IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)
ADINYIRA (MRS), JSC
BAFFOE-BONNIE, JSC
AKOTO-BAMFO (MRS), JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/08/2018

12TH DECEMBER, 2018

WOODHOUSE LTD. ……. PLAINTIFF/RESPONDENT/RESPONDENT

VRS

AIRTEL GHANA LTD. ……. DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

BAFFOE-BONNIE, JSC:-

In this judgment the defendant/appellant/appellant shall be referred to as the defendant while the plaintiff/respondent/respondent shall be referred to as the plaintiff.

At the High Court the plaintiff's claim against the defendant was for

i. An order directed at defendant to pay the sum of US$2,225,600 being an amount due plaintiff as at 31st December 2012 by virtue of the agreement dated 5th January 2009.

ii. Interest on the sum of money from January 2009 to date of final removal of all the seven 20 Footer containers on plaintiffs land at the prevailing commercial rate.

iii. Damages for loss of use of plaintiffs land.

The High Court entered judgment for the respondent in the sum as endorsed on the writ of summons with interest to be calculated. The appeal to the Court of Appeal did not yield much for the appellant as the Court virtually confirmed the findings of the High Court except a slight variation in the quantum of award. The appellant has further appealed to this court on a number of grounds.

FACTS OF THE CASE.

The facts of this case as settled by the trial High Court are as follows. The parties were business partners. The plaintiff's case was that by an agreement in writing dated the 5th day of January 2000 made between the parties herein, the plaintiff offered defendant temporary storage of ten 20ft containers belonging to the defendant. The agreement indicated that the first seven days was free and wouldn't attract any fees. Thereafter a daily fee of $200 would be paid on each container that remained on the premises. It was also contended that the first 2 containers were removed after 6 months and another was removed after a year. The rest remained on the premises until plaintiff issued the writ claiming an accumulated amount of $2,225,600.00 being defendant's indebtedness to him as at 31st December, 2012.

The defendant denied plaintiff's claim and put forth several defences. The defendant said that it did not know the plaintiff company in respect of the land and that ZED NETWORK LTD, another company belonging to the MD of the plaintiff company was the one they dealt with in respect of the land. ZED held sole distributorship rights with regard to defendant's products and so since the containers were all branded in the name of the defendants and they were empty, ZED permitted defendants to place the containers there for free. Sometime later their business relationship went cold leading to the defendant terminating the sole distributorship agreement and bringing an action in court against ZED and its MD, George Boateng. Defendant opined that this current action has been started by the plaintiff

as a result of the termination of the sole distributorship rights of ZED CO LTD. All attempts then to evacuate the containers were resisted because the matter was in court.

At the trial court when the defendant submitted that they were permitted to keep the containers on the plaintiff's premises for free, they were confronted with the document, Exhibit A, that had been executed to witness the transaction. Their initial response was that the document was not genuine and then later said the person who executed the said document on behalf of the defendant company did not have the mandate to do that. It was also their case that they could not have committed themselves to pay $200 dollars per day for each container when in reality even if the containers had remained at the Port, the highest amount of demurrage charges they would have been called upon to pay was $34 per day after an initial $2 and $7, daily payments.

Indeed he brought a witness from the shippers authority to show the various payments on containers stored at the port.

The trial judge dismissed all the defences of the defendant and based his decision on the irrevocable agreement signed by the defendants. Judgment was entered for the plaintiff on his claim. At the Court of Appeal the defendant submitted that this transaction was essentially a landlord and tenant matter and so the Commercial Court to which the matter had been referred did not have jurisdiction and should have referred the matter to the Chief Justice for her directions. Again, the irrevocable agreement upon which the trial High Court's judgment was based, was not stamped and therefore inadmissible and should have been rejected.

