IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION HELD IN ACCRA ON THE 20TH DAY OF FEBRUARY 2023 BEFORE HIS LORDSHIP JUSTICE JUSTIN KOFI DORGU

SUIT NO CM/BDC/0383/2019

IZONE GHANA LTD **PLAINTIFF**

VRS

MR. GEORGE APPIAH KUBI **DEFENDANT**

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PARTIES: **PLAINTIFF REPRESENTED BY TIJANI APENENSO**

DEFENDANT PRESENT

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JUDGMENT:

On or about the 4th of February, 2019, the Plaintiff herein, a limited liability company incorporated under the laws of the Republic of Ghana to engage in the business of selling, marketing and distribution of MTN products and services throughout the Greater Accra Region took out the instant writ against the Defendant, a Ghanaian businessman, trading under the name and style of Giant Media Enterprise for the following reliefs;-

"(a) An order directing the Defendant to pay his outstanding debt of GH¢ 100, 130.76 or in the alternative, an order for the enforcement of the Deed of Assignment entered into on the 27th February, 2018

(b). Interest on the GH¢100, 130.76 from 2014 to date of final payment at the prevailing commercial rate

(c). Cost including costs of litigation

(d). Any other order this Honorable Court may deem fit.

The Plaintiff supported his endorsement with an eighteen (18) paragraph Statement of Claim, part of which I reproduced hereunder in no special order;-

3. The Plaintiff avers that somewhere in July 2011, the Defendant entered into a sales arrangement with the Plaintiff as one of the Plaintiff's sub-dealer.

4. The Plaintiff further avers that under this contract, the Defendant was to purchase MTN products from the Plaintiff and to present cheques after each transaction.

5. The Plaintiff avers that the practice flowing from the agreement was to the effect that the Defendant issued cheques for payment of goods requested and supplied on the same day.

6. The Plaintiff further avers that the parties abided by the terms of their contract until May 2014.

7. The Plaintiff avers that Defendant breached his agreement with the Plaintiff between the period of May 2014 and September 2014 when the Defendant presented eight cheques to the Plaintiff for goods requested and delivered but all of the cheques were dishonoured.

8. The Plaintiff avers that the total value of cheques returned amounted to GH¢ 182,601 and that the Plaintiff was subsequently forced to use Defendant's incentives for the months of May, June, August and September in 2014 to defray part of the debt. He also made some additional cash payments in this same timeframe.

9. The Plaintiff further avers that despite the Defendant's indebtedness to Plaintiff, it continued trading with the Defendant in the belief that the Defendant would pay his debt as and when he had some money while still in business.

12. The Plaintiff avers that after the payment of GH¢ 18,019.00, the Defendant failed, neglected and/or refused to honour his outstanding debt which was GH¢ 100,130.76.

14. The Plaintiff says that after it agreed verbally with the Defendant in respect of using his property document as security, the Defendant vanished again for two years and it took a report to the Ghana Police service in November 2017 for the Defendant to show up

15. The Plaintiff further avers that it finally executed the agreement with the Defendant on the 1st March, 2018 wherein the Defendant agreed to assign his interest in property situate at Sowutuom in the Ga South District of the Greater Accra Region of the Republic of Ghana to the Plaintiff in fulfilment of the debt if the Defendant failed to pay the debt within the time stated in that agreement.

Upon service of the Writ and Statement of Claim on the Defendant, he also filed on the 27th March, 2019, a 17 paragraph Statement of Defence. Subsequent to the **initial** Statement of Defence filed as recounted above, the Defendant with the leave of the Court filed an amended Statement of Defence and Counterclaim on the 30th June, 2020. In the said amended Statement of Defence and Counterclaim, apart from the denial that the Defendant was indebted to the Plaintiff in any amount at all, he also set up a defence of fraud perpetrated on him and his accounts as well as undue influence and duress in the execution of the Deed of Assignment. At the close of defence, the Defendant Counterclaimed in the following terms

(i) An order direct at the Plaintiff to pay all incentives due the Defendant for the months of June, August and September totaling GH¢ 10, 397.76
(ii) Interest on the said GH¢ 10, 397.76 from September 2014 till final date of payment
(iii) Damages for the arbitrary blockage of cards and collapse of the Defendants eight shops amidst emotional torment, psychological trauma, social stigma and financial hardship
(iv) Damages for the abuse of the constitutional right of the Defendant and forcing him to sign the agreement under duress
(v) Costs of litigation including legal fees and
(vi) Any other order this Honorable Court may deem fit"

Now, prior to the Defendant being granted leave to amend his Statement of Claim, the following were set down as the issues for the determination by the Court. They are:

1. Whether or not the Defendant is in breach of his obligations under his contract with the Plaintiff when all the cheques issued by the Defendant were returned
2. Whether or not there were unauthorized transactions in the name of the Defendant

