

IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE HELD AT THE LAW COURT COMPLEX, ACCRA (GENERAL JURISDICTION 11) ON WEDNESDAY THE 3<sup>RD</sup> DAY OF MAY 2023 BEFORE HIS LORDSHIP JUSTICE RICHARD APIETU (J)

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SUIT NO. GJ/0761/2020

KAWA KOHATSU ENTERPRISE LIMITED - PLAINTIFF

VRS

EDWARD DARLINGTON - DEFENDANT

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### **RULING**

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This is a Ruling on an application brought for and on behalf of the Plaintiff/Applicant hereinafter referred to as the Applicant for Summary Judgment based on admissions/payments made by the Defendant/Respondent hereinafter referred to as the Respondent which was resisted by an Affidavit in Opposition filed by the Respondent challenging the capacity of the Applicant.

### **FACTS OF THE CASE**

The Applicant commenced this action by a Writ of Summons dated 11<sup>th</sup> March, 2020 with suit number GJ/0761/2020 for the reliefs endorsed thereon against the Respondent. The Respondent entered an Appearance by his Lawyer and caused a Statement of Defence to be filed on his behalf. The Applicant filed a Reply to the Statement of Defence and on 17<sup>th</sup> July, 2020 the Applicant filed a Motion on Notice for Summary Judgment which was resisted by an Affidavit in Opposition filed by the

Respondent on 12<sup>th</sup> July, 2020. On 27<sup>th</sup> January, 2021 the Applicant filed a Motion on Notice for an Order Granting Interest on Money owed and paid Cost of Litigation brought under Order 19 of C. I. 47. The said Motion was resisted by an Affidavit in Opposition filed by the Respondent on 11<sup>th</sup> February, 2021. On 27<sup>th</sup> April, 2021 the Applicant filed a Motion on Notice for Summary Judgment based on admission/payments made by Respondent to the Applicant under Order 14 of C. I. 47/Inherent Jurisdiction of the Court. This was resisted by an Affidavit in Opposition filed by the Respondent on 14<sup>th</sup> May, 2021 challenging the capacity of the Applicant. On 9<sup>th</sup> February, 2023 the Applicant filed a Written Address on the issue of capacity.

### **THE APPLICANT'S CASE**

The Applicant says that it is a company incorporated under the laws of Ghana acting by its Managing Director, Solomon Kusi. In January, 2019 acting through its Managing Director, the Applicant entered into negotiations in respect of a piece of land in Wa which Applicant believed belonged to the Janbrugu family of Wa.

Applicant states that during the negotiations, the Respondent was introduced to the Applicant as Lawyer for the Janbrugu family by one Abubakar Adolf who was a member of the Janbrugu family.

The Applicant avers that, at the close of negotiations at the Law office of the Respondent, it was agreed that the purchase price for the land was GH¢600,000.00 and payment was to be made to the Respondent. At the first meeting in February, 2019 and upon the insistence of the Respondent, a cheque of GH¢200,000.00 was issued in the name of the Respondent as a deposit, no receipt was given by the Respondent upon receipt and clearance of the said cheque.

The Applicant says that, on 8<sup>th</sup> May, 2019 the balance of GH¢400,000.00 was paid by cheque to the Respondent after the Respondent had presented some papers for signature which papers were supposedly documents on the land. Again, no receipts

were issued by the Respondent and the document on the land were not returned to the Applicant.

The Applicant further says that, the Respondent failed to keep his end of the bargain to deliver signed documents on the land to the Applicant and Applicant was prevented from entering unto the land. Applicant subsequently discovered following a search that the Janbrugu family had no interest in the land. The Applicant's Managing Director was no longer interested in the land but rather wanted a return of the money. The Respondent promised to return the money within two weeks but failed, refused and or neglected to do so.

The Applicant states that after persistent demands, the Respondent issued a cheque for GH¢600,000.00 on 2<sup>nd</sup> September, 2019 to the Applicant which was dishonoured and still remained unpaid. All legitimate demands on the Respondent to refund the money proved futile and the Respondent has evinced a clear intention not to refund the said amount unless compelled by this Honourable Court.

The Applicant says that on 17<sup>th</sup> July, 2020 the Applicant filed a Motion on Notice for Summary Judgment pursuant to Order 14 Rule 1 of C. I. 47 and annexed to the Motion paper an Affidavit in Support sworn to by Nana Yaa Nartey the substantive lawyer for the Applicant.

