IN THE SUPERIOR COURT OF JUDICATURE. IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD ON MONDAY THE 27TH DAY OF FEBRUARY, 2023 BEFORE HER LADYSHIP JUSTICE AKUA SARPOMAA AMOAH (MRS.)

SUIT NO. CM/RPC/0506/2019

SAMUEL YAO KAMASSAH & 13 ORS. - PLAINTIFFS

VRS

FINE FORT CAPITAL LTD & ANOR. - DEFENDANTS

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PARTIES: - **11TH PLAINTIFF PRESENT AND REPRESENTS ALL OTHER PLAINTIFFS**

2ND DEFENDANT PRESENT AND REPRESENTS 1ST DEFENDANT

COUNSEL: - **ERIC SENYO PONGO FOR PLAINTIFFS – PRESENT**

- **MICHAEL AKANBEK FOR DEFENDANTS – PRESENT**

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J U D G M E N T

INTRODUCTION

On the 11th of March, 2019, the Plaintiffs herein sued out a writ against the Defendants praying inter alia for:

a) *An order of this Honourable Court for the recovery of the sum of One* ***Million Six Hundred and Thirty-One Thousand Nine Hundred and Forty-Nine Ghana Cedis Thirty-Seven Pesewas (GH¢ 1,631,949.37)*** *from the Defendants jointly and severally, being the principal investment and accrued interests on the investment made by the Plaintiffs up to February 2019.*
b) *Costs of the action.*

PLAINTIFFS' CASE

The case of the Plaintiffs as disclosed by the Statement of Claim is quite simple. It is this: The Plaintiffs, all resident in Accra invested various sums in the 1st Defendant, a company registered under the laws of Ghana and said to be in the business of Fund Management in Accra.

This was after Plaintiffs came across an advertisement put out by the 1st Defendant inviting members of the general public to invest in its business.

Consequent upon the said advertisement, the Plaintiffs numbering 14, proceeded to invest in the investment products of the 1st Defendant namely, the Portfolio and Unity Diamond as follows:

1. 1st Plaintiff in March 2018, invested an amount of ***Forty-Three Thousand Ghana Cedis (GH¢ 43,000.00.)*** in Portfolio and ***Thirty-Six***

Thousand Ghana Cedis (GH¢ 36, 000.00) in Unity Diamond in August 2018.

2. 2nd Plaintiff invested in June 2018 an amount of ***Seventy-Five Thousand Ghana Cedis (GH¢ 75,000.00)***
3. 3rd Plaintiff in May, 2018 invested an amount of ***Twenty-Six Thousand Five Hundred Ghana Cedis (GH¢ 26,500***) in Portfolio.
4. 4th Plaintiff invested ***Ten Thousand Ghana (GH¢ 10,000.00)*** in September, 2018
5. 5th Plaintiff invested ***Fifteen Thousand Ghana Cedis (GH¢ 15,000.00)*** in Portfolio in September 2018
6. 6th Plaintiff invested ***Thirty-Five Thousand Ghana Cedis (GH¢ 35,000.00)*** in Unity Diamond with the 1st Defendant in September 2018.
7. 7th Plaintiff invested the sum of ***Thirty-Five Thousand Ghana Cedis (GH¢ 35,000.00)*** in August 2018 and another ***Thirty-Five Thousand Ghana Cedis (GH¢ 35,000.00)*** in Unity Diamond with 1st Defendant in October 2018.
8. 8th Plaintiff in September 2018 invested ***Forty-Six Thousand Ghana Cedis (GH¢ 46,000.00)*** in Unity Diamond.
9. The 9th Plaintiff invested ***Thirty-One Thousand Ghana Cedis (GH¢ 31,000.00)*** and ***Forty Thousand Ghana Cedis (GH¢ 40,000.00)*** respectively in Unity Diamond in August 2018.
10. 10th Plaintiff invested an amount of ***Twenty Thousand Ghana Cedis (GH¢ 20,000.00)*** in Portfolio and ***Thirty-One Thousand Ghana Cedis (GH¢ 31, 000.00)*** in Unity Diamond

