IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)
LOVELACE-JOHNSON (MS.) JSC
AMADU JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/05/2022

6TH JULY, 2022

FELIBAT COLDSTORE LIMITED …… PLAINTIFF/RESPONDENT/APPELLANT

VRS

STANBIC BANK GHANA LIMITED …. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

DOTSE JSC:-

PREFACE

This court, on the 6th day of July 2022, by a unanimous decision dismissed the appeal filed by the Plaintiffs against the Court of Appeal judgment dated 29th May 2022 save the ground of appeal against costs which we sustained.

We hereby proceed to give reasons for our said decision.

FACTS

The facts giving rise to this present appeal are that the Plaintiff/Respondent/Appellant (hereinafter referred to as Plaintiff previously a customer of Defendant/Appellant/Respondent, (hereinafter referred to as Defendant) Bank obtained a loan facility from the Defendant. The Plaintiff has averred in its statement of claim that it was unable to fulfill its repayment obligations to the Defendant Bank due to some challenges.

By a letter dated 30th November 2010, the Plaintiff admitted its indebtedness of GH¢481,922.78 to the Defendant and proposed a re-scheduling of the loan facility. The Plaintiff's proposal was as follows:

> *"We wish to apply for a re-scheduling of the facilities as follows to enable us settle our indebtedness to the bank:*
>
> *(i) That all the 3 facilities be consolidated and treated as a term loan for a 12 months duration.*
>
> *(ii) That the total outstanding balance as at 21st May 2010 of GH¢ 481,022.78 (interest inclusive) be maintained at GH¢ 450,000.00 (waving off GH¢ 31,922.78).*
>
> *(iii) That the re-scheduled term of GH¢ 450,000.00 shall attract no interest thereon.*
>
> *(iv) That the re-scheduled loan will be paid in 12 equal installments of GH¢37,500.00for a period of 12 months."*

The Defendant by a letter dated 20th January 2011, responded to the Plaintiff's letter and stated that "*The bank in principle is agreeable to reviewing its current interest charges on the account and also consider the restructuring proposal subject to the payment of GH¢120,000.00 by three equal installments of GH¢ 40,000.00 by post dated cheques to be lodged with the Bank to mature on the last working day of the months of January, February and March*."

After receipt of this letter and upon having further discussions with the relationship manager at the bank, the Plaintiff made payments of GH¢ 40,000.00 from January to September 2011 and an additional payment of GH¢ 30,000.00 from October 2011 to December 2011. These payments amounted to GH¢450,000.00.

The Plaintiff on 13thJanuary 2012, through their lawyers, wrote to the Defendant stating that upon completing payment of the loan facility they are requesting that all the title deeds of all properties used to secure the facilities be returned to the Plaintiff. In a letter dated February 7 2012 the Defendant disputed that the Plaintiff had completed payment of the loan facility and instead requested that the Plaintiff pay an additional GH¢ 72,463.00 before the security documents are released.

The Plaintiff outraged by the turn of events on the 22nd February 2012 commenced the present suit at the High Court for the following reliefs:

1. An order for the release of all Plaintiff's title deeds
2. Damages for the detention of the said title deeds
3. Interest on the amount found to be due at the prevailing commercial bank rate from 13th January 2012 till final payment.
4. The refund of all penalty charges paid to the defendants.

The Defendant on 21st March 2012 filed their statement of defence and counterclaimed as follows:

1. A declaration that Plaintiff is still indebted to Defendant in the sum of GH¢ 72,463.00.
2. An order for the repayment of the said sum by the end of April 2012.
3. An order for interest to accrue on the said sum from May 2012 till date of final payment in the event Plaintiff is unable to repay by the end of April 2012.
4. Such further order(s) as the Honourable Court may deem fit.

HIGH COURT

The High Court, Kumasi, on 12th December, 2015 gave judgment in favour of the Plaintiff and dismissed the counterclaim of the Defendant. The High Court stated in its judgment as follows:-

> *"I will conclude on this main issue and say that in my considered opinion the defendant agreed with the plaintiff to do all that the plaintiff requested in exhibit 'C.' And that the parties agreed to the Plaintiff's request to pay GH¢450,000.00 within a twelve-month period without any interest or alternatively put with interest frozen"*

The High Court went on to further state that:

> *"And does the plaintiff owe the defendant the sum of GH¢72,463.00. It follows logically from the conclusion reached above that the plaintiff does not owe the defendant this amount.*
>
> *Again, following from the conclusion reached in the immediate paragraph it stands to reason that the continued detention of the plaintiff's title deeds by the Defendant is unlawful since the plaintiff has fully liquidated its indebtedness to the defendant."*

The High Court granted relief 1 in favour of the Plaintiff but refused to grant special damages in respect of the detention of the title deeds and also refused the plaintiff's claim for the refund of all penalty charges paid to the defendant.

