IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: ADINYIRA (MRS.), JSC (PRESIDING)

BAFFOE-BONNIE, JSC

MARFUL-SAU, JSC

AMEGATCHER, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/03/2019

8TH MAY, 2019

ERIC KOFI ASAMOAH
H/NO. 4 HAGAR ASAMOAH STREET
APRAMANG KUMASI ……. PLAINTIFF/RESPONDENT/APPELLANT

VRS

STEPHEN NYAMEKYE
BREMANG-KUMASI ……. DEFENDANT/APPELLANT/RESPONDENT

J U D G M E N T

MARFUL-SAU, JSC: -

The appellant in this appeal is urging us to set aside the decision of the Court of Appeal, sitting at Kumasi on 19th July 2016, which reversed the decision of the trial High Court, Kumasi. The trial High Court had entered judgment for the appellant herein on the 22nd of December, 2014. From the facts of the case, the parties agreed that appellant herein, would obtain an overdraft facility from Stanbic Bank for their

common use, using the respondent's property as security. The arrangement was that the parties will both use the facility of GHC 50,000.00 and share the interest payment on a pro rata basis depending on how much each had out of the GHC 50,000.00. The overdraft facility was granted in December 2007 and an account in the name of appellant's business "Asamok Enterprise" was opened for the disbursement of the overdraft.

The appellant initially gave the respondent GHC 10,000.00 in 2007 and later the amount was increased to GHC 20,000.00. As agreed by the parties by 2009, the respondent had received a total of GHC 50,000.00 from the appellant. The appellant who took the overdraft, informed the respondent that the interest payable on the facility was 33.7% per annum. The respondent was thus to pay GHC 300 per month as interest on every GHC10,000.00. Accordingly, at GHC 50,000.00, the respondent was paying interest of GHC 1,500.00 per month. In 2010, the respondent requested the appellant to convert the overdraft into a loan to enable him settle the indebtedness gradually, but the appellant rather renewed the overdraft and took GHC 1,000.00 from the respondent.

The respondent, however, faithfully paid the interest as indicated to him by the appellant on the overdraft until 2010, when he requested the appellant to render account on the facility and show documentary proof of the interest rate he had paid over the years. The appellant refused to account and also failed to provide the evidence of the interest rate. In April 2012, the appellant put pressure on the respondent to pay GHC 10,000.00 into the overdraft account in addition to the monthly interest payments. In September 2012, the respondent stopped further payment of interest, because he believed the interest charged by the Bank on the overdraft could not have been fixed from 2007 to 2012. As at the time, respondent had paid interest in excess of GHC 80,000.00 into the overdraft account.

The respondent's decision to stop paying further monies into the overdraft account caused the appellant to initiate this action at the High Court, Kumasi for the following reliefs:

'' a. Recovery of Forty Thousand Ghana Cedis (GHC 40,000.00) being the outstanding balance of facility the Defendant utilised as a result of a special arrangement between the parties.

b. Interest of 3.5% per month on the GHC 40,000.00 from 11/11/12 till date of final payment.

c. Such further order as this Honourable Court may deem fit."

The respondent denied the claims by the appellant and counterclaimed for the following:

'' a. An order compelling the plaintiff to render accounts on the overdraft facility especially on the exact interest rate after each renewal of the facility.

b. An order compelling the plaintiff to release defendant's lease to him."

The trial court after taking evidence entered judgment for the appellant to recover GHC 40,000.00 together with a 3.5% interest from the respondent and also granted relief (b) of the respondent's counterclaim and ordered the appellant to release respondent's lease document. The respondent appealed against the trial court's decision to the Court of Appeal, which reversed the decision of the High Court. It is against the judgment of the Court of Appeal that the appellant has appealed to this court on the following grounds:

'' i). The Judgment is against the weight of evidence

ii). The Court below erred when it held that the Plaintiff insistence on 3% monthly payment on any sum the Defendant used sought to change the terms of the Defendant's obligation from a pro-rata interest payment.

iii). The Court below erred by relying on the testimony of DW3."

We have carefully examined the record of appeal and the statement of case urged on us by both counsel for the parties and we are convinced that addressing ground (i) of the Notice of Appeal will determine the appeal. That ground is that the judgment is against the weight of evidence. Indeed, the effect of appellant's grounds (ii) and (iii)

is that the Court of Appeal failed in its duty to properly evaluate the evidence adduced at the trial, which properly fits into ground (i).

We now address ground (i), which is that, the judgment was against the weight of evidence. It is trite that when an appellant alleges this ground, the appellate court is empowered to re- examine the entire record to ascertain whether the trial court or in this case, the first appellate court's decision is supported by evidence adduced at the trial or not. In effect, this Court, is to ensure that the first appellate court whose judgment is the subject of this appeal, arrived at its decision, after a proper evaluation of evidence adduced at the trial.

See: Tuakwa v. Bosom {2001-2002} SCGLR 61

Djin v Musah Baako {2007-2008} 1 SCGLR 686

Republic v. Conduah; Ex-parte Aaba (substituted by) Asmah {2013-2014}

2 SCGLR 1032.

It is also the law that the onus is on the appellant who so alleged this ground of appeal to demonstrate from the record that the court whose decision is impugned erred in its evaluation of evidence on record or that the Court misapplied a law in its judgment occasioning substantial injustice.

See: **AG v. Faroe Atlantic {2005-2006} SCGLR 271**

Owusu-Domena v. Amoah {2015-2016} 1 SCGLR 790

From the record of appeal, the main claim of appellant, was that out of the overdraft arrangement he had with the respondent, an amount of GHC 40,000.00 was due and owing from the respondent as at September 2012. The appellant pleaded and testified that as a result of this outstanding amount, Stanbic Bank put pressure on him and he was compelled to take another facility of GHC 40,000.00, from Express Savings and Loans Co. Ltd, at a monthly interest rate of 3.5% to pay off the overdraft. The evidence on record is clear that as at September 2012, the respondent had stopped further payments into the appellant's account. This was because the appellant had failed to

render account on the overdraft and also refused to provide proof of the 33.7% per annum fixed interest rate, appellant made him pay on the overdraft.

Appellant pleaded at paragraph 13 of his statement of claim as follows:

''13. The Plaintiff says that ever since September 2012, the Defendant has failed and/ or refused to pay both principal of GHC 40,000.00 and the GHC 1,200.00 interest and other charges in spite of repeated demands for same."

The respondent then responded to the above pleading in his paragraph 13 of the statement of defence as follows:

''13. The defendant denies paragraph 13 of the statement of claim and says he has consistently impressed upon the plaintiff to render proper account to no avail given that he has so far paid interest in excess of GHC 80,000.00."

Now, having failed to render accounts on the overdraft as demanded by respondent; and having sued for an alleged outstanding amount of GHC 40,000.00 on the overdraft, it was expected that appellant would lead sufficient or credible evidence that as at September 2012, when respondent stopped payments on the overdraft, there was a debit balance of GHC 40,000.00 on the account. The appellant needed to discharge this evidential burden since the dispute between the parties related to the balance on the overdraft account. We do not, however, see any evidence on record from the appellant, that as at September 2012 or as at the time he issued the writ against the respondent on the 8th of November 2012, the overdraft account was in debit of GHC 40,000.00.

From the record, the appellant testified at the trial but did not call any witness. He tendered Exhibit A, B and C which are the Facility Letter from Stanbic Bank, Renewal of Banking Facility and a Letter of Grant- Term Loan Facility respectively. Whilst the appellant was under cross- examination, he was asked to produce Bank Statements covering the overdraft and same were tendered through him by Counsel for respondent and marked as Exhibit 1 series. From his pleading and testimony, the appellant stated that as at September 2012, there was a debit of GHC 40,000.00 on the overdraft account. Impliedly, this figure ought to reflect on the Bank Statements

for the period but this was not the case as the evidence below clearly showed from the record at page 191 to 198.

a. Exhibit 1 AAB, Bank Statement of 18th June 2012 had a credit balance of GHC 76.08.

b. Exhibit 1 AAD, Bank Statement of 18th July 2012 had a debit balance of GHC153.95

c. Exhibit 1 AAE, Bank Statement of 3rd August 2012 had a debit balance of GHC 185.03.

d. Exhibit 1 AAF, Bank Statement of 3rd September 2012 had a debit balance of GHC 219.87.

e. Exhibit 1 AAG, Bank Statement of 3rd October 2012 had a debit balance of GHC 255.67.

f. Exhibit 1AAH, Bank Statement of 3rd November 2012 had a credit balance of GHC 10.90.

g. Exhibit 1 AAJ, Bank Statement of 3rd December 2012 had a debit balance of GHC 19.10.

The evidence on record as shown above clearly demonstrates that there was nothing like an outstanding amount of GHC 40,000.00, on the overdraft account as alleged by the appellant.

The appellant in his pleadings and testimony stated that in October 2012, as a result of pressure from Stanbic Bank to pay the GHC 40,000.00, he was compelled to take another facility of GHC 40,000.00 from Express Savings and Loans Co. Ltd, to pay off the debit on the overdraft account. Firstly, the appellant failed to prove what pressure Stanbic Bank put on him. One would have expected appellant to tender in evidence letters demanding payment of the overdraft, as done in normal Banking practice, if there was an outstanding amount at all. From the record the appellant also failed to provide any evidence for this new facility in support of his claim. We observed that

the appellant could have tendered documents covering the new facility but he failed to do so.

We note that these are facts capable of positive proof by the appellant, as required under section 11 of the Evidence Act, 1975, NRCD 323, to discharge the evidential burden on him and to prove that his case was reasonably probable. **Sections 11 (1) and (4) of the Evidence Act, 1975, NRCD 323 provides thus:**

'' 11 (1) 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 on the issue against that party.

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

However, we find from the record that appellant failed to adduce any credible evidence to prove the facts so claimed by him.

The appellant in his evidence at page 22 of the record stated thus:

''Since September 2012 the Defendant has not made further payments to me. Because of the pressure my bankers mounted on me for the payment of the money, I was compelled to raise money to pay for the overdraft facility from Express Savings and Loans Company. By way of interest I am paying 3.5% on GHC 40,000.00 per month.''

From appellant's own testimony above, when he took the new facility of GHC 40,000.00 he paid it into the overdraft account to settle the outstanding amount. If this new facility was actually taken and paid into the overdraft account as alleged by the appellant, it would have reflected in the Bank Statements between September and December 2012, since the new facility was allegedly taken in October 2012. However, upon careful examination of the Bank Statements tendered as ''Exhibit 1 Series'', no GHC 40,000.00 was ever paid into the said account. From the Bank Statements of 18th June 2012 to that of 3rd December 2012, at pages 297 to 304 of the record of appeal,

there is no entry of any GHC 40,000.00 at the Credit column of the Statements. Further examination of Bank Statements from 3rd January 2013 to 13th December 2013, at pages 305 to 316 of the record of appeal, do not show any entry of GHC 40,000.00 at the Credit column of the Bank Statements. There is therefore no evidence on record that appellant, ever took a new facility of GHC 40,000.00 which was used to settle the overdraft.

Now, from the claims indorsed on the writ of summons, it seems the appellant sued for the new facility he allegedly took from Express Saving and Loans Co. Ltd. According to appellant he took a new facility of GHC 40,000.00 at an interest of 3.5% per month. This was the claim indorsed on the writ of summons. Indeed, this claim which we find unsupported by evidence on record, could not have been from the initial overdraft arrangement, since by that initial arrangement, the respondent was required to pay pro-rata interest of 33.7 % per annum on the overdraft of GHC 50,000.00 and not 3.5% per month.

There is evidence on record that even though appellant made respondent pay a fixed interest rate of 33.7 % per annum on the overdraft, the interest rate charged by Stanbic Bank on the overdraft fluctuated. The Court of Appeal in its judgment, particularly at page 411 of the record captured the fluctuating interest rates charged by Stanbic Bank as follows:

> ***'' It started with 25.5 % as indicated in the opening lines of clause 4'' Interest on the facility will be charged at 5% per annum above the Bank's Base Rate prevailing from time to time (currently 20.5 % p.a). This rate of interest is stated clearly at the top of the bank statement for the period 18th January to 31st January 2008 found on page 238 of the record. In February and March 2008, it was 25.55. From April to May 2008, it was 26.25%. It moved to 30.7% in November 2008 and remained there until March 2009 when it changed to 32. 7%. The interest rate remained at 32.7% until late July 2009 when it increased to 39.7 %. By mid-September 2009, it had reduced to 33.7% and remained there till February 2010. By February 2010, it had reduced to 26.9% and went up to 29. 7% in March 2010, where***

it remained until July 2010. It went down again to 26. 9% in August 2010 and remained there until December 2010. From December to March 2011, the facility attracted no interest rate and this was seen on page 281. By that date, it had been totally settled, and there was no debt payable. This early settlement of balances and application of 0% continued until June 2012 when interest rate of 32% was again indicated as applied to the account. Please see page 299 of the record of appeal. This 32% prevailed until December 2012 when the interest rate moved down to 0% again. From the record, at the time that the account was being charged 0%, it was in credit."

This meant that anytime the interest rate charged by Stanbic Bank went below 33.7%, the excess amount went to credit, thus reducing the principal of the overdraft account. The appellant himself under cross-examination at page 26 of the record admitted that with an overdraft, any amount paid had the effect of reducing the amount owed.

At the trial, the respondent subpoened DW3, Emmanuel Kwao Batsa Nakotey, a Charted Accountant, of Messrs BNA Chartered Accountants, who examined the overdraft account and tendered his report as Exhibit 7 which is at page 341 to 354 of the record of appeal. In Exhibit 7, DW3, examined the costs of the facility, including interest, insurance and service fees charged, as against payments made by respondent. At page 346 of the record of appeal, which is part of Exhibit 7, DW3 cogently concluded that respondent paid a total of **GHC 86,500.00** into appellant's account. The total cost of the overdraft was **GHC 83,819.57** made up of GHC 49,000.00 representing cash and goods, given to the respondent; GHC 30,488.27, being Bank interest charged; GHC 2,000.00 being total 2% Processing /Facility fee; GHC 810.06 being Insurance Premium and GHC 1,521.24 being total Service fee. The report thus revealed that there was excess payment of **GHC 2,680.43.**

Counsel for appellant sought to discredit the evidence of DW3 as contained in Exhibit 7. This was ground (iii) of the Notice of Appeal that the Court of Appeal erred in relying

on the evidence of DW3. Counsel for appellant in his Statement of Case argued that DW3 under cross-examination, admitted that he did not factor in his report two facility fees relating to the overdraft, so the report was unreliable. We find this claim by counsel for appellant without basis in that at pages 66 and 67 of the record of appeal, DW3 positively stated that the said facility fees were excluded in calculating the account, because they did not relate to the overdraft transaction between the parties.

Clearly, we are of the opinion that from the record, DW3's evidence in Exhibit 7 corroborates the evidence in Exhibit 1 series, which are Bank Statements, covering the overdraft account and tendered through the appellant. We are satisfied that while appellant failed to adduce credible evidence to prove the claims indorsed on his writ of summons; evidence on record showed that between September and December 2012 there was no amount owed on the overdraft account by the respondent, neither was there any evidence that appellant borrowed GHC 40,000.00 from Express Saving and Loans Ltd. and paid same into the overdraft account.

From evidence on record, it is clear that the trial High Court should have dismissed appellant's action. Having failed to dismiss the appellant's action, the Court of Appeal was thus right in dismissing same but upholding the trial court's order that respondent's lease be returned to him. In the circumstances, we affirm the decision of the Court of Appeal and accordingly dismiss this appeal.

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

ADINYIRA (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

S. O. A. ADINYIRA (MRS.)
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

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

AMEGATCHER, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

COUNSEL

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