3. Whether or not the Plaintiff is entitled to his claim being the sum of GH¢ 100, 130.76
4. Whether or not the Plaintiff is entitled to interest on the said GH¢ 100, 130.76

In view of the amendment and Counterclaim however, I will adopt the further issues set down by the Defendant's Lawyers in his written address as they are necessary and flowing directly from the amended Statement of Defence and Counterclaim to wit;

5. Whether or not the Defendant suffered any damages as a result of the arbitrary blockage of cards by the Plaintiff
6. Whether or not the agreement dated 27th February, 2018 was signed by the Defendant under duress and
7. Whether or not the Plaintiff breached the constitutional right of the Defendant"

Now, the case of the Plaintiff is that, it is a limited liability company which at all material times was engaged in the business of selling, marketing and distribution of MTN products and services throughout the Greater Accra Region. It is the case of the Plaintiff that in or about July, 2011, it entered into sales arrangement with the Defendant as one of its numerous sub-dealers and by which the Defendant purchased MTN products from the Plaintiff Company for outward sale to the public and as part of the terms, the Defendant was to pay for any supplies or purchases with cheques on the same day as the supplies. It is the case of the Plaintiff that this arrangement went on smoothly until May 2014 when cheques the Defendant issued for the supplies/purchases of May, June, July, August and September were dishonoured. The Plaintiff testified that the total value for the goods supplied within the time amounted to GH¢ 182, 601.00. It is the case of the Plaintiff that it had to use Defendant's incentive package for the months of May to September to offset part of the debt in addition to other cash payments made by the Defendant to reduce the Defendant's indebtedness to GH¢ 100, 130.76 which Defendant has failed or refused to pay to date, hence the action.

The Defendant on the other hand admitted entering into a contract with the Plaintiff as a sub-dealer and was supplied with goods up to the threshold limit of GH¢ 94, 000. As part of the conditions, the Defendant intimated that the Plaintiff was to hold on portions of his monthly sales of 5% which was to be paid back to him as monthly commission at the end of each month. The Defendant's case is that he gives out post-dated cheques for future supplies and keeps same with the Plaintiff who uses them to pay for the supplies made. It is the case of the Defendant that throughout his transactions with the Plaintiff, he had never exceeded his approved threshold limit of GH¢ 94, 000 let alone incur a debt of over GH¢ 100, 000.00. The Defendant testified that it was only about August 2014 that he run into difficulties making him incur the debt of GH¢ 63, 006.00 resulting from dishonoring cheques when he was unable to deposit the sales amount into the respective bank accounts. The Defendant's case is that he had since made up for the debt and has even overpaid the liability averred**.** It is the case of the Defendant that in the meantime, the Plaintiff caused his business to collapse and put him into great expense and inconvenience by unilaterally blocking cards he purchased from the Defendant and sold to his customers. The Plaintiff also caused his arrest and while in detention, procured an admission from him under duress. The Defendant then prays for the reliefs as endorsed in his Counterclaim.

Now, there is no gain-saying that this is a simple civil case which determination is based on the balance of probabilities. In other words, a Plaintiff succeeds if on all the evidence, his case is seen as more probable than not and that is to say, upon the balance or preponderance of probabilities. Thus in the case of **BISI V. TABIRI ALIAS ASARE [1987-1988]** 1 GLR 360 at 361, the Supreme Court held as follows;-

"*The standard of proof required of a Plaintiff in a civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue. The demand for such strict proof of pleadings had however never been taken as a call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle. Preponderance of evidence became the trier's belief in the preponderance of*

probabilities. But probability denoted an element of doubt or uncertainty and recognized that where there were two choices it was sufficient if the choice selected was more probable than the choice rejected".

In a similar vein, the Court of Appeal in **GIFTY AVADZINU v. THERESA NJOOMO [2010]** 26 MLRJ 105 @108, it was held;-

"The law relating to the standard of proof in all civil actions without exception was stated to be proof by preponderance of probabilities, having regard to section 11 (4) and 12 of the Evidence Decree, 1975 (NRCD 323). This means that a party must show that his claim is more probable than that of the other".

What is trite and must be said at this onset is that, a counterclaim is also a claim on its own and a Defendant Counterclaimant bears the same onus of proof as a Plaintiff in order to succeed on his counterclaim**.** Thus the Supreme Court in the case of MORU V. HUSEIN [2013] 59 GMJ 17 had this to say per Baffoe-Bonnie JSC at page 17

"*It is true that a Counterclaim is a separate action from the claim"*

Then also, the case of **ARYEH & AKAKPO V. AYAA IDDRISU [2010)** SCGLR 891 @901 per Brobbey JSC

"*A party who counter-claims bear the burden of proving his counterclaim on the preponderance of the probabilities and will not win on that issue only because the original claim failed. The party wins on the counterclaim on the strength of his own case not on the weakness of his opponent's case*".

