IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2013

CORAM: DR. DATE BAHJSC (PRESIDING)
ANIN-YEBOAH JSC

P. BAFFOE-BONNIE JSC

A. A. BENIN JSC

J. B. AKAMBA JSC

CIVIL APPEAL.
No J4/8/2012

26TH JULY, 2013

LIZORI LIMITED ... PLAINTIFF/RESPONDENT /APPELLANT

VRS

1. MRS. EVELYN BOYE ... DEFENDANTS/RESPONDENTS
2. SCHOOL OF DOMESTIC SCIENCE & CATERING /RESPONDENTS

JUDGMENT

BENIN, JSC:-

The Defendants/Appellants/Respondents, hereinafter called the Defendants and the Plaintiff/Respondent/Appellant, hereinafter called the Plaintiff entered into a contract whereby the Plaintiff was to construct a two storey building plus an extra floor at Kotobaabi for use by the Defendants as a domestic science and catering school block. The Plaintiff's case was that the total cost of the project was estimated at over one billion old cedis. The plaintiff was to pre-finance the project and submit bills to the Defendants for payments as and when necessary. Plaintiff further averred that they completed two floors and started work on the extra floor. At this stage the Defendants unilaterally abrogated the agreement and re-awarded the job to another person. The Plaintiff pleaded further that it submitted bills for work so far done but the Defendants failed or refused to pay despite repeated demands. That was why it commenced this action at the High Court, Accra, claiming the reliefs endorsed on the writ, as amended, namely:

1. An amount of ¢298,268,634.00 being value of work done for Defendant by Plaintiff.

b) Alternatively, any amount found due to Plaintiff after assessment by court.

2. Interest on (a)

3. General damages for breach of contract.

The Defendants averred that the agreement was between the Plaintiff and the second defendant and was made around August 2002. That the second defendant supplied quantities of materials notably iron rods and blocks to the Plaintiff for the construction. However, the Plaintiff did a shoddy job. According to the Defendants it was the Plaintiff who abandoned the work after December 2003. They went on to describe what works the Plaintiff did at the site which was not substantial compared to what it was contracted to do. The defendants averred that the second defendant paid the Plaintiff for work done. They therefore rejected the Plaintiff's claims.

The trial court heard oral testimony; but, before then, it appointed the Architectural and Engineering Services Limited (AESL) as experts to ascertain the amount of work done on the entire building and to value same and ascertain any outstanding payments. Both parties were ordered to co-operate with the experts. The experts' report was put in evidence as Exhibit CE1, with four Appendices. At the end, the trial High court entered judgment for the Plaintiff and made certain awards including special and general damages and interest in its favour. The trial court rejected some receipts that were introduced by the defendants for reasons that they were not stamped and also on ground that it could attach no weight to them for reasons explained by the court. This was the trial court's conclusion: *".....the plaintiff is entitled to the sum of ¢300,691,431.03 as damages. I shall.....enter judgment for the plaintiff for the sum of ¢288,639,911.00 as the outstanding payment for work done on defendants' building which is due and owing. I shall also grant the plaintiff ¢300,691,431.00 for breach of contract and cost.....Interest on the said sum from the date of the breach occurred being March 2004 up to date of payment."*

The Defendants appealed to the Court of Appeal against the High Court's judgment. In a judgment delivered on 27th January 2011, the Court of Appeal overturned part of the High Court's judgment, by admitting some receipts and some deductions which the Court of Appeal said the High Court had wrongfully discountenanced. In particular the Court of Appeal added the total value of Exhibits 2-2N which it said totalled ¢391,935,000.00 and also two payments totalling ¢94, 935,000.00. The Court also varied the award of general damages and reduced same to GH¢10,000.00 on ground that the trial court's award was excessive and made without justification. Dissatisfied with the Court of Appeal's judgment, the Plaintiff has appealed to this court on these grounds:

i. The judgment was against the weight of evidence.
ii. The judgment of the learned justices of the Court of Appeal violates the clear and unambiguous provisions of the Stamp Act, 2005 (Act 689).
iii. The judgment of the learned justices of the Court of Appeal violates the clear and unambiguous provisions of the Court's Act 1993 (Act 459) on rulings regarding stamping.

iv. The learned Justices of the Court of Appeal erred in disturbing findings of fact made by the learned trial Judge on the weight to be placed on documents admitted during the trial.

v. The learned Justices of the Court of Appeal erred in placing reliance on unstamped documents (which required stamping) and ordering same to be stamped, when respondent had been given the opportunity by the trial Court to stamp same before judgment and the Respondent had refused to do so.

vi. The Court of Appeal erred in making further deduction of a total of ¢94,935,000 from the unpaid contract sum when in fact and indeed these payments had already been deducted by the court appointed expert.

vii. The Court of Appeal erred in reducing the quantum of general damages awarded by the trial court.