11. 11th Plaintiff in July, 2018 invested ***Forty Thousand Ghana Cedis (GH¢ 40,000.00)*** in Unity Diamond and another ***Forty Thousand Ghana Cedis (GH¢ 40,000.00)*** in Portfolio in July, 2018.
12. 12th Plaintiff invested ***Fifteen Thousand Ghana Cedis (GH¢ 15,000.00)*** in Portfolio in August, 2018.
13. 13th Plaintiff invested ***Thirty-One Thousand Ghana Cedis (GH¢ 31,000.00)*** in Unity Diamond with 1st Defendant in September, 2018
14. The 14th Plaintiff invested ***Twenty-Five Thousand Ghana Cedis (GH¢ 25, 000.00)*** in Portfolio and ***Forty Thousand Ghana Cedis (GH¢ 40, 000.00)*** in Unity Diamond in April, 2018 and June, 2018 respectively.

Plaintiffs aver that by the Agreement between the parties the interest payable on Unity Diamond was 25% and for Portfolio also about 25% per month.

They say that the amount due them collectively from the Defendants as at the end of February, 2019 was ***One Million Six Hundred and Thirty-One Thousand Nine Hundred and Forty-Nine Ghana Cedis Thirty-Seven Pesewas (GH¢ 1, 631,949.37)***

DEFENDANTS' CASE

The Defendants deny the generality of the Plaintiffs' Claims. Even though the 1st Defendant does not deny that the Plaintiffs invested various sums in its products, it avers that the Plaintiffs had made withdrawals from the

respective amounts invested and had in addition been paid various sums as interest by the 1st Defendant.

With specific reference to the underlisted Plaintiffs, 1st Defendant stated as follows:

i) The 1st Plaintiff made some withdrawals from his investments
ii) 2nd Plaintiff had made an investment of ***Twenty-Eight Thousand Six Hundred and Thirty-Four Thousand (GH¢ 28,634,000.00)*** and not ***Seventy-Five Thousand Ghana Cedis (GH¢ 75,000.00)*** as alleged out of the said amount, the 2nd Plaintiff had been paid an amount of ***Twenty-Seven Thousand Two Hundred and Eighty-One Ghana Cedis (GH¢ 27,281.00)*** as interest on his investment an amount almost equal to what he had invested.
iii) The 5th Plaintiff had invested an amount of ***Fourteen Thousand Three Hundred and Eighteen Ghana Cedis (GH¢ 14,318.00)*** and not ***Fifteen Thousand Ghana Cedis (GH¢ 15,000.00)*** as claimed.

iv) The 7th Plaintiff had only invested an amount of ***Thirty-Five Thousand Ghana Cedis (GH¢ 35, 000.00)*** just like the 6th Defendant.
v) 9th Plaintiff had only invested an amount of ***Forty Thousand Ghana Cedis (GH¢ 40,000.00).***
vi) 10th Plaintiff had been paid an amount of ***Thirty-Nine Thousand and Fifteen Ghana Cedis (GH¢ 39, 015.00)*** out of his investment of ***Fifty One Thousand Ghana Cedis.***

vii) 11th Plaintiff contrary to his assertions had only invested ***Forty Thousand Ghana Cedis (GH¢ 40, 000.00)***.

viii) 14th Plaintiff only ***invested Twenty-Five Thousand Ghana Cedis (GH¢ 25, 000.00)*** in the Portfolio Account out of which he has been paid ***Twenty-Five Thousand Four Hundred and Twenty-Eight (GH¢ 25, 428.00)***

ISSUES

Upon the failure of the parties to resolve the matter at Pre-Trial Conference the following issues were settled for trial:

a) *Whether or not the Plaintiffs are entitled to recovery of the sum of* ***One Million, Six Hundred and Thirty One Thousand Nine Hundred and Forty-Nine Ghana Cedis Thirty-Seven Pesewas (GH¢1,631,949.37)***
b) *Whether or not the parties entered into a contract, and whether or not the contract has been breached.*
c) *Any other issues arising out of the pleadings.*

EVIDENCE ADDUCED BY THE PARTIES

At the trial, the 1st Plaintiff testified for himself and on behalf of all the other Plaintiffs. The Plaintiffs' evidence as set out in their amended witness statement filed on the 15th of February, 2021 was in line with their pleadings.