The question arises as to how this proof is ascertained and the issue was answered by the Supreme Court in the case of **TAKORADI FLOUR MILLS V. SAMIRA FARIS [2005-2006]** SCGLR 882 @ 900 thus;-

"*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 more probable of the rival version and is deserving of a verdict*".

Now, what is the evidence offered by the Parties in support of their respective cases. In Court, the Plaintiff testified by its representative and called an additional Witness while the Defendant testified and called two additional witnesses to close the case. The evidence of the Plaintiff is as contained in the evidence of Stephen Adipa Nyarko, the Chief Financial Officer of Plaintiff's company and Richmond D. Amankwa, the Head of Audit of the Plaintiff Company which Witness Statements were admitted and adopted as the evidence of the Plaintiff. The gravamen of the Plaintiff's evidence is contained in paragraphs 8 through 23 of the evidence of Stephen Adipah Nyarko and paragraphs 6 through 17 of the evidence of Richmond D. Amankwa, thus:-

"6. The Defendant has been a customer of Izone Limited since 2011 after its formation. He used to purchase stock from the head office until the opening of the Dansoman Zonal Office which served the same purpose of business. Defendant started buying from the Dansoman Zonal Office sometime in 2012.

7. The Defendant purchased inventory with cheque from the zonal office. During such occasions, on the 2nd June, 2014, the Defendant operating in the name and style of Giant Media Enterprise bought stocks with Twenty-Five Thousand, Three Hundred and Nineteen Ghana Cedis (GH¢ 25, 319.00) with cheque written and signed by him.

8. My Lady, the Defendant came again on the 3rd day of June, 2014 and bought more stocks worth Thirty-Seven Thousand, Six Hundred and Eighty-Eight Ghana Cedis (GH¢37,688.00) of which he issued two more cheques of face value of GH¢30,000.00 and GH¢7,687.00 for payment.

9. The cheques issued by the Defendant were presented for clearance but the bank returned all the three cheques with the face value of GH¢25,319.00, GH¢30,000.00 and GH¢7,687.00 totaling an amount of Sixty-Three Thousand and Six Ghana Cedis (GH¢63,006.00) which was deposited into I-zone bank account.

10. My Lady when a cheque returns and the reason is due to insufficient funds on the part of the customer, we (the Plaintiff Company) ask the customer to bring cash equivalent to defray his outstanding debt immediately. In the case of the Defendant operating under the name and style of Giant Media Enterprise, this was communicated to him and he requested that we block his products due to a robbery. The serials were sent to MTN and the unused scratch cards were accordingly blocked.

11. The Defendant after the said communication made a cash deposit of Twelve Thousand Eight Hundred and Twenty-One Ghana Cedis (GH¢12,821.00) on the 5th day of June, 2014. In addition to the cash deposit, incentives he earned from his sales in May 2014 worth Three Thousand, Four Hundred and Fifty Ghana Cedis and Eighty-Eight pesewas (GH¢3,452.88) was credited to his account. This brought the total amount paid to Sixteen Thousand, Two Hundred and Seventy- Three Ghana Cedis and eighty eight pesewas (GH¢16,273.88).

12. My Lady as a policy, the Defendant ended up trading with the Plaintiff Company when the issue was resolved with management. Management of the Plaintiff Company and the Defendant entered into a new agreement and/or arrangement which allowed the Defendant to start trading in order to enable him settle his indebtedness. Attached hereto and marked as "Exhibit F" is a copy of the repayment agreement.

13. The Defendant started trading on the 21st day of August, 2014, buying and clearing his cheques on daily basis until his cheques issued from the 18th day of September 2014 to the 23rd day of September 2014 totalling an amount of Ninety-Three Thousand, Nine Hundred and Ninety Nine Ghana Cedis, Fifty Pesewas (GH¢ 93, 999.50) were dishonoured. His total indebtedness therefore as at the 28th day of September, 2014 was one Hundred and Forty Thousand, Seven Hundred and Thirty-One Ghana Cedis and Sixty-Two Pesewas (GH¢140,731.62).

14. My Lady on the 29th day of September, 2014, the Defendant paid a cash amount of Ten Thousand Ghana Cedis (GH¢ 10,000.00) to reduce his indebtedness.

15. Additionally the August and September incentives of GH¢ 890.77 and GH¢1, 691.85 respectively were credited to his ledger account to debt outstanding as well as products retrieved amounting to GH¢ 10,000.00. His total debt as at close of 2014 was One Hundred and Eighteen Thousand, Two Hundred and Twenty-Nine Ghana Cedis (GH¢118,149.76).

16. His last transaction to reduce his debt was on the 31st day of March, 2015 valued at (GH¢ 18,019.00). This has brought his total debt to GH¢ 100, 130.76

17. In the circumstances My Lady, I humbly pray this Honourable Court to grant the Plaintiff Company's reliefs as set out in the Statement of Claim and any Order(s) that this Honourable deems fit".