### **THE RESPONDENT'S CASE**

The Respondent denies the capacity of the Applicant putting him to strict proof and that if the Applicant were a Limited Liability Company as claimed it need not act by any other person in this matter.

The Respondent says that whatever negotiations the Janbrugu Naa family had concerning the land, the subject matter of the suit, the Respondent was not a party or a purchaser for that matter.

The Respondent avers that, the document of title prepared to cover the sale and purchase of the said land and executed by the parties, speaks for itself. The payment for the land was made to the Janbrugu Naa family and that the purchase price was decided by the parties without the Respondent.

The Respondent says that, he had no obligation to return executed documents of title to the Applicant. It was the responsibility of the grantor to deliver the documents to the purchasers who were not the instant Applicant.

The Respondent says that, the cheque he issued was for a specific purpose and not to satisfy a debt owed to the Applicant. The Respondent denied the reliefs sought by the Applicant.

On 12<sup>th</sup> August, 2020 the Respondent deposed to an Affidavit in Opposition to the Motion on Notice for Summary Judgment brought by the Applicant pursuant to Order 14 Rule 1 of C. I. 47. In the said Affidavit in Opposition, the Respondent deposed that the Applicant had a legal personality of its own and for which reason it could enter into any contract such as the Sale and Purchase of land. The act of Shareholders who have acquired properties in their personal names cannot be said to be the act of the Applicant's company.

### **ISSUES TO BE DETERMINED**

I have read the Application and the Affidavits filed by the parties. I have also considered the written submissions of both Counsel. I am of the considered view that the issues which this Court has been called upon to determine are:

1. Whether or not the Applicant has capacity?
2. Whether or not the Applicant is entitled to Summary Judgment based on admissions/payments made by the Respondent?

In doing so, reference shall be made to the relevant legislations and authorities in relation to the subject matter before me.

In the Supreme Court case of **OXYAIR LTD. & DARKO V. WOOD [2005-2006] SCGLR 1057** "The second defendant admitted that he was the managing director of the first defendant. Accordingly he was, in law, one of the organs of the company, able to bind the company in terms of the provision set above."

Similarly, Section 147 of the Companies Act, 2019 (Act 992) provides that; "An act of the members in general meeting of the Board of Directors or of a Managing Director while carrying on in the usual way the business of the company is the act of the company and accordingly the company is criminally and civilly liable for that act to the same extent as if the company were a natural person.

Applying the authorities cited above, Solomon Kusi as the Managing Director of the Applicant company is in law able to represent the Applicant and bind it in such transactions and while carrying on the usual way of business of the Applicant company, his acts is deemed as the act of the Applicant.

In the High Court case of **ADDU V. GHANA CO-OPERATIVE MARKETING ASSOCIATION LTD. [1962] 1 GLR 418**, it was held that: "The plaintiff as president of the defendant association was in the same position as the managing director of a company - he could take part in the policy decisions, such as the one by the committee to sell the plots. It is immaterial that the decision turned out eventually to benefit the plaintiff among others."

Solomon Kusi at all material time during the negotiations represented the Applicant and it is immaterial that the purported assignment drafted by the Respondent seems to confer benefits under that transaction on the shareholders. As such, the Applicant can maintain an action for recovery of the money had and received by the Respondent, since all the cheques issued to the Respondent was in the name of the Applicant.

Section 5 (1) of the Contracts Act, 1960 (Act 25) provides that, "A provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract whether as a designated person or as a member of a class of persons, may subject to this Section and Sections 6 and 7, be enforced or relied on by that person as though that person were a party to the contract".

The Managing Director has in the pleadings variously provided an explanation for the transaction involving the Respondent and him. Thus, the negotiation was for the purchase of land for the benefit of the Applicant.

The Respondent on the other hand, has failed to state the nature of the transaction he has with the Applicant. In paragraph 8 of his Statement of Defence the Respondent stated that the cheque issued was for a specific purpose. Yet in paragraph 6 of his Affidavit in Opposition filed on 14<sup>th</sup> May 2021 to the Applicant's application for summary judgment the Respondent states; "6. That paragraph 5 of the Affidavit in Support of the instant application is vehemently denied. The cheque referred to, was not issued for the payment of the Plaintiff herein as the Defendant had no transaction whatsoever with the Plaintiff for which the Defendant/Respondent is indebted to the Plaintiff/Applicant".

