IN THE SUPERIOR COURT OF JUDICATURE. IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD ON TUESDAY THE 14TH DAY OF FEBRUARY, 2023 BEFORE HER LADYSHIP JUSTICE AKUA SARPOMAA AMOAH (MRS.)

SUIT NO.: CM/BFS/0349/2018

CAL BANK GHANA L TD - PLAINTIFF

VRS

FERBRIT INTERNATIONAL - 1ST DEFENDANT

KWESI ASANTE - 2ND DEFENDANT

CHARLES DARKWA - 3RD DEFENDANT

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PARTIES: PLAINTIFF – PRESENT

DEFENDANTS – ABSENT

COUNSEL: FRANICS KWAME OFFIN HOLDING BRIEF FOR BRIGHT OKYERE-ADJEKUM FOR PLAINTIFF – PRESET

COUNSEL FOR DEFENDANTS – ABSENT

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J U D G M E N T

The facts of the instant suit are in my view quite straight forward and do not admit of much controversy.

On the 10th of May 2018, the Plaintiff herein issued a Writ against the Defendants herein seeking against them jointly and severally, the following reliefs:

a) *Recovery of the sum of* ***One Hundred and Thirty-One Thousand Four Hundred and Twenty-Nine Ghana Cedis Forty-Six Pesewas (GH¢ 131,429.46)*** *being the Defendants' indebtedness to Plaintiff as of the 1st of March, 2018*
b) *Interest on the said sum of* ***One Hundred and Thirty-One Thousand Four Hundred and Twenty-Nine Ghana Cedis Forty-Six Pesewas***

(GH¢ 131,429.46) *at the Plaintiff's base rate plus margin of 3% per annum from the 1st of March, 2018 till date of final payment.*

Plaintiffs' case may be summarized as follows;

It is a corporate body registered under the Laws of Ghana and engaged in the business of banking. The 1st Defendant on the other hand at all times material to the instant suit was its customer

On or about the 14th of March, 2014 the Plaintiff, (at the 1st Defendant's request) granted an Auto Loan Facility of the cedi equivalent of ***Twenty-Three Thousand Four Hundred and Twenty-Eight United States Dollars Forty-Three Cents (US$ 23,428.43)*** to the 1st Defendant. This was to support the 1st Defendant's purchase of a brand new Nissan Navara Vehicle.

The facility was to be repaid by the 31st of March, 2017 and was to attract interest at the Plaintiff's base rate plus a margin of 3% per annum or such other rate as may be determined by the Plaintiff from time to time.

Further to this facility, the Plaintiff on or about the 17th of November, 2015 again granted the 1st Defendant an Overdraft facility of ***One Hundred and Fifty Thousand Ghana Cedis (GH¢ 150, 000.00.)*** which expired on the 30th of November, 2016. This was also to attract interest at Plaintiff's base rate plus margin of 3% per annum.

The security furnished for the said facilities by the 1st Defendant were as follows;

a. *Charge over Nissan Navara 2014 with Registration Number GN 2066-14*
b. *Charge over DAF Truck with Registration Number GE 4995-14*
c. *Joint and Several Guarantees by 2nd and 3rd Defendants.*

The facilities have expired but the Defendants have failed to make good their indebtedness despite persistent demands on them by the Plaintiff.

According to the Plaintiff the 1st Defendant's indebtedness stood at ***One*** Hundred ***and Thirty-One Thousand Four Hundred and Twenty-Nine Ghana Cedis Forty-Six Pesewas (GH¢ 131,429.46)*** as of the 1st of March, 2018 with the said amount continually attracting interest.

Plaintiff says the Defendants will not retire their indebtedness unless compelled by this Court to do so. Hence the instant suit.

By their joint Statement of Defence filed on the 19th of July, 2018, the Defendants do not deny applying for and being granted the facilities referred to in the Plaintiff's Statement of Claim, upon the terms referred to therein.

It is their case however that the 1st Defendant has made significant payments towards liquidating the 1st facility. They further deny that their failure to make good their outstanding indebtedness is deliberate and proceed to give a number of reasons for their default. The said reasons they say include certain manufacturers' defects inherent in the vehicles which were purchased for the business operations of the 1st Defendant.

According to Defendants, the 1st Defendant for this reason, was compelled to halt its business operations for the Manufactures of the said vehicles to fly into the country to remedy the situation. This they say had a grave impact on the financial fortunes of the 1st Defendant.