The Court of Appeal did not find any merit in the ground of appeal that suggested that the trial Commercial Court did not have jurisdiction to hear the matter. The Court said,

"Counsel dedicated ten pages of his written submissions on this issue and a further 4 pages of his reply to it. As a result of this counsel for the Respondent also went on at length in response. As interesting as the arguments of counsel may sound, they lack merit and should not take much of this courts time and effort in disposing of it." After a brief analysis the Court concluded,

"In deciding the issue of jurisdiction I have not found it necessary to determine the question of whether the present action is in the nature of a landlord tenancy matter or a commercial matter properly so called. I am satisfied that whatever the nature of the case before the trial commercial court, even though it may have been more conveniently dealt with in another division of the High Court, the said trial court had jurisdiction to hear it, This ground of appeal lacks merit and so fails".

The Court of Appeal treated the other grounds of appeal under the omnibus ground "Judgment is against the weight of evidence" and proceeded, as required by Rule 8(1) of the Court of Appeal rules 1997, C.I. 19, to review the whole evidence and pronounce on whether the conclusions of the trial judge are borne out by the evidence.

As indicated earlier, the whole of the case for the defence collapsed when the trial judge decided that the exhibit A, which was the irrevocable agreement was accepted as the foundation of the contract between the parties. When that document was admitted into evidence over the protestations of the defendant, the trial High Court judge had sealed the fate of the defendant. So before the Court of Appeal, the appellant argued vehemently for the exclusion of the said exhibit. The Court of Appeal subjected the document to relevancy and admissibility test by reviewing Part IV of the Evidence Act with special emphasis on Section 51(2), and Sections 32 (1), (2), (3) and (6) of the Stamp Duty Act 2005, Act 689.

Section 32(6) of the Stamp Duty Act 2005, Act 689 provides as follows,

"Except as expressly provided in this section, an instrument (a) executed in Ghana: or (b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana- shall except in criminal proceedings, not be given in evidence unless it is stamped in accordance with the law in force at the time when it was first executed."

The Court of Appeal was of the opinion, and rightly so in our view, that, Sub section (6) covered documents such as exhibit A which was tendered by the plaintiff and which actually formed the basis of the trial judge's judgment. That document was not stamped at the time it was admitted and remains unstamped till today. Relying on the case of **Lizori Ltd v. Boye & School of Domestic Science & Catering [2013-2014] 2 SCGLR 889,**

the Court of Appeal ruled that exhibit A was inadmissible and same ought to have been thrown away, saying

"It is clear from all this that Exhihibit A in this case, being unstamped ought not to have been admitted into evidence by the trial court even if no objection was raised by the defendant. It is hereby excluded."

This is what was said of an unstamped document in the Lizori Ltd case,

"The provisions in section 32 of Act 6989 are clear. Either the document has been stamped and appropriate duty paid in accordance with the law in force at the time it was executed or it should not be admitted in evidence. There is no discretion to admit it in the first place and ask any party to pay the duty and penalty after judgment."

The exclusion of exhibit A notwithstanding, the Court of Appeal was of the view that there was sufficient evidence from other sources to justify the trial judge's finding that there was an agreement to store the containers on the plaintiffs premises at a fee of 200 dollars a day per container. Save for a slight twitch in the quantum of money awarded, the court of appeal virtually confirmed the reasoning and conclusions of the trial high court judge. Being dissatisfied, the defendant has appealed to us on the following grounds.

GROUNDS OF APPEAL

a. Having rightly excluded from the evidence the irrevocable undertaking, Exhibit "A" purportedly executed between the parties herein, the learned justices of the Court of Appeal erred in their finding that the parties herein entered into an agreement for the storage of the containers at US$200 per each container per day.

b. The learned justices of the Court of Appeal erred in awarding the plaintiff rent of US$200 per each container per day from 13th January ,2009 to 31st December, 2012 notwithstanding abundant evidence on record that plaintiff earlier on refused to allow the defendant to remove the said containers.

c. The learned justice of the Court of Appeal erred in holding that the trial court had jurisdiction to hear and determine the matter.

d. Judgment is against the weight of evidence.
e. The appeal having been allowed in part, the costs of Gh₵5,000 awarded to the plaintiff by the Court of Appeal was unjustified and unwarranted by law.

