

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HELD AT KIBI ON 3RD DAY OF DECEMBER 2024 BEFORE HER LADYSHIP RUBY NAA ADJELEY QUAISON (MRS) HIGH COURT JUDGE.

SUIT NO:

C2/01/2023

ALBERT KUMODZI)
PLAINTIFF

VRS:

RICHARD BOSOMPEM)
DEFENDANT

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Plaintiff present

Defendant present

Samuel Baffuor Awuah holding brief for Andrew Edwin Arthur for Plaintiff present

Eunice Odum-Boateng for Defendant absent

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JUDGMENT

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The plaintiff herein instituted this action on 03/11/22 against the defendant claiming the following reliefs:

- a. An order of the honorable court compelling defendant to supply plaintiff with outstanding 451 bags of CIMAF Cement out of 3,600 cement plaintiff ordered from CIMAF cement Company through defendant’s account on 2nd September 2022.

b. Cost

The defendant entered appearance and filed a statement of defence on the 9/12/2022. The defendant did not file any counterclaim. At the close of pleadings, issues set out in an application for directions filed on behalf of the plaintiff on 03/02/2023 and additional issues filed on 07/02/2023 were set down for trial on 17/02/2023 as follows:

1. Whether or not plaintiff made payment of GH¢181,800.00 for the supply of 3,600 bags of cement at GH¢50.50 factory price.
2. Whether or not defendant did supply the 1st and 2nd consignments totaling 1,800 bags.
3. Whether or not defendant did supply the 3rd consignment on the date agreed upon.
4. Whether or not at the time defendant refunded GH¢90,360.00 did factory price of the cement increase from GH¢50.50 to GH¢67.00.
5. Whether or not the plaintiff refused to take delivery of the 3rd consignment of cement ordered from the defendant.
6. Whether or not defendant refunded an amount of GH¢90,360 being the amount received from the plaintiff, 11 days after the plaintiff refused to take delivery of the goods.

The brief facts are that on the 29th day of September 2022, the plaintiff together with defendant went to the ADB Suhum branch where plaintiff made payment to the defendant for 6,600 bags of cement. The plaintiff avers that the 6,600 bags of cement summed up to an amount of One Hundred and Eighty-One Thousand and Eight hundred Ghana Cedis (GH¢181,800) at the time as a unit price per one bag of cement was Fifty Ghana cedis and Fifty Pesewas (GH¢50.50). The defendant admits to the 6,600 bags of cement transaction but disputes the unit price of each bag stating it was at the unit price of GH¢50.20 and not GH¢50.50. Both plaintiff and defendant do not dispute that the defendant supplied to plaintiff the 1st and 2nd consignments of cement totaling 1,800 bags of

cement with an outstanding consignment of 1,800 bags of cement yet to be supplied by the defendant. In November, 2022, the defendant in a bid to refund the monies paid him for the outstanding 1800 bags of CIMAF cement paid into the account of the plaintiff at GCB bank an amount of GH¢90,360.00. by then the price of a bag had escalated to Ghc 67.00 per bag going by the purchase price given by the agent/ distributor of the defendant to plaintiff. The GH¢90,360.00 therefore represents cost of 1, 349 bags of cement instead of GH¢120,600 leaving a shortfall of 451 bags of cement unaccounted for or not paid for by the defendant. The agent/ distributor of the defendant for CIMAF cement for the transaction between parties was Dynamic top ventures.

It is the plaintiff case that in October 2022, the price of cement was again increased to GH¢67.00 per a bag of cement. At the time defendant had to supply plaintiff an outstanding consignment of 1,800 bags of cement but defendant failed to do so. It is also the case of the plaintiff that, someone's (i.e. Dynamic top ventures) consignment of 900 bags of cement was rather supplied to plaintiff. Plaintiff had therefore to deliver back to the rightful owner dynamic top ventures the said 900bags. The plaintiff requested defendant to send 900 bags of plaintiff's outstanding supply of 1,800 bags, to the rightful owner being dynamic top ventures, however defendant failed to do so. Dynamic top ventures the said rightful owner called plaintiff to inform him that, he did not want the cement again since it had delayed but rather he wanted the money at the then rate of GH¢67.00 per bag. It is also the case of the plaintiff that, he called the defendant and requested him to refund into plaintiff's account, the total amount of 900 bags of cement basing his calculation on the new cost price per a bag of cement at the time, to enable plaintiff refund same to the rightful owner.