We propose to discuss the grounds of appeal in the same manner that Counsel for the Plaintiff argued them. Grounds i and vi were argued together. This is the relevant part of the Court of Appeal's decision: *"The work done by AESL was not final as being alleged by the Defendants because it was the duty of the learned Judge to examine expert evidence and give his opinion. The court may even decide to reject or ignore expert evidence based on justifiable grounds. See Conney vrs. Bentum Williams (1984-86) 2 GLR 301. Expert evidence is a guide for the court and does not bind the court in any way. The exhibits considered by AESL excluded exhibits 2M and 2N with the face value of ¢50,000,000.00 (GH¢5,000.00) and ¢44,935,000.00 (GH¢4,493.50) respectively, totalling ¢94,935,000.00 (GH¢9,493.50). All the other exhibits were captured by the AESL report."* The Court of Appeal proceeded to deduct this figure from the amount found due to the Plaintiff. Counsel's argument was that this was in error as the AESL Report captured both sums and took them into account.

We think this was a factual error committed by the Court of Appeal since the record is clear that these amounts had been taken into account by the Exhibit CE1, Appendix 3 at page 282 of the record. We are pleased that Counsel for the Respondents graciously conceded this point which in his words is *"incontrovertible or otherwise unarguable."* These grounds of

appeal therefore succeed and the Court of Appeal's decision is set aside accordingly.

Next, Counsel argued Grounds ii, iii, iv and v together since, according to him, "they all attack the court's decision on the admissibility and weight to be placed on unstamped documents." During the trial, the parties were ordered to place before the court-appointed experts all documents concerning their respective claims, including payments made by the Defendants. The Plaintiff complied with the order; the Defendants did not, choosing instead to present them to the court. At the hearing the Defendants introduced some receipts claiming they evidenced payments for building materials supplied to the Plaintiff other than what the Plaintiff had presented to the experts. An objection was raised on ground of non stamping. The court accepted them with a caveat that they should be stamped and the appropriate penalty paid before being marked as exhibits. That was on 11th July 2007 over ten months before the trial court gave its final judgment on 21st May 2008. As at the date of the judgment the Defendants had not complied with the court's directive to them to pay the stamp duty and penalty for late stamping as a pre-condition to admissibility. The trial court rejected them, not only on account of the Defendants' refusal and/or failure to comply with its directive on stamping, but also on account of the fact that it considered that it was an afterthought to produce the receipts at the point they sought to bring them in when they had spurned an earlier opportunity given them to give same to the experts if they were really available. The court decided not to place any weight on them.

The Court of Appeal rejected the trial court's decision on this issue and reversed it, saying stamping was a matter of revenue so it was a miscarriage of justice that the High Court did not have regard to the receipts, which the Court held could be stamped even after judgment. The Court relied on this court's judgment in **ANTIE and ADJUWUAH vs. OGBO (2005-2006) SCGLR 494.** It is against this position taken by the Court of Appeal that the grounds ii, iii, iv and v of appeal referred to above were formulated. Counsel made reference to section 32 of the Stamp Act, 2005 (Act 689) and submitted that an unstamped document could not even be admitted in

evidence. Moreover the case of ANTIE etc vs. OGBO is inapplicable because in that case stamp duty had been paid, unlike the situation in the present case. Besides, the trial court gave reasons other than failure to pay stamp duty in not considering those documents.

In their response, the Defendants tried to justify the Court of Appeal's position. In respect of the trial court's rejection of the documents as an afterthought and its refusal to give any weight to them, Counsel for the Defendants said that it was *"unfortunate, prejudicial and entirely unmerited-it simply makes it abundantly clear that the trial judge did not read and appreciate the unstamped receipts tendered and admitted subject to stamping on 11/7/2007 for had he done so he would have observed that in fact the Defendants' said receipts exactly mirrored and confirmed the payments acknowledged by the Plaintiff as per the said list contained in Appendix 3 of Exhibit CE1"*

Before we proceed further, let us set the record straight on this issue. We will refer to the concluding part of the Court of Appeal judgment at page 426 of the record. It reads: *"I will therefore consider the receipts which the trial court failed to consider on the grounds of non payment of stamp duty and order the Defendants to pay the requisite duty on the exhibits 2-2N within thirty days after the delivery of this judgment. The appeal in respect of ground 2.....succeeds. The total value of the receipts amounted to ¢391, 935,000.00 and same will be added to the payment made by the Defendants to the Plaintiff."*

