**IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD ON WEDNESDAY, THE 14H DAY OF JUNE, 2023 BEFORE HER LADYSHIP JUSTICE AKUA SARPOMAA AMOAH (MRS.)**

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**SUIT NO. CM/RPC//0812/2017**

**PIH COMPANY LIMITED … PLAINTIFF**

**VS.**

**STEPHANIE BENSON … DEFENDANT**

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**PARTIES: - ABSENT**

**COUNSEL: - COUNSEL FOR PLAINTIFF – ABSENT**

**ENOCH ADU AMEYAW HOLDING BRIEF FOR RALPH POKU-ADUSEI FOR DEFENDANT – PRESENT**

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**JUDGEMENT**

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***Introduction***

The Plaintiff herein, by an Amended Writ and Statement of Claim filed on the 1st of March, 2018 seeks the following reliefs against the Defendant;

a) *The repayment of the sum of* ***Forty-Five Thousand Five Hundred and Fifty-Two United States Dollars Sixty-Two Cents (USD $45,552.62)*** *or its cedi equivalent being the amount outstanding as at November, 2017 for rent arrears due the Plaintiff.*
b) *Interest on the said sum at the Commercial bank rate from November, 2017 up to date of actual and final payment*
c) *Damages for restoration of the houses for wastage caused*

***Plaintiff's Case***

From the pleadings, the case of the Plaintiff, a Ghanaian registered company involved in the business of Hotel Management and Real Estate, is quite straight forward. It is this;

On the 1st of January, 2013, Plaintiff entered into a tenancy agreement for the rental of 2 houses to the Defendant, a professional musician and business woman. The said tenancy was for a fixed term of 5 years ending on the 2nd of January, 2018.

By the terms of the agreement, the Defendant was to pay a monthly rent of ***One Thousand United States Dollars (USD$ 1,000.00.)*** or its cedi equivalent. Rent for the first year was to be paid in advance and that for the remaining term paid monthly as and when it fell due.

The Defendant however failed to comply with the said terms by failing to pay the rent on time and then leaving rent for several months unpaid.

In addition to the said breach, Defendant carried out several unauthorized works and fixtures without the written consent of the Plaintiff, contrary to the terms of the tenancy agreement.

The Defendant further abandoned one of the properties without formally handing over same to Plaintiff and in or about November, 2017, handed over keys to the second apartment to Plaintiff's lawyers without the formal termination of the tenancy agreement.

Plaintiff says rent owed by Defendant as at the date of filing the writ was ***Forty-Five Thousand Five hundred and Fifty-Two United States Dollars Sixty-Two Cents (USD$ 45,552.62)*** which the Defendant has failed to pay despite demands by the Plaintiff. It is for this reason that Plaintiff has approached this Court for redress.

***Defendant's Case***

The Defendant neither denies entering into a tenancy agreement with Plaintiff nor its terms as averred to in Plaintiff's pleadings. Her case however is that, the initial agreement was not for a tenancy but for the outright purchase of the properties in question.

She says that one of the Directors of the Plaintiff Company had informed her that the properties had not been registered with the Lands Commission due to lack of funds among other reasons. The Defendant therefore, at the

Plaintiff's request, advanced monies to the Plaintiff for the completion of the registration process.

However, nothing has been heard from the Plaintiff till date on this particular issue.

Defendant further denies being tardy in the payment of rent. According to her she always paid her rent in advance and on time except for the period that she was, to the Plaintiff's knowledge, diagnosed with cancer and had to undergo treatment in London.

With respect to the Plaintiff's allegation about unauthorized renovations, Defendant says she was compelled to carry out several repairs when she took over the properties due to the faulty nature of the amenities she found there. This was however with the Plaintiff's verbal agreement.

She says that the Plaintiff indeed agreed that some of these repairs were necessary and assured her that the monies spent on same would be deducted from the rent arrears. She therefore maintains that she does not owe as the Plaintiff failed to take into account rent paid by Defendant in the year 2017.

Also resisted is the Plaintiff's claim for damages for restoration of the said houses. According to Defendant, the said properties were rather left in an enhanced state for which reason Plaintiff is not entitled to its claims or at all.