It is further the case of the plaintiff that, in November, 2022, defendant paid into the account of the plaintiff an amount of GH¢90,360.00 representing 1, 349 bags of cement instead of GH¢120,600 representing the outstanding

supply of 1,800 bags of cement, leaving a shortfall of 451 bags of cement unaccounted for or not paid for by the defendant. It is therefore the case of the plaintiff that, with the above stated payment made by the defendant to the plaintiff, defendant is expected to further refund to the plaintiff, a balance of GH¢30,240 representing the shortfall of 451 bags of cement.

The defendant in denial of plaintiff's case claims and asserts that there was no contractual or business relationship between himself and the plaintiff so as to make him liable to pay damages and interest. The defendant again asserts that he did in fact ensure the supply of the cement to the plaintiff, and that the plaintiff unjustly refused to accept delivery of the consignment for which he now seeks damages. The amount received from the plaintiff was GHC180,720.00 and not GHC181,800.00.

The defendant's case is that at no point did he enter into any sort of binding commercial contract with the plaintiff, which is clearly illustrated by the fact that monies were paid directly to CIMAF and not to him, just that the defendant facilitated this payment through his account, because he was an existing customer of CIMAF. This payment was made on 29th August 2022, and evidenced by a receipt tendered by the defendant as Exhibit 1. The plaintiff in his witness statements and throughout the trial however claimed the payment was made on 2nd September and for a greater amount of GHC 181,800.00 but was unable to provide any evidence of any such deposit on the said date, but rather producing a withdrawal from his own bank account, which does not evidence any payment made to CIMAF through the defendant's account.

The parties subsequently filed their witness statements. At the close of pleadings six issues were set down at the application for directions stage, the issues however gleaned by the honourable court as the gravamen of this suit are as follows:

1. Whether or not plaintiff made payment of GH¢181,800.00 for the supply of 3,600 bags of cement at GH¢50.50 factory price.
2. Whether or not defendant did supply the 3rd consignment on the date agreed upon.
3. Whether or not at the time defendant refunded GH¢90,360.00 did factory price of the cement increase from GH¢50.50 to GH¢67.00.
4. Whether or not the plaintiff refused to take delivery of the 3rd consignment of cement ordered from the defendant.
5. Whether or not defendant refunded an amount of GH¢90,360 being the amount received from the plaintiff, 11 days after the plaintiff refused to take delivery of the goods.

EVIDENCE:

The plaintiff commenced his case by testifying himself and subsequently called one witness. The plaintiff testified that he Plaintiff, Albert Kumodzi, relied on his witness statement filed on 20/03/2023 and a GCB Bank Cheque Deposit Form, which was tendered and admitted as exhibit 'A', as well as Supplementary Witness Statement and its attachments filed on the 5th day of July 2023 as his evidence in-chief and same were subjected to cross-examination by defendant's counsel. Per his witness statement, both the plaintiff and defendant are businessmen who deal in the sale of cement at Kyebi and that, the two of them engaged in a business transaction of the supply of cement at a point. It is his testimony also that, on the 29th day of August 2022 he reached an agreement with the defendant for defendant to supply him 3,600 bags of CIMAF Cement to enable him sell to his customers and that, at the time they entered into the agreement, one bag of cement was selling at GH¢50.50 per factory price.

According to plaintiff, he paid an amount of GH¢181,800.00 as the total cost for the 3,600 bags on the 15th day of September 2022, defendant supplied the first consignment of 900 bags of cement and again on the 29th day of September 2022 defendant supplied the 2nd consignment of another 900

bags making a total of 1,800 bags supplied. It is also the plaintiff's evidence that, on the 30th day of September 2022, defendant called him on phone informing him that, he (defendant) had brought the 3rd consignment of 900 bags at the time plaintiff was traveling outside Ghana, so plaintiff arranged with one of his customers to take delivery of the 900 bags of cement. The Plaintiff says in his evidence that, he returned from his journey a week after his customer had taken delivery of the 3rd consignment but to his surprise, a gentleman named Dynamic Akakpo came to inform him that, the 900 bags that his customer took delivery of on the 30th day of September 2022 belonged to him. According to plaintiff, he called the defendant, who confirmed that fact, that the 900 bags of cement he took delivery of through his customer on the 30th day of September 2022 was indeed for Dynamic Akakpo.

It is again plaintiff's evidence that, defendant denied calling him to take delivery of the said 900 bags of cement, which was wrongfully directed to him and which was received by plaintiff's customer. on the basis of defendant informing him that, the 900 bags of the cement did not belong to plaintiff, plaintiff had no option than to refund the money at the prevailing price per bag of GH¢67.00, which summed up to GH¢60,300.00 to defendant as per exhibit A.