The Defendant on the other responded to the above evidence in his Witness Statement and adopted as his evidence in paragraphs 2 through 6

2. I was initially buying MTN products on cash basis from the Plaintiff Company. After some time, the Plaintiff made me a sub dealer and offered me credit

facility based on my good performance in increasing sales and meeting sales target. The said credit facility came with the following conditions:

a. I was given a new set of sales target for every month and was asked to open a number of shops to meet the Plaintiff's key performance indicators.
b. The Plaintiff advised me to open bank accounts with UT Bank and Royal Bank since they were the Plaintiff's bankers
c. The Plaintiff requested me to give a number of signed post-dated cheques to be drawn on my account upon lodging the sales proceeds into the said bank account.
d. The Plaintiff gave me a credit threshold of Ninety-four Thousand Ghana Cedis (GH¢ 94,000.00).
e. The Plaintiff held 5% of my monthly total sales to be given to me as commission at the end of every month and also give me incentives upon meeting sales target.

3. In view of this, the Plaintiff Company asked me to issue post-dated cheques to be drawn on my account after lodging sales proceeds into the account. I did not present cheques after each transaction.

4. The agreed practice was that when the post-dated cheques were due and there was a genuine reason not to present the cheques, the Plaintiff's attention was to be drawn to that reason for postponement or payment by cash.

5. The post-dated cheques were issued pending supply of the products on most occasions. In most cases, not all of the products, quantities and various scratch card denominations were available. The Plaintiff sometimes could not meet the Defendant's demand due to shortage. Therefore products and quantities requested for were not always supplied on the same day.

6. As at August 2014, I was owing the Plaintiff an amount of GH¢ 63, 006.00 and the Plaintiff had post-dated cheques amounting to the said amount. However, I could not lodge funds into my accounts for same to be drawn by the Plaintiff due to a robbery attack on me in May, 2014 whilst I was taking funds to the bank.

As further evidence, the Defendant testified in paragraphs 8 to 12 of his Witness Statement as follows;-

8. Both Parties met to decide on how I could pay my indebtedness of GH¢63, 006.00. Thus on 12th August, 2014, the Plaintiff entered into a repayment agreement with me and in fulfilment of the said repayment, I paid a total of GH¢64, 292.88 which is GH¢1, 286.88 in excess of the said GH¢63, 006.00. Attached and marked as Exhibit 2 is a copy of the repayment agreement.

"9. The payment breakdown is as follows:

a. GH¢12, 821.00 cash payment as evidenced in the repayment agreement (Exhibit 2)

b. GH¢10, 000.00 being closing stock of MTN rechargeable cards retrieved by the Plaintiff and evidenced in the repayment agreement (Exhibit 2)

c. GH¢3, 452.88 being incentives due me and evidenced in the repayment agreement (Exhibit 2)

d. GH¢10, 000.00 cash payment on 29th September, 2014

e. GH¢10, 000.00 cash payment on 14th October, 2014

f. GH¢18, 019.00 cheque payment on 31st March, 2015

10. Upon a statement of accounts presented to me by the Plaintiff, I discovered that the Plaintiff had allowed unauthorized persons to trade in my exclusive account

11. I was very dissatisfied and raised queries on some of the sales invoices as same were not signed by me or anyone through me. I then called for reconciliation of accounts which the Plaintiff agreed but has been dragging its feet in clarifying such behaviours. I later discovered further that the unauthorized transactions included one conducted by one Kwaku who is even not known to me in any way.

12. I still have some of the invoices relating to the unauthorized transactions which the Plaintiff Company printed for me and I hereby attach copies of same as Exhibit 3 series. That I also hereby attach copies of the sales invoices signed by my authorized personnel Pedro Razak and mark same as Exhibit 4 series. The signatures on Exhibit 3 series are totally different from the ones on Exhibit 4 series. The signatures on Exhibit 3 series are neither mine nor that of my authorized personnel. I kindly implore the Court to have a look at my signature on Exhibit 2".

The Defendant's case was supported by the evidence of the DW1 Pedro Razak who described himself as a Dispatch Rider to the Defendants. His testimony that is of material relevance is as contained in paragraphs 4 through 10

"4. From the inception of the credit facility, I was then given several post-dated cheques signed by the Defendant which I deposited with the Plaintiff at all times pending supply of the MTN recharge cards.

5. It therefore became mandatory that apart from the Defendant himself, 1 Pedro Razak was the only person mandated to collect stocks for any of the post- dated cheques and acknowledge receipt for same by appending my signature on the Credit Sales Invoice. Therefore my signature or that of the

Defendant was the only authorized signature required for the issuance of stocks for any of our post- dated cheques.

6. Often times out of about six or seven post-dated cheques that I deposit with the Plaintiff, the Plaintiff Company were unable to supply for all of the cheques due to shortages of some of the recharge card denominations.