The High Court after analyzing the evidence stated that:

> *"The result would be that this court is unable to grant the plaintiff any special damages arising from the detention of its title deeds by the defendant. I will instead grant the plaintiff general damages which I fix at GH¢ 30,0000.00 over the period of unlawful detention of the title deeds- i.e. from January 2012 when plaintiff completed the payment of its debt to present."*

The court, on the issue of the refund of penalty payments stated that:

> *"the whole dispute arose because plaintiff failed to pay its debt to the defendant and as it were 'pleaded' with the defendant to restructure the debt. What this means is that plaintiff was unable to pay its debt to the defendant. And if the defendant exacted penalty interest, was that out of place? In my view the answer is negative. It was a contractual term and plaintiff cannot resile from it. The result would here again not be entitled to recover any such refund from the defendant."*

The Defendant aggrieved by the decision of the High Court filed an appeal to the Court of Appeal. The Plaintiff also proceeded to file a cross appeal.

COURT OF APPEAL

The Court of Appeal after a very thorough analysis of the Record of Appeal and a careful consideration of the grounds of appeal dismissed the appeal. The court found that the first ground of appeal sinned against rule 8(6) of the Court of Appeal Rules, 1997 CI 19 (ROA 726) and further that on the totality of the evidence on record the appeal must fail.

The Court of Appeal in considering the entire record as well as the cross appeal filed by the Plaintiff in this case made two main changes to the judgment of the High Court.

First, the Court of Appeal found that the learned High Court judge erred when he refused to order the refund of the penalty charges. The Court of Appeal made reference to the cases of *Dunlop Pneumatic Tyre Co Ltd vrs New Garage and Motor Co Ltd [1915] AC 79 HL* as well as *Adjei vrs Oteng alias Ama [1997-98] 1 GLR 725* and literature on the subject and concluded that penalty charges are generally unenforceable.

The Court of Appeal then concluded the judgment as follows:-

"It is therefore clear that the penalty charge levied by the bank is not just a liquidated damage levied for the lending of the money but meant or "intended predominantly to discourage breach" and it is therefore stipulated in terrorem of the Plaintiff borrower. Such sums of money cannot be sanctioned by the court notwithstanding that it was a contractual term. It was therefore wrong, with respect, for the trial judge to conclude that because it was a term of the contract, the plaintiff cannot resile from it and that the Plaintiff was not entitled to recover same from the defendant. The truth is that, it is not the Plaintiff who cannot resile from it but the law will not permit such sums to be exacted from the Plaintiff borrower."

The Court of Appeal reversed the conclusion of the High Court and ordered the Defendant to refund the sum of GH¢93,366.60 which it deducted from the Plaintiff's account in the name of penalty charges to the Plaintiff. The Defendant was further ordered to pay interest on this sum from the date of the judgment of the trial court, which is the 21st December 2015, to date of final payment.

Secondly, after the Court of Appeal had concurred with the High Court that the Plaintiff, had not established a claim for special damages, the Court of Appeal however recognized that since the Defendant had no lawful basis for holding onto the title deeds after the Plaintiff had finished repaying the debt and requested for the release of the title deeds, the Defendant committed the tort of detinue and is therefore liable to the Plaintiff in damages for the wrongful detention of the title deeds.

The Court of Appeal, therefore, granted the Plaintiff general damages and also dismissed the cross-appeal on the question of cost.

GROUNDS OF APPEAL TO THIS COURT

The Plaintiff even though the apparent victor from the judgment of the Court of Appeal on the 24th August 2020 filed a notice of appeal to the final appellate court on the grounds that:

i. The Court below erred in failing to award damages having come to the conclusion that Plaintiff was entitled to damages in detinue.
ii. The holding by the Court of Appeal that the Plaintiff/Respondent/Appellant was not entitled to special damages claimed cannot be supported having regard to the evidence on record.
iii. The cost awarded by the High Court and the Court of Appeal are on the low side having regard to the length the case traveled.
iv. Further grounds of appeal would be filed upon receipt of the record of appeal.

SUMMARY OF ARGUMENTS

Even though the plaintiff stated that additional grounds of appeal will be filed on the receipt of the record of appeal no additional grounds were filed.

Both parties argued ground (II) of the notice of appeal first before arguing grounds (i) and (III).

GROUND II

THE HOLDING BY THE COURT OF APPEAL THAT THE PLAINTIFF/RESPONDENT/ APPELLANTWAS NOT ENTITLED TO SPECIAL DAMAGES CLAIMED CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE ON RECORD.

ARGUMENTS BY PLAINTIFF

Learned Counsel for the Plaintiff, submitted that the evidence given by the Plaintiff's witness during evidence in chief as to special damages was not challenged by the Defendant at the trial. Counsel submitted that the Court of Appeal's rejection of Exhibit L that is, an abstract from the Balance sheet of the Plaintiff from January 2011 to June 2011 (ROA 538 to 542) as self-serving as it did not emanate from the Ghana Revenue Authority was with the greatest respect in error. Counsel referred to the case of **Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR** where the court referred to the case of **Tutu v Gogo, Civil Appeal No 25/67, dated, 28 April 1969, Court of Appeal, unreported, digested in (1969) CC 76**, where Ollenu JA said that:

> *"in law, where evidence is led by a party and that evidence is not challenged by his opponent in cross-examination, and the opponent did not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the party against whom it is led, and must be accepted by the court"*

Counsel referred to Exhibit S, the Statement of Activities for 6 months period ended 30th June 2011 and argued that, the document revealed that due to the retention of the title deeds, the Plaintiff's business suffered a loss because the documents could not be used as collateral for additional facilities. Counsel argued that *"sales were steadily declining at 12% per annum even though its direct cost were increasing for which reason as of the year ending December 2015, Plaintiff (Plaintiff herein) rather than profiting from its business incurred a net loss of GH¢ 1,089,516 whereas in the year 2012 it incurred a loss of GH¢ 783,787 having regard to Exhibit S."*

Counsel further argued that the Court of Appeal's conclusion that the special damages could not have been reasonably contemplated by the Defendant is untenable. He invited the court to take judicial notice of the fact that loan facilities are only granted upon the production of collateral mostly in the form of landed property, and as such the Defendant should have known that the Plaintiff would not be able to secure loan facilities once the title documents were detained.