They further aver that the 1st Defendant had only managed to commence business around the time the writ was issued, for which reason they were taking the necessary steps to settle their indebtedness to Plaintiff.

Defendants however disputed the amount claimed by Plaintiff and requested a reconciliation of account to ascertain the actual amount due.

In its terse Reply, the Plaintiff joined issue with the Defendants generally on their statement of Defence.

Upon the failure of the parties to settle the dispute at Pre-Trial Conference, the following issues were settled for trial by the Pre-trial judge:

a) *Whether or not the Defendants' indebtedness to Plaintiff stood at* ***One Hundred and Thirty-One Thousand Four Hundred and Twenty-Nine Ghana Cedis Forty-Six Pesewas (GH¢ 131,429.46)*** *as at the 1st of March, 2018.*
b) *Whether or not the Plaintiff is entitled to its claims.*

At the trial, Henry Teye Sackey, Plaintiff's Branch Manager in charge of the Defendants account since the year 2016 testified on Plaintiff's behalf. He tendered in evidence as ***Exhibit A***, a copy of the Facility Letter detailing the terms and conditions of the Auto Loan Facility granted the 1st Defendant. ***Exhibit B*** was also tendered in proof of the overdraft granted the 1st Defendant. He further tendered in evidence ***Exhibit C***, a Joint and Several Guarantee of the 1st Defendant's directors. ***Exhibits D*** and ***D1*** are also evidence of charges created over the two vehicles purchased with the facilities namely the Nissan NAVARA and the DAF truck.

My subsequent examination of the said Exhibits however brings to the fore one pertinent issue. This is whether they ought to have been admitted in evidence by this Court. Did the said Exhibits not qualify as instruments in terms of the ***STAMP DUTY ACT, 2005 (ACT 689)*** for which reason they required stamping in order to make them admissible in evidence? This is the question I intend to answer in my analysis to follow.

Section 32 of ***Act 689*** which is the provision relevant to this enquiry states as follows;

"32. Admissibility of insufficiently stamped or unstamped <u>instrument.</u>

1) ***Where <u>an instrument</u> chargeable with a duty is produced as evidence***
   (a) In a Court in a civil matter; or
   (b) before an arbitration or referee,

the judge, arbitrator or referee, shall take notice of an omission or insufficiency of the stamp on the instrument.

2) ***If the instrument is one that may legally be stamped after its execution, it may on payment of the amount of the unpaid duty to the registrar of the Court or to the arbitrator or referee, and the penalty payable on stamping that instrument, be received subject to just exception on other grounds***
3) ***An instrument which is sufficiently stamped under this Act shall be receivable in evidence although that instrument may not have been stamped or is insufficiently stamped according to the law in force in the place where that instrument was executed***

6) ***Except as expressly provided in this section an instrument***
   a) executed in Ghana; or
   b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana.

shall except in criminal proceedings, not be given in evidence or be available for any purpose unless it is stamped in accordance with the at the law in force at the time when it was first executed." [Emphasis mine]

What then is an instrument?

Section 50 of ***Act 689*** defines an instrument as a "***written or printed document***".

A "***document***" is further refined to mean "***anything on which things are written, printed or inscribed and which gives information whether stored electronically or otherwise***."

Considering the wide definitions given the words "document" and 'instrument' in ***Act 689***, the question that often arises is whether it is every written or printed document that can be accorded the status of an "instrument" within the meaning of the said Act. Can ordinary friendly letters for instance, be considered instruments liable to Stamp Duty?

To answer this question, this Court turned to other relevant authorities for guidance.

The ***Black's Law Dictionary [8th Edition]*** defines an instrument as ***"A written legal document that defines rights, duties, entitlements and liabilities such as a contract, will, promissory note or share certificate."***

The ***Oxford Legal Dictionary [7th Edition]*** also, defines an instrument as ***"A formal legal document, such as a will, deed or conveyance which is evidence of (for example) rights and duties"***