Often times the Plaintiff will supply for 3 cheques out of about 7 post-dated cheques due to shortages of some of the scratch card denominations. Scratch card denominations included GH¢2, GH¢5, GH¢7.50, GH¢10, GH¢20, etc. and electronic transfer.

7. The Plaintiff at all times material had our post-dated cheques, pending supply of the stocks and therefore it is only when the Defendant or I acknowledge receipt by signing on the Credit Sales Invoice that a particular post-dated cheque or cheques will be supplied.

8. It is therefore critical to note that the mere fact that the Plaintiff is in possession of Giant Media's post-dated cheques does not mean Giant Media has automatically received stocks for those cheques. The cheques were issued pending supply, and it is only when the Credit Sales Invoices are signed by me (Pedro Razak) or the Defendant that stocks will be issued out to us.

9. I recollect vividly that Giant Media became indebted to the Plaintiff to the tune of GH¢ 63,006.00 when he was robbed of sales proceeds that he was taking to the bank somewhere in May, 2014. I personally accompanied the Defendant to the Plaintiff's Head Office at Labone where we informed the Plaintiff of the robbery incident and asked the Plaintiff not to present three of our post-dated cheques totalling GH¢ 63,006.00.

10. The Plaintiff then entered into a Repayment Agreement with the Defendant of which I Pedro Razak signed as the Guarantor for the

Defendant for the Repayment Agreement, which was executed on 12th August, 2014. I supported in my own small way as the Dispatch Rider, worked so hard and we paid Izone an amount of GH¢ 64, 292.88 which was even in excess of the said GH¢ 63,006.00".

I must say that even though the Defendant called a second Witness Gloria Appiah Kubi who testified as DW2 and coincidentally happens to be the wife of Defendant, her testimony is of little or no relevance to the case as it is mostly hearsay from the husband, the Defendant without any firsthand knowledge of what she testified to.

Now, the first issue adopted by the Court is "Whether or not the Defendant is in breach of his obligations under the contract with the Plaintiff when all cheques issued by the Defendant were returned?" By the evidence of the Plaintiff as contained in paragraphs 4 and 5 of the Plaintiff's Witness Statement, the arrangement was as follows:-

"4. Under the company's credit policy, customers are allowed to buy stocks to their credit limit approved by management of the Plaintiff Company and pay with cheques. The cheques Plaintiff accepts for stock are not post-dated cheques"

5. My Lady it is worthy of note that all cheques received from customers are deposited into Plaintiff's bank account the next day for it to clear"

Now, to this testimony, both the Defendant admit, albeit with qualification that the Defendant was to pay for the goods purchased or supplied with cheques. To the Defendant, it was with post-dated cheques but the Plaintiff insist that the cheques were drawn after every transaction. Indeed, in paragraph 2(b) reproduced above, the Defendant testified as "The Plaintiff advised me to open bank accounts with U.T Bank and Royal Bank since they were the Plaintiff's bankers"

The DW1, Pedro Razak support this position in paragraph 4 of his Witness Statement as follows:

"4. From the inception of the credit, I was then given several post-dated cheques signed by the Defendant which I deposited with the Plaintiff at all times pending supply of the MTN recharge cards".

Now, it is trite learning that a fundamental obligation of a buyer in a contract of sale is to pay the price of the goods supplied. There is evidence attached to the Plaintiff's case as captured in paragraphs 10 and 11 of the Witness Statement of Stephen Adipa Nyarko and the Exhibit B series that cheques deposited by the Defendant were returned as dishonored due to insufficient funds. The Defendant's defence attached in his paragraphs 6 and 7 of his Witness Statement cannot avail him. The fact or otherwise of the robbery incident alleged confirms the assertion that he could not lodge funds into the respective accounts on which he issued the cheques. They were thus dishonored and returned. What this assertion means is that both parties are at ad idem with the issue that the mode of payment as between them was by the use of the cheques and that for one reason or the other, cheques drawn for the payment were returned as dishonoured. Thus in the case of SAMUEL OKUDZETO ABLAKWA & ANOR V. JAKE OBITSEBI LAMPTEY & ANOR [2013-2014] 1 SCGLR 16, the Supreme Court held on admissions as follows**;-**

"*Where a matter is admitted, proof is dispersed with*"

So also in the case of ADORMISON VRS. TETTEH [2013] 59 GMJ 62 AT 69 per Dzodzie JA (as she then was), it was held-:

"*Where the evidence of one party on an issue in a suit is corroborated by witness of his opponent whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses a Court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reasons (which must appear on the face of the judgment) the Court finds the uncorroborated version incredible or impossible"*

In this particular case, it is not as if the two parties were presenting rival versions but both Plaintiff and the Defendant agreed on the issue of the dishonored cheques. The rest is all about explanations as to why the cheques did not go through which indeed has no effect on the issue. It goes without saying therefore that the Plaintiff was able to prove that the Defendant indeed breached his obligation under the contract which I call fundamental obligation to pay for goods supplied or purchased in as much as the cheques he issued were dishonoured.