ARGUMENTS BY THE DEFENDANT

It was submitted by learned Counsel for the Defendant that the Court of Appeal did not err in coming to the conclusion that the Plaintiff failed to lead cogent evidence to support a claim for special damages as required by law. Further, both the High Court and Court of Appeal had come to the conclusion that the documentary evidence the Plaintiffs ought to rely on was self-serving, speculative, and most importantly not within the reasonable contemplation of the parties at the time they entered into the contract.

Also, the Defendant stated that the submission by the Plaintiff that the evidence on the special damages was unchallenged is erroneous as the record will reveal that the Defendant cross-examined the Plaintiff's witness on Exhibit L and S on the 17th July 2014 and 27th October 2014 respectively.

The Defendant further added that assuming arguendo that the evidence was unchallenged the trial judge was free to evaluate the probative value of the evidence, more so when the Defendant in their statement of defence had denied and disputed the Plaintiff's claim to special damages. Counsel referred to the case of ***Ghana Highway Authority v Mensah [1999-2000] 2 GLR 237*** and stated that a party claiming special damages ought to prove same strictly and in the present case the Plaintiff had failed to prove his special damages.

GROUND I

THE COURT BELOW ERRED IN FAILING TO AWARD DAMAGES HAVING COME TO THE CONCLUSION THAT PLAINTIFF WAS ENTITLED TO DAMAGES IN DETINUE

ARGUMENTS ON BEHALF OF PLAINTIFF

Learned Counsel for the Plaintiff submitted that the Court of Appeal rightly held that the Defendant had committed the tort of detinue but failed to award damages for same,

rather the Court of Appeal endorsed the trial judge's award of GH¢ 30,000.00 for the period of unlawful detention.

Plaintiff further submitted that detinue is a continuing tort and that as at May 2020 the Defendant had still not released the title deeds for which reason the cause of action against the defendant continued.

Plaintiff, therefore, submitted that the Court of Appeal should have awarded further damages in favour of the Plaintiff.

ARGUMENT ON BEHALF OF DEFENDANT

On this ground, learned Counsel for the Defendant vehemently denied the Plaintiff's submission that the title documents had not been released to the Plaintiff.

The Defendant submitted that Plaintiff's submissions are untrue as the Defendant had long released the plaintiff's title deeds to them through their counsel. Further, the Defendant submitted that the lack of candour on the part of the Plaintiff was a subject of comment by the Court of Appeal when it came to the issue of delays in the conduct of the trial.

The Defendant also stated that aside from the Plaintiff's failure to be candid to the court, on the question of damages for detinue the High Court and the Court of Appeal had rightly exercised their discretion to award damages of GH¢ 30,000.00.

GROUND III

THE COST AWARDED BY THE HIGH COURT AND THE COURT OF APPEAL ARE ON THE LOW SIDE HAVING REGARD TO THE LENGTH THE CASE TRAVELLED.

ARGUMENTS BY COUNSEL FOR THE PLAINTIFF

Learned Counsel for the Plaintiff submitted that the High Court awarded cost of GH¢ 10,000.00 in its favour against the Defendant, whilst an amount of GH¢5000.00 was awarded by the Court of Appeal. According to the Plaintiff, this amount is low

having regard to all the factors of the case and the requirements as laid down in Order 74 rule 2(4) of the High Court Civil procedure rules C.I 47.

The Plaintiff stated that consideration must be given to the length and complexity of the trial as distinct and separate from the conduct of the parties during the pendency of the trial. Also, the expense incurred by the Plaintiff, particularly in engaging a senior lawyer is a factor that needs to be considered in the award of cost.

ARGUMENTS BY COUNSEL FOR THE DEFENDANT

Learned Counsel for the Defendant in response submitted that both the High Court and Court of Appeal awarded cost to the Plaintiff in the sum of GH¢ 10,000.00 and GH¢ 5,000.00 respectively. The Court of Appeal justified the award of nominal cost when they stated as follows:-

> *"Main Appeal dismissed as well as the cross-appeal subject to the order against the defendant to refund to Plaintiff the penalty charges of GH¢ 93,366.60 deducted and payment of interest thereon. Costs assessed at GH¢ 5000.00 in favour of the Plaintiff/Defendant as against the Defendant/Plaintiff. We awarded nominal costs as against the GH¢ 70,000.00 demanded by the Plaintiff/Defendant because Plaintiff/Defendant has lost its cross appeal and gained refund of penalty charges which the Defendant/Plaintiff has also lost its appeal"*

Further, Defendant submitted that the grant of cost is at the discretion of the court and the Plaintiff has not shown any exceptional circumstances why the court should interfere with the discretion of the two lower courts. Counsel referred to ***Crentsil v Crentsil [1962] 2 GLR 171*** *and* ***Blunt v Blunt [1943] AC 517 at 518, HL*** in support of its argument that the discretion of the two lower courts should not be disturbed.

