IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA, JSC (PRESIDING)
AKUFFO (MS), JSC
ADINYIRA (MRS), JSC
ARYEETEY, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
NO. J4/5/2009
21ST APRIL, 2010

DON ACKAH ... PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. **PERGAH TRANSPORT LIMITED**
2. **BERTHA BADOE** **... DEFENDANTS/APPELLANTS/**
3. **SG-SSB** **RESPONDENTS**

J U D G M E N T

ADINYIRA (MRS), JSC:

This is an appeal from the judgment of the Court Appeal dated 13 December 2007, which subject to certain orders set aside the judgment of the High Court Accra dated 12 April 2O06.

FACTS

In 1999, the SG SSB Bank Ltd, the 3rd Defendant herein offered its property House No. Plot 642 East Legon, Accra, for sale. The area of contention throughout the trial on the part of the Plaintiff/Appellant (hereinafter Plaintiff) was that the then Managing Director of the Bank, Mr. P.K. Thompson informed him of the intention of the Bank to sell the house. He was initially not interested and later decided to buy the house after private discussions with Mr. Thompson. The latter introduced him to Bertha Badoe, the 2nd Defendant/Respondent (hereinafter 2nd Defendant) the Managing Director of Pergah Transport Ltd the 1st Defendant/Respondent (hereinafter 1st defendant), who was then living in the house as his licensee. A friendship developed between the Plaintiff and 2nd Defendant and they mutually agreed that the Plaintiff will purchase the house in the name of the 1st Defendant in order to boost its assets base to meet the terms and conditions of a bid put out by the Ghana Commercial Bank. It was also agreed that after the 1st Defendant has won the bid, the house will be transferred to the Plaintiff.

The case of the 1st and 2nd Defendants was that, they made an offer to the Bank to purchase the house. While the 2nd Defendant was waiting for funding from her brother in Canada, the Plaintiff offered financial assistance to them to enable them to purchase the house as he did not want one other person who has expressed interest in the house to buy it. The Defendants claimed further that there was no agreement that the house was to be transferred to the Plaintiff after they won a bid from the Ghana Commercial Bank.

The High Court found the version of the Plaintiff to be more credible and gave judgment in his favour. The 1st and 2nd Defendants appealed against the judgment on the sole ground that the judgment was against the weight of evidence. The Court of Appeal reversed the judgment of the High Court. It however ordered the 1st and 2nd Defendants to refund to the Plaintiff the sum of GH¢20,000 with interest thereon at the prevailing bank rate to be calculated at simple interest from 24 November 1999 to date of judgment.

The Plaintiff is now inviting this Court to restore the judgment of the trial court on the grounds that:

A. The judgment is against the weight of evidence.
B. The Court of Appeal erred when it substituted its findings of facts for those of the trial judge.
C. The Court of Appeal misdirected itself on the law of privity of contract.
D. The Court of Appeal failed to give adequate and proper consideration to the Supreme Court decision in the case of In Re Koranteng (Decd); Addo vrs. Koranteng [2005-2006] SCGLR 1039.
E. The Court of Appeal failed to give adequate and proper consideration to the Supreme Court decision in the case of Brown vrs. Quashigah [2003-2004] SCGLR 920.

We will consider ground grounds **A, B, and E** together as they are inter-related.

Parties Submissions

Plaintiff

Plaintiff submits on grounds A and B that:

"in spite of the very clear nature of the evidence, the Court of Appeal decided to ignore it and the findings of the trial judge on the facts placed before him, the evidence led and the demeanor of the witnesses to embark on its own journey which culminated in the judgment appealed against".

He submits that the statement by the Court of Appeal that the plaintiff arranged a loan of GH¢20,000 from Unique Trust Financial Services Ltd. which amount was paid by Ist Defendant as part payment of the purchase price and after 4 years the Plaintiff paid the balance of GH¢13,000 was incorrect.

Defendants

The defendants submit that no offer was made by the Plaintiff to the then Managing Director for the purchase of the house and no offer was made to him by the 3rd Defendant for the sale of the house to him, accordingly there was no contract for sale of the property which the trial court sought to enforce by its decision. They submit

further that the only arrangement made between the Plaintiff and 2nd Defendant was the loan which was secured by the decision to give the title document of the house to Unique Trust as a guarantee for its repayment by 1st Defendant to Plaintiff.

Consideration

We will touch on ground E first, which states that:

> "The Court of Appeal failed to give adequate and proper consideration to the Supreme Court decision in the case of **Brown vs. Quarshigah [2003-2004] SCGLR 920."**

Counsel for the Plaintiff submits that the Defendants in the Court of Appeal filed and relied on the sole ground of appeal that the judgment is against the weight of evidence. Yet

> "[t]he Court nevertheless suo motu decided to decide the appeal on the failure of the Appellant to discharge the burden of proof imposed on him under the guise of the principle of an appeal is by way of re-hearing."