Additional grounds of appeal will be filed on receipt of record. No additional grounds have been filed before us.

Even though the ground C was argued last, we are of the view that the matter of whether or not the High Court had jurisdiction should be tackled first. In his submission before us Counsel cited the case of Tsikata v Attorney General [2001-2002]SCGLR 1, and quoted profusely the statement of Kpegah JSC that ***"Another essential attribute or feature of the division of a court is that the creation of a division derogates from the courts general jurisdiction and limits it to a specific subject area. For example, probate matters cannot be filed in a criminal Division of the High Court vice versa."*** On his part Adzoe JSC said as follows ***"Establishing a division of a court involves the question of jurisdiction. The jurisdiction of a court is the authority which the court has to hear and determine matters litigated before it. It has two matters- the element of subject matter and venue. Subject matter jurisdiction relates to the type and nature of actions and matters that the court can take cognizance of, eg murder or land cases or chieftaincy dispute."***

Even though counsel concedes that the majority decision was overturned in a subsequent review application, counsel submits that the principles of law discussed by both Kpegah and Adzoe JJSC, are valid and remain good law. Anticipating that he would be confronted with the fact that he did not raise this objection at the time of the trial, counsel has referred us to the case of **Essex County Council v Essex Incorporated Congregational Church Union [1963] 2 WLR 802 @808** where Lord Reid said *"but the appellants say that the respondents cannot be allowed to maintain this point now because they consented to the matter being dealt with by the tribunal….In my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction."*

In effect, since the Commercial Court lacked jurisdiction to sit on a matter which was a landlord/tenant issue, no proper jurisdiction was conferred by the defendant's failure to raise the issue at the time. Concluding he submitted, *"My lords, it is submitted that the learned trial judge after perusing the pleadings of the parties and the issues set down by the pre-trial judge, ought to have held the view that this instant matter in substance was a land matter involving Landlord-Tenant or Licensor-Licensee, over payment of rent for storage of containers on plaintiff's land. In that instance, the matter was not one of those causes or matters which could be determined by the Commercial Division of the High Court. The matter ought to have been referred to the Chief Justice for transfer to the High Court, Land Division"*

When this argument was presented at the Court of Appeal it was rejected and same has been rehashed before us. We do not think that this ground of appeal need to engage our attention too much. The Constitution of Ghana 1992 provides in Article 140(1) as follows *"The High Court shall subject to the provisions of this Constitution have jurisdiction in all matters and in particular, in civil and criminal matters and such original and appellate and other jurisdiction as may be conferred on it by the Constitution or any other law.* Section 15(1) of the Courts Act 1993, Act459 on the other hand provides that *"In accordance with Article 140 of the Constitution, the High Court has, subject to the constitution*

> *(a) Any original jurisdiction in all matters*
> *(e) Any other jurisdiction conferred by the Constitution, this Act or any other enactment*

Section 14(3) of the Courts Act, 1993 Act 459, which confers power to create divisions of the High Court on the Chief Justice provides as follows;

"There shall be in the High Court such divisions consisting of such number of Justices respectively as the Chief Justice may determine"

A subsidiary legislation like CI 47 cannot purport to limit the jurisdiction given to the High Court by the 1992 constitution or the courts act. Clearly then, the power of the Chief Justice to create divisions of the high court such as commercial or land division cannot remove from the power the constitution confers on the said court ie jurisdiction on all matters as stated in Article 140 (1) of the 1992 constitution. We are therefore agreeable to

the holding of the Court of Appeal that there is no merit in this ground of appeal and so same is dismissed.