ANALYSIS OF THE GROUNDS OF APPEAL

The facts in this appeal actually admit of no controversy. The facts in issue are whether the Plaintiff herein is entitled to "more damages and costs or not". The grounds of appeal will reveal that the Plaintiff herein is seeking in this appeal to get **special damages, damages for the detention of his title deeds and a plea for more cost.**

GROUND II – SPECIAL DAMAGES

The authorities governing the claim of special damages provide that a party must plead any special damages he may have suffered and must then proceed to lead cogent evidence in support of such a claim. The party has the responsibility of proving the special damages strictly. In the case of **Delmas Agency Ghana Ltd v. Food Distributors International Ltd (2007/2008) SCGLR 748** the court in drawing a distinction between general damages and special damages stated the principle as follows:

> *"Special damages are distinct from general damages. General damages are such as the law will presume to be the natural or probable consequence of the Defendant's acts. It arises by inference of law and therefore need not be proved by evidence. The law implies general damage in every infringement of an absolute right. The catch is that only nominal damages are awarded.* ***Where the Plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate****."*

Also, in **Chitty On Contracts Volume 1, Sweet &Maxwell 33rd Ed, 2018**, the learned authors describe general and special damages in these words on pages 1798 and 1799:

'General damages are given in respect of such damage as the law presumes to result from the infringement of a legal right or duty. The main meaning of ***special damages is that precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in his pleadings'*** (emphasis mine)

The Plaintiff at paragraph 11 of its statement of claim gives particulars as to the damage it is alleged to have suffered by reason of the Defendant's detention of its title deeds. Paragraph 11 reads as follows:

> "11. The defendant has failed and/or refused to return the said title deeds, and by reason whereof the plaintiff has suffered loss and damage.
>
> **Particulars**
>
> a. The plaintiff wanted to use the said title deeds as security for his loan with Prudential Bank where its treasury bills are used as security for the said loan. These bills could have been used by the plaintiff to expand its business.
> b. The Plaintiff is therefore losing an amount of GH¢ 50,000.00 per month for not using the treasury bills to acquire more materials for the business."

The Plaintiff in proof of these damages on 17th July 2014 called Emmanuel Agbenyega (PW 1) an accountant to testify on its behalf. He tendered into evidence Exhibit L and S. In his evidence in chief, he stated as follows:

> *"Exhibit "S" is in respect of plaintiff's company. It is for the period January to June 2011(6 months). It is the same as profit and loss accounts for the period of six months. In January it was showing profits but over time it started decreasing and as at June it was showing loss. It is sort of a management account. So, we held consultation with management of the plaintiff. It was explained that at the end of every month he has been paying debt and this has affected the company's working capital."*

The Defendant cross -examined the Plaintiff's witness (PW 1) on 27th October 2014 in respect of Exhibit S as follows:

"Q: I put it to you that Exhibit "S" is not audited Financial statement?

A: It is an extract of the audited financial statement for 2013."

The cross-examination continued as follows:

"Q: Do you have the actual audited financial statements for the various monthsnot just the ones requested of you?

A: Yes my Lord.

Q: For the period that you have this accounts, Exhibit S. Is it the same accounts you sent to I.R.S?

A: I have explained that is a management account. I.R.S is one for a full year.

Q: So are you telling us that for 2011 you prepared accounts for I.R.S?

A: We prepared it for the client.

Q: So in 2011 you prepared financial statement for the whole year on behalf of your client?

A: Yes we did that.

Q: Is Exhibit S the financial statement you prepared for your client in 2011?

A: No"

The trial Judge after careful consideration of the evidence adduced at the trial and the submissions made by counsel for the Plaintiff arrived at the following conclusion:

"I have examined plaintiff's evidence in that regard and is ***of the opinion that the amount claimed in special damages is only estimated and not based on actual or empirical evidence. Most importantly, plaintiff failed to tender its financial statements, particularly those it sends to the***

Ghana Revenue Authority to corroborate its evidence on this issue. Exhibit S could only be self-serving. *While agreeing with plaintiff that the amount of GH¢560,000.00 being used as fixed deposit if invested in the business could yield profit, it is equally true that it could also have been lost especially giving the uncertainties in the Ghanaian economy; in other words, the estimated profit is speculative."*

The Court of Appeal agreed with the finding of the trial high court when after a critical consideration of the evidence on record it also found that the evidence in respect of the special damages was speculative. The Court of Appeal stated thus:

"This court finds no cogent evidence on record to the effect that Plaintiff incurred losses to the tune of GH¢ 58.000.00 per month from January 2012 onwards. No wonder therefore that the trial judge held, and in our view rightly so, that the plaintiff's claim for damages of GH¢ 58,000.00 was speculative. Indeed, since the plaintiff's claim was in the nature of special damages, the law requires that the Plaintiff leads cogent evidence, which it failed to do, to prove same. See ***Marfo and Others v Adusei [1965] GLR 320."***

The authorities have established that this honourable court should be slow to interfere with the concurrent findings of fact by the two lower courts unless after combing through the entire record the Supreme Court determines that the two lower courts committed some obvious blunder in their analysis of the evidence and ultimately in the resolution of the issues raised in the case which has resulted in a miscarriage of justice. See: ***Achoro & Anor v Akanfela & Anor [1996-97] SCGLR 209 at Page 214 and Gregory v Tandoh IV and Hanson (2010) SCGLR 97*****.**

After carefully combing through the record, it is our view that there are no compelling reasons to disturb the concurrent findings by the two lower courts. This is because the evidence adduced in respect of the special damages is indeed speculative. The Plaintiff had a duty to lead cogent and reliable evidence that during the period the Defendant unlawfully detained its title deeds it actually lost a particular amount of money and not

that if it had the documents it could have by some good fortune possibly been able to make a particular amount of money.