Counsel has obviously misunderstood the decision in the case of **Brown v. Quarshigah** which states in head note 1 that:

> "The expression that "an appeal is by way of re-hearing" meant that the jurisdiction of the appellate court was available but the rule of practice in the court was that the appellant must invoke it by filing appropriate grounds of appeal, distinguishing the so called omnibus ground, namely, the judgment was against the weight of evidence at the trial, from misdirection or errors of law, challenge to jurisdiction or capacity etc. Thus a party (such as the plaintiff in this case) who gave notice that he intended to rely solely on the omnibus ground should not be permitted to argue point of law. Dictum of Osei-Hwere J (as he then was) in **Nkrumah v. Ataa [1972] 2 GLR 13** at **18** explained."

We do not find the logic in this ground of appeal. If the Court of Appeal has substituted its own findings with the trial Court on the basis that the Plaintiff failed to discharge the burden of proof as required under Sections 10 and 11 of the Evidence Act 1975, (NRCD 323) it does not mean the judgment was based on a ground of an error of law which the Defendants by the requirement of rule 8 (4) of the Court of Appeal Rules, 1997, C.I.

19 ought to raise and set out as a ground of appeal. The Court of Appeal did what it was required to do in considering a ground of appeal that the Judgment was against the weight of evidence. It is the duty of an appellate court to ascertain from the record of appeal whether the party who bears the burden of proof has properly discharged that burden.

It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree .The relevant sections for our purpose are set out as follows:

"Section 10

(1) For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

(2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Section11

(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."

The Plaintiff further makes a strong criticism against the Court of Appeal that it substituted its own finding for that of the trial court which had the opportunity of seeing and hearing the witnesses. We do not think this a legitimate complaint. Even if the findings of the trial court were based solely on the demeanor and credibility of the witnesses, it is still the primary duty of an appellate court in respect of a judgment based on findings of fact to examine the record of proceedings in order to be satisfied that the said findings are supported by evidence on the record. The appellate court in so doing is in the same position as a trial court to make its own inferences from the established facts as an appeal is by way of rehearing. See the cases of ***Koglex Ltd. (No.2) v. Field [2000] SCGLR 175 and GIHOC V. Hanna Assi [2005-2006] SCGLR 458.***

The crux of the Plaintiff's case can be found in Paragraph 15 of his statement of claim to the effect that:

"[A]t all material times it was agreed between him and the 2nd Defendant acting for and on behalf of the 1st Defendant that the title deeds of the house would be prepared in the name of the 1st Defendant to be transferred to him after the 1st Defendant has won the bid."

The Court of Appeal was of the view that the Plaintiff failed to discharge the burden of proof of this averment, since he failed to call Mr. Thompson to corroborate his evidence. Counsel for the Plaintiff submits that since Mr. Thompson was not aware of the private arrangement between him and the 2nd Defendant as regards the sale of the house in the 1st Defendant's name he was therefore not a material witness. The flaw in this submission is that the plaintiff in his evidence claimed he had all his discussions and arrangements on the house with this same Mr. Thomson who asked him to help the 2nd Defendant to get her business going.

The Lordships of Appeal referred to several excerpts from the record of appeal to illustrate that:

> "[]he gravamen of the Respondent's case is that the entire transaction concerning the purchase of the house was between himself and the former Managing Director of SG-SSB Bank, Mr. Thompson."

Reference was made by the Lordships to pages 43, 44,48,49,52,65,67,69 and 82 of the record of appeal among others as illustrations. We will only refer to pages 48 to 49 of the record where the Plaintiff in his evidence in chief as led by his Counsel said:

> *"Q. Now did you make any application to SSB to purchase this house?*
>
> *A. Initially I spoke with the Managing Director made all the arrangements with the Managing Director so I did not go subsequently to SSB; I had all my dealings with the Managing Director of SSB on the house.*
>
> *Q. So can you tell the Court how come you said the money should be paid on behalf of the 1st Defendant?*
>
> *A. When I spoke to the Managing Director and we agreed on these issues, I went back to Unique Trust after I have discussed it with him…I asked that Unique Trust must pay the money to SSB and Unique Trust said no, we (sic) will not pay the money in the name of a third party unless SSB agrees in writing to deliver the title deeds to them.*
>
> *Q. Who is that 3rd party?*
>
> *A. The 1st Defendant.*
>
> *Q. So why did you say that the house be bought in the name of the 1st Defendant can you explain the reason?*
>
> *A. Because when I met them, Mr. Thompson asked me to help the 2nd Defendant to get her business going and so part of the process of helping her [was] to boost her balance sheet for Ghana Commercial Bank. I said if we took the house and put the house in the name of Pergah Transport the value of ₵330 million will be part of her balance sheet that would be submitted to Ghana Commercial Bank. That was the main reason."*

There is therefore positive assertion by the Plaintiff that it was as a result of this request from Mr. Thompson that he arranged with the 2nd Defendant to buy the house in her company's name. That was the crux of the Plaintiff's claim which was challenged by the 2nd Defendant. The onus then was on the Plaintiff to establish these matters which were capable of proof by simply calling Mr. Thompson as a witness to corroborate the evidence.