The defendant argued grounds (a) and (e) together. Ground a reads, *"Having rightly excluded from the evidence the irrevocable undertaking Exhibit A purportedly executed between the parties herein, the learned Justices of the Court of Appeal erred in their findings that the parties entered into an agreement for the storage of the containers at $200 per each container per day."* Ground E reads, *"judgment is against the weight of evidence."*

In their judgment the Court of Appeal had concluded as follows *"it is clear from all this that Exhibit A in this case, being unstamped ought not have been admitted into evidence by the trial court even if no objection was raised by the Defendant. It is hereby excluded. The exclusion of Exhibit A does not relieve this court of its duty to determine from other evidence led, be it oral or documentary to determine whether the plaintiff successfully proved its case on the balance of probabilities as required by the provisions of sections 11(1), (4) and 14 of the Evidence Act 1975, Act 323*."

The court thereafter subjected the oral evidence of the plaintiff and other documentary evidence to analysis and came up with a finding that the parties had indeed entered into an agreement in which the plaintiff was to allow the storage of the containers belonging to the defendant on plaintiff's premises at a fee of $200 per day per container.

Before us, the gravamen of counsel's submission on behalf of the defendant is that after throwing away the exhibit A, the evidence on record did not support the conclusions arrived at by the Court of Appeal. It is therefore their submission that the decision is against the weight of evidence.

We have reminded ourselves of the fact that being an appellate court we are enjoined by law and procedure to treat this appeal as a rehearing and review the whole of the evidence and pronounce on whether the conclusions of the trial judge are borne out by the evidence. See the case of RE Asamoah(deceased) Agyeiwa & Ors v Manu [2013-2014] 2 SCGLR 909, and Djin v Musa Baako.

We have also reminded ourselves of the fact that being an appellate court, we are not to substitute our findings for the findings of fact made by the trial judge especially where such findings of fact have been endorsed by the first appellate court. See the cases of Tuakwa V Bosom and Achoro V Akinfela

The initial issue in dispute which the trial High Court was required to resolve was;

Whether or not the containers were kept on the plaintiffs premises for storage purposes or it was only part of the business arrangements between the defendant and ZED LTD, the sister company of the plaintiff.

The plaintiff's case was that the defendant ran to them to store the containers on plaintiff's premises because they were running away from accumulated demurrage charges at the port. And that they only agreed to allow the containers to be stored there at an agreed fee of $200 per day per container.

On their part the defendant said containers were sent there as part of their business arrangements with ZED LTD and not for storage purposes. Mr Afaghani who allegedly signed the irrevocable agreement did not have such mandate to do that. Finally, they could not have signed an agreement to pay a daily fee of $200 per container when the Harbour from where they were allegedly running was charging as low as $2.00 per day for 7 days and $7.00 rising to $34.00.The trial High Court found that containers were sent there for storage purposes. This was affirmed by the Court of Appeal. We believe that this finding of fact is consistent with the evidence on record and we endorse same.

The next issue was the agreed amount to be paid for the storage.The trial High Court found as a fact that the parties agreed on a storage fee of $200 dollars per container per day. This finding was based solely on the exhibit A which was headed Irrevocable Agreement. The defendant denied ever signing any document and when they were confronted with the exhibit A, they sought to distance themselves from it saying the person (Mr Afaghani) who signed on behalf of defendants did not have such mandate. When these defences broke down, the trial judge did not look for any further evidence and based her judgment solely on the exhibit. The Court of Appeal however found exhibit A inadmissible and therefore threw it out. The Court of Appeal however, reviewed the oral evidence of the parties and other documentary evidence, mainly, letters sent by the plaintiff to the

defendant and came to the conclusion that even without exhibit A, there was enough evidence to support plaintiff's claim that there was an agreed storage fee of $200 per day per container.

We have looked at the judgment of our learned brothers in the Court of Appeal, and we endorse their finding to throw out the Exhibit A which till date is unstamped. We also endorse their statement that, *"The exclusion of Exhibit A does not relieve this Court of its duty to determine from other evidence led, be it oral or documentary to determine whether the plaintiff successfully proved its case on the balance of probabilities as required by the provisions of sections 11(1), 11(4) and 14 of the evidence Act 1975, Act 323".*

We have had the benefit of looking at the various correspondence exchanged between the parties before the current writ was issued and we are convinced that the protestations of the defendant notwithstanding, the containers were not sent to the premises of the plaintiff as part of their business arrangements with ZED LTD, but they were sent there for storage purposes and the defendant is obliged to pay storage fees. However, after reviewing the totality of evidence, we cannot endorse the finding of the court of Appeal that there was enough evidence outside the Exhibit A to suggest that there was this agreement to pay $200. We believe that the Court of Appeal was unduly influenced by the Exhibit A which it had thrown out on the grounds of admissibility.