In this instance, we could have favourably considered a scenario in which the plaintiff has been able to provide concrete verifiable and or quantifiable documentary evidence in proof of this head of damage, linked to the wrongful and unlawful detention of his land title documents.

What is the evidence that the Plaintiff gave in support of this damage? According to the Plaintiff, the properties which he used to secure the loan with the Defendants are the following:-

- The cold store
- A storey building near the cold store at Adum, Kumasi
- An uncompleted building at Kentinkrono – this building when completed was used as a hotel

Giving reasons why he needed the title deeds, the plaintiff testified as follows:-

> *"I need the title deed because the* ***company business is huge and you need it to deal with*** *banks as security for loans. Due to their failure to release the title deeds the company became cash strapped because it could not deal with any bank without providing collateral security."*

The plaintiff further testified that he did not approach the Defendants for further loans because they told him they were not in a position to give further loans.

As a result, the plaintiff testified that he approached the following financial institutions for assistance who demanded fixed deposit payments in lieu of landed documents which were not released to him by the Defendants.

- First Allied Savings and Loans Bank, and
- Prudential Bank

Plaintiff tendered Exhibits "G" and "H" in support of his case on this head of damage.

We have also considered the evidence of the Plaintiff where he mentioned various fixed deposits used to secure loans from the above named financial institutions.

The plaintiff apart from these bare assertions, failed to make any necessary impact and linkage about the said amounts and the losses he claimed to have incurred. There were no verifiable audited accounts which established that the Plaintiff Company lost the said amounts, due to the failure of the release of the land title documents or proof that the Plaintiff Company had performed poorly in the preceding years because of this phenomenon.

Plaintiff also testified that he was claiming an amount of GH¢58,000.00 in specific damages per month from the Defendant Bank from January 2012 to date of the release of the documents.

We have accordingly examined Exhibits G and H, already referred to supra, as well as the following:-

1. Exhibit K and K series - Bank Statements
2. Exhibit L - Assets and Liabilities
3. Exhibit M - which is a notebook extraction of exhibit L
4. Exhibit N series - Bank statements
5. Exhibit P series - Fixed deposit with Prudential Bank

In our opinion, having exhaustively considered the effect of the Plaintiff's evidence and the evaluation of the above documents vis-à-vis pleadings and evidence, we agree with the learned Judges of the Court of Appeal when they state as follows:-

> *"The natural course of a refusal to release the title deeds, in the circumstances of this case, will be that the Plaintiff might suffer some inconveniences* ***but to argue that the Defendant should reasonably be aware, at the time of the contract, that a refusal to release the title deeds, promptly, will lead to a loss of profit in the sum claimed or at all is to stretch the reasonability test beyond imagination.*** *It comes with no surprise therefore*

that the learned trial Judge, rightly, held the claim to be more ***speculative than realistic." Emphasis***

We on our part, whilst endorsing the above statement from the Court of Appeal, would sound a note of caution to all litigants that, it is not enough to just put together figures and sums of money as heads of claim without any verification and expect same to be granted by a court of law. What should be noted is that, a company registered and doing business in Ghana must be able to prove not only by mere assertion and from documents which can be said to be self serving, but also require proof from Statutory Bodies like the Ghana Revenue Authority on the Taxable Income levied on the Audited Accounts of the company for the period concerned.

Amounts claimed as special damages in the law courts must not be based on speculation, but on actual profits earned and really verified from relevant and documentary evidence.

The plaintiff had a duty to lead cogent and reliable evidence that, during the period, the Defendant unlawfully detained its title deeds, it actually lost a certain sum of money which is verifiable, and not that if it had the documents, it could have by some good fortune or luck been able to make so much profit. The rule of the game so far as special damages of this kind are concerned is that the losses must be quantifiable and strictly proved. In essence, the loss must not be too remote or consequence of the breach complained of at the time of the transaction.

On the basis of the above, this ground of appeal fails.

However, does the failure to lead cogent evidence in support of a claim disable the aggrieved party from obtaining any damages at all? This must be answered in the negative. A party whose claim for special damages fails may be entitled to nominal damages. In ***Ankomah vrs City Investments Company Ltd [2012] SCGLR 1123*** this court stated the principle as follows:

"It must be noted that, the lower courts correctly applied themselves to the law when they held that the plaintiff did not strictly prove the damages for loss of use being claimed by him. It does not really matter whether the damages are described as general or special. The distinction between the two really lies in the fact that whilst special damages must be strictly proved in order for a claimant to succeed, that of general damages need not be strictly proved."

