THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)
GBADEGBE, JSC
MARFUL-SAU, JSC
DORDZIE (MRS), JSC
AMEGATCHER, JSC

CIVIL APPEAL
SUIT NO. J4/40/2019

11TH DECEMBER 2019

EKOW ESSUMAN (DECEASED)
SUBST. BY RUTH ESSUMAN (MRS)
BODJA ESSUMAN & NANA ASARE BEDIAKO ..... PLAINTIFFS/RESPONDENTS/ RESPONDENTS

VRS

ABOSO GOLDFIELDS LIMITED ..... DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY MARFUL-SAU JSC, AS FOLLOWS-:

This is an appeal against the decision of the Court of Appeal sitting at Cape Coast dated 27th June 2018. In this judgment, the defendant/ Appellant /Appellant will be referred to as Appellant and the Plaintiff/Respondent /Respondent shall be referred to as Respondent. The facts of the case briefly are that the respondent claimed that in January 2009, the appellant agreed and released control, possession and management of sand deposits on its concession to him. According to the respondent, as part of the agreement, he was to make available to the appellant and its officers quantities of sand as and when

they needed it. The respondent also asserted that he was required to maintain the private motorways linking appellant's concession area of the sand deposits.

The respondent also alleged that in January 2015, appellant requested him to re-gravel the public road from the town of Atta Ne Atta to Bogoso Junction in the Prestea-Huni Valley District. The respondent further claimed that with the consent of the appellant, he secured a credit facility in the sum of GHC 900,000.00 from his bankers at an interest rate of 35% to execute the road works. The respondent finally contended that in November 2015, the appellant unilaterally abrogated the agreement without any justifiable reasons and repossessed the sand deposit.

The appellant denied the claims of the respondent and insisted that it never entered into any agreement with him to rehabilitate the Atta- Ne Atta to Bogoso Junction road. The appellant also denied that it agreed or consented to the respondent taking a facility of GHC 900,000.00 from his bankers to execute the road works. The appellant case is further that in 2015, it embarked on a community project involving the rehabilitation of the road and the appellant voluntarily assisted by conveying gravel and laterite for the road works. The appellant also stated that the District Assembly also contributed in the rehabilitation of the road works.

Based on these facts, the respondent took out a writ of summons against the appellant and claimed the following reliefs:-

''(a)Recovery of the sum of GHC 900,000.00 being the cost incurred by the plaintiff in re-gravelling the road from the town of Atta Ne Atta to Bogoso Junction at the instance of the defendant; and

(b)Interest at 35% on the said sum from January to date of payment.

After the trial in the High Court, judgment was entered for the respondent to recover the sum of GHC 500,000.00 and interest on that sum at 35% from January 2015 till date of payment and costs of GHC 12,000.00. The appellant appealed to the Court of Appeal

against the judgment of the trial High Court but the appeal was dismissed. The appellant being dissatisfied with the decision of the Court of Appeal, further appealed to this court praying that the decision of the Court of Appeal be set aside.

We observed that in the amended Notice of Appeal, the appellant formulated eight (8) grounds of appeal, the first ground being that the Court of Appeal's judgment was against the weight of the evidence adduced at the trial.

We note that beside the general ground of appeal, all the other grounds either alleged errors and misapplication of law for which no particulars were provided as required by rule 6 (2)(f) of the Supreme Court Rules, CI 16. Those grounds are incompetent and they are struck out. We intend therefore to address ground (i), which is that the judgment of the Court of Appeal is against the weight of evidence adduced at the trial.

From the pleadings and evidence before the trial court, respondent's main claim before the court was the recovery of the GHC 900,000.00 and interest at 35%. The respondent alleged that this money was used by him to rehabilitate the road. Indeed, at the Application for Directions, two issues were settled by both parties and same set down for trial. The issues were:

'' (1) Whether or not plaintiff is entitled to the reliefs endorsed on his writ of summons, and

(2) Whether or not the Plaintiff secured a credit facility pursuant to an agreement between the parties."

