IN THE DISTRICT MAGISTRATE COURT, HARBOR AREA, TAKORADI, HELD ON THURSDAY 4TH DAY OF AUGUST, 2023 BEFORE HIS WORSHIP BERNARD DEBRAH BINEY ESQ. - MAGISTRATE

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SUIT NO. **A4/21/2022**

EBUS. THOMAS ABBEY ..... PLAINTIFF

HEAD OF ANONA FAMILY OF ASSAKAE

H/NO. 72/8 KWESIMINTSIM

VRS

JOHN BAPORE …. DEFENDANT
TAKORADI

JUDGMENT

The Plaintiff caused writ to be issued out from the registry of this court on 16th January, 2023 and served same on the Defendant claiming the following reliefs;

1. An order granting the Plaintiff leave to re-enter Plot Nos. 85 & 88 for the breach of covenant.
2. Any further Order(s) that this honorable Court deem fit.

The court ordered for substituted service to be effected on the Defendant due to the difficulties experienced by court officers in getting Defendant to be served personally with the court processes. The Defendant never showed up in court to respond to the claims of the Plaintiff despite consistent pasting of orders for substituted service which were posted on the land in dispute and the notice board of the courts per the dictates of the orders of the court. The court was then left with no choice but to proceed to hear the case only on the side of the Plaintiff. Accordingly, after complying with the orders of the court to file his witness statement, the Plaintiff was called upon to give his testimony on 13/07/2023.

In his pleadings before the Court, the Plaintiff averred that he is the head of Akona Family of Assakae and resides at H/No. 72/8, Kwesimintsim, l am the head of the Akona Family of Assakae. The Defendant are lessees of the Plaintiff. The Plaintiff avers the land in dispute forms part of large tract of land which was acquired by his ancestors as virgin forest. That the said tract of land was occupied by several family members who cultivated various crops on same. At the time Ebusuapanyin Kweku Essoun became the family head, he caused the said tract of land to be demarcated into building plots. Plaintiff avers that his predecessor then sold some of the plots that were realized from the demarcation to prospective buyers. Plaintiff says that on 1st July, 2008, defendant acquired the disputed land Plot Nos. 109 &107 situate and lying at Assakae from Ebususpanyin and after the acquisition of the said land Ebususapanyin Kweku Essoun executed an indenture in favor of the Defendant. That per the indenture executed and the covenants stated therein, the Defendant was given five (5) years to erect or construct and complete a structure on the disputed land. The Defendant had failed to abide by the said covenant in the lease therein, such that the Defendant had failed to erect or construct on the land nor exercised any act of possession for about 16 years. That Ebusuapanyin Kweku Essoun died in 2011 and Plaintiff was appointed as the new family head.

That Plaintiff have been responsible for the clearing of the disputed land and also responsible for the payment of the ground and property rate as the Defendant had refused/failed so to pay. That Re-entry notice was duly served on Defendant by Plaintiff's lawyer for defendant to remedy the breach caused, which Defendant had refused to comply with same. The acts of the Defendant amount to breach of covenants as contained in the indenture therein and therefore pray that this honorable court grant his relief sought.

Issues for Determination

1. Whether or not the Defendant has breached any covenant in their lease Exhibit "A"
2. Whether or not Plaintiff is entitled to his reliefs.

Burden of Proof

Having set down issues for determination in this trial, it is relevant to point out the burden of proof in this matter. It is settled law that a party who asserts assumes the burden of proving same. The burden of producing evidence as well as the burden of persuasion is cast on such a party and the

standard of proof required to discharge the burden of persuasion in civil matters is one of "preponderance of probabilities". See sections 12(1) and (2) and 11(4) of the Evidence Act, 1975[NRCD 323].

These statutory provisions have been subject of discussion in plethora of decisions in our Courts. Some of the cases are **Takoradi Flour Mills v.Samir Faris[2005-2006]SCGLR 882**, where the Supreme Court per Ansah JSC exhaustively dealt with the burden of proof at pages 896-898 of the report and **In re Ashale Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors. [2004-2005] SCGLR 420**, among others.

Section 14 of NRCD 323 also provides that:

"Except otherwise provided by law, unless and until 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 he is asserting".