The Respondent just makes evasive denials without leading any credible evidence to suggest what warranted his issuing of a dud cheque of GH¢600,000.00 from his UBA account to the Applicant. This happens to be the same amount the Applicant is

claiming from Respondent in the suit. The Respondent has given inconsistent averments in his pleadings regarding the dud UBA Cheque numbered 022101 he issued in the name of the Applicant. The Respondent denied receipt of any money from the Applicant in the face of clear evidence of his withdrawal of the said amount from the bank account of the Applicant and has again failed to provide an explanation as to what transaction the payment relates to.

The factual situation of the issue of two cheques numbered 0000513 and 000539 from Respondent's Cal Bank account for the sum of GH¢200,000.00 and GH¢400,000.00 respectively paid to the Respondent makes it unjust or unconscionable for the Respondent to deny the capacity of the Applicant, to sue for its money when he in an attempt to refund the said amount issued a cheque in the name of the Applicant and during the pendency of this suit Solomon Kusi, the Managing Director of the Applicant company has received GH¢600,000.00 from the Respondent on behalf of the Plaintiff.

In the case of **HARLEY V. EJURA FARMS GHANA LTD [1977] 2 GLR 179-222** the Court of Appeal (Full Bench) held that; "The common law doctrine of privity of contract was now subject to some important modifications: (a) by the equitable principle that a party to a contract could constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party and (b) by the use of the concept of agency, namely, a principal was in law entitled to sue for the recovery of money paid on his behalf by his agent where the payment was made under a mistake of fact or upon a consideration that had failed or in consequence of fraud, duress or any other circumstance ordinarily entitling a person paying money to recover it from the payee."

Applying the above cited authority, it is my considered opinion that the Applicant is entitled to maintain an action against the Respondent for the recovery of money paid for the purchase of land upon a consideration that has failed under a mistake of fact.

Solomon Kusi an agent of the Applicant by a mistake of fact that the land it sought to buy belonged to the Janbrugu family. As such the lack of privity of contract raised by the Respondent would not preclude the Applicant from maintaining an action for money had and received from it for its use.

It is immaterial that Exhibit KA2 Series which is the evidence of receipts acknowledging the payment of the GH¢600,000.00 attached to Applicant's application for summary judgment filed on 27<sup>th</sup> April 2021 is in the name of Solomon Kusi since the Applicant is entitled on the face of its evidence to maintain this suit against the Respondent.

The Respondent by making payments totaling GH¢600,000.00 to the Managing Director of the Applicant during the pendency of this suit is estopped by conduct from saying the Applicant has no capacity to sue. Per Section 26 of the Evidence Act, 1975 (NRCD 323) the Respondent having made the payments to the Managing Director of the Applicant during the pendency of this suit is stopped by his own act from maintaining the capacity argument. The reason is that the conduct of the Respondent is inconsistent with the 'defence' raised. In my considered opinion, to insist on the form, the substance of the Applicant's quest for justice will be defeated as it is inequitable to allow the Respondent to insist on form and thereby defeat the substance of Applicant's claims against him.

## **CONCLUSION**

It is my considered opinion that the Applicant has established by cogent evidence that it is immaterial that the shareholders and or the Managing Director of Applicant company took interest in the land transaction.

The Applicant have demonstrated in their written address that the Applicant can maintain an action for money had and received against the Respondent. The Respondent has during the pendency of this suit paid the principal sum of

Gh¢600,000.00 after having kept the said money since 2019 and having caused the Applicant to institute this legal action against him, the Applicant has capacity and as such can demand for the payment of interest and cost from the Defendant.

Based on the admitted payments, I hereby grant the other relief's claimed by the Applicant consequent upon the payment of the principal amount by the Respondent.

Cost of GH¢5,000.00 awarded in favour of Applicant against the Respondent.

(SGD)

**JUSTICE RICHARD APIETU  
(HIGH COURT JUDGE)**

**COUNSEL**

**SALOMEY DANSOH HOLDING THE BRIEF OF REGINA MARTIN-PEPRAH  
FOR THE PLAINTIFF/APPLICANT**

**DEFENDANT/RESPONDENT APPEARS IN PERSON**