The next issue set down for determination is "Whether or not there were some unauthorized transactions in the name of Defendant".

The Defendant testified to this allegation in his paragraph 8 to 12 of his Witness Statement which had already been reproduced above. The Plaintiffs naturally denied any such transactions. Indeed on the 22nd June, 2021, whilst the Plaintiff was under cross-examination, this is what transpired on the issue of strange transactions in the Defendant's exclusive account:

"Q. Is it your position that Exhibit 'E' is the Statement of Account of the Defendant being kept by the Plaintiff Company?

A. Yes My Lord.

Q. Can you tell this Court when exactly Exhibit 'E' was prepared?

A. My Lord Exhibit 'E' was entered into our system same as the dates indicated on the document.

Q. Quite Apart from Exhibit E, is there any other Statement of Account of the Defendant being kept by the Plaintiff Company?

A. My Lord that I am not aware of.

Q. So you want this Court to believe that as the Chief Finance Officer you are not aware of any other Statement of Account of the Defendant apart from Exhibit E?

A. My Lord I am not aware of any system printed statement.

Q. Do you know one Cynthia Fosu?

A. Yes My Lord.

Q. Kindly tell the Court Cynthia Fosu's position in the Plaintiff's Company?

A. At the time of the incident, she was the Operations Manager.

Q. And what about now?

A. Now, she is the Chief Executive Officer for the past 14 months.

Q. I suggest to you that the said Cynthia Fosu has already sworn to an Affidavit in Support of Motion for Summary Judgment which was filed on 19th July, 2019 and she attached a different Statement of Account of the Defendant.

A. My Lord, I am not aware

Q. I put it to you that the said Statement of Account gave the full details of all the transactions and same disclosed unauthorized transaction in the Defendants exclusive account.

A. My Lord, I am not aware.

Q. I further suggest to you that the Plaintiff Company after becoming aware of the unauthorized transaction during the determination of the Motion for Summary Judgment quickly revised the Defendant's Statement of Account and came out with Exhibit E.

A. My Lord, I am not aware.

Q. I further put it to you that the Plaintiff Company in revising the Statement of Account took out the full details so as to cover the unauthorized transactions.

A. My Lord, I am not aware."

Now this assertion having been denied, it fell on the Defendant who was asserting same to prove his allegations. For now, the principle is that he who asserts must prove and you do not do that by only repeating the allegation on oath either by yourself or your Witness. The Defendant aware of this in my estimation testified in paragraph 12 of his Witness Statement which **also** has been reproduced that he had some of the invoices and tendered in the Exhibit 3 series as his corroboration of the assertion. Unfortunately for the Defendant, the Exhibit 3 series are hardly decipherable. Indeed, on the 21st December, 2020 when the Court engaged in the CMC hearings, the Defendant was ordered to produce the originals of his exhibits at the trial since the ones filed were faint. This the Defendant could not do. Quite apart from that, the Defendant also did not tender the alleged Affidavit of Cynthia Fosu exhibiting the unauthorized entries in his exclusive account. To me, he could have done that by tendering the said Motion and Affidavit under the hearsay Rules.

In the absence of any proof of the alleged unauthorized transactions, I hold that the Plaintiff was able to prove that the only Statement is as Exhibited in Exhibit E. The Defendant could not tilt the scales on the issue to his side that yes and indeed, there was unauthorized transactions in his accounts.

The next issue for the determination is "whether or not the Defendant suffered any damages as a result of the arbitrary blockage or cards by the Plaintiff". Now, the Plaintiff did not dispute the blocking of the cards or airtime that the Defendant purchased at the time he was still indebted to Plaintiff as a result of the alleged robbery. The Plaintiff to me was entitled to mitigate his loses since it was obvious that

the Defendant would not have been able to pay for the lost cards. The impression I get is that the cards were part of the items robbed but it came to light that, the Defendant sold out the cards and it was the proceeds that he was allegedly robbed of. Now, the Defendant did not also dispute the fact that the value of the blocked cards were used to reduce the indebtedness of the Defendant to the Plaintiff. I must say that the Defendant has been very contradictory on the issue of cards or airtime. Whilst the Plaintiff maintained that the cards worth GH¢ 10, 000.00 were blocked, the Defendant maintained that the cards worth GH¢ 10, 000.00 were cards in his shops yet to be sold out which he voluntarily gave out to the Plaintiff. On 9th March, 2022 while the Defendant was still under cross-examination, he was asked at page 5 of the Defendant's proceedings thus;

"Q. Were you robbed of some supplies you had received from the Plaintiff at the time?