In the very first letter written by the plaintiff to the defendant one can see the real relationship between the parties in respect of the containers and the premises. For ease of appreciation let me quote the letter in full.

Dear Sir

<u>USE OF WOODHOUSE LAND TO STORE AIRTEL CONTAINERS</u>

We write to inform you that, in the beginning of 2009, the then Zain Ghana Ltd. Now Airtel Ghana brought and packed ten (10) 20- feet containers on our land with a promise that they would be removed within one week. Two containers were removed within six (6) months and one (1) after a year remaining seven (7).

Since then, we have made countless effort for your company to remove the containers to enable us use the land for its intended purpose, but to no avail.

We are therefore per the attached invoice charging you rent for the use of our land for the number of years that is from 2009 till date when the containers have been on the land depriving us from using the land for the intended purpose.

Yours faithfully

.....

GEORGE BOATENG

ON BEHALF OF WOODHOUSE LTD

This letter on the subject was written in 2011, two full years after the containers had been sent to the land. This letter was not a demand notice and makes no reference whatsoever to an earlier agreement reached regarding payment for storage if there was one. In fact what one gathers from the last paragraph is that the plaintiff is now going to charge rent for storage because the containers had kept too long at the premises. We wonder why no reference was made in this 2011 letter to an agreement to pay storage fees of $200 per container per day agreed in 2009 if such an agreement existed.

It is very interesting to note that this letter was written a few months after the defendants had taken steps to terminate the sole distributorship arrangements between them and ZED LTD, a sister company of the plaintiff, with the same Managing Director, George Boateng. Also interesting is the fact that even though it makes reference to "countless efforts" to have the containers removed, not a shred of evidence was led to show a single effort made before this letter was written. Further, the letter refers to the date of commencement of the agreement as "in the beginning of 2009" the attached invoice puts the commencement date at 1st of January and the number of days used to calculate defendants indebtedness is 365 days. Yet the commencement date in the irrevocable agreement, which was not referenced at all in the Exhibit A, is 5th January 2009.

The second letter written to the defendant on this subject was on the 11th January 2013. It was written by a lawyer on behalf of the plaintiff and it fared no better. For a letter making a claim for money for a period of storage of the containers, the letter does not indicate how the grand total of $2,227,000.00 was arrived at. Again in paragraph 2 of the said letter they wrote, "Our clients inform us that two of the said containers were removed within six

months and one after a year bringing the number left to seven". So when exactly were the 3 containers removed? When is 'within 6 months' and when is 'after a year'? For a letter coming from a lawyer making a demand for payments arising from days of storage, the letter lacked specificity. If payments are to be calculated on number of days the containers had been stored, then the least a demand letter could do was to indicate the commencement date, period of storage for each container, when containers were removed and how much is the total number of days the containers remained on the premises. This would make for ease of calculation if the base amount agreed upon is known. As things stand now none of the two letters Exhibits B and C tell us the exact dates when the containers were sent to the premises, when the first two were removed and when the third one was removed. How then does one calculate the number of days the containers have remained on the premises and how much is owed.

On the other hand, the defendant has insisted that the containers were sent to the premises as part of the business arrangements with ZED LTD and does not see why they should pay any amount for the storage. They have again debunked the claim by the plaintiff that they were compelled to seek storage for the containers to avoid demurrage charges accumulating at the ports. They brought in DW1 who gave evidence that charges at the ports where they were allegedly running away from, was far lower than what they were supposed to be paying for. How on earth would they be running away from port charges of $2.00, $7.00 rising to $34.00 to contract to pay $200.00?