The Plaintiff also gave evidence that, at the time, there was information making the rounds that, the price of cement would be increased so he approached defendant for the supply of his remaining 1,800 bags of cement but defendant informed him that, one Elorm, would supply the remaining 1,800 bags of cement to him. It is the evidence of the plaintiff that, defendant gave him Elorm's phone number and plaintiff called Elorm on phone and connected defendant for them to have a conference call but the moment defendant was joined to the call and realized that, it was a conference call between the four of them, that is plaintiff, Elorm, Dynamic

Akakpo and the defendant, the latter disconnected himself from the conference call.

According to the plaintiff in his evidence, by the 22nd day of October 2022, the factory price of cement was increased to GH¢67.00 per a bag of cement and an announcement to that effect had been made official to all customers of all cement manufacturing companies. The Plaintiff state in his evidence that, upon persistent demands for his outstanding cement, defendant on the 2nd day of November 2022 paid an amount of **GH¢90,360.00** into his bank account with the defendant claiming that, the GH¢90,360.00 refunded was for the remaining 1,800 bags outstanding, which defendant had to supply to the plaintiff. It is further the evidence of plaintiff that, as at the 2nd day of November 2022, when defendant refunded the GH¢90,360.00, that amount could only buy 1,349 bags of cement instead of the 1,800 bags outstanding, which defendant had to supply to the plaintiff. The Plaintiff stated in his evidence-in-chief that as at 2nd November 2022 1,800 bags of cement at GH¢67.00 per factory price, would amount to **GH¢120,600.00** and that, with the refund of the **GH¢ 90,360.00** by defendant, that amount could buy only **1,349** leaving **451** bags of cement not refunded in monetary terms. The Plaintiff therefore prayed this Honourable court to hold that, defendant owed him 451 bags of cement yet to be either supplied or to be paid for and further prayed the Honourable court to give him judgment on the reliefs endorsed on his writ of summons as well as cost of this proceedings, including the legal cost he has incurred.

Under cross-examination, plaintiff asserted that, it was common knowledge among cement dealers that, indeed the price per a bag of cement had been increased at the time defendant made a refund to the plaintiff and that, defendant ought to have made his refund to plaintiff factoring the increase in price, which defendant failed to, which failure led to misunderstanding between them and which misunderstanding is the subject of this dispute.

PW1: is KWAKU GYEBI. He relied on his witness statement filed on 20/03/2023 as his evidence in chief, and was duly cross-examined by counsel for the defendant. He states in his witness statement that, plaintiff supplies him with cement and also do receive cement supplies from Dynamic top Ventures. His evidence, as stated in his witness statement, affirms that, he received a supply of cement on the 29th day of September 2022 and also on the 30th day of September 2022 which were all brought to him by the same driver. According to PW1, it later became known to him that, the 30th September consignment was not supplied by the plaintiff but rather by Dynamic top Ventures. Pw1 further testified that he was aware that, plaintiff had refunded to Dynamic top Ventures the monetary value of the consignment misdirected to his shop by the defendant on the 30th day of September 2022.

DEFENDANT: The defendant, Richard Bosompem relied on his 29-paragraphed witness statement filed on 03/04/2023 and three documents he tendered as exhibits 1, 2 and 3 respectively as well as a supplementary witness statement filed the 28th day of November 2023 and its attached exhibit A1 and same were adopted by the court as his evidence-in-chief and same subjected to cross-examination. Per the said witness statement, he did not know that the price per bag had been increased but admitted in paragraphs 23 to 27 that, he was told by a representative of Dynamic top Ventures that, if he defendant had not requested for a 3rd consignment, any increase would not have affected him, which evidence indicates that, there was indeed price increase. The defendant again admitted in paragraph 23 that, the refund to the plaintiff delayed, which affirms plaintiff's insistence that, the refund was caught up by the increase in price per bag of cement.

DW1: Madam Doreen Koranteng relied on her 25-paragraphed witness statement filed on 03/4/2023 and an attachment she tendered as exhibit 4 and same were adopted by the court as her evidence-in-chief and same

subjected to cross-examination. Per the said witness statement, she mainly indulged in hearsay but later corroborated most of the things already told to the court by the defendant. Under cross-examination, DW1 contradicted most of the things she had earlier told the court in her witness statement and was also not helpful in disclosing the date on which defendant spoke to the plaintiff on phone, a date plaintiff insists he was out of the jurisdiction and so could not have been reached on phone. DW1 could also not tell the court the exact number of days it took to pay back the cost of the 900 bags of cement to the plaintiff, the delay of which was caught up by the increase in the factory price per a bag of cement.