The website of the ***Ghana Revenue Authority*** (GRA) was also beneficial by way of guidance as it also sheds light on the types of documents/instruments liable to Stamp Duty in this country. This is in line with the First Schedule of the Act. These documents are categorized into four groups namely;

i) *Inspection Cases*- ***Documents that transfer interest in land namely conveyance, gifts, assignment, of lease etc***

ii) *Non-Inspection Cases*- ***leases, sub-leases, mining leases***

iii) *Financial Documents* - ***Mortgages, Liens, Promissory Notes, Performance Bonds, Guarantees, Agreements, Debentures etc***

iv) *Light Documents*-***Powers of Attorney, Share Transfers, Certificates, Declarations, Vesting Assent, Probate etc***

Now, what I glean from these definitions is that any document which seeks to define or confer rights, duties, liabilities and entitlements qualifies as an instrument within the meaning of ***Act 689.***

It is therefore evident that ***Exhibits A*** and ***B*** which are copies of facility letters defining the rights and liabilities of the Parties to the suit, required stamping to be admissible in evidence.

But not just ***Exhibits A and B***. ***Exhibit C*** is a copy of a Guarantee executed by the 2nd and 3rd Defendants in favour of Plaintiff. It therefore clearly qualifies as an instrument in terms of ***Act 689*** and therefore required stamping to make same admissible in evidence. Likewise ***Exhibits D*** and ***D1*** being Deeds of Assignment executed by the 1st Defendant in favour of Plaintiff.

In the case of ***LIZORI LTD v SCHOOL OF DOMESTIC SCIENCES [2013-2014] 2 SCGLR 889, Benin JSC*** explained in detail the effect of a failure to

stamp documents as required by law and set the standard for the treatment of such documents by our Courts. He emphasized that:

"The provisions in Section 32 of Act 689 is so clear and unambiguous and requires no interpretation. Either the document has been stamped and the appropriate duty paid in accordance with the law in force at the time it was executed or it should not be admitted in evidence. There is no discretion to admit it in the first place and ask any party to pay the duty and penalty after judgment".

Flowing from the above, it is obvious that this Court's admission of the said Exhibits in evidence without objection still does not help the case of Plaintiff. This is because they are inadmissible per se. The Court is therefore obligated by law to exclude even at this stage. The said Exhibits shall therefore not be considered in this judgment.

The exclusion of the said Exhibits however does not relieve this Court of the duty to determine from other evidence led, whether the Plaintiff has established its case on a balance of probabilities. See the case of ***WOODHOUSE v AIRTEL (J4 of 2018) [2018] GHASC 76 (12 December 2018)***

Now, a reading of the Defendants' Statement of Defence discloses that they do not deny applying for and being granted the facilities in question by the Plaintiff and at the interest rate specified in the Plaintiff's pleadings. They also do not deny that the said facilities have expired. The Defendants further

admit having furnished various forms of Security including a Directors Joint and Personal Guarantee in favour of the Plaintiff.

Indeed despite their claim that the amount outstanding remains unclear, it is evident from a reading of ***Paragraphs 10*** to ***14*** of the Statement of Defence that Defendants acknowledge that their repayment obligations were due.

The fact that a party in whose favour admissions are made is relieved from proving the admitted matters is so trite that I need not cite any authorities in support of same.

Now in light of the undisputed fact that the Defendant remained indebted to the Plaintiff the burden shifted onto Defendants to establish their assertion that they had made significant payments for which reason the amount claimed by the Defendant was not a true reflection of the 1st Defendant's indebtedness.
This position indeed accords with the principle laid down in the case of ***ADJEIODA v CFAO [1971] 2 GLR 11*** where the Court stated that;

"The general rule is that the animus probandi is on the party who substantially asserts the affirmative of the issue. But where the defendant in an action for the recovery of a debt pleads that it has been paid, the burden shifts upon him to prove payment."

As is clear from the record, the Defendants, despite having filed a Witness Statement chose not to testify in the matter. This was indeed their right.

However, they cannot escape the legal consequences arising from this choice.