Plaintiffs tendered ***Exhibits A to Q*** in proof of their case. ***Exhibits A*** to ***P*** were tendered in proof of the various investments made by each Plaintiff.

Exhibit Q is also Plaintiffs' own calculation, of the 1st Defendant's indebtedness to each of them which they say stood at a total amount of ***One Million, Six Hundred and Thirty One Thousand Nine Hundred and Forty-Nine Ghana Cedis Thirty-Seven Pesewas (GH¢1,631,949.37)*** as at the end of February 2019.

The 2nd Defendant for his part, testified on behalf of the 1st Defendant and on his own behalf. He maintained in the Witness Statement filed jointly by the Defendants, that he only acted as Chief Executive Officer of 1st Defendant (sometimes erroneously referred to as 2nd Defendant) in its dealings with Plaintiff but could not be described as its alter ego. He also maintained that most of the Plaintiffs had been paid their respective principal amounts invested together with interest in accordance with the terms of their respective investment accounts.

According to the Defendants, each Plaintiff as evidenced by their own ***Exhibits A and A1,*** signed an Agreement with the 1st Defendant by which Plaintiffs signified their understanding and acceptance that their investments were subject to "general market currency, economic, political and business risk as well as risks associated with investments".

Consequently, Plaintiffs were made aware of the "exceptional challenges" facing the 1st Defendant. It was these challenges that affected the otherwise regular payments on Plaintiffs' investments. This, the Defendants say was out of the control 1st Defendants leading to the current state of affairs.

EVALUATION OF EVIDENCE

Before delving into the merits of the case, I propose to address one pertinent issue that came up during cross- examination of the 1st Plaintiff. This is the assertion of Counsel for Defendants that the 1st Plaintiff had no capacity to represent the other Plaintiffs. I consider this important as want of capacity does not concern itself with the merits of the case but could disable a Plaintiff from approaching a Court for judicial relief.

Order 4 Rule 3 of Civil Procedure Rules, 2004, CI 47 provides that two or more persons may be joined together in the same action as Plaintiffs or as Defendants without leave of Court, where

a) *"if separate trials were brought by or against each of them some common question of law or fact will arise in all the actions; and*
b) *all rights to relief claimed in the action whether joint, several, or in the alternative are in respect of the same transaction or series of transactions"*

In the instant case, it is clear that the transaction upon which each Plaintiff's claim is founded is the investment agreement they each entered into with the 1st Defendant. They each allege that 1st Defendant had breached the said agreement.

Thus the matters complained of by the Plaintiffs arise from the same series of transactions which involve common questions of law and fact. Indeed the 2nd Defendant under cross-examination on the 10th of March,2022 claimed

that the 1st Defendant paid the Plaintiffs "in bulk" and had made "mass payments" to them. This means the Defendants themselves collectively.

Consequently, even though each Plaintiff sues in his or her own right, nothing precludes the Plaintiffs from appointing one of them to testify on behalf of their behalf. The English case of ***DAVIS (JOSEPH OWEN) v ELI LILY & CO [1987] 3 AER 83*** exhorts the Court to be flexible in the management of cases and to adopt the necessary procedures so as to reach decisions quickly and economically.