Excerpts of cross-examination of DW2 by counsel for plaintiff.

...

Q: Do you know the plaintiff's shop where he sells the cement.

A: He does not have a shop.

Q: Your witness statement paragraph 8 you said I was present when the driver Christian from Dynamic Top Ventures brought the 1st consignment and I directed him to plaintiff shop but now you are saying plaintiff does not have a shop.

A: I am always at my shop and my husband who is the defendant instructed me that when the cement consignment for the plaintiff comes, I should direct the driver to the plaintiff, so when I direct the driver to the plaintiff, the plaintiff in turn would direct the driver where to take the cement to be delivered to some shop owners to sell.

...

Q: Are you aware the plaintiff paid an increment of the price to Dynamic Top Ventures.

A: In anything concerning payments I was not present, so cannot speak to it. As it was the plaintiff and defendant who went together.

Q: From your witness statement you supplied the 2nd consignment on 1st October 2022 per your paragraphs 10 and 11 of witness statement.

A: I recall it was in the month of October 2022 through the exact date unless I refresh my memory.

Q: Can you tell the means of communication between the plaintiff and defendant per your paragraphs 10 and 11 of your witness statement.

A: It was through phone call.

Q: I put it to you. That paragraphs 10 and 11 never happened as at that time plaintiff was out of the country.

A: The plaintiff and defendant communicated on phone on the said date.

Q: Can you tell us the cost of the bags of cement at the time the 3rd consignment cement was delivered.

A: 3RD Consignment was rejected.

Q: At that time how, much was the cost of cement.

A: The factory price was GH¢50.2 as at October 2022, when the transaction took place.

...

LAW

Section 10 - 12, 14 of NRCD 323 defines the Burden of Persuasion as:

10 "(1) For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

(2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

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 the issue.

(2) In a criminal action the burden of producing evidence, when it is on the prosecution as to any fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(3) In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to guilt.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

12 (1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

14 Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted 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 that person is asserting."

The law relating to standard of proof in civil matters without exception is proof by preponderance of probabilities having regard to sections 10, 11

and 12 of Evidence Act, 1975 (NRCD 323). Section 11 states among other things that, for the purposes of the Act the burden of producing evidence mean the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue. Section 12 instructs that unless otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities which means the degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence. **See: ADWWUBENG v DOMFEH (1996-97) SCGLR 660. See also: AVADZINU vrs. NYOONA (2010) 27 GMJ 132CA.** The Supreme Court in the case entitled **DON ACKAH VRS PERGAH TRANSPORT LTD (CIVIL APPEAL NO. J4/51/2009) 21st April 2020, [2010] SCGLR 728** at 736 held as follows:

“It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail.

The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay documentary and things (often described as real evidence) without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the Court or Tribunal of fact such as a Jury”

It is trite learning that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence.”

In **AMIDU ALHASSAN AMIDU & ANOR VS MUTIU ALAWIYE & 6 ORS (2020) 155 GMJ 120**, the Supreme Court per Pwamang JSC at page 159 stated the principle on the allocation of persuasion as follow:

“The settled position of the law is that it is the party who stands to lose on an issue if no evidence is led on it that bears the burden of proof as far as that issue is concerned. This principle is stated in Section 14 and 17 of NRCDC 323...”

Suffice to say that a defendant, who did not counterclaim, is also required by law to lead evidence to prove facts he asserted and or alleged that would inure to the benefit of his defence. This is because under **Section 17(1) of NRCDC 323**, and as was stated by the Supreme court in **ENEKWA & ORS VS KNUST [2009] SCGLR 242** Per Anin Yeboah JSC (as he then was) at page 248, stated that *“The burden of producing 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”*.

The expression burden of persuasion can therefore be interpreted to mean the quality, quantum, amount, degree or extent of evidence the litigant is obliged to adduce in order to satisfy the requirement of proving a situation or a fact. See: **AGO SAI & OTHERS v KPOBI TETTEH TSURU III [2010] SCGLR 762 at 779**. See also: **Fred Obikyere in his Book, Legal Resource Book: The Law as Decided by The Superior Courts In Ghana pages 150,151, 164**

It therefore means that in assessing the balance of probabilities, all the evidence of both the plaintiff and defendant must be considered and the party in whose favour it tilts is the person whose case is more probable of rival version and is deserving of a favourable verdict. See: **TAKORADI FLOOR MILLS VRS SAMIRA FARIS (2005-2006) SCGLR 682 @ 900**