We accordingly agree with the Lordships of the Court of Appeal that:

> *"[H]aving said all these concerning the role played by Mr. Thompson; one expected the Respondent to have called the said Mr. Thompson to testify to corroborate the evidence.*
>
> *From the record of appeal, I find at pages 100 to 101 that the Respondent applied for a subpoena directed at Mr. Thompson to testify for the Plaintiff on the 9 February 2006. Even though the subpoena was filed, the said Mr. Thompson did not appear to testify.*
>
> *On examination of the evidence, the Respondent needed to call Mr. Thompson to corroborate his evidence. Indeed Mr. Thompson in this suit was a very material witness for the Respondent and taking into account his evidence some of which has been reproduced above in this judgment the failure of the Respondent in calling the said Mr. Thompson was fatal to the discharge of the evidential burden he assumed in the trial. Indeed the law is well settled in* ***Majolabi v. Larbi &Anor****.* ***[1959] GLR 190****, that where evidence is capable of positive proof it must be proved and a mere repetition of the evidence on oath without more does not discharge the burden of proof required in law."*

On the part of the 1st and 2nd Defendants their case that the Plaintiff merely offered them financial assistance could be reasonably inferred from the following excerpts of the cross-examination of the plaintiff by the 3rd Defendant found at page 117 of the record.

"Q. Subsequently you also said in your evidence in chief that you had discussions with the 2nd Defendant and you were prepared to assist the 1st defendant to enhance its credit worthiness?

A. That is correct.

Q. All these discussions which resulted in your willingness to assist the 1st and 2nd Defendants were done without involvement of SSB Bank?

A. That is correct.

Q. As a result of your desire to assist the 1st Defendant you would know that it was the 1st Defendant which made an offer to purchase the property not you?

A. That is correct.

Q. And so you never offered to purchase the property from SSB Bank?

A. That is correct."

It is clear from the above excerpts that the Plaintiff did not apply or offer to purchase the property from the 3rd Defendant. His concern was to help the 1st and 2nd Defendants to acquire the property rather than a particular person who was also interested in same. He had no dealings with the 3rd Defendant in respect of the sale of the property except when he directly paid the balance of GH¢13,000 to the Bank.

There is however evidence that the 1st Defendant did apply to the 3rd Defendant to purchase the house (Exhibit G) and the initial payment of GH¢20,000 was paid by Pergah Transport Ltd by a payment Order. It is also in evidence that this GH¢20,000 was a loan raised by the Plaintiff from Unique Trust Financial Services Ltd. as a financial assistance to the 1st Defendant and its Managing Director the 2nd Defendant, to enable them to buy the house. The loan agreement (Exhibit 10) was secured with the house the subject matter in dispute, which is a normal security condition of a loan transaction. In all these steps in the acquisition of the property, there was no reference whatsoever of the Plaintiff's interest in the said property. The Sale Agreement which was the evidence in writing made no reference to the Plaintiff's interest in the property. It is trite law that when a transaction has been reduced into writing by agreement of the parties, extrinsic evidence was in general not admissible to vary the terms.

Another observation we wish to make is that though the Plaintiff claimed the purchase was made in the name of the 1st Defendant to boost its assets neither the property nor the loan appeared in the 1st Defendant's Financial Statements.

It was also clear from the evidence that the Plaintiff expected the Defendants to pay the balance of GH¢13,000 to SSB Bank and also refund the GH¢20,000 as well with interest. This can be deduced from the following excerpts from evidence from both sides.

Cross-examination of Plaintiff at page 82 of record of appeal:

"*Q. You told this Court that you went to pay the 130 million Cedis when you realized the 1st Defendant has not paid the money to SG-SSB is that correct?*

A. That is correct.

Q. If you were buying the house and the ownership was to be in you why were you expecting the 1st Defendant to pay the balance that you claim to have paid?

A. Because I discussed this matter with Mr. Thompson and the 2nd Defendant that I was not interested in the house and the interest rates that I was paying were too high and that if she wanted the house, she could take it, she could pay and take the house."