This position was emphasized in the Supreme Court case of ***JOHN DRAMANI MAHAMA vrs ELECTORAL COMMISSION & NANA AKUFFO ADDO [2021] DL SC 9953*** where the Court held that;

"... it is ..an undisputed fact that a Defendant in a case can elect whether or not to adduce evidence at the close of the Plaintiff's case, when such a Defendant is called upon by the Court to open his or her defence.
We are of the considered opinion that it would be wrong in law to hold that a party is deemed to have elected to adduce evidence as soon as that party files and serves a Witness Statement in compliance with a Court order. To hold so would mean that once a party files and serves a Witness statement that party mandatorily has to mount the witness box and adduce evidence at the trial. This position is not borne out by the rules. Indeed order 38 r 3E (5) clearly provides otherwise as follows;
"(5) If a party who has served a witness statement does not call the witness to give evidence at the trial or put in the Witness statement as hearsay evidence, any other party may put in the Witness statement as hearsay evidence"

The above rule implies that when a witness statement is filed and served the party who filed same may choose not to give evidence at the trial.... Such a witness cannot be compelled be compelled by the court for cross-

examination. He suffers the penalty of the evidence being expunged from the record."

With the expunction of the Defendants' Witness statement from the record, the only evidence left to be considered is that of the Plaintiff.

I must say that I have not overlooked the fact that the Defendants, despite their decision not to testify, attempted to challenge the accuracy of ***Exhibit F*** during cross-examination of Plaintiff, on the basis that there was no evidence of the actual account relating to the said facilities before this Court. In response Plaintiff's representative sufficiently explained that loans are normally held in loan accounts until repayment is due when they fall into the current account as evidenced by ***Exhibit F***. In the absence of any evidence to the contrary I have no reason to doubt the explanation offered by the said witness.

In any event ***Exhibit E1*** would have left the Defendants in no doubt regarding the amount outstanding as at the 1st of March, 2018 however this did not elicit any denial or protest from the Defendants.

I therefore find it established on a balance of probabilities that the 1st Defendant was indebted to the Plaintiff in the sum of ***One Hundred and Thirty-One Thousand, One Hundred and Twenty-Nine Ghana Cedis (GH¢ 131,129.00.)*** as at the 1st of March, 2023.

With regards to the 2nd and 3rd Defendants, I find that the fact that they executed a Joint and Several Guarantee as security for the said facilities has never been in issue.

A guarantee is generally defined as an undertaking to answer for another's default. See ***Goode on Commercial Law [4th Edition] @ page 878***

The ***Black's Law Dictionary [8th Edition]*** further defines a Guarantee as;

"Something given or existing as security such as to fulfill a future engagement or condition subsequent....
To assume a suretyship obligation to agree to answer for a debt or default. ..."

There is therefore little doubt that the 2nd and 3rd Defendants by executing the said Guarantee in favor of Plaintiff had undertaken to meet the monetary liability of the 1st Defendant as Principal Debtor in the event of its default.

Additionally, ***Exhibits E*** and ***E1*** which were addressed to the 2nd Defendant as Managing director made it clear that Plaintiff would proceed against the 1st Defendant as well as 2nd and 3rd Defendants (as Guarantors of the facilities in question) if the 1st Defendant failed to make good its indebtedness by the date stated therein. 2nd and 3rd Defendants therefore had due notice of the 1st Defendant's default since the year 2018 but had clearly reneged on their obligations under the said Guarantee.

In light of the foregoing, I find the Plaintiff's case proven on a balance of probabilities and in the result, enter Judgement for the Plaintiff to recover from the Defendants jointly and severally as follows:

1. *The sum of* ***One Hundred and Thirty -One Thousand, One Hundred and Twenty-Nine Ghana Cedis (GH¢ 131,129.00.)*** *being the 1st Defendant's indebtedness to the Plaintiff as at the 1st of March, 2018*
2. *Interest shall be payable on (a) above from the 2nd of March, 2018 till date of final payment.*

Costs of ***Ten Thousand Ghana Cedis (GH¢ 10,000.00.)*** in favour of Plaintiff.

(SGD)

AKUA SARPOMAA AMOAH (MRS)

JUSTICE OF THE HIGH COURT

Cases referred to:

LIZORI LTD v SCHOOL OF DOMESTIC SCIENCES [2013-2014] 2 SCGLR 889

WOODHOUSE v AIRTEL (J4 of 2018) [2018] GHASC 76 (12 December 2018)

ADJEIODA v CFAO [1971] 2 GLR 11

JOHN DRAMANI MAHAMA VRS ELECTORAL COMMISSION & NANA AKUFFO ADDO [2021] DL SC 9953

Statutes referred to:

STAMP DUTY ACT, 2005 (ACT 689)

Stated Edition:

Goode on Commercial Law [4th Edition] @ page 878

The Black's Law Dictionary [8th Edition]