FINDINGS OF FACT

I have considered section 10, 11, 12 and 14 of the Evidence Act, 1975 (NRCD 323). I have also taken into consideration written addresses filed on behalf of the plaintiff and the defendant. From the entire evidence before the court, I make the following findings of fact: -

- Both parties trade in cement from CIMAF however use different agents
- Both parties had wind of impending increment of cement prices from CIMAF company
- Plaintiff could not make an order through his regular agent on time before orders closed
- Plaintiff approached the defendant for assistance in that regard. The defendant assured plaintiff his agent could assist plaintiff buy the cement before the impending price increase
- Plaintiff on 2/9/2022 ordered cement totaling 3,600bags from defendant to be distributed to plaintiff's customers
- The parties went to Defendant's bank ADB Suhum branch on 2/9/2022 and defendant paid for the total cost for 3600bags of cement to defendant's supplier at GH¢180,700.00.
- Both parties agree defendant has supplied two consignments of cement of 900bags each totaling 1800bags
- Both parties agree 1800bags were still outstanding which the defendant failed and/or did not supply
- The agent whom defendant ordered the cement consignments from for plaintiff happens to be Dynamic top ventures
- The driver of Dynamic top ventures who was instructed to deliver the first consignment to plaintiff customer later sent a second consignment to the plaintiff customer which did not belong to the defendant but to Dynamic ventures
- The customer of plaintiff received the cement upon enquiry from plaintiff as he had not made any orders for cement. The plaintiff made enquiries from defendant who encouraged him to get his customer keep the

cement though plaintiff and customer had not initially requested for their next consignment of cement

- The plaintiff's customer upon demands from Dynamic top ventures for payment informs plaintiff of Dynamic top ventures demands as the said customer had made payment for the said consignment already to the plaintiff.
- Plaintiff directs the defendant to send one of plaintiff's outstanding consignments to Dynamic top ventures to resolve the issue but he fails /and or refuses to do so
- by the 22nd day of October 2022, the factory price of cement had increased to GH¢67.00 per a bag of cement
- Dynamic top ventures after the delays for return of the cement refuses to accept the cement but demands for payment by which time the cost of a bag of cement had been increased to 67ghc.
- The plaintiff pays Dynamic top ventures and requests for refund of the monies or in lieu the cement
- The defendant decides to refund the monies to plaintiff.
- Plaintiff gave a GCB Bank account number to defendant to effect the payment for the outstanding bags of cement of 1800ghs into that account.
- The defendant paid into the said account an amount of GH¢90, 360 on the 31st day of October 2022 representing the total cost of 1,800 bags of cement at a unit price of GH¢50.20.
- As at 2nd November 2022, 1,800 bags of cement at GH¢67.00 per factory price, would amount to **GH¢120,600.00** and that, with the refund of the **GH¢ 90,360.00** by defendant, that amount could buy only **1,349** leaving **451** bags of cement not refunded in monetary terms.
- From the evidence on record it cannot be determined whether plaintiff made payment of GH¢181,800.00 for the supply of 3,600 bags of cement at GH¢50.50 factory price or paid GH¢180,700.00 for the 3,600 bags

- What is however evident is that at the time plaintiff refunded the monies to Dynamic top ventures the price of cement had increased and he paid 67ghc per bag of cement to Dynamic top ventures
- The defendant paying the **GH¢ 90,360.00** into plaintiff GCB account as refund was after Plaintiff's refund of monies to Dynamic top ventures when the price of cement had already been affected by an increment thus a bag of cement was **GH¢67.00**
- The customer of plaintiff who is Pw1 admits plaintiff supplies him with cement and also he does receive cement supplies from Dynamic top Ventures.
- The plaintiff has refunded to Dynamic top Ventures the monetary value of the consignment misdirected to his shop on the 30th day of September 2022.

Having taken all the evidence of both plaintiff and defendant through the lens of established laws, especially on the burden of proof and persuasion, the court has come to a determination of the main issues of this instant suit as follows;

ISSUE 1: Whether or not plaintiff made payment of GH¢181,800.00 for the supply of 3, 600 bags of cement at GH¢50.50 factory price.

From the evidence before the court, the plaintiff considers the defendant as a relation of his wife and are on cordial terms. According to the plaintiff he entered into a business transaction with the defendant for the supply of 3,600 bags of cement, and paid to defendant an amount of GH¢181,800 which fact was pleaded by the plaintiff in paragraph 6 of his statement of claim filed on the 3rd day of November, 2022. In proof of the said averment plaintiff affirmed in his evidence-in-chief per paragraphs 5, 6 and 7 of his witness statement. Also, under cross-examination, plaintiff emphatically stated that, he paid to the defendant an amount of GH¢181,800 for the supply of 3,600 bags of cement at a unit price of GH¢50.50.