Additionally, an examination of this Court's record will reveal that all Plaintiffs were present in Court on the 15th of September, 2019 and also on the 21st of December, 2021. This is ample evidence of their knowledge of the pendency of the instant suit in this Court and the fact that they were all being represented by the
1st Plaintiff.
Again, the fact that 1st Plaintiff had in his possession documents covering the transactions entered into by all the other Plaintiffs with 1st Defendant leaves me in no doubt that the 1st Plaintiff had their blessing to testify in the suit on their behalf.
The Defendants' contention regarding the want of capacity of the 1st Plaintiff is therefore without merit and will be disregarded by this Court.

Now, as in every civil suit the standard of proof in the instant suit is on a balance of probabilities. The well -received principle therefore is that, for a Plaintiff (who bears the initial burden of proof) to succeed on his claim, the

evidence adduced in support of his case must measure up to the standard set under ***Sections 10, 11*** and ***12*** of the ***Evidence Act (NRCD 323).***

It is however important to note that this burden does not remain static but continues to shift from party to party.

This principle was sufficiently elucidated by our Supreme Court per ***Brobbey JSC*** in the case of ***IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU AND OTHERS v KOTEY & OTHERS [2003-2004] 420 @ 464 and 465*** as follows;

"The hackneyed common law principle has always been that a Defendant in a civil case assumes no onus of proof and, indeed is said to be under no obligation to prove his defence. Serious inroads have however been created in this principle by two sections in NRCD 323"
The first is section 11 which states that;

"11(1) for the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue

The second is Section 14 reads that:

"Except as otherwise provided by law, unless and until it is specified a party has the* burden *of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting"

These sections of the Evidence Decree... clearly require a defendant who wishes to win a case to lead evidence on issues he desires to be ruled in his favour...if the court has to make a determination of a fact or an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has the duty to help his own cause or case by adducing before the court such facts or evidence which will induce the determination to be made in his favour... if he leads no such facts or evidence that , the court will be left with no choice than to evaluate the entire case on the basis of evidence before the court , which may turn out to be only the evidence of plaintiff. ..."

Taking this position a step further. the allocation of the burden of proof in actions for debt recovery was however put to rest in the case of ***ADJEIODA v C.F.A.O. [1971] 2 G.L.R 11*** where the Court held that;

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

Turning to the instant suit, one fact that is not in dispute is that the Plaintiffs made various investments in the 1st Defendant company. They maintain that they have tried unsuccessfully to redeem their investments from the 1st

Defendant contrary to the terms of the respective agreements entered into with 1st Defendant.

In light of this established fact, the burden shifted onto 1st Defendant to prove that it had indeed paid most of the Plaintiffs their Principal amounts invested, together with interest as it alleges.

I find that the evidence of the 1st Defendant was not only fraught inconsistencies but clearly ridiculous. In its pleadings and testimony, the 1st Defendant averred that most of the Plaintiffs had been paid their principal amounts invested together with interest. Under cross-examination, however it's story suddenly changed to having paid all the Plaintiffs in full. No evidence was however produced in proof of the said payments. In my opinion this shift in itself undermines its credibility of the Defendants.

The 2nd Defendant's suggestion under cross-examination that the 1st Defendant had failed to tender evidence of the said payments because statements of accounts are only made available on request is so preposterous, I choose to disregard same. Proof, as held in the seminal case of ***MAJOLAGBE v LARBI [1959] GLR 190*** is by proper legal means. Not by bare assertions but by clear, cogent and convincing evidence.
Having chosen not to lead any evidence in support of its assertions for the spurious reason that the Plaintiffs had failed to request such evidence, the 1st Defendant cannot escape the legal consequences of its choice.

Equally unproven was the claim of the so-called "exceptional challenges" rendering 1st Defendant incapable of honoring its obligations under the respective agreements entered into with the Plaintiffs. I have little doubt that the 1st Defendant is indebted to Plaintiffs.

That said, this Court still considered it unsafe to rely on ***Exhibit Q*** which was the Plaintiffs' own computation of the 1st Defendant's indebtedness as I considered same self-serving.