***Issues for Determination***

After a failed attempt by the Parties to resolve their dispute amicably, 2 main issues were settled for trial. These are:

a) *Whether the Defendant owes the Plaintiff the sum of* ***Forty-Five Thousand Five hundred and Fifty-Two United States Dollars Sixty-Two Cents (USD$ 45,552. 62) or its cedi equivalent together with interest from November 2017 as outstanding rent arrears***

b) *Whether or not Plaintiff is entitled to damages for repairs and restoration of any wastage caused.*

***Burden of Proof***

In my view, all the above issues can be summed up into one fundamental question. This is whether or not the Plaintiff discharged on a balance of probabilities the burden imposed on it by ***Sections 10***, ***12***, ***14*** and ***17*** of the ***Evidence Act (NRDC 323).***

As a starting point, it is important to bear in mind the salutary legal principle that the legal or persuasive burden is borne by the party who will lose on a particular issue if he does not produce sufficient evidence to establish the facts alleged. See the case of ***Boakye v Asamoah [1974] 1 GLR 38 @ 45***

The onus was thus on the Plaintiff to establish first and foremost the fact that Defendant was indebted to it in the sum of ***Forty-Five Thousand Five hundred and Fifty-Two United States Dollars Sixty-Two Cents (USD$ 45,552.62)***. The evidence led by the Plaintiff on this issue will therefore be critically examined.

But before I proceed to do so there is the need to address an issue that I consider rather profound.

***Failure to Stamp Tenancy Agreement (Exhibit A)***

The Ghanaian law on stamping is embodied in the ***STAMP DUTY ACT, 2005 (ACT 689).***

***Section 32,*** the provision in issue states as follows;

***"32. Admissibility of insufficiently stamped or unstamped instrument.***

1) ***Where an instrument 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 law in force at the time when it was first executed.***

***Section 50*** of the said law 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***."

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"***

Consequently, if ***Exhibit A*** is found to be liable to stamp duty, it would have been erroneously admitted in evidence and this Court will by law be precluded from considering same in this judgment.

Considering the wide definitions given the words "document" and 'instrument' in ***Act 689***, the difficulty which has confronted this Court on several occasions is whether every written or printed document can be accorded the status of an "instrument" within the meaning of the said Act. For instance, can ordinary letters be considered instruments?

I think it may be helpful to look to other sources for definitions of the said word.

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]*** on the other hand, defines an instrument as ***"A formal legal document, such as a will, deed or conveyance which is evidence of (for example) rights and duties"***

Now, what I glean from these definitions is that for a document to qualify as an instrument it must not only define or confer rights, duties, liabilities and entitlements but must have legal force or be recognized by law as having legal effect.

Fortunately, the **Ghana Revenue Authority Website** provides a guiding light to the types of documents/ instruments liable to stamp duty in this country. This is in line with the First Schedule of ***Act 689***. The said website defines "Stamp Duty" as "a tax imposed on specific instruments which have legal effect." 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.***

It is therefore evident that ***Exhibit A*** which is a copy of a Tenancy Agreement defining the rights and liabilities of the Parties herein, required stamping to be admissible in evidence.

In the absence of stamping, it becomes quite clear that the said exhibit upon which Plaintiff's claim is founded, cannot be considered by this Court. Both statute and case law as already noted, point to the fact that the same ought to have been rejected at the trial even without any objection from the opposing side.

Now, having excluded this vital document, what becomes of the Plaintiff's case? I think the approach adopted by the Court of Appeal and the Supreme Court in the case ***AIRTEL V WOODHOUSE (J48 of 2018) GHASC 76 DATED 12TH DECEMBER, 2018*** is quite instructive on the issue. In that case the Supreme Court endorsed the view taken by the Court of Appeal after it had excluded the unstamped exhibit in the following words:

***"We have looked at the judgment of our learned brothers in the Court of Appeal, and we endorse their finding to throw out Exhibit A which till date is still unstamped. We also endorse their statement that, "The exclusion of Exhibit A does not relieve this Court of the duty to determine from other evidence led, be it oral or documentary to determine whether the plaintiff successfully proved its case on the balance of probabilities as required by the provisions of sections 11(1), 11(4) and 14 of the evidence Act 1975, Act 323."***

The above reasoning makes it clear that despite having discarded ***Exhibit A***, this Court cannot shirk its duty to evaluate the totality of the evidence on record, in order to ascertain whether or not the Plaintiff has still established

its case on a balance of probabilities. Buoyed by this binding decision, this Court shall proceed to do so in the analysis to follow.