The defendant admits he was contracted to supply 3, 600 bags of cement to plaintiff. The defendant categorically disputes the amount of Ghc181,800.00 quoted by the plaintiff being a unit price of GH¢50.20 . The defendant testifies that the amount paid him by the plaintiff was GHC180,720.00 being the cost of the 3600bags of cement at a unit price of GH¢50.20.

The defendant in his witness statement and under cross-examination admits the monies paid him was for 3600 bags of cement. Inferably, because of the perceived family relationship between the parties, the plaintiff did not take any proof of payment from the defendant especially as he was at the bank also when defendant paid the money. *Exhibit A and A1* confirm what total amount was paid by defendant into Dynamic top ventures account it however does not confirm what amount plaintiff paid defendant.

The defendant filed witness statements for witnesses he intended to call inclusive the branch manager of the bank in whose presence the transaction took place however opted to call one witness being his wife in addition to himself to testify. The other witness statements therefore went in as hearsay evidence. A look at the witness statement filed on behalf of defendant by the bank manager who was the only person present aside the parties during this transaction is in contradiction to the defendant's claims in paragraph 6 of his witness statement. That he together with plaintiff on 29 august 2022 met in the manager's office where the plaintiff placed an amount of GHC180,720.00 on the managers table which defendant directly paid into the account of Dynamic top ventures who are his agents with defendant's name as reference. However Sampson Okyere, who is the said Bank manager and the only person present aside the parties was not called to testify. His witness statement in paragraphs 4 to 8 contradicts the evidence of defendant save the amount. The paragraphs 4 to 6 stated inter alia that the plaintiff was the person who walked into his office first and plaintiff and the manager started counting the money before the defendant came in. that after he finished counting the money he filled the deposit

forms totaling GHc180,720.00 and gave same to the defendant to deposit. There is no bank statement to confirm the amount stated in Exh 1. Brobbey JA (as he then was) in the case of **DUAH V YORKWA [1993-94] 1 GLR 217** at page 224 stated thus:

"In our jurisprudence, if two parties go to court to seek redress to a dispute, it is the plaintiff who initiates the litigation and literally drags the defendant into court. If both parties decide to lead no evidence, the order which will be given will necessarily go against the plaintiff. Therefore it is the plaintiff who will lose first, who has the duty or obligation to lead evidence in order to forestall a ruling being made against him. This is clearly amplified in section 11 (1) of NRCDC 323 which provides 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 the issue."

However, the burden of proof is not static. Thus in the suit **JOHN DRAMANI MAHAMA VRS ELECTORAL COMMISSION & NANA ADDO DANKWA AKUFO-ADDO [2021] 171 G.M.J 473@ 530** the supreme court, per Anin Yeboah JSC (as he then was) as follows; ***"The burden of persuasion rests with the person who substantially asserts the affirmative of the issue on the pleadings and this is the principle of law that has been unremittingly followed by our Courts for decades"***.

The established principle of law requires the plaintiff to lead a clear evidence as to his claim. It is the view of the honourable court that, the plaintiff repeating his pleading and averments during his testimony is not enough to proof his case.

In law, all issues of fact in dispute are proved by evidence. It is a fundamental principle in the law of evidence that he who asserts or claims an entitlement has the onus of proving the basis of that claim. Per the oft-cited case of **MAJOLAGBE V LARBI [1959] GLR 190**, a party on who the

burden of proof lies proves an averment in his pleadings, capable of proof in a positive way, **not by merely mounting the witness box and repeating it on oath but by producing corroborative evidence that must necessarily exist if his averment were to be true.** The corroborative evidence may be documents, like one on the terms of a contract, otherwise called the terms or conditions of service.

The plaintiff failed to produce sufficient, cogent and clear evidence in support of the allegations. The Supreme Court in the case of **BANKERS-WOOD V. NANA FITZ [2007-2008] SCGLR 879** stated that, “... *in a quest to ascertain the party upon whom the burden rests, it is a fundamental requirement of any judicial system that the person who desires the court to take action must prove his case to its satisfaction*”. Therefore, as a matter of common sense, the persuasive burden of proving all facts essential to a claim normally rests upon the claimant in a civil matter such as the instant case. It is trite learning that matters that are capable of proof must be proved by sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence

In business transactions plaintiff ought to have been more vigilant and requested for documentation for the payments made between them in respect of the transaction. The plaintiff has only himself to blame for not sighting the receipt and taking a copy to confirm and authenticate the amount truly involved. Anything could have happened to the money after the plaintiff had given the money to defendant and the defendant left to pay at the teller. Yet the court deals with evidence not suspicions or mere allegations/ or hearsay.