It is also the duty of the court to assess all the evidence on record in order to determine in whose favor the balance of probabilities should lie. In the case of **In re Presidential Election Petition (No.4) Akuffo – Addo & Ors v. Mahama & Ors[2013]SCGLR (Special Edition) 73,** the Supreme Court held at page 322 as follows;

"***Our understanding of the rules in the Evidence Decree, 1975 on the burden of proof is that assessing the balance of probabilities, all the evidence, be it that of the plaintiff, or the defendant, must be considered and the party in whose favor the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favorable verdict"***

In **Okudzeto Ablakwa (No.2) v. Attorney General & Obetsebi- Lamptey(No.2)[2012]2 SCGLR 845**, the Supreme Court in dealing with the burden of proof held at page 867 and stated 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 the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court, if the case is based on allegation which he fails to prove or establish***"

See also **Faibi v. State Hotels Corporation [1968] GLR** and **Ackah v. Pergah Transport [2010] SCGLR 728**

Evidence Adduced in Court (Plaintiff's Case)

The Plaintiff in his evidence -in -chief to the court stated that, he does not know the defendant but he knows the land in dispute forms part of large tract of land which was acquired by his ancestors as virgin forest and was occupied by several family members who cultivated various crops on it. Plaintiff testified further that during the reign of Ebusuapanyin Kweku Essoun as the family head, he caused the said tract of land to be demarcated into building plots, and sold some of the plots that were realized from the demarcation to prospective buyers. So on 1^{tt} July, 2007, defendant acquired the disputed land Plot No. 86^{B} situate and lying at Assakae from his head of family Ebususapanyin Kweku Essoun who executed an indenture (Exhibit A) in favor of the Defendant. That per the indenture executed and the covenants stated therein, the Defendant was given five (5) years to erect or construct and complete a structure on the disputed land. The Defendant had failed to abide by the said covenant in the lease therein, such that the Defendant had failed to erect or construct on the land nor exercised any act of possession for about 15 years. Ebusuapanyin Kweku Essoun died in 2011 and Plaintiff was appointed as the new family head, and since been responsible for the clearing of the disputed land and payment of the ground and property rate as the Defendant had refused/failed so to pay. The Plaintiff tendered a rent demand note from the Lands Commission including her non-compliance of payment as Exhibit 'C'. According to the Plaintiff, re-entry notice was duly served on Defendant by his lawyer for her to remedy the breach caused, but Defendant had refused to comply with same. The Plaintiff concluded that this acts of the Defendant amount to breach of covenants as contained in the indenture executed and therefore pray that this honorable court grant his reliefs sought.

Finding of Facts.

The court found as a fact that the Defendant obtained a lease from Plaintiff's family in respect of Plot Nos. 858&8 lying and situate at Mpatado. That the said lease/indenture executed between the parties has been registered at Lands Commission as Document No. WR 2719^{A}/07. That in the parties executed registered indenture, the Defendant covenanted with the Plaintiff's family to erect

a building on the demised premises within (5) five years from the date of lease. That the lease was dated 15th November, 2007. That office of the Administrator of Stool Lands issued Rent Demand Note to John Bapore, the Defendant herein which was in respect of rent arrears from 2007- 2021 for rent payable of Ghc 160.00 in respect of Plot Nos. 85 & 88 at Assakae.

Analysis of Issues and Application of Relevant laws.

The Defendant though was not served personally with the court processes, but based on order 4 rule 5 of the District Court Rules (C.I.59), the court ordered substituted service to be effected on the Defendant of which the Court bailiffs filed affidavit of posting on the docket to indicate that same had been done, but still Defendant failed/ refused to appear. The court will therefore take it that after the Court afforded defendant the opportunity to be heard, he failed to respond to the Plaintiff's claim or attend court. The law is that where a party fails to appear in Court after due service on him, he is said to have deliberately failed to take advantage of the opportunity given him to be heard. The *audi alteram partem rule* cannot be said to have been breached.

