

GHANA / JUDGMENT

DELIMAN & 2 OTHERS VRS. DELIMAN & 4 OTHERS (A1/5/24) [2024] GHADC 401 (14 June 2024)

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IN THE DISTRICT COURT 2, TAMALE HELD ON FRIDAY 14TH JUNE, 2024 BEFORE HIS WORSHIP
D. ANNAN ESQ. BETWEEN SUIT NO. A1/5/24 IDDRISU ISSAHAKU DELIMAN & 2 ORS. -
PLAINTIFFS AND FATAWU ISSAHAKU DELIMAN & 4 ORS. - DEFENDANTS

JUDGMENT

INTRODUCTION

1. This judgment regards probate.
2. The plaintiffs are the present administrators of the estate of a former Magistrate, Issahaku Deliman. The 1st defendant was a former co-administrator of said estate. Both the plaintiffs and 1st defendant are children and beneficiaries of the estate of the late Issahaku Deliman. The 1st defendant is said to have rented portions of house number B385, Tishegu, Tamale which forms part of the said estate to 2nd, 3rd and 4th defendants. The 5th defendants are described as all other tenants of the said house.
3. On 13th November, 2023 the plaintiffs took out a writ of summons against the defendants for the following reliefs: “a. Recovery of an amount of GHS85,463.00 being the balance from the sale of land which forms part of the estate of the late Issahaku Deliman from the 1st defendant. b. Interest on the GHS85,200.00 from March 2023 till date of final payment.
- 1 - c. Recovery of 42 bags of cement from the 1st defendant as remaining building materials used in the renovation of House No. B 385. d. Recovery of all the rent taken from the tenants from the 1st defendant since Letters of Administration granted to him was revoked on 23rd February, 2022 till date. e. An order directed at the 1st defendant to give vacant possession to the administrators of the estate of the late Issahaku Deliman. f. An order directed at the 2nd to 5th defendants to [leave] the premises and give vacant possession to the administrators. g. Costs including legal fees.”

4. On 1st February, 2024 the 1st defendant, through his lawyer, filed a Statement of Defence basically disputing the plaintiffs' claim. He contended that the estate rather owes him an amount of GHS3,137.00.
5. The plaintiffs on 2nd February, 2024 filed a Reply similarly disputing the 1st defendant's assertions.
6. The 2nd, 3rd and 4th defendants were duly served with the plaintiffs' writ, but they failed to file any process or attend court. I shall deal with the effect of their actions later in this judgment. The 5th defendant was only described as "other tenants" so I shall not bother myself with their attendance or otherwise since they are unnamed person or persons.
7. Below are the cases of the plaintiffs and the 1st defendant.
 - 2 -
8. Before I summarize the respective case of the plaintiffs and the 1st defendant, it is worth mentioning here that on 6th May, 2024 this court granted judgment on admission in favour of plaintiffs in respect of reliefs a, b and c above. Hence, the outstanding issues regard reliefs d, e, f and g, only. PLAINTIFFS' CASE
9. The plaintiffs testified through their attorney, Abdul-Rafui Issahaku Yaro. Copy of the said Power of Attorney granted Mr. Yaro dated 1st February, 2024 was tendered as Exhibit A. Copy of plaintiffs' letters of administration dated 16th February, 2023 was also tendered as Exhibit B. According to Mr. Yaro, the 1st defendant put in occupation the 2nd, 3rd and 4th defendants in house number B 385, Tishegu, Tamale without lawful authority or consultation to any of the family members. He explained that the said defendants were given eviction notice sometime in July, 2023 to yield up vacant possession to the plaintiffs, but they have since failed to heed to that notice. Copy of the said eviction notice dated 16th July, 2023 was tendered as Exhibit C. A reminder or further notice to evict was served on the 2nd, 3rd and 4th defendants to leave the premises by 31st October, 2023. Yet again the said defendants/tenants failed to leave. Copy of the further notice to evict dated 16th October, 2023 was tendered as Exhibit D. Plaintiffs' lawful attorney argued it is the 1st defendant who indicated to the said defendants/tenants that they should not move out, and that unless compelled by this court said tenants will not move.
10. Regarding reliefs a, b and c as earlier determined, the plaintiffs' lawful attorney tendered in evidence Exhibits E and E1, which are cash deposits into 1st defendant's bank account with ADB, and a GHS100,000.00 Fidelity Bank cheque, respectively. Exhibit F is Table of Account in renovating house number B 385, Tishegu by 1st defendant and his co-administrator, Yakubu Deliman Issahaku. Exhibit G is a notice of intention to sue one Alhaji Iddrisu Mohammed by lawyers of 1st defendant to
 - 3 - recover an amount of GHS10,000.000. Exhibit H is a copy of the Letters of Administration granted to 1st defendant and one, Ayishetu Issahaku Deliman.

