

GHANA / JUDGMENT

Ndk Financial Services Vrs Hearts Of Lions Fc [2023] GHAHC 364 (19 January 2023)

[2023] GHAHC 364

COURT

High Court

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IN THE SUPERIOR COURT OF JUDICATURE. IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD ON THURSDAY THE 19TH DAY OF JANUARY, 2023 BEFORE HER LADYSHIP JUSTICE AKUA SARPOMAA AMOAH (MRS.) SUIT NO.: CM/INTD/0069/22019 NDK FINANCIAL SERVICES - JUDGEMENT-CREDITOR/DEFENDANT HEARTS OF LIONS FC VICTOR AHIKPOR

- JUDGEMNT DEBTORS AND OWUOMPESIKA JACINTA EDEM AKUA - 1ST CLAIMANT/ PLANITIFF JASVY SELORM AHIKPOR -2ND CLAIMANT /PLAINTIFF

===== PARTIES:

CLAIMANTS/PLAINTIFFS – ABSENT STANLEY WILMOT REPRESENTIING /JUDGEMENT CREDITOR/DEFENDANT– PRESENT SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD COUNSEL: CHARLES GBKLEY HOLDING BRIEF FOR ARCHIE DANSO FOR CLAIMANTS/PLAINTIFFS – PRESENT COUNSEL FOR JUDGEMENT -CREDITOR/ DEFENDANT – ABSENT

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JUDGEMENT

INTRODUCTION

On the 26th of October, 2017 this Court entered Judgment in favour of the Judgment- Creditor / Defendant (Judgement Creditor) herein in Suit Number BFS/172/14. In its attempt to levy execution against the property of the 2nd Defendant in that suit (2nd Judgment Debtor) the Judgment-Creditor caused to be attached an unnumbered house situate at Community 25, Tema near Timberland Bar and Restaurant (the Property) Upon being notified of the attachment of the said property, the Claimants/Plaintiffs herein (Claimants) being the wife of the Judgment-Debtor and his son (a minor) filed a Notice of Claim alleging that the Property in question did not belong to the Judgment-Debtor but to them. The Judgment-Creditor by an Affidavit of Dispute challenged the claims of the Claimants and maintained that the 2nd Judgment-Debtor was the owner of the

SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD Property. It stated that the Judgment-Debtor had, at the time of contracting the loan facility from the Judgment-Creditor stated that the attached property belonged to him. Upon their initial appearance before this Court, one fact did not seem to be in dispute. It was that the Judgment Debtor resided in the property in question. This Court therefore, guided by the case of SALAMA v SHARANI [1973] 2 GLR 364, concluded that the initial burden of producing evidence of ownership rested on the Claimants. Claimants were therefore designated Plaintiffs and the Judgment-Creditor, Defendant. ISSUE FOR DETERMINATION One issue clearly stood out for determination. This was; who owned the Property? Was it the Claimants or the 2nd Judgement Debtor? Before delving into the merits of the instant suit I consider it necessary to address one procedural issue. This is whether the 2nd Claimant is properly before this Court. I note that the 2nd Claimant is said to act by his Next Friend, the 1st Claimant. Order 5 Rule 2 (1) of the High Court (Civil Procedure) Rules, 2004 (CI 47) states that: “No order for the appointment of a next friend or guardian ad litem shall be necessary except where any of these Rules provides.

- (2) Except where a friend or guardian ad litem has been appointed by the Court, the name of a person shall not be used in any cause or matter, as SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD next friend or guardian ad litem of a person with disability unless the lawyer of the person with disability has filed in the registry
 - (a) a written consent of the person proposing to be next friend or guardian ad litem to act in that capacity
 - (b) a certificate made by that lawyer for the person with disability certifying that the lawyer knows or believes the person to whom the certificate relates is a person with disability and that the person named in the certificate as next friend or guardian ad litem is a proper person to act as such and has no interest in the cause or matter adverse to that of the person with disability....” I note that in breach of the above-quoted Rule, neither a written consent of the next friend nor a certificate was issued by Counsel. The case of QUAIKO v ANNOBIL [GHANA] LTD [1977] 1 GLR 461 is however, authority for the proposition that this default is only an irregularity that may be waived. Consequently, the Judgement Creditor having proceeded to file its affidavit of dispute without objecting to this procedural infraction should be deemed to have waived the same. 2nd Claimant is therefore deemed to be properly before this Court. Delving now into the merits of the instant suit, a good starting point is to note that, as with all civil suits, the standard of proof in this case, is on a balance of probabilities. See Sections 10 and 11 of the Evidence Act, NRCD 323. What this means is that, to succeed on a claim, a party must satisfy the Court of the probable existence of a fact in issue than its non-existence. SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD The case of the Claimants as Plaintiffs will therefore only succeed if they satisfy this Court on a balance of probabilities that their version of the matter is true and accurate and that of the Defendant false or mistaken. The next point worth noting is the nature of evidence a Claimant is expected to adduce in proceedings of this nature, in order to satisfy the Court of their title to the attached property. In this regard