See the case of **Ankumah v. City Investment Co. Ltd. [2007-2008]1 SCGLR 1068**. See also the case of **Republic v. High Court(Fast Track Division); Exparte State Housing Co. Ltd (No.2) Koranten- Amoako Interested Party, [2009]SCGLR 185** where Wood JSC (as she then was) stated authoritatively at page 190 as follows:

"***A party who disables himself or herself from being heard in any proceedings cannot later turn round and accuse an adjudicator of having breached the rules of natural justice"***

Accordingly, the court, in the instant matter and being mindful of the position of the law as espoused in the above case, and in conformity with Order 25 rule 2 (a) of District Court Rules (C.I. 59) proceeded to hear the matter of the Plaintiff without the Defendant.

The relevant law which regulates the relationship between landlord and tenant or lessor and lessee and the instances or circumstances that may trigger ejection or recovery of possession of leased or rented premises, in the case in the instant suit is the Rent Act of 1960 (Act 220)

Section 17 of the Rent Act supra is headed Recovery of Possession and Ejectment and provides:

"*(1) Subject to the provisions of subsection (2) of section 25 and of section 28, no order against a tenant for the recovery of the possession of, or for the ejectment from, any premises shall be made*

or given by the appropriate Rent Magistrate, or any other Judge of a court of competent jurisdiction in accordance with the provisions of any other enactment for the time being in force, except in any of the following circumstances:—

(a) where any rent lawfully due from the tenant has not been paid or tendered within one month after the date on which it became lawfully due;

(b) where any obligation of the tenancy, other than that specified in paragraph (a), so far as such obligation is consistent with the provisions of this Act, has been broken or not performed;"

Whereas the law as quoted above, provides grounds for recovery of possession or ejectment from premises, to be non-payment of rent within one month after the date on which it became due, in the instant case, the Defendant has not paid the recoverable rent in respect of the leased premises for the past sixteen years, though on the evidence, he has been notified of this breach or default in payment of the recoverable rent, since 10th November, 2022. The plaintiff in proof of this assertion of default and notice of re- entry tendered in evidence exhibit "E". This exhibit "E", is a letter addressed to John Bapore, the Defendant herein written on the letterhead of Gaisie Zwennes Hughes & Co., Legal Practitioners & Notaries Public, captioned, Notice of Re-entry – Plot No. 86B Assakae and signed by Philip Fiifi Buckman, lawyer for the Plaintiff. In exhibit "E", which is dated on 10th November, 2022, and posted to Defendant at her own address provided during the transaction, the Defendant was given 21 days to remedy the breach but according to Plaintiff no response was received, though exhibit "E1" from Ghanapost showed that the notice was actually posted.

Additionally, as per their own lease Exhibit "A" which the Defendant executed in the presence of Peter Asempa as his witness, Defendant covenanted under clause 4 headed as PROVIDED ALWAYS AND IT IS HEREBY AGREED AS FOLLOWS:

(a) "If the rent hereby reserved or any part thereof shall be unpaid for one year after becoming payable and the lessor shall have demanded the same in writing from the lessee, it shall be lawful for the lessor at anytime thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demised shall determine absolutely."

From the above, it is abundantly clear that Defendant has defaulted in payment of the reserved rent and has breached his own covenant with the Plaintiff's family as his grantors/ lessors.

Beside the default in payment of the reserved rent, Defendant further covenanted with the Plaintiff Lessors to erect a building on the demised premises within five (5) years from the date of lease, but on the evidence, no building or structure has been erected on the land/premises demised to the Defendant as at the time plaintiff instituted this action, contrary to defendant's own covenant. The court finds this covenant quite onerous, and wonders why a lease of land for ninety nine (99) years should have such a covenant, but the court seemed helpless because this is Defendant's own covenant which he executed and the court would have to respect it as such. We are in the sixteenth year after the lease between the parties was executed and registered, and the fact that no building has been erected on the demised premises is clear on exhibit "C" which is a photograph of the leased land taken 29/03/2023.

On the basis of the above, it is my view that Defendant has breached the covenants of the lease she obtained from the Plaintiff's family in respect of Plot No. 85 & 88 as captured in Exhibit A.