In this appeal, we are of the opinion that the fundamental issue disclosed by the pleadings and the evidence on record is whether the respondent was contracted orally to rehabilitate the road for which he allegedly took a loan of GHC 900,000.00 with the consent of appellant. The respondent's case is that he entered into an oral agreement with appellant to rehabilitate the Atta Ne Atta to Bogoso Junction road and he borrowed GHC 900,000.00 from his bankers to execute the contract. His case further is that the appellant consented to his taking the bank facility. From the evidence on record the

appellant denied these claims by the respondent and it was thus the duty of the respondent to lead credible evidence to prove the oral agreement and the fact that he took a loan of GHC 900,000.00 to rehabilitate the road.

Section 11 (1), of the Evidence Act, 1975 (N.R.C.D 323) which deals with the burden of producing evidence provides as follows:-

'' For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue".

Section 11(4) of the Evidence Act also provide that:

''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 a fact was more probable than its non-existence."

As already observed the burden was on the respondent to prove the claims he made against the appellant. So what evidence was led by the respondent? We have combed the entire record of appeal and our considered opinion is that the respondent led no credible evidence to discharge the evidential burden on him. First, we tackle the issue that he was contracted by the appellant to rehabilitate the road. At page 77 of the record of appeal, the respondent under cross-examination testified as follows:

''Q. Regarding the re-graveling of the Atta Ne Atta to Bogoso Junction the defendant did not enter into any contract with you?

A. My Lord the defendant invited me and we made that agreement. It was the Mining Manager, Mr. Samuel Takyi who invited me on behalf of the defendant company.

Q. The re-gravelling of the Atta Ne Atta to Bogoso Junction road was a community project the defendant undertook?

A.I did it."

Q. You voluntarily approached the defendant and offered to use your trucks to convey laterite and gravels for the project?

A. It was not voluntary work. It was at the invitation of the defendant per Samuel Takyi. I used my trucks, rollers and excavators for the project. I recall that in the beginning the Mining Manager promised to help me with a grader and a roller. They came and worked for two (2) days; went away and never returned.

From the above evidence, respondent asserted that he solely re-graveled the road as a result of the agreement with the appellant. However, the respondent failed to prove this assertion. For example the respondent claimed it was one Mr. Samuel Takyi, the Mines Manger of the appellant who invited him to the meeting where the agreement was concluded, but the respondent made no effort to call such a material witness to testify for him.

The evidence on record is that the respondent was a civil contractor, so we can easily assume that if he actually executed the re- graveling of the road, he would have called some of his workers who worked on the project, to testify as witnesses to support his claim, but he failed to do so.

The respondent in his Witness Statement testified that the project was supervised by officers of appellant, namely, Iddi Adams and Thomas Nyamesesi, but he failed to call any of them to testify for him. Most importantly, the respondent throughout the trial failed to prove the amount of money he spent on the re-graveling of the road. He only called, PW1, David Badu Bow, from the Ghana Highway Authority, to testify on how much it cost the Government of Ghana, in reshaping and re-graveling of roads. All the respondent stated in his testimony was that it cost the Ghana Government GHC 100,000.00 to reshape and re-gravel a kilometer of road.

Clearly, from the evidence on record the respondent woefully failed to discharge the evidential burden on him and we find it difficult to appreciate the basis of the decision of both the trial High Court and Court of Appeal to the effect that respondent was contracted by the appellant to re-gravel the road and that he did in fact executed the project from his resources.

We now examine the evidence led by the respondent that with the consent of appellant he had to take a credit facility from his bankers to finance the re-graveling of the road. At paragraph 7 of his Witness Statement, respondent testified that he secured a credit facility in the total sum of GHC 900,000.00. From the evidence he first took GHC 470,000.00 from Freedom Micro Finance Company Ltd. What this means is that the balance of the GHC 900,000.00, which is GHC530, 000.00 was borrowed from the Stanbic Bank, Tarkwa. The trial Court and the Court of Appeal rightly rejected the claim that respondent took GHC 470,000.00 from the Freedom Micro Finance Company Ltd and we do endorse same as we are satisfied that no evidence was led to prove that claim.