The court referred to the case of ***Norgbey & Anr v Asante & Anr [1992] 1 GLR 506, at 516***, where Acquah J, (as he then was) commented in some detail on this issue of special damages and what is considered as proof and the various levels of proof required at each stage. The learned jurist stated that:

"The legal position therefore is that in a claim for special damages where the claimant succeeds in proving both the subject matter and the value, he is entitled to be awarded the value he claims. But where he succeeds in proving only the subject matter but fails to prove the value of the subject matter, the claimant is not to be denied any compensation. In such a situation the claimant is entitled to be awarded some value for the damaged subject matter. In ***Yirenkyi v Tarzan International Transport [1962] 1 GLR 75 at 78****, Ollennu J (as he then was) explained it thus:*

"The plaintiff completely failed to prove the special damages as claimed. But that failure does not disentitle him to some damages. There is no doubt that he suffered some loss. The fact that the evidence he led has not made it possible for the court to assess damages is not completely fatal. It has been held that in such cases he should be awarded nominal damage [sic]…"

Also in ***Ghana Highway Authority v Mensah [1999-2000] 2 GLR 237*** this court held that:

"Special damages ought to be proved strictly in accordance with the rules. However, where the Plaintiff failed to prove the special damages claimed, his

action would not be dismissed but the court would award him nominal damages."

The Supreme Court was called upon in the case of ***Tema Oil Refinery v African Automobile Ltd., [2011] 2 SCGLR 907 at 931*** to explain the differences between General/Nominal and Special damages wherein the court held as follows:-

"In the case of ***Attorney-General v Faroe Atlantic Co. Ltd. [2005-2006] SCGLR 271 at 290*** supra, what the Supreme Court (per. Twum JSC) stated is not different from the basic principle stated in the case of ***Hadley v Baxendale (1854) 9 Exch. 341 (supra).*** The Supreme Court (per Dr. Twum JSC) in ***Attorney-General v Faroe Atlantic Co. Ltd***. stated the law on the award of general damages and special damages (at page 290 of the Report) thus:-

"My Lords, in my view, a claim for damages for breach of contract will entitle the plaintiff to nominal damages only unless the plaintiff gives particulars of special damage. No particulars of general damages are ever ordered. See ***London & Northern Bank Ltd. v Newness [1900] 16 TLR 433***. ***General damages are such as the law will presume to be the natural or probable consequence of the defendant's act.*** They arise by inference of the law and need not therefore be proved by evidence. Hence they may be averred generally as was done on this suit."

Continuing, Dr. Twum JSC stated further as follows:-

"Special damages, on the other hand, are such a loss as the law will presume to be the consequence of the defendant's act, but depend at least, on the special circumstances of the case. They must therefore always be explicitly claimed on the pleadings. See ***Hayward v Pullinger & Partners [1950] 1 ALL E.R 581."***

Applying the above stated principles of law to the facts of this appeal clearly result into a situation where on the evidence, the plaintiff failed to quantify the losses which he

was reasonably expected to have derived from the failure of the Defendants to release the land title documents to him.

As was stated earlier, the Plaintiff should have pleaded and proved to the satisfaction of the trial court that failure to release the documents by the defendants to him led to his loss of "X" amount of funds. His inability to use the "X" amount of money in executing or expanding his businesses failed because of the non availability of the documents of title as a result of Defendant conduct.

If this set of facts had been pleaded and proved by evidence, then perhaps there could have been evidence for award of special damages.

The established principle is then that where a party fails in proving the special damages claimed but there is enough evidence on record to prove that indeed the claimant has suffered some damage, a court of law will be doing justice by considering all the circumstances of the case and award such a party nominal damages.

In this present case, the Plaintiff at the trial tendered in evidence Exhibits G, H and P series as well as Exhibit L and S as proof of the loss it had suffered by reason of the Defendant's unlawful detention of its title deeds. It is evident from the evidence that the Plaintiff herein has suffered damages but this evidence was sadly unreliable and thus both lower courts found them to be speculative. This ground of appeal thus fails.

GROUND I

THE COURT BELOW ERRED IN FAILING TO AWARD DAMAGES HAVING COME TO THE CONCLUSION THAT PLAINTIFF WAS ENTITLED TO DAMAGES IN DETINUE

The High Court upon finding that the Plaintiff was not entitled to special damages granted them general damages of GH¢ 30,000.00.The Court of Appeal after finding that the Plaintiff is entitled to damages for wrongful detention of his goods maintained the award of GH¢ 30,000.00. The Court of Appeal stated as follows:

"After holding that the Plaintiff had failed to prove the special damages which it had sought, the trial judge awarded general damages of GH¢ 30,000.00. Together with interest to the plaintiff "for the period of unlawful detention of the title deeds…" In our opinion the judge was right in awarding general damages to the plaintiff".

My Lords, in considering what constitutes nominal damages the court in **Yirenkyi v. Tarzan International Transport [1962] 1 G.L.R. 75 at 78** held as follows:

"The nominal damages referred to by Ollennu J. (as he then was) does not mean that the claimant should be awarded just a trivial sum. It is called nominal because on the face of it the claim is being made under the heading special damages, while in reality he is being awarded damages at the court's own discretion. For in making some award on failure to prove the value, the court is expected to have regard to the pre- and post-accident value of the property, and the figure to be awarded must be a reasonably fair approximation of the pre-damaged value of the property."