the dictum of Benin JSC in the Supreme Court case of *AMIDU v ATTORNEY GENERAL & OTHERS* J7/10/2014 DATED THE 27TH OF JUNE, 2019 may be of some help. In that case, his Lordship said; “In this matter, the burden of producing evidence is on the Claimant, in the first instance. They ought to lead evidence albeit prima facie, to satisfy the court that they have a real or proper claim over the properties they have listed. They do so on a balance of probabilities. The burden then shifts to the judgement creditor to lead evidence....” The Black’s Law Dictionary [Eighth Edition] defines the word Prima facie as: “at first sight, on the face of it, matters that if believed will be sufficient to prove the case of a party” It is in the backdrop of the above that I shall proceed to examine the evidence of the Claimants.

EVIDENCE OF CLAIMANTS The Claimants testified through their Attorney Carl Owuompesika, an elder brother of the 1st Claimant. **SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD** His case is that the Property attached in execution of the Judgment belongs to the Claimants. According to him he represented the Claimants in all the transactions leading up to the acquisition of the Property. The land on which the Property is situate according to him, was purchased by the 1st Claimant in the name of her son, the 2nd Claimant and for herself from one Nii Tetteh Oglie II, Chief of Nmlitsakpo and Nii Tettey Otu II paramount Chief of Kpone Traditional Area. Receipts marked Exhibits C, C1 and C2 respectively were tendered in proof of the said purchase. A Deed of Lease said to have been executed in favour of Claimants was also tendered as Exhibit D. Exhibits E and F respectively were also tendered to prove that the 1st Claimant procured a building plan and applied for a building permit before she commenced construction of the Property. 1st Claimant was also said to be the one who has caused electricity to be connected to the Property. The Claimants tendered Exhibit G as electricity receipts. In sum it is the 1st Claimant’s case that she singlehandedly acquired the Property from her own resources and that 2nd Judgement Debtor neither holds an interest nor permanently resides in same. The Claimants called 2 Witnesses- a representative of their Vendor (PW1) and the Contractor who is supposed to have been engaged to construct the Property (PW2). Both PW1 and PW2 corroborated the evidence of the Claimant’s Attorney that all dealings in respect of the Property were with the 1st Claimant who acted through the said Attorney. **SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD** They insisted that they never had any dealings with the 2nd Judgement-Debtor as far as the acquisition of the Property was concerned. Having led evidence both viva voce and documentary to substantiate their claims, the burden now shifted onto the Judgement-Creditor to establish that the Property did not belong to Claimant but the Judgment Debtor. This is in line with the time-honored principle that it is he who asserts that must prove. In the case of *IN RE ASHALLEY BOTWE LANDS: ADJETEY AGBOSU AND OTHERS v KOTEY AND OTHERS* [2003-2004] @ 420 the Supreme Court at page 464 – 465 refined the position as @ 464 as follows; “The hackneyed common law principle has always been that a Defendant in a civil case assumes no burden 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 the issue.” SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD “Except as otherwise provided by law, unless and until it is specified a party has a burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting..... The effect of Sections 11(4) and 14 and similar sections in the Evidence Decree, 1975 [now Evidence Act] may be described as follows; A litigant who is a Defendant in a civil case does not need to prove anything; the Plaintiff who took the Defendant to Court has to prove what he claims he is entitled to from the Defendant. At the same time, if the Court has to make a determination of a fact or of 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 wishes 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 that will induce the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence, the Court will be left with no choice but to evaluate the whole case on the basis of the evidence before the Court, which may turn out to be only the evidence of the Plaintiff....” Counsel for Judgement Creditor relied on the above authority in his written address but appears to have been astute to end his quote where the Court stated that “a Defendant in a civil case does not need to prove anything” SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD That cannot be right as the Court in that case proceeded to hold at Page 464 that the burden of proof does not remain static but continues to shift from party to party depending on the assertion being made. See also Section 17 of NRCD 323. EVIDENCE OF JUDGEMENT CREDITOR/DEFENDANT The Judgment Creditor testified through Mark Ofori, its Loan Recovery Executive. He confirmed that the Property had been attached by the Judgment-Creditor following the failure of the Judgment-Debtors to satisfy the terms of the Judgement of this Court. He maintained that the Property belonged to the Judgment-Debtor and that the Claimants had no interest in same. The Judgment-Creditor called no witness(es). EVALUTION OF EVIDENCE During his cross-examination of the Claimants and their witnesses, Counsel for the Judgment-Creditor seemed to impugn the Claimant’s exhibits on the main ground that the same were not authentic but prepared for the purposes of this Interpleader suit. These were some of the questions put to the Claimants’ Attorney by Counsel during cross-examination: “Q: I am putting it to you that the date on the site plan Exhibit D has been altered A: No... SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD Q: I suggest to you that Exhibit C, Exhibit C1, Exhibit C2 and D, E and F are all of recent origin...” Similar questions challenging the genuineness of the said exhibits were put to Claimants’ witnesses. Now, to the extent that the Judgment-Creditor sought to charge the Claimants with acts amounting to forgery, it shouldered an even greater burden of proof by virtue of Section 13 of NRCD 323. This is because the act of forgery borders on criminality and must be proved beyond reasonable doubt. See the Amidu Case (supra). It is however crystal clear from its testimony, particularly, the answers given by its representative under cross-examination, that the Judgment-Creditor was only on a fishing expedition, hoping to chance on property that belonged to the 2nd Judgment- Debtor. Its Witness persistently contended that the