11. Plaintiffs did not call any other witness. DEFENDANTS' CASE 1st defendant
12. 1st defendant in his witness statement filed on 16th February, 2024 did not mention anything about the alleged rental of portions of house number B 385, Tishegu to the 2nd, 3rd, 4th and 5th defendants. He basically concentrated on the account regarding reliefs a, b and c. I will not reproduce the accounts here, save to mention that the new accounts in renovating house no. B. 385, Tishegu prepared by 1st defendant was rejected as Exhibit R. 2nd, 3rd, 4th and 5th defendants
13. As I mentioned earlier, the 2nd, 3rd and 4th defendants were duly served with the plaintiffs' writ on 14th November, 2023, but they failed to file any process or attend court. ISSUES FOR TRIAL
14. The issues borne out of the facts are:
 - a. Whether or not the 1st defendant put the 2nd, 3rd and 4th defendants in occupation of portions of house no. B 385, Tishegu, Tamale and has failed to account for the rent thereof?
 - b. Whether or not the 2nd, 3rd and 4th defendants are to vacate the house no. B 385, Tishegu, Tamale?
- 4 - BURDEN OF PROOF
15. In civil cases, the general rule is that the party who in his pleadings or his writ raises issues essential to the success of his case assumes the onus of proof on the balance of probabilities. See the cases of *Faibi v State Hotels Corporation* [1968] GLR 471 and *In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors.* [2003-2004] SCGLR 420. The Evidence Act, 1975 (NRCD 323) uses the expression 'burden of persuasion' and in section 14 that expression has been defined as relating to, 'each fact the existence or non-existence of which is essential to the claim or defence he is asserting.' See also ss. 11(4) and 12(1) and (2) of NRCD 323.
16. Therefore, a person who makes an averment or assertion which is denied by his opponent has a burden to establish that his averment or assertion is true and he does not discharge this burden unless he leads admissible and credible evidence from which the fact(s) he asserts can properly and safely be inferred, see *Zabrama v Segbedzi* [1991] 2 GLR 221. See also the often-cited case of *Majolagbe v. Larbi* [1959] GLR 190 per Ollennu J (as he then was) where the court held that: "Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true".

17. It is when the claimant has established an assertion on the preponderance of probabilities that the burden shifts onto the other party, failing which an unfavourable ruling will be made against him, see s. 14 of NRCD 323 and the cases of *Ababio v*
 - 5 - *Akwasi III* [1995-1996] GBR 774, *Sarkodie v FKA Company Ltd.* [2009] SCGLR 65 and *Klah v. Phoenix Insurance Company Limited* [2012] 2 SCGLR 1139. ANALYSIS OF THE ISSUES Issue a
18. issue 'a' is whether or not 1st defendant put the 2nd, 3rd and 4th defendants in occupation of portions of house no. B 385, Tishegu, Tamale and has failed to account for the rent thereof? Section 9 of the Administration of Estate Act, 1961 (Act 63) requires that administrator(s) distribute the estate within one year. Similar in *Republic v High Court, Sekondi, Ex parte Mensah and Others* [1994-95] GLR 491, SC, it was held that, "the duties of administrators did not include the right to possess and run an estate, whether the estate comprised a business or not. The administrator's duties, upon receipt of the Letters of Administration, were to gather in the estate and distribute it to persons who were beneficially entitled. Those persons might include some or all of the administrators, but it did not detract from the primary function of the administrators. Section 9 of PNDCL 113 required that the estate be shared out as quickly as possible, and in any case within one year of the grant of Letters of Administration or probate." Where they are unable to distribute within a year, they are to go back to the court for extension of time.
19. His Lordship Kweku T. Ackaah-Boafo J (as he then was) in the case *Susana Naa Akle Tetteyfia & 4 Ors v Emmanuel Nortey Tetteyfia*, High Court, dated 10th November, 2022 (unreported) cited the case of *Eid v Eid* [1979] GLR 290 where he recounted that Executors/Administrators are like trustees who, "have a fiduciary duty to the deceased person they are acting for and the beneficiaries of the estate. They must keep proper records of all financial transactions and show those records to residual beneficiaries, should they wish to see to them." His Lordship Kweku T. Ackaah-Boafo J similar cited the case of *Abotsi (An Infant): In re Kwao v Nortey & Ors* [1984-86] 1 GLR 144-156, CA, stating that,
 - 6 - "As trustees ... the duty to account is so fundamental that in some jurisdictions an express exemption therefrom is adjudged contrary to public policy...As the deceased's family were in this case fiduciaries vis-à-vis the infant appellant, there should be no difficulty in holding them accountable to him. They had taken it upon themselves to manage his property and authorise alienations of some of it. And on their own showing expended the proceeds of the sales of his house for various purposes. A clearer case of liability to account cannot be imagined."
20. From the above authorities, it is the duty of every administrator(s) to account. In this instance, it is on record that when the Issahaku Deliman died sometime in 2005, the the 1st defendant and Yakubu Issahaku Deliman took Letters of Administration dated 19th May, 2005. The said Letters of Administration got lost, when house no. B 385, Tishegu got burnt. Instead of going to the court for a copy of the said Letters of Administration or to be re-