In considering whether to alter the nominal damages awarded by the two lower courts the case of ***Bressah v. Asante & Another [1965] 1 GLR 117***provides some guidance on the circumstances under which an appellate court would interfere with an award of damages by a lower court in the following words:

"An appellate court would only interfere with the quantum of damages on the ground that the trial judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it an erroneous estimate".

After careful consideration of the documentary evidence and the oral evidence in support of the claim for special damages, it is respectfully submitted the Plaintiff has failed to establish any grounds for the reversal of the decision of the two lower courts.

The award of GH¢30,000.00 by the High Court as far back as 2015 and the recovery of penalty charges of GH¢ 93,366.60 awarded by the Court of Appeal in the circumstances of this case is more than adequate to compensate it for any damages it may have suffered.

The Plaintiff's plea for "more" in this case cannot be granted having regard to all the circumstances of the case.

GROUND III

THE COST AWARDED BY THE HIGH COURT AND THE COURT OF APPEAL ARE ON THE LOW SIDE HAVING REGARD TO THE LENGTH THE CASE TRAVELLED

The grant of cost is at the discretion of the court. However, a trial court must consider the provisionsin Order 74 of the High Court (Civil Procedure) Rules, 2004, CI 47 as it has laid down a number of factors to be taken into consideration in awarding costs. Sub-rules 3 and 4 of rule 2 of Order 74 provides that:

> "(3) Without prejudice to the powers and discretion of the Court, an award of costs shall ordinarily be designed to: (a) compensate for expenses reasonably incurred and court fees paid by the party in whose favour the award is made; and (b) provide reasonable remuneration for the lawyer of that party in respect of work done by the lawyer."

The Supreme Court in a unanimous decision in the case of ***Juxon- Smith v KLM Royal Dutch Airline [2005-2006]SCGLR 438***,particularly at 456, provided the following guidelines in the award of costs. These are

> "Under Order 74 r.2 (4) (a) (b) and (c) of the High Court (Civil Procedure), Rules 2004 (C. I. 47), the factors that maybe taken into account in assessing costs are stated as

a. the amount of expenses, including **travel expenses,** reasonably incurred by **that party** or that **party's lawyer or both** in relation to the proceedings
b. the amount of **court fees paid by that party** or that party's lawyer in relation to the proceedings;
c. **the length and complexity of the proceedings**…."

Continuing, the Court per Georgina Wood JSC (as she then was) explained thus:-

> "The Plaintiff's counsel appears to have misunderstood the import of the sub-rule (b), which allows parties to recover his court fees in the proceedings; hence his unjustified criticisms. **As a general rule, a losing party must never be made to bear the full cost of filing fees, in situations where as result of having an exaggerated opinion of one's case, recklessness, or some other unjustifiable cause, a party puts in a huge monetary claim for either a debt recovery, or special or general damages, only to obtain just a fraction of it at the end of the trial. The court should in such circumstances, saddle a losing party with only such a proportion of the cost of filing fees as may appear reasonable and justifiable on the given facts."** Emphasis

The following factors may also be considered:-

d. The conduct of the parties and their lawyers during the proceedings and
e. any previous order as to costs made the proceedings.

With these as a guide, we now proceed to evaluate and assess the appeal on this ground of costs by the Plaintiffs.

Since the determination of the amount of cost is at the discretion of the court, aPlaintiff that invites an Appellate Court to tamper with the exercise of the discretion of the lower court must establish that the lower court considered or gave weight to some irrelevant or unproved matters or even wholly failed to consider some other relevant matters. This

principle was stated in the English case of ***Blunt v Blunt [1943] AC 517 at 518, HL*** where it was stated that:

> *"An appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account, but the appeal is not from the discretion of the court to the discretion of the appellate tribunal."*

This Honourable court in the case of ***Crentsil vrs Crentsil [1962] 2 GLR 171 at 175***also held that:

> *"As to appeals from the exercise of the court's discretion, it is a rule of law deep rooted and well established that the Court of Appeal will not interfere with the exercise of the court's discretion save in exceptional circumstances."*

And further in ***Poku v Frimpong [1972] 1 GLR 230 at 241****, CA* it was also held that:

> *"The award of costs in any proceedings in the High Court is in the discretion of the court or judge, and where this is done judicially, its exercise will not be interfered with by an appellate court . . . this court. . . will only review the discretion, if it is exercised on material that is illegitimate, or violates some principle of substantive right. The onus is on the applicant to show that the discretion had been wrongly exercised. . ."*

It is thus incumbent on the Plaintiff herein to show the error committed by the trial court in awarding an amount of GH¢ 10,000.00. In respect of the Court of Appeal it will be relevant to quote the words of the court in awarding the cost of GH¢ 5,000.00. The Court of Appeal stated as follows:

> *"Main Appeal dismissed as well as the cross-appeal subject to the order against the defendant to refund to Plaintiff the penalty charges of GH¢ 93,366.60*

deducted and payment of interest thereon. Costs assessed at GH¢ 5000.00 in favour of the Plaintiff/Defendant as against the Defendant/Plaintiff. We awarded nominal costs as against the GH¢ 70,000.00 demanded by the plaintiff/Defendant because Plaintiff/Defendant has lost its cross appeal and gained refund of penalty charges which the Defendant/Plaintiff has also lost its appeal"

In our consideration of this ground on costs, we are minded to take into consideration the conduct of the Defendants in unjustifiably holding onto the Plaintiffs title documents long after the amount due them had been paid.