To begin with, the total value of the receipts amounts to ¢401, 935,000.00 and not the figure quoted by the Court of Appeal. That is not even significant. Next, the Court of Appeal clearly confused the matter when it ordered the Defendants to go and pay duty on exhibits 2-2N as though they were the receipts that the trial court did not take into account. The confusion was compounded by Counsel for the Defendants in his submission before this court quoted above. Counsel's confusion becomes even more apparent when his conclusion on this point is considered. He stated thus: *"It is our position in this regard that the trial court's decision not to consider the unstamped receipts in the event made no difference to its Judgment of the case as the same unstamped receipts were captured in*

the Court appointed valuers' report Exhibit CE1 at Appendix 3 thereof and were duly credited to the Defendants as sums of money paid to the Plaintiff for their work on the project and in reduction of the amount assessed as due and owing to the Plaintiff from the Defendants for work done but not paid for. This Honourable Court is nonetheless entitled to consider and rule on these issues as they have been formally raised by the Plaintiff in this appeal." No doubt, Counsel for the Defendants did not appreciate the points in issue. He fell into the same error as the Court of Appeal and appeared not know what to make of it.

The true position is that Exhibits 2-2N were admitted at the trial without any objection when the Defendants introduced them as evidence of payments made to the Plaintiff. That explains why they were marked as exhibits in the case. As Counsel for the Defendants rightly said, all the payments stated on exhibits 2-2N were duly captured in Appendix 3 of Exhibit CE1. Hence there was no issue in respect of exhibits 2-2N, so the trial court did not consider them at all, and that was right. So for the Court of Appeal to have added the value of these exhibits to payments made to the Plaintiff was unjustified and was unduly enriching the Defendants; indeed it amounted to double accounting for one payment. Counsel for the Defendants should have conceded this point too, but for whatever reason he also fell into the same error as the Court of Appeal. Thus both the Court of Appeal and Counsel for the Defendants missed the issue they raised, no wonder Counsel left this Court to resolve what appears to be a mystery surrounding the unstamped receipts. That invitation is gladly accepted in order that substantial justice may be done finally in this matter. But in the meantime the Court of Appeal's decision crediting the Defendants with ¢391,395.000.00 cannot be supported and same is set aside.

At the hearing of the case the Defendants stated that apart from payments made to the Plaintiff, they also purchased and supplied them with some building materials for the project. They sought to tender some receipts for these materials and it was against the tendering of these receipts that objection was raised. The court then ruled that they should be accepted subject to the payment of the stamp duty and penalty for late stamping before they would be formally marked as exhibits. We will quote the

relevant evidence of the first defendant who testified on behalf of both defendants. She said: "*As stated later, My Lord, I supplied Wawa Boards, iron rods of various sizes, blocks, doors, hinges of various sizes. The wawa boards were bought on 3 occasions, the 1st one cost 5 million cedis, the 2nd one was ¢1,750,000 million cedis and the 3rd was 3,600,000 million cedis. I have receipt for most of them but not all. I bought iron rods worth ¢20,470,000.00, the second one was ¢7,040,000.00. The third iron rods cost ¢22,600,000.00 and fourth batch was ¢ 5,796,000. The cost of the locks and keys was ¢3,274,000; the second consignment was ¢1,242,000. As regards hinges and screws the first batch was ¢870,000 and the second batch was ¢330,000. Also I bought 6 inches blocks 1,500 at ¢5,000 at ¢7,500,000. The iron rods I bought before the construction work started was ¢44,935,000. I bought doors made of red wood costing ¢18,200,000. The last but not the least is cutting and polishing terrazzo at ¢4,000,000.00. I have receipts covering some of these purchases which I intend to tender into evidence.*"

The sum of ¢44,935,000 was already noted in Appendix 3 of Exhibit CE1. It was also acknowledged by both parties in Exhibit A at page 234 when they signed what they termed new contract sum. That figure was also put in evidence by the defendants without objection and was marked as exhibit 2N. So it cannot be taken into account again. Leaving that figure aside, the total amount spent on materials by the defendants which have been quoted above will be ¢101,672,000.00. The cost of iron rods put at ¢20,470,000 was captured in Appendix 3 of exhibit CE1; so too was the cost of the 1,500 blocks as well as the wooden boards, totalling ¢12, 800,000.00. So out of the ¢101,672,000.00 the sum of ¢33,270,000.00 should be deducted. That leaves a difference of ¢68,402,000.00, which is the correct amount the trial court did not take into account. This is nowhere near the ¢391 million cedis plus that the Court of Appeal found for the Defendants. Indeed the trial court gave the total figure as ¢106,017,000.00 in its judgment, which is equally not accurate.

Whatever the final difference is, the question is whether the trial court was justified in not placing reliance on the evidence on the supply of materials, including the receipts. At the Court of Appeal the complaint focused on the trial court's refusal to consider them on account of their not being stamped.

In this Court the Plaintiff has gone further to argue that there were other factors that led to the trial court not to take them into account.

Let us begin with the last part of the submission by Counsel for the Defendants. He admits the