Property belonged to the 2nd Judgment- Debtor but it became obvious from his answers that this assertion was only grounded on information received from some faceless persons resident in the neighborhood where the Property is situate. Needless to say, possession has never amounted to conclusive proof of ownership, otherwise the same argument could be made in favour of the Claimants. Having adopted this line of reasoning, how can the Judgement Creditor fairly dispute the Claimants assertions? After all there is no evidence before this Court disputing the fact that the Claimants also reside in the Property. SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD In my view, the Judgment-Creditor could have averted the current state of affairs by simply conducting the necessary searches to ascertain who held title to the Property. Instead, it chose to fight this matter on mere suspicion. Unfortunately, suspicion no matter how strong does not amount to proof in law. What I find curious is that the property used by the Judgment-Debtor as security for the facility in question, was not pursued by the Judgment Creditor. Under cross-examination the Judgment- Creditor's Representative was asked; Q: Do you know the 2nd Defendant provided a collateral for the facility granted to the 1st Defendant? A: Yes Q: What is the collateral? A: A landed property at new Achimota... Q: You did not attached[sic] the Achimota house of the 2nd Defendant which you accepted? A: No. We did not attach it. We later got to know that he does not own the house Q: How do [sic] you get to know... A: We were told by occupants of the house that he does not own that house and that he fraudulently used it as collateral for the facility.." It is to me amazing, how an institution like the Judgment-Creditor will choose to rely on rumours or hearsay in its bid to ascertain the 2nd Debtor's title to the properties in SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD question, when such information could easily have been ascertained from the relevant authorities. Even if we accept the contentions of the Judgment-Creditor and proceed on the assumption that the Property does not belong to the Claimants, that in and of itself will not amount to proof that the same belongs to the Judgment-Debtor. The case of Judgement Creditor is therefore not maintainable.

CONCLUSION

Given the total want of credible evidence establishing that the Property belongs to the 2nd Judgment Debtor, the Claimants' case must prevail over that of the Judgement Creditor. DECISION In the result the Claimant's claim is upheld. I hereby order the attached property described as the Unnumbered house situate at Community 25, Tema near Timberland Bar and Restaurant, to be discharged from further execution. I award Costs of Five Thousand Ghana Cedis (GH¢ 5,000.00) in favour of Claimants. AKUA SARPOMAA AMOAH (MRS) JUSTICE OF THE HIGH COURT SUIT NO. BFS/172/2014 NDK FINANCIAL SERVICE VS HEARTS OF LIONS FC LTD Cases referred to: SALAMA v SHARANI [1973] 2 GLR 364 QUAIKO v AANNOBIL [GHANA] LTD [1977] 1 GLR 461 AMIDU v ATTORNEY GENERAL & OTHERS J7/10/2014 DATED THE 27TH OF JUNE, 2019. IN RE ASHALLEY BOTWE LANDS: ADJETEY AGBOSU AND OTHERS v KOTEY AND OTHERS [2003-2004] @ 420 Statute referred to: The Civil Procedure Rules, 2004 (CI 47) The Evidence Act, 1975, [NRCD 323] State edition: The Black's Law Dictionary [Eighth Edition] SUIT

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Prepared on 24 October 2026 · Esheria