***<u>Does the Defendant owe the Plaintiff Forty-Five Thousand Five hundred and Fifty-Two United States Dollars Sixty-Two Cents (USD$ 45,552. 62)?</u>***

Unfortunately, apart from its bald laconic statement that the Defendant owed the said amount as at November 2017, no evidence was led to establish how the Plaintiff arrived at that figure. Such evidence was particularly crucial in light of the Defendant's insistence that she never fell into arrears of rent except for the period that she was, to the knowledge of Plaintiff, undergoing cancer treatment in the United Kingdom. She stated that the cost of renovation works carried out on the said properties alone, amounted to ***Forty Nine Thousand and Eighty Ghana Cedis (GH¢ 49, 080.00).***

Even though the Plaintiff appeared to deny that the said amount was indeed expended by the Defendant, he did not deny her claim that the parties had agreed that any monies spent on the properties would be deducted from the rent arrears.

This is obvious from the following answers he gave under cross-examination. On the **13th of February, 2020** the Plaintiff was asked;

Q: *I am putting it to you that works she [Defendant] did were itemized and costed individually summing up to* ***Forty Nine Thousand and Eighty Ghana Cedis (GH¢ 49,080.00)*** *and communicated to you through your email address*

A: *Yes, it could be possible but the amount he [sic] mention, I am not too sure about it but I remember having a document of the work she said she had done on the properties, which she wanted to use to defray part of her debts and which myself and her agent or lawyer went through the list to clarify what I could accept as part of my cost to defray her debt and it was done in the final calculation.*

On the **9th of February, 2021**, the Plaintiff further stated under cross-examination

*"....when we were trying to follow up on the rent arrears she suggested that she has done several works on the property and that is why I wanted to clarify with Sylvia who is her Attorney at that time. After receiving the message from Sylvia I had to meet with Sylvia to go through the list of the things with her and in going through the list with Sylvia at the premises we noticed that several changes had been done which was not authorized but other changes we saw logical we accepted them and deducted them from her total arrears with us."*

The reasonable question that objective bystander will pose is, what was the original debt? How much of the expenses incurred by the Defendant on renovations and /or repairs did the Plaintiff accept as legitimate and how was the amount found to be outstanding arrived at? From the evidence led by Plaintiff, all these questions and more remain unanswered.

It should be remembered that ***Section 17*** of ***Act 323*** provides that;

***Except as otherwise provided by law;***

- ***(a) the burden of providing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof***
- ***(b) the burden of producing evidence of a particular fact is on the party with the burden of persuasion as to that fact***

In the case of ***OKUDZETO ABLAKWA (No.2) v A-G & OBETSEBI LAMPTEY (No.2) [2012]2 SCGLR 845 @ 867*** the Supreme Court ***@ 867*** shed light on the effect of ***Section 17*** as follows;

***"...What this rule literally means is that if a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation unless it is admitted. If he fails to do that, the ruling on that allegation will go against him."***

It is well-settled that a party who makes an averment which is denied does not prove that averment by merely repeating it on oath. This principle was encapsulated in the oft-cited case of ***Majolagbe v Larbi [1959] I GLR 190*** and emphasized in the more recent case of ***Klah v Phoenix Insurance Co Ltd. [2012] 2SCGLR 1139.***

I think it is necessary to point out that I have not overlooked the principle laid down in the case of ***ADJEIODA v CFAO [1971] 2 GLR 11*** where the Court held 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"***

What is important to note however, is that this evidential burden does not shift onto the Defendant from nothing. The existence of the debt must be established first and foremost, before a Defendant is called upon to prove payment of same. This is especially so in this case, where Plaintiff admits that there was an agreement that legitimate expenses incurred by Defendant on the properties in question would be offset against any amount owed.