Buoyed up by ***Order 28 Rule 2*** of the ***High Court (Civil Procedure) Rules (CI 47)*** which provides that:

> ***2. (1)***
> ***"The Court may refer to a referee for enquiry and report any question or issue of fact raised in a cause or matter before it"***

I ordered (with the consent of both parties) the appointment of Mr. Afatsao (Deputy Registrar of Finance) of the Judicial Service to reconcile accounts between the parties.

Upon completion of his work, the Referee on the 22nd of November 2022, filed his Report at the Registry of this Court and served both parties with copies of same as ordered by the Court. In the said Report, the Referee concluded in favour of the Plaintiffs and found that the 1st Defendant was indebted to Plaintiffs in the sum of ***One Million Six Hundred and Nineteen***

Thousand, Two Hundred and Thirty Five Ghana Cedis Ninety-Four Pesewas (GH¢1, 619,235.94)

Counsel for both parties, after studying the said Report informed the Court that they had no questions for the said referee which in my view signified their acceptance of the conclusions reached in the said Report.

It is trite learning that the findings of an expert/ referee are not binding on a Court.

However, on the totality of the evidence before me, I have no reason to doubt that the referee duly discharged the duty entrusted to him by this Court. I therefore adopt his findings in their entirety.

CONCLUSION

In conclusion, I note that the Plaintiffs' claim against the 1st and 2nd Defendants jointly and severally. The pleadings however do not disclose any allegations made against the 2nd Defendant personally. The attempt by Counsel for Plaintiff to impute liability to 2nd Defendant during cross-examination therefore went to no issue. Moreover, Plaintiffs' suggestion during cross-examination of 2nd Defendant that the 2nd Defendant personally caused the collapse of the 1st Defendant company due to his lavish lifestyle was not backed by any evidence.

It would appear from the pleadings and evidence on record that the 2nd Defendant was only made a party to this suit because he is the CEO of the 1st Defendant.

In the case of ***MORKOR v KUMA [1998-99] SCGLR 620*** this is what the Court had to say;

"It is patently clear from the statement of claim that the only reason that the appellant was sued was because she was the chief executive, a director and the main shareholder of the first defendant company. The statement of claim made no averments against the appellant that would prima facie attach any liability to her....when an officer of a company in the normal course of her duties so negotiates or signs an agreement entered into by the company, no liability is thereby created in the absence of any clear indications to the contrary..."

As already noted, in the absence of clear and credible evidence disclosing that 2nd Defendant was responsible for the collapse of the 1st Defendant or fraudulent in his dealings I find and the Plaintiffs suit against the 2nd Defendant cannot stand.

Indeed it is obvious that the 2nd Defendant was unnecessarily made a party to the present suit. In the premises the 2nd Defendant is hereby struck out as party to the suit.

DECISION

In the result, judgment is entered in favor of the Plaintiffs to jointly recover from the 1st Defendant as follows:

a) The sum of ***One Million Six Hundred and Nineteen Thousand, Two Hundred and Thirty Five Ghana Cedis Ninety-Four Pesewas (GH¢1, 619,235.94)***
b) Interest shall be payable on the said amount from the ***1st of March 2019*** until date of final payment.

Plaintiffs' action against the 2nd Defendant is dismissed.

I award costs of ***Twenty Thousand Ghana Cedis (GH¢20,000.00.)*** in favour of the Plaintiffs against 1st Defendant.

(SGD)
AKUA SARPOMAA AMOAH (MRS)
(JUSTICE OF THE HIGH COURT)

Cases referred to:
DAVIS (JOSEPH OWEN) v ELI LILY & CO [1987] 3 AER 83
IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU AND OTHERS v KOTEY & OTHERS [2003-2004] 420 @ 464 and 465
ADJEIODA v C.F.A.O. [1971] 2 G.L.R 11
MAJOLAGBE v LARBI [1959] GLR 190
MORKOR v KUMA [1998-99] SCGLR 620

Statute referred to:
The Civil Procedure Rules, 2004, CI 47

The Evidence Act, 1975, (NRCD 323)