The court hereby holds that the plaintiff failed to sufficiently substantiate his averments that he paid 50.50ghc per bag of cement instead of 50.20ghc which has been denied by defendant. The plaintiff’s inability to lead cogent

evidence to prove his side of the story requires this court to rule against him on this issue

ISSUE 2: Whether or not Defendant Did Supply the 1st and 2nd Consignments Totaling 1,800 Bags

Both parties at the close of case management and in the course of hearing are at ad idem that the defendant did supply the 1st and 2nd consignment of cement bags being 900bags per each consignment and both totaling 1800bags of cement.

In FATTAL V WOLLEY [2013 - 2014] 2 SCGLR 1070 @ 1076 the Court held that

“ ... Admittedly, it is, Indeed sound basic Learning that courts are not tied down to only the issues identified and agreed upon by the parties at pretrial. Thus, if in the course of the Hearing, an agreed issue is clearly found to be irrelevant, moot or even nor germane to the action under trial, there is no duty cast upon the Court to receive evidence and adjudicate upon it. The converse is equally true. If a crucial issue is left out, but emanates at the trial from the pleadings or the evidence, the court cannot refuse to address it on the ground that it is not included in the agreed issues...”

See also: Republic V High Court Koforidua; Ex - Parte Bediako II [1989 - 90] SC GLR 91 @ 102.

The court hereby holds thus; that this issue is moot and as such would not be expedient for the court to address and/or adjudicate on same.

ISSUE 3: Whether or not Defendant did supply the 3rd Consignment on the date agreed upon

The plaintiff received a consignment of 900 bags intended for someone else thus instructed the defendant to replace same with plaintiff's outstanding supply, which was not honoured by the defendant. The plaintiff having realized the consignment earlier delivered to his customer kweku Gyebi (PW1) belonged to Dynamic top Ventures requested the defendant to deliver the 3rd consignment to Dynamic top Ventures however defendant failed to comply. The said 900bags consignment belonged to Dynamic top Ventures who turned out to be the defendant's agent from whom he had bought the said cement from for plaintiff. Dynamic top Ventures was also a supplier for plaintiff customer (Pw1). In effect the plaintiff customer Pw1 at all material times buys cement from both plaintiff and Dynamic top Ventures.

From the evidence before the court the defendant, did not return cement and or /reconcile records in respect of the 3rd consignment with Dynamic top Ventures as instructed by plaintiff. All defendant had to do was to have reconciled the supply issue in respect of the 3rd consignment with Dynamic Ventures to forestall this confusion. Due to the delay in rectifying the records with Dynamic Ventures the said company refused to accept the cement but demanded for payment from Pw1. Pw1 also knowing he had paid the monies to plaintiff demanded same from plaintiff. The plaintiff in the circumstances had no option than to refund the money at the prevailing price per bag of GH¢67.00, which summed up to GH¢60,300.00 to Dynamic Top ventures. As at that time the price of cement had increased to 67ghc per bag. The Plaintiff furnished defendant with his GCB bank details. The defendant refunded the cement at 50.20ghc as he alleges plaintiff paid for knowing very well the value of the cement had appreciated to 67ghc. The defendant definitely did not and would not have sold the cement below the 67ghc per bag especially as his sale of the cement was subsequent/or after plaintiff refunding monies to Dynamic top Ventures when by then the cement from defendants own agent Dynamic top ventures was being sold at 67.00ghc per bag.

Generally, a contract for the sale of goods should come with time schedules for delivery or are subject to a certain contractual agreement by parties and these will become part of the contract and enforceable at law. **Section 6 of Sale of Goods Act, 1962 (Act 137)** states that: “... (1) *If no time is fixed for the delivery of the goods, they must be delivered within a reasonable time.*

(2) Unless a contrary intention appears stipulations as to the time of delivery are conditions of a contract of sale...”

It is trite, that in contracts for delivery of goods, timely delivery is extremely important especially if they involve fluctuating goods where delays can lead to significant financial losses. In the instant case, the misunderstanding between parties was due to the unauthorized delivery caused by the driver sent to deliver the 2nd consignment. This brought some delay, the defendant however further delayed when this mistake was discovered by not timeously reconciling the accounts with Dynamic top ventures after all the said 3rd consignment of cement was already in the custody of Dynamic top ventures being defendants agent for the transaction. This led to price increases, and defendant undoubtedly stood to profit unjustly at the expense of the plaintiff.