In my view, Plaintiff's evidence on this particular issue is so porous that the same will have to be resolved in favour of Defendant. Plaintiff has failed to prove that the Defendant is indebted to it in the sum of ***Forty-Five Thousand Five hundred and Fifty-Two United States Dollars Sixty-Two Cents (USD$ 45,552. 62)*** or at all and I so hold.

***<u>Is Plaintiff entitled to damages for any repairs or restoration of wastage allegedly caused by Defendant?</u>***

I must say I find the Plaintiff's evidence on this particular issue rather conflictual. In one breath the Plaintiff complained of work done on the properties without its authorization or approval. In another breath it appears to be Plaintiff's testimony that Defendant was granted free rein as far as the said properties were concerned.
Reproduced below are but a few of the Plaintiff's answers that support me in this view.

On the **13th of February, 2020**, Plaintiff was asked;

Q: *So you want this Court to believe that the Defendant being your tenant could bring persons of her choice to come and work on your properties. Is that not so?*

*A: Yes my Lady because I was not to disturb her when she was living in the properties and anything she would have done, she could have done it without my knowledge.*

Q: *And therefore the Defendant did not need your consent in doing whatever renovation works she wanted to do on your properties. Is that what you want the Court to believe*?

*A: No the Defendant needed my consent for renovations that is different from repairs.*

I think the Plaintiff makes heavy weather of the difference between renovations and repairs. ***The Oxford Learner's Dictionary [New 8th Edition]*** defines the word "renovate" as;

***"to repair and paint an old building, a piece of furniture etc, so that it is in good condition again***"

The word "repair" is also defined as;

"***to restore something that is broken, damaged or torn to good condition***"

I therefore fail to appreciate how the alleged renovations carried out by the Defendant could constitute wastage. If it did the same was not sufficiently proven by the Plaintiff.

Indeed the Defendant does not deny carrying out massive renovations on the properties. Her case however is that same was done with the Plaintiff's consent as the Plaintiff had promised to sell the properties to her. I find that this allegation was not seriously challenged by Plaintiff.

Said he, in response to the following questions asked under cross-examination;

*Q: The Defendant carried out massive renovation works on your properties because you promised selling the properties to her*

*A: No, my Lady she did not carry out massive renovation but it is also true that she was given the first option*.

The above answer given by Plaintiff in my opinion lends credence to the Defendant's assertion that she carried out the said renovations in the hopes of eventually becoming owner of the properties and with Plaintiff's endorsement too.

In any event, the evidence that emerges from the Plaintiff's own testimony is that the renovations complained of were not as massive, as the Plaintiff initially sought to contend.

There is also no evidence on record to support Plaintiff's claim that the said "renovations" were carried out without his authorization. If they were initially unauthorized, then the Plaintiff by its subsequent conduct had clearly, acquiesced, adopted and ratified the Defendant's unauthorized conduct and is therefore estopped from complaining of same at this stage. See ***Section 26*** of ***Act 323.***

I say so because one would have expected the Plaintiff to have registered in no uncertain terms its displeasure with the alleged unauthorized renovations. But there is no such evidence in its communication with the Defendant.

Instead, it was rather the Defendant who constantly expressed concerns that the Plaintiff may in the end refuse to sell the properties to her despite the continuous expenditure she continued to make on same.

By ***Exhibits 1***and ***2,*** Defendant made no secret of the fact that she had carried out major works on the property, which included ripping out all the toilets and re-doing the bathrooms. The evidence shows that the same was brought to the notice of the Plaintiff but elicited no protests or resistance.

I am therefore inclined to consider the Plaintiff's complaints about the alleged wastage belated and probably an afterthought. In any event, which of the changes made by the Defendant did Plaintiff find unacceptable? and which of them was "logical". This we are not told.