Section 29 of Conveyancing Decree, 1975 NRCD 175 which is headed thus**; Restriction on Re-Entry and Forfeiture, provides:**

"(1) *A right of re-entry or forfeiture under any provision in a lease for a breach of any covenant, condition or agreement in the lease shall not be enforceable, by action or otherwise, until—*

(a) the lessor serves on the lessee a notice:

(i) specifying the particular breach complained of;

(ii) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(iii) (except where the breach consists of a non-payment of rent) requiring the lessee to make reasonable compensation in money for the breach; and

(b) the lessee has knowledge of the fact that such notice has been served;

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and, (except where the breach consists of a non-payment of rent) to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a notice has been sent by registered post addressed to a person at his last known postal address in Ghana, then, for the purposes of subsection (1), that person shall be deemed, unless the

contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

(3) This section applies notwithstanding any provision to the contrary in the lease."

The above provision of the law has been the subject of plethora of judicial decisions and one of such decisions is the case of **Western Hardwood Ltd v. West African Enterprise Ltd [1998-99] SCGLR 105** where the Supreme Court held that **"*the provisions of section 29 of NRCD 175 shows clearly that the lessee must be served with notice of the breach complained of, and must have the knowledge of the fact that such notice has been served. Furthermore, the enforceability of the re-entry shall be by action or otherwise, and by section 30(1) where the lessor proceeds by action or otherwise to enforce his right of entry or forfeiture under any provision in a lease, or for non- payment of rent, the lessee may, either in the lessor's action or in any action brought by such person for that purpose, apply to the court for relief. It means, therefore, that Apowa stool can only legally divest the Plaintiff of his lease and resell the property to the first Defendant under the circumstances of this case is therefore illegal and unenforceable*"**

In their book, Ghana Land Law and Conveyance, 2nd Edition, authored by **B J Da Rocha** and **CHK Lodoh**, at page 72 the learned authors shared their view on the subject and posited:

"Re-entry by way of forfeiture by the lessor puts an end to the lease forever. A lessor's right to forfeit the lease arise if the lessee is guilty of a breach of a condition for the lease. At common law, a breach of condition by the lessee automatically give rise to the lessor's right to forfeit the lease subject only to statutory restrictions contained in the Act 220 and NRCD 175. The right to forfeit the lease or tenancy is vested in the lessor or the landlord only. A lessee or tenant cannot breach a condition and then set up the breach as terminating the lease or tenancy. A breach of covenant by the lessee also gives rise to the lessor's right to forfeit the lease. However, a breach of covenant does not automatically entitle the lessor to forfeit the lease unless the lease expressly provides for forfeiture for a breach of the particular covenant.

In the case of Bassil v Said Raad [1958]3 WALR 231, Ollenu J, as he then was said "Now, at common law, there can be no forfeiture for the breach of covenant under a lease, unless there is an express provision in the lease for re-entry….. where the lease or tenancy is oral or if it is in writing or it is preceded by a contract for a lease and made subject to the "usual covenants"

there is an implied condition for re-entry by the lessor or landlord for a breach of covenant to pay rent, whether or not, if the lease is in writing, it contains a forfeiture clause"

Taking a cue from the above position of the eminent authors together with the decision of the Supreme Court in the preceding paragraph supra, and applying their views in the instant case, the breach of the Defendant herein of the conditions/covenants which have been explicitly provided in the parties lease, it is my view that this present breach in the instant case, automatically gives rise to Plaintiff's right to forfeiture of the lease.

In the case of **Sackey v Ashong [1956] 1WALR 108**, the tenant covenanted to repair the leased premises. The covenant was not fortified by a forfeiture clause. In an action by the landlord to recover possession because of the tenant's alleged breach of covenant to repair, it was held that; "***in the absence of an express provision, a breach of covenant to repair does not give the landlord a right of re-entry***."

But in this present case, there is an express provision in the lease to pay rent and erect structure on the leased premises within five years.

Again, in the case of **Interplast Ltd v Bonsu [1979] GLR 285-289**, the court held, allowing the appeal*:*

(1) The trial judge had misconstrued clause 4 (a) which on its proper construction, merely gave B, the landlord, a right to re-enter the premises and thereby determine the lease. The lease was not determined before the re-entry of the premises.

Per curiam. It is this right of re-entry that the landlord sought to exercise by the instant action. Although in times past, the landlord may make an actual entry and forfeit the lease for breach of covenant which reserves to him the right of re-entry, the usual practice of the present day is to sue for recovery of possession. Dictum of Willes J. in Grimwood v. Moss (1872) L.R. 7, C.P. 360 at p. 364 applied.