The court thus holds that as by the 22nd day of October 2022, the factory price of cement was increased to GH¢67.00 per a bag of cement. The defendant is to refund the outstanding cement @67ghc per bag. The 1,800 bags of cement at GH¢67.00 per factory price, amounted to **GH¢120,600.00** and that, with the refund of the **GH¢ 90,360.00** by defendant there is an outstanding sum still due the plaintiff from defendant of **GH¢ 30,240.00**.

ISSUE 4: Whether or Not the Time Defendant Refunded GH¢90,360.00, the Factory Price of Cement Had Increased to GH¢67.00 per Bag.

It is the plaintiff's position that, by the time the defendant issued a partial refund in November 2022, the market price of cement had risen to GH¢67.00 per bag. The plaintiff also contends that, the delay in supply caused financial losses to the plaintiff due to the increased cost of the cement he had to pay to the rightful owner.

Section 53 of the Sale of Goods Act, 1962 (Act 137) deals with damages for Non-delivery. Section 53 allows for damages when there is a failure to fulfil contractual terms leading to financial losses. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, in accordance with the terms of the contract, or where the buyer rejects the goods delivered by the seller having the right so to do, the buyer may maintain an action against the seller for damages for non-delivery.

It is the view of this court that it can be reasonably inferred that indeed the price had appreciated to 67.00ghc at the time the defendant refunded monies to plaintiff especially as this was after the defendant agent Dynamic top ventures had been refunded monies for the cement at 67.00ghc prior to defendant refunding the GH¢90,360.00 to plaintiff.

Again, the mistake with delivery of the said consignment was a genuine one initiated by a third party. The defendant should not be held totally responsible for same albeit he did not act timeously to resolve same.

The court hereby holds thus, that at the Time Defendant Refunded GH¢90,360.00, the Factory Price of Cement had increased to GH¢67.00 per Bag.

The court further holds that the plaintiff is not entitled to damages save the refund of the outstanding price of cement as determined by this court.

For the avoidance of doubt the outstanding price of cement as determined by this court are that; the 1,800 bags of cement at GH¢67.00 per factory price, amounted to **GH¢120,600.00**, with the refund of the **GH¢90,360.00** by defendant there is an outstanding sum still due the plaintiff from defendant of **GH¢ 30,240.00**.

ISSUE 5: Whether or Not the plaintiff refused to take Delivery of the 3rd Consignment of Cement Ordered from the Defendant

The plaintiff has consistently denied ever refusing to take delivery of any consignment, stating instead that, the defendant rather failed to fulfil the third delivery obligation. This factual evidence contradicts the defendant's assertion that, the plaintiff refused to take delivery on 1st October 2022. In **OBENG V TETTEH (1988-89)1 GLR 412**, the court held that, when one party fails to perform their contractual duty, the burden falls on them to prove that they attempted delivery as agreed.

The court holds that the defendant has not provided sufficient evidence of delivery for which the plaintiff may be estopped to seek redress for the outstanding bags of cement.

ISSUE 6: Whether or Not Defendant Refunded an Amount of GH¢90,360.00 Eleven Days after Plaintiff Refused to Take Delivery

Both parties at the close of case management admit and there is copious evidence on record per proceedings during the hearing that indeed the defendant refunded an amount of **GH¢90,360** to plaintiff through plaintiff's bank account at GCB bank.

The defendant is liable to refund to plaintiff the price difference in the bags of cement paid back to the defendant's distributor Dynamic top ventures. This position, is founded on the principles of restitution and unjust enrichment.

The court holds that at the time of refunding plaintiff's money, the market price had indeed increased from GH¢50.20 to GH¢67.00 per bag. The doctrine of unjust enrichment holds that, a person who is unjustly enriched at the expense of another must make restitution to that person. Under Ghanaian law, this principle has been established in several cases, including the case of **MENSAH V. MENSAH [1987-88] 1 GLR 256**, where the court held that, a party who benefits from an enrichment caused by a mistake is liable to refund the value of that enrichment. Where a party benefits from a

mistake made by another party, the law imposes an obligation on the enriched party to make restitution.

In conclusion, the court states as follows per the reliefs prayed:

The plaintiff is entitled to his relief. The court makes the order that the defendant to refund to the plaintiff an outstanding amount of **GH¢ 30,240.00** being the cost of **451** bags of cement @ **GH¢ 67.00**.

No order as to costs.

**H/L RUBY NAA ADJELEY QUAISON [MRS.]
JUSTICE OF THE HIGH COURT**