Cross-examination of 2nd Defendant at page 169 of record of appeal:

"*Q. You will agree with me that Pergah Transport by taking the 200 million Cedis from Mr. Don Ackah is Mr. Don Ackah's creditors?(sic)*

A. 200 million Cedis was given as assistance, the intention of Pergah Transport was to pay back, so yes, Pergah Transport owes Mr. Don Ackah200 million Cedis."

From the foregoing we come to the same conclusion as the Court of Appeal that the judgment of the trial judge was against the weight of the evidence. The circumstances of the present case are such that the learned Justices of Appeal were justified in setting aside the findings of facts of the trial Court.

The Appeal is dismissed on grounds A, B and E

Ground C

There is no basis in this ground as the Plaintiff concedes that there was no privity of contract between him and the 3rd Defendant. It is accordingly dismissed.

Ground D

Plaintiff submits that the Court of Appeal failed to consider the principle of resulting trust laid down in the case of **In Re Koranteng (Decd); Addo vrs. Koranteng [2005-2006] SCGLR 1039.**

We are completely taken aback by this ground of appeal, as in the statement of case filed by Counsel on behalf of the Plaintiff at the Court of Appeal, (at page 454) Counsel argued that since the 1st and 2nd Defendants relied solely on the omnibus ground of appeal that the judgment was against the weight of evidence they should not be allowed to argue points of law including resulting trust. Their Lordships therefore rightly ignored all submissions raised by Counsel for the Defendants on legal points. So we do not find any basis in this ground of appeal and it is accordingly struck out.

From the foregoing the entire appeal fails and is hereby dismissed. We affirm the judgment of the Court of Appeal.

The Court of Appeal in allowing the appeal made some consequential orders which we have to address.

Although the Plaintiff in his writ did not ask for an alternative relief, the Lordships were of the view that the 1st and 2nd Defendants ought to refund to the Plaintiff the loan of GH¢20,000 he got for them to make the down payment for the house. This is legitimate as it is the court's duty to do substantial justice and from the circumstances of this case failure to make such an order would have occasioned a grave miscarriage of justice.

They further ordered the payment of interest calculated at the prevailing bank rate at simple interest from 24 November 1999 to date of judgment. This loan was sourced from the Unique Trusts Financial Services Ltd at an interest rate other than simple interest.

We note that Rule 1 of the **Court (Award of Interest and Post Judgment Interest) Rules 2005 (C.I. 52)** provides that:

Rule 1- Order for payment of Interest

"If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in an action, that interest shall be calculated

a) at the bank rate prevailing at the time the order is made, and
b) at simple interest

but where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner the court shall award that rate of interest calculated in that manner."(The emphasis mine).

Even though the 1st and 2nd Defendants did not sign the loan agreement, the loan was obtained by the Plaintiff for the benefit of the 1st and 2nd Defendants. In the circumstances we find that the 1st and 2nd Defendants have been unjustly enriched if they do not indemnify the Plaintiff with the same conditions that he borrowed and paid off the GH¢20,000 as per the loan agreement with Unique Trust Financial Services Ltd. It is therefore just and equitable and in compliance with Rule 1 of C.I. 52 that we set aside the interest rate set by the Court of Appeal and award the appropriate rate. Since Equity follows the law, it is fair that the Plaintiff holds a lien on the property in dispute until the final payment of what is due him by the 1st and 2nd Defendant.

The Plaintiff further paid the outstanding balance of GH¢13,000 to the 3rd Defendant on behalf of the 1st Defendant, and there is no evidence that it has been refunded to him. This amount has to be refunded by the 3rd Defendant with interest.

We will therefore vary the consequential orders made by the Court of Appeal on the said financial assistance and order as follows:

1. The 1st and 2nd Defendants shall refund to the Plaintiff the sum of GH¢20,000 together with the same conditions and interest rate as per the loan agreement with Unique Trust Financial Services Ltd. from 24 November 1999 to the date that the Plaintiff finally paid off the whole loan or debt to Unique Trust Financial Services Ltd.

2. The 1st and 2nd Defendants shall pay interest on the exact sum or monies the Plaintiff paid to Unique Trust Financial Services Ltd. calculated at the prevailing bank rate at simple interest from the date of the issue of the writ to date of this judgment.
3. The Plaintiff shall hold a lien on the said house No. Plot 642 East Legon, Accra until the final payment of the monies due to him by the 1st and 2nd Defendants.
4. The 3rd Defendant shall refund to Plaintiff (if it has not done so already) the sum of GH¢13,000 together with interest from the date of the issue of the writ to date of final payment, calculated at the bank rate prevailing at the time of this order and at simple interest.

Subject to the above variations, the appeal is dismissed and the judgment of the Court of Appeal is affirmed.

We will make no order as to cost.

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

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) S.A.B AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

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