A. No My Lord. I was robbed of sales proceeds that I was taking to the bank.

Q. And you reported the alleged robbery to the Plaintiff, is that correct?

A. Yes My Lord

Q. Was this prior to you signing the Repayment Agreement or after you signed the Repayment Agreement?

A. It was before the signing of the Repayment Agreement and that was what led to the Repayment Agreement.

Q. Can you look at Clause 9 of Exhibit F, that is the Repayment Agreement and confirm to the Court whether there is reference to the retrieval of MTN airtime worth GH¢ 10,000?

A. Yes it is here. But these as indicated there was closing stocks of mine that I combed through all my shops and handed over to the Plaintiff as they demanded to offset part of my debt among other payments. I must

emphasize that I have never reported to the Plaintiff that my scratch cards have been stolen. The cards I handed over to them were valid cards of my closing stock to offset part of my debt as indicated in the Repayment Agreement.

Then down the line, the Defendant was asked:

"Q. Were you given any document to reflect that indeed you returned MTN airtime worth GH¢ 10, 000.00 to the Plaintiff?

A. My Lord I dealt directly with Cynthia Fosu, the then Operations Manager now CEO of Izone and she treated those scratch cards worth GH¢10, 000.00 as physical cash given to Izone which is captured in the Repayment Agreement.

Q. Will I therefore be right to say that you were not given any document to reflect that you indeed returned MTN airtime worth GHC10, 000.00?

A. The document I received to that effect was the Repayment Agreement which captured the value of the valid MTN airtime which I returned to Izone.

"Q. So is it your testimony before this Court that the Plaintiff who is into the sale of MTN airtime in turn receives MTN airtime from you as a means of paying your indebtedness?

A. My Lord what I am saying is that the commissions due me comes in the form of MTN airtime that I am supposed to receive and for the payment of my indebtedness, Izone retains them.

Q. Look at Exhibit F, clause VIII, and you will agree with me from the said clause (VIII), the retrieved MTN airtime worth GH¢10, 000.00 was out of the total stocks supplied to you at the time.

A. Not entirely My Lord

Q. If not entirely then what is it?

A. It is MTN airtime I had in my shop"

Then, on this issue of MTN airtime cards, when the Defendant was pressed again under cross-examination on 9th May, 2022, he was asked;

Q. I suggest to you that MTN will never block airtime scratch cards that it very well knows to have been sold to the public

A. I have already told the Court that the blocked cards are in my custody now in my bag to show to the Court. It is The Plaintiff I dealt with and not MTN. I am saying that upon the instructions of the Plaintiff, the cards were blocked.

Quite apart from the fact that the Defendant did not exhibit this vital piece of evidence of the blocked cards, he could not also show the Court the cards as he indicated in the just quoted answer. The Defendant's testimony on the cards (blocked, returned or surrendered) is so confusing and full of the Defendant picking and choosing the portions favorable to him and denying the ones that he felt were unfavourable to him. In the light of the contradictions in the Defendant's case on this point, I find the narration of the Plaintiff more credible, logical and more probable than that of the Defendant. I do not fault the Plaintiff when he caused the MTN Airtime cards in the Defendant's custody to be blocked in order to mitigate their loss.

Now, the next issue I will tackle is the issue of "whether or not the Plaintiff breached the constitutional right of the Defendant". As I have already determined on the issue of the Defendant's admission statement being procured under duress, there is equally no supporting evidence to support the allegation that the Defendant was kept in police custody for a period beyond the constitutionally mandated period of 48 hours. Quite apart from the fact that there is no supporting evidence on the allegation, it could not also be shown, assuming without admitting that the Defendant was actually detained beyond the constitutionally mandated period, that such a detention was under the direction or influence of the Plaintiff. I do not think there is any constitutional injunction in this country that prohibits any citizen from lodging a complaint against any other person if the complainant sincerely feels that a crime has been committed

against him or the Republic. Perhaps above all the jurisdiction of the Court for the vindication of a breach of a constitutional duty or right has not been properly invoked. Order 67 of the High Court (Civil Procedure) Rules, 2004 (C.I 47) deals specifically with the enforcement of fundamental human Rights. Rule 1 of this Order states;-

"Application for address under Article 33 of the Constitution

(1) A person who seeks redress in respect of the enforcement of any fundamental human rights in relation to the person under Article 33(1) of the Constitution shall submit an application to the High Court

(2)(1) The application shall be made to the Court by motion supported by an Affidavit signed by the Applicant or by the Applicant's Lawyers and shall contain the following….."

At this juncture, I want to put on record that this Court has taken judicial notice of the existence of the Human Rights Division of the High Court that fundamentally is seized with jurisdiction to hear such cases. Quite apart from the short comings earlier on recounted, I hold that the jurisdiction of the Court has not been properly invoked and so is bereft of jurisdiction to hear and determine same. The relief of damages for abuse of Defendant's constitutional human right as contained in the counterclaim is accordingly dismissed.

