000.00 to be paid by the Defendant to the Plaintiff. In law, this amount (GH¢260,000.00) became due and payable on 31st December 2014, when the Defendant defaulted to pay the then remaining purchase price, thereby crystallizing the right of the Plaintiff to review the agreement. It is therefore in the interest of justice and fairness that interest on the said amount (GH¢260,000.00) be worked out from 1st January 2015 (i. e. a day after the 31st December 2014 deadline), given the inflationary situation in Ghana and the fact that the Plaintiff has being operating the hotel, the subject matter in this suit, for a profit, since April 2014.

The House of Lords, per Viscount Simon, in distinguishing between interest and capital, described interest in the case of ***Riches v Westminister Bank Ltd*** [1947] AC 390, at page 398 of the report as "the accumulated fruit of a tree which the tree produces regularly until payment."

On the Court's power to award interest on sums claimed, the Supreme Court provided in ***Delle & Delle v Owusu-Afriyie*** [2005-2006] SCGLR 60 [holding 4] as follows:

> "Whilst it is true that at common law interest was not payable on a debt or a loan in the absence of express or a course of dealing or custom to that effect, under the existing statutory regime in Ghana, the courts have the power to award interest on sums claimed and found to be due. Such interest is payable from the date on which the claim arose."

Summing up on situations in which interest is exigible, Justice S.A. Brobbey states in his ***Practice & Procedure in the Trial Courts & Tribunals of Ghana*** [2nd edition] at page 402 paragraph 923 as follows:

> "Interest is payable under common law by agreement between parties, by trade usage, on damages awarded by the court or by statutory provisions."

On payment of interest by statutory provisions, ***section 1 of the Court (Award of Interest and Post Judgment Interest) Rules, 2005 (CI 52)*** provides as follows:

> "1. 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 to 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."

Section 4 of CI 52 further provides as follows:

"4. (1) In these Rules, statutory rate of interest is the bank rate prevailing at the time the judgment or order is made by the Court.

(2) Where there is doubt as to the prevailing bank rate, the 91 days Treasury Bill rate as determined by the Bank of Ghana shall be the prevailing bank rate."

Conclusion

The agreement entered between the parties herein, as per Exhibit 1 dated 22nd April 2014, is hereby reviewed, upon the failure of the Defendant to pay the remaining purchase price by the agreed deadline of 31st December 2014, from the original purchase price of GH¢150,000.00 to **GH¢300,000.00**.

For the avoidance of doubt, the outstanding balance of GH¢260,000.00 is to be paid at the 91 Days' Treasury Bill interest rate applicable as at the day of Judgment, at simple

interest, calculable from 1st January, 2015 (e. i. a day after the said amount became due and payable) till the date of final payment.

It must be stated that the whole action was instituted upon the failure of the Defendant to pay the remaining purchase price before the deadline as agreed by the parties. The Defendant himself was well aware of this deadline, but failed to meet it. If he had paid the remaining purchase price before the deadline as he himself undertook to do (as patent on the face of Exhibit 1), the Plaintiff's right to review the agreement would not have accrued, and the instant action would not have been instituted, as same would have been needless. This case has been pending in this Court since 23rd October 2015.

It appears from the language of Exhibit 1 that its drafting did not have the expertise of a Lawyer. It must be stated that, review clauses in agreement that are left at large to be unilaterally exercised by one party, without any in-built yardsticks, checks, controls, etc., as is the case in the instant action, are recipes for fueling avoidable and needless litigations in our Courts. It is thus important for parties to employ the expertise of Lawyers in drafting their contract/agreements to prevent needless litigations.

On the basis of the above Orders, the Plaintiff's claim for recovery of possession and the ancillary reliefs are denied.

Cost of GH¢8,000.00 is assessed against the Defendant in favour of the Plaintiff.

H/L KWAME AMOAKO

JUSTICE OF THE HIGH COURT