(2) In the eyes of equity, the object of a right of re-entry was to give the landlord security for his rent. Consequently where an action was brought to enforce a right of forfeiture the court would relieve the tenant again [p.286] forfeiture if he paid all the arrears and costs even though such payment did not take place until after the date of forfeiture had passed. On the facts of the

instant case, the company was entitled both in equity and under sections 210-212 of the English Common Law Procedure Act, 1852, a statute of general application by virtue of Act 372, s. 111 (1), to a grant of relief against forfeiture. To enforce a right of forfeiture in the circumstances would cause great hardship to the company and would be plainly unjust. Howard v. Fanshawe [1895] 2 Ch. 581 and Boston v. Khemland Brothers [1964] G.L.R. 277, S.C. cited.

In the instant case, the fact that Defendant has failed to erect a building or structure on the leased premises is not in doubt, and per their lease, this is a condition that parties covenanted that breach of it shall entitle the lessor to re-enter. The Plaintiff lessor in compliance with the provision of the law in section 29 of NRCD 175 supra caused his lawyer to write to notify Defendant of this breach and gave her 21 days to remedy same, and further inform defendant in the same re-entry notice, of his intention to proceed to court but no response was received from the Defendant. The Plaintiff's present action against the Defendant is to enforce his right of re-entry under the lease as required by law.

From the totality of the evidence adduced, and in the light of the provisions of the relevant laws, together with the various decisions of the courts in the foregoing authorities, I am of the opinion that Plaintiff has been able to discharged the burden of proof imposed on him, and has accordingly proved his case on balance of probabilities against the Defendant.

In the circumstances of the case, I am convinced that Plaintiff has established that defendant has breached her own covenants in the lease executed between herself and Plaintiff's family in respect of Plot Nos.85&88 located at North West Mpatado Planning Scheme, Takoradi which lease was registered on 14-10 -2008 at Lands Commission, Sekondi as Document No. WR 2719A/07. Plaintiff must therefore be entitled to the reliefs being sought in this action.

In coming to this determination, I am mindful of section 30 (1) of NRCD 175 supra which allows the lessee to apply to the court for a relief of forfeiture but I am unable to explore same due to Defendant non participation in this matter and the fact that breach complained about is not remedied, and it is still ongoing as the recoverable rent continues to accumulate.

Conclusion

In conclusion therefore, I hereby enter judgment in favor of the Plaintiff for the reliefs sought against the Defendant ie to re-enter Plot Nos.85 & 88 located at North West Mpatado Planning Scheme which was leased to the Defendant in 2007.

Cost of the action is assessed at Ghc 3,000.00 in favor of the Plaintiff against the Defendant

SGD
H/W Bernard D. Biney
(Magistrate)

COUNSEL

Philip Fiifi Buckman for Plaintif- Present

REFERENCES;

1. Sections 12(1) and (2) and 11(4) of the Evidence Act, 1975[NRCD 323].
2. Takoradi Flour Mills v. Samir Faris[2005-2006]SCGLR 882
3. In re Ashale Botwe Lands; Adjetey Agbosu & Ors. V.Kotey & Ors. [2004-2005] SCGLR 420,
4. Section 14 of NRCD 323
5. Faibi v. State Hotels Corporation [1968] GLR
6. Ackah v. Pergah Transport [2010] SCGLR 728
7. Ankumah v. City Investment Co. Ltd. [2007-2008]1 SCGLR 1068.
8. Republic v. High Court(Fast Track Division); Exparte State Housing Co. Ltd (No.2) Koranten- Amoako Interested Party, [2009]SCGLR 185
9. Order 25 rule 2 (a) of District Court Rules (C.I. 59)
10. Section 17 of the Rent Act of 1960 (Act 220)
11. Section 29 of Conveyancing Decree, 1975 NRCD 175
12. Western Hardwood Ltd v. West African Enterprise Ltd [1998-99] SCGLR 105
13. Ghana Land Law and Conveyance, 2nd Edition, authored by B J Da Rocha and CHK Lodoh, at page 72
14. Sackey v Ashong [1956] 1WALR 108
15. Interplast Ltd v Bonsu [1979] GLR 285-289