This then brings me to the ultimate issue of "whether or not the Plaintiff is entitled to his claims being the sum of GH¢100, 130.76"

Now, throughout the trial, the impression I get from the Defendant is that even though at a point in time he had defaulted in paying for goods supplied him by the Plaintiff, he had long since paid up and to him even over paid. To the Defendant at no point in time had he exceeded his credit limit of GH¢94, 000.00 and so could not have incurred a debt far and above his authorized credit limit. But the evidence of the Defendant while under cross-examination gives a lie to this assertions of the Defendant. On the

30th March, 2022, the Defendant while under cross-examination averred the following thus;-

"Q. You told the Court per your evidence that you were robbed in May when you were going to deposit the proceeds worth GH¢63, 006.00, is that correct?

A. Yes My Lord

Q. And according to your evidence your indebtedness of GH¢63, 006.00 was as a result of this robbery, is that correct?

A. Yes My Lord

Q. Can you tell the Court at the time of the said robbery whether you had stocks of MTN Airtime

A. Yes My Lord. I had bits of them in all my eight shops"

Then the cross-examination continues

"Q. You also agree with me that after May 2014, the Plaintiff still supplied you with stocks of MTN Airtime

A. My Lord, they did not.

Q. Are you telling this Honorable Court that the Plaintiff did not supply you with stocks of MTN Airtime in September 2014

A. The repayment agreement was executed on 12th August, 2014. My Lord if you less GH¢36, 732 from GH¢94, 000.00, you will receive a little over GH¢57, 000.00. I am saying that after 12th August, 2014, Izone did supply me but operated within the credit limit of GH¢57, 000.00

Q. You have told the Court that in your dealings with the Plaintiff, you have always operated within the credit limit of GH¢94, 000.00, is that correct?

A. After the execution of the repayment agreement, the credit limit became GH¢57, 000.00

Q. Take a look at Exhibit F, on the fourth sheet of the Exhibit, there is reference to credit limit, is that correct?

A. Yes My Lord

Q. Can you read to the Court the interpretation of credit limit in Exhibit F

A. (reads)

Q. That means that your credit limit after the repayment agreement was GH¢94, 000.00 but not GH¢57, 000.00 that you want the Court to believe

A. That is wrong. As I said earlier, my credit limit has always been GH¢94, 000.00 from the inception of being a sub-dealer but after the execution of the repayment agreement, I became indebted to them to the tune of GH¢36, 732.00. so if you less that from GH¢94, 000.00 you will get a little over GH¢57, 000.00. And so after the repayment agreement, I operated a credit limit of GH¢57, 000.00

Q. I suggest to you that you are not being truthful to this Court

A. My Lord I am being truthful"

Now, again on the 9th May, 2022 the Defendant was asked the following questions;-

"Q. You will agree with me that Exhibit B attached to the Witness Statement of Stephen Adepa Nyarko shows your said indebtedness of GH¢36, 732.12, is that not correct? He answered thus;-

A. My Lord I see GH¢36, 732.12 on Exhibit B but the other narration I disagree

Q. Subsequently on 18th September, 2014, you were supplied with goods by the Plaintiff worth GH¢36, 265.00, is that correct?

A. My Lord, that is correct but the Plaintiff blocked the cards they supplied to me on that day".

It is instructive to note that even though the Defendant denied the Plaintiff supplying him with stocks of MTN Airtime after May 2014, he subsequently admitted issuing cheques to wit; Royal Bank Cheque No. 000033 dated 19th September, 2014 and Royal Bank Cheque No. 000034 on 20th September, 2014 with a face value of GH¢16, 901.00 all for the payment of goods supplied. What these discrepancies show to me is that the Defendant was not truthful to the Court

At the close of case and due evaluation of the evidence and law before me, I find the case of the Plaintiff more probable than that of the Defendant. The Defendant's position to me is not in tandem with sound and prudent commercial practice and so I disbelieve it. Quite apart from that the leg of the Defendant's counterclaim on the abuse or breach of his fundamental human rights cannot be sustained as the Defendant's mode of invoking this court's jurisdiction to determine that issue is not in consonance with the procedure prescribed by the constitution and the Rules of Court. Indeed, the Defendant to me mounted his whole case on afterthought but not on proven facts. I find the counterclaim unproved in its entirety and dismiss same. The case of the Plaintiff to me however has been proved on the balance of probabilities as indicated above. I find the Plaintiff entitled to the claim in the following terms;

The Plaintiff shall recover the amount of GH¢100, 130.76 being the unpaid debt owed the Plaintiff by the Defendant.

Interest shall run at the prevailing Commercial Bank Lending Rate (GCB PLC' rate) from 2014 to date of final payment.

I award cost of GH¢10, 000.00 against the Defendant.

(SGD)

JUSTICE JUSTIN KOFI DORGU

(JUSTICE OF THE HIGH COURT)

LEGAL REPRESENTATION

EMMANUEL KOFI DARKO FOR THE PLAINTIFF

EDWIN KUSI APPIAH FOR THE DEFENDANT

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