issued, the 1st defendant caused new Letters of Administration to be issued. This time to him and a sister, Ayishetu Issahaku Deliman dated 21st December, 2005, see Exhibit F. When the 1st defendant and Yakubu Issahaku Deliman rendered their accounts, nothing was said about the rent in this issue. In fact, the said Letters of Administration were revoked and a new Letters of Administration issued to the plaintiffs herein. In this case, however, the plaintiffs unfortunately failed to join Yakubu Deliman Issahaku or Ayishetu Issahaku Deliman. Despite this, there is no doubt that house no. B 385 was renovated after it got burnt (in 2005) and portions of same rented out. 1st defendant admitted that he put the tenants in occupation. However, it is unclear when the tenants were put in occupation or when the rent will expire. Below is what transpired when 1st defendant was under cross-examination: “Q: And while that particular letters of administration was in existence which you were aware, you took your sister Ayishetu Issahaku Deliman and took another letters of administration on the same estate?

- 7 - A: Yes. When the house got burnt, we did not have any document again. Q: As we speak, you are living in house no. B 385, Tishegu which is part of the estate? A: Yes. Q: There are tenants in the said house which you put them in occupation? A: Yes. Q: These tenants were served with eviction notice to leave the house which you are aware? A: No. It was the family members who said they should be there that since they were already in the house before the house got burnt, they should be there. Whoever wants to live, they could leave. Q: As we speak, no other beneficiary of the late Issahaku Deliman lives in house no. B 385, Tishegu, except you? A: Apart from me being in the house, my sisters and brothers’ children are there. Q: Your sisters and brothers’ children are not beneficiaries of the estate of the late Deliman? A: I accept that.
 - 8 - Q: That will be all for him.”
21. On the totality of the evidence, it is unclear as to when the rent commenced or it will end. There is no doubt that the 1st defendant put the tenants in occupation of house no. B 385, Tishegu. He is, however, yet to account for the said rental. In fact, none of the accounts submitted by the 1st defendant (either together with the other administrators or not) reflect the rental in dispute. With 1st defendant admitting that he put the tenants in occupation, I therefore on the strength of the fiduciary duties of an administrator(s) conclude that the 1st defendant, either with Yakubu Deliman Issahaku or Ayishetu Issahaku Deliman, or solely accounts for the rental, see *Ex parte Mensah* [supra]. Issue b
22. Issue b regards whether or not the 2nd, 3rd and 4th defendants are to vacate the house no. B 385, Tishegu, Tamale?
23. As earlier pointed out, the 2nd, 3rd and 4th defendants were duly served with the court processes, but they failed to attend court or filed any process. The law regarding their inaction 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. The court is entitled to proceed

with the trial to conclusion and make deductions, draw conclusions or make findings on the basis of the evidence adduced at the trial, see the cases of *In re West Coast Dyeing Industry Limited: Adams v Tandoh* [1984-86] 2 GLR 561, CA and *Ankumah v. City Investment Co. Ltd.* [2007-2008] 1 SCGLR 1068. See also the case of *Republic v. High Court (Fast Track Division); Ex-parte State*