We have had the benefit of the analysis of both the trial court and the first appellate court, and as indicated earlier, we accept the findings of fact made by both courts and affirm that, the containers were stored on the plaintiffs premises for a fee and reject the defendants claim that they were sent there as part of the business arrangements between the defendant company and ZED LTD.

However, we are of the view that, not enough evidence was led outside the rejected Exhibit A to show that the parties agreed on a fee of $200.00 per container per day against the backdrop that, charges at the ports are even far lower than that being cited by the plaintiff as the agreed amount.

Having found as a fact that the containers were sent to the plaintiffs premises for storage at a fee but having rejected the $200.00 fee being quoted by the plaintiffs as unproven, being a court of equity it will be fair to both parties to take the circumstances into consideration and fix a reasonable fee for the storage. DW1 gave detailed evidence of port charges for empty containers and this was not challenged by the plaintiff. In his evidence in Chief, Fred Asiedu Ghartey (DW1) informed the court that he works at the Public Relations Department of the Ghana Shippers Council. This is what took place;

Q. Please tell the court when demurrage are charged

A. Demurrage arises when a consignor is unable to clear his goods and make the container available to the shipping line within seven days of vessel arrival.

Q Could you please tell this court how much it costs to store an empty container

A. Containers may be stored within the port itself that is empty containers, and then in one of the many off dock terminals, that is available within the port itself, the first seven days are free and the next 7 days that is, from the 8th to the 14th days will attract seven dollars per day …. And there from the 15th to the 21st day it attracts 11.5 dollars per day and 34 dollars thereafter. My lord for the off dock terminals because they are private entity the prices differ. The price for storing a 20ft container after the 7 days is 2 dollars per day and that is not graduated, so once you stored there 2 dollars and it runs through. For haul life terminal it is 3.5 per day and that also runs through after the seven days……..”

This evidence was not challenged in cross examination.

So with these quoted figures, none of which exceeds 34 dollars a day, we are finding it difficult to see how the defendant could go and agree on a storage fee of 200 dollars per day per container!

Having accepted the finding that the storage was at a fee but not free, but having rejected the 200 dollars per day per container, we will fix a storage fee at a flat rate of 30 dollars per container per day after the initial free period of seven days.

CALCULATION OF RENT TO BE PAID

Seven containers were stored at a fee of 30 dollars from 13th January till 13th of February 2013 which is a period of 1492 days. 13th February 2013 was when the defendant made its first attempt to take their containers and they were told they could not because the matter was in court.

2009 = 353 days

2010 = 365 days

2011 = 365 days

2012 =365 days

2013 = 44days

Total = 1492

If 1,492 days is multiplied by 30 dollars we get 44,760. This means after 4 years and some days each container attracts a storage fee of $44,760.00. If this is multiplied by 7 we get $313,000.00. Two containers were there for only the first six months meaning they will attract fee for a total of 341days. If this is multiplied by 30 dollars we get $10,230.00. The third container which was removed within a year, will attract a storage fee for 353 days x 30 dollars totalling $10,590.00. The total storage fees for the ten containers will then look like this

1. Two Containers for a total of 341 days(6 months each) = $10,230.00
2. One container for one year (353)days = $10,590
3. Seven containers for 4years,1 and 1/2 months (1492 days) =$313,000
   Total =$333,820.00

We believe this amount is the most reasonable in the circumstances to be paid by the defendant for the storage of the containers. The total amount will attract interest at the prevailing bank rate for the dollar from the date of the High Court Judgment till date of final payment.

The appeal on ground e is dismissed.

Appeal is granted in part and the judgment of the Court of Appeal is varied to the extent of a variation in the quantum of the judgment debt.

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

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

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

AKOTO-BAMFO (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

V. AKOTO-BAMFO (MRS.)
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

O. K. OSAFO-BUABENG FOR THE DEFENDANT/APPELLANT/APPELLANT.

K. AMOAKO-ADJEI FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.