Turning to ***Exhibits B and C series*** tendered in proof of the alleged wastage and the cost allegedly incurred in restoring the said properties to a tenantable state, I must say the same leave a lot to be desired.
First, nothing in the undated photographs ***(Exhibit B series)*** show that they relate to the properties which were occupied by Defendant. The Plaintiff in its pleadings describes itself as a company engaged in the "business of Hotel Management and Real Estate". This will mean or should reasonably be taken to mean that the Plaintiff possibly owns other properties aside those rented out to the Defendant.

How therefore is this Court to conclude that the said exhibits are indeed photographs taken of the properties in question or relate to the subject matter of the present suit?

Indeed one wonders what ***Exhibits B2, B5, B6, B7*** and ***B8*** are supposed to prove. This is I am at a loss to ascertain the exact nature of images captured therein. Maybe the Plaintiff would have helped its case if it had taken the time to shed light on what each photograph was tendered to depict instead of merely attaching them to its Witness Statement and leaving the Court to make sense of same.

***Exhibit C*** series are also not free from doubt. First, some of them are illegible. These include ***Exhibits C, C8*** and ***C 10.*** The rest in my view, do not help the case of the Plaintiff either. I say so because except for ***Exhibits C 5*** and ***Exhibit C12,*** which are receipts issued for the payment of ***Fifteen Thousand, Seven Hundred Ghana Cedis (GH¢15,700.00.)*** and ***Eleven Thousand, Five Hundred Ghana Cedis (GH¢ 11,500.00.)*** respectively, all the other exhibits are pro-forma invoices of which do not establish that the amounts stated therein were indeed paid by the Plaintiff. Even ***Exhibits C5*** and ***C 12*** do not provide sufficient proof that the said costs were incurred in respect of the property in question.

I do not think there is any dispute regarding the fact that the Defendant did some work on the properties. However, Plaintiff's claim of wastage should be evaluated against the backdrop of Defendant's assertion that the said changes improved rather than caused destruction to the properties. Even if the Plaintiff is granted the benefit of the doubt and we proceed on the assumption that the said exhibits indeed relate to the property or properties in question, I do not think they sufficiently support Plaintiff's claims of wastage.

In light of the porous nature of the evidence tendered in support of this particular issue also, this Court is not enthused to attach any weight to same.

***Conclusion***

As the party with the persuasive burden, the Plaintiff could have done better than merely repeat its averments oath and rely on documents which did nothing to advance its case. Throughout the trial it failed to make available to this Court vital documents or evidence that would have helped established its case.

It should also be remembered that the Defendant had no duty to disprove that she owed the Plaintiff unless the evidentiary burden shifted. I find that the Plaintiff failed to even make out a case that required the Defendant to dislodge its claims and for the Court to decide whose version was more probable than not. The Plaintiff's action should therefore fail.

***Decision***

Accordingly, the Plaintiff's action is dismissed. I award costs of ***Ten Thousand Ghana Cedis (GH¢10,000.00.)*** in favour of Defendant against the Plaintiff.

**(SGD)**

**AKUA SARPOMAA AMOAH (MRS)**

**JUSTICE OF THE HIGH COURT**

***Cases referred to***:

***BOAKYE V ASAMOAH [1974] 1 GLR 38 @ 45***

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

***AIRTEL V WOODHOUSE (J48 of 2018) GHASC 76 DATED 12TH DECEMBER, 2018***

***OKUDZETO ABLAKWA (NO.2) v A-G & OBETSEBI LAMPTEY (NO.2) [2012]2 SCGLR 845 @ 867***

***MAJOLAGBE V LARBI [1959] I GLR 190 KLAH V PHOENIX INSURANCE CO LTD. [2012] 2SCGLR 1139.***

***ADJEIODA v CFAO [1971] 2 GLR 11***

***Statute referred to:***

***The Evidence Act, 1975 (NRCD 323).***

***THE STAMP DUTY ACT, 2005 (ACT 689)***

***Stated edition***:

***THE BLACK'S LAW DICTIONARY [8TH EDITION]***

***OXFORD LEGAL DICTIONARY [7TH EDITION]***