With regard to the credit facility from the Stanbic Bank, the respondent tendered exhibit B series, to support his claim that he took a total of GHC 500,000.00 as a loan from Stanbic Bank to execute the road project. The exhibits showed that the loans were taken in July 2015, September 2015 and October 2015, while according to the pleadings and evidence of respondent, the agreement to rehabilitate the road was done in January 2015.

There is no evidence to show that the said loans, if they were granted at all were used to fund the road project. The respondent's claim was that he borrowed in total an amount of GHC 900,000.00 to fund the project. If we add the GHC 470,000.00 he allegedly took from the Freedom Micro Finance Company and the GHC 500,000.00 he took from Stanbic Bank, the total is GHC 970,000.00 and not GHC 900,000.00. By this alone, respondent's claim in his pleadings and evidence that he took a total facility of GHC 900,000.00 from his Bankers could not be true by his own evidence.

We also observed that the respondent was claiming interest of 35% on the sum of GHC 900,000.00 as endorsed on his writ of summons. The evidence however, revealed that it was the facility that he took from the Stanbic Bank as evidenced by exhibit B series that attracted the interest of 35%. As the record of appeal further revealed, the GHC 470,000.00 respondent allegedly took from the Micro Finance Company, which was rightly rejected by the trial court, was not even documented and as such no one could have determined the interest rate charged by that company. So from the evidence it was wrong

even for the respondent to have lumped the two facilities together and claimed an interest of 35%. The claim was wrong and a misrepresentation.

On the loan facilities, respondent asserted that he took the loans with the consent of the appellant. We note from the record that no evidence was led by respondent to establish this claim and same will be dismissed. The respondent just mounted the witness box and repeated his pleading that he informed the appellant that he will need a loan facility, to enable him execute the road project. No evidence was led by the respondent as to who in appellant's company, gave the consent and when this took place. The respondent, once again failed the evidential test.

It is trite that an appellate court ought not disturb the findings of fact made by a trial court and in this case concurred by the intermediate appellate court, but there is a caveat, indeed the law is that an appellate court has the authority to disturb and set aside such findings made by a trial court where the findings of fact are wholly not supported by the evidence on record. In this appeal evidence from the record of appeal showed clearly that the respondent failed to adduce credible evidence to prove his claim before the court.

This Court being the second appellate court is therefore entitled to depart from the findings of fact made by the trial court and concurred by the intermediate appellate court.

See: Achoro v. Akanfela (1996-1997) SGCLR 209

Gregory v. Tando IV and Hanson (2010) SCGLR 971.

In Re Okine (decd.): Dodoo v. Okine (2003-2004) SCGLR 582.

From the record of appeal we are satisfied that the claims alleged by respondent were capable of positive proof. As demonstrated in this judgment, the respondent could have led positive evidence to prove that he was contracted by appellant to execute the road rehabilitation and also the fact that he took a facility of GHC 900,000.00 from his bankers to finance the project. Having failed to positively prove the claims alleged by him, the respondent ought to have lost the contest.

In Ackah v.Pergah Transport Ltd & Others (2010) SCGLR 728, this Court speaking through Sophia Adinyira,JSC held at page 736 as follows:-

'' It is a basic principle of 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 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 law 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 probable than its non-existence...''

From evidence on record, we are satisfied that the Court of Appeal was wrong in affirming the judgment of the trial High Court. The judgment of the Court of Appeal was therefore against the weight of evidence adduced at the trial and on that ground alone the appeal ought to be allowed. We accordingly allow the appeal and set aside the judgment entered by the Court of Appeal to the respondent. The appeal succeeds accordingly.

SGD. S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

SGD. P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

SGD. N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

SGD. A.M. A. DORDZIE
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