- 9 - 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.”
- 24. Having heard the plaintiffs’ lawful attorney and 1st defendant under oath and without any response from the 2nd, 3rd and 4th defendants, I shall proceed as appropriate, see *In re West Coast Dyeing Industry Limited: Adams v Tandoh* (supra).
- 25. When plaintiffs’ lawful attorney was cross-examined, he also failed to tell the court when the rent commenced or when it will end. Below is what transpired: “Q: Please tell the court how much the people you claim 1st defendant put in the house as rent? A: I have no idea. Q: Can you tell the court the exact time when the 1st defendant put them in the house? A: I have no idea.”
- 26. Regrettably, the 1st defendant who put the said tenants in occupation also failed to tell the exact date of rent or when the rent will expire. In fact, no answers were elicited by counsel for the plaintiff. It will, therefore, be difficult for this court to ascertain whether or not the 2nd, 3rd and 4th defendants have exhausted their rent or failed to pay rent since no account has been given yet. Accordingly, I am unable to determine this
- 10 - issue. Hence, an unfavourable ruling shall be entered against the plaintiffs for failing to prove their case, see *Ababio v Akwasi* [supra].
- 27. Before I conclude, PNDCL 111 provides how a person who died interstate, his properties are to be shared. The beneficiaries include surviving spouse, children, surviving parents and those who enjoy by way of customary law. It will be repugnant to order a child/beneficiary of an estate to vacate the estate/property without any just cause. Since the plaintiffs and 1st defendant as well as other children of the late Issahaku Deliman are beneficiaries of the estate, I wonder how only one of the beneficiaries, the 1st defendant, can be ordered to give vacant possession without a just cause. From the evidence, there was no reason given for 1st defendant to give up vacant possession of house no. B 385, Tishegu Tamale. Since, the plaintiffs are the new administrators, they are in-charge and they are to take all the remaining properties and ensure that every beneficiary gets his/her entitlement.

CONCLUSION

- 28. In effect, I hereby enter judgment in favour of the plaintiffs as follows:

- a. Reliefs a, b, and c have been determined by a ruling of this court dated 6th May, 2024. For emphasis, the plaintiffs to recover the amount of GHS85,463.00 being the balance from the sale of land which forms part of the estate of the late Issahaku Deliman from the 1st defendant, interest to be calculated on the said amount from March 2023 till date of final payment, and recovery of the 42 bags of cement from the 1st defendant as remaining building materials used in the renovation of House No. B 385, Tishegu.
- b. The 1st defendant either with Yakubu Issahaku Deliman or Ayishetu Issahaku Deliman, or solely accounts for rental of the portions of house no.
 - 11 - B 385, Tishegu to the plaintiffs, i.e. the present administrators, within two
- (2) months from the date of this judgment.
- c. This court is unable to make a determination for the rent to be retrieved from the 1st defendant, since same is yet to be accounted for. The plaintiffs lose on this one.
- d. Again, the court is unable to order the 1st defendant to give up vacant possession of the part of house no. B 385, Tishegu since he is a beneficiary of the estate. The plaintiffs, however, are to take all the remaining properties and ensure that every beneficiary gets his/her entitlement.
- e. Lastly, since the court is unable to tell when the rent commenced or to expire, no determination is made on eviction of the 2nd, 3rd, 4th defendants or other tenants of house no. B. 385, Tishegu.
- f. No order as to costs. H/W D. ANNAN [MAGISTRATE] SAMPSON LAMBON ESQ., HOLDING THE BRIEF OF SYLVESTER ISANG ESQ., FOR THE PLAINTIFFS IAN AKANTOE ADAGWINE ESQ., FOR THE 1ST DEFENDANT
 - 12 - References:
- 1. ss. 11(4) and 12(1) and (2) of the Evidence Act, 1975 (NRCD 323)
- 2. s. 9 of the Administration of Estate Act, 1961 (Act 63)
- 3. Faibi v State Hotels Corporation [1968] GLR 471
- 4. In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors. [2003-2004] SCGLR 420
- 5. Zabrama v Segbedzi [1991] 2 GLR 221
- 6. Majolagbe v. Larbi [1959] GLR 190
- 7. Ababio v Akwasi III [1995-1996] GBR 774
- 8. Sarkodie v FKA Company Ltd. [2009] SCGLR 65
- 9. Klah v. Phoenix Insurance Company Limited [2012] 2 SCGLR 1139.
- 10. Republic v High Court, Sekondi, Ex parte Mensah and Others [1994-95] GLR 491, SC

11. Susana Naa Akle Tetteyfio & 4 Ors v Emmanuel Nortey Tetteyfio, High Court, dated 10th November, 2022 (unreported)
12. Eid v Eid [1979] GLR 290
13. Abotsi (An Infant): In re Kwao v Nortey & Ors [1984-86] 1 GLR 144-156, CA
14. In re West Coast Dyeing Industry Limited: Adams v Tandoh [1984-86] 2 GLR 561, CA
15. Ankumah v. City Investment Co. Ltd. [2007-2008] 1 SCGLR 1068
16. Republic v. High Court (Fast Track Division); Ex-parte State Housing Co. Ltd. (No. 2) Koranten-Amoako Interested Party, [2009] SCGLR 185

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