The attitude of Banks to their customers as exhibited by the Defendants in our estimation falls below the standard expected of financial institutions to their customers. This is because it is the customers of the Banks who collectively make them what they are.

Secondly, in considering the issue of costs, it is also necessary to consider the following factors:-

- Expenses incurred – i.e. cost of filing the suit
- Solicitors fees
- The length of time spent in the courts
- The conduct of the Defendants during the trial

The Supreme Court speaking with one voice through Georgina Wood JSC (as she then was) in the case of ***Juxon-Smith v KLM Dutch Airlines supra, particularly at 456*** stated what we will state as the locus classicus on the principles governing the award of costs. This has already been referred to supra.

CONSIDERATION OF THESE GUIDELINES

What is clear is that, the plaintiff would not have gone to court if the Defendants had not detained their land title documents. We will therefore hold and rule that the Defendants precipitated the Plaintiff into issuing the writ against them.

Secondly, we have examined the way and manner Plaintiff's Solicitors couched the writ of summons. Out of abundance of caution, let us refer to the said writ of summons.

It reads as follows:-

1. An order for the release of all Plaintiff's title deeds.
2. Damages for the detention of the said title deeds
3. Interest on the amount found to be due at the prevailing commercial Bank rate from 13th January 2012 till final payment.
4. The refund of all penalty charges paid to the defendants.

A detailed reading and appreciation of the above reliefs reveals that the Plaintiffs' intentionally couched their reliefs to avoid payment of the appropriate filing fees.

Whilst this court frowns upon the conduct of Counsel in denying the Judicial Service of much needed revenue by concealing the actual claims before the court, we hereby urge His Lordship the Chief Justice and Rules of Court Committee to tighten the Rules to prevent this flagrant abuse by Practitioners with the connivance sometimes of our filing staff. In this respect, the cost incurred upon filing of the writ in this case will be minimal. We will therefore not take this into consideration, when considering the award of costs.

We take note of the fact that, the Plaintiff resides and carried on business in Kumasi. He also issued the writ in Kumasi and the appeal was also conducted in the Court of Appeal in Kumasi.

We accordingly take the view that, very minimum travelling expenses and or inconvenience would have been caused and or incurred by the Plaintiffs during the conduct of the case.

Concerning the issue of Solicitor's fees, save for the fact that Solicitors are expensive, we have no data to measure the amount of money paid to Counsel for the Plaintiffs in the lower courts and in this court. In any case, it must be made clear that, the issue of Solicitors fees is a vexed issue. This issue of Solicitors fees being a factor taken into

consideration in the award of costs to a successful litigant must not be construed to mean reimbursement of the successful party in totality. It is sufficient if the successful party is awarded costs based on the discretion of the court but not to fully reimburse him.

See cases such as the following:-

- ***Bank of Ghana v Nyarko [1973] 2 GLR***
- ***Guardian Assurance Co. Ltd. v Khajat Trading Store [1972] 2 GLR 48, CA***

We will therefore only exercise our discretion and award the Plaintiffs' costs we consider just and proper under the circumstances of this case.

On the length of time this case spent in the corridors of the courts from the High Court to this Court, we realize that this is an endemic issue which should be taken note of but not to use it as an index to punish a party unless this court is of the view based on evidence on record that a party intentionally contributed to the length of time the case spent in the courts.

The Writ of summons was filed by the plaintiffs on 22nd February 2012. Judgment was delivered by the High Court on 21st December, 2015, barely three years.

The Defendants filed their appeal against the High Court judgment on 5th February 2016, and on the same date paid into court an amount of GH¢100,400.65 for the benefit of the plaintiff.

On the 15th June 2016, the Plaintiff pursuant to leave filed a Notice of Cross-Appeal against the High Court judgment.

We note that the appeal was heard by the Court of Appeal in Kumasi and this therefore did not involve much travelling by the parties and counsel. Judgment was given by the Court of Appeal in Kumasi on 29th May 2020 and on the 24th August 2020, the plaintiff herein filed an appeal against the judgment of the Court of Appeal.

On the 6th of July 2022 the Supreme Court delivered its decision with the reasons to be filed on or by Thursday, the 28th day of July 2022.

On the whole, the time the case has spent in court appears to be long, but considering the fact that appeals had been filed at each level of the court structure, the delay is acceptable, even though we reckon that the processes should be done faster than what appears to be the case as at now.

We have considered the attitude of the Defendants and their Counsel and we do not think they have intentionally contributed towards the delay in prosecuting their case. The delays if any are due to systemic problems and failures. Taking all the above factors into consideration, we are of the considered opinion that costs of the Plaintiff should be enhanced to GH¢40,000.00.

CONCLUSION

The above are the reasons why on the 6th July 2022, we dismissed the Plaintiffs appeal against the judgment of the Court of Appeal, save the appeal on the issue of costs which we hereby enhance to GH¢40,000.00 in favour of the Plaintiffs against the Defendants.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

A. LOVELAVCE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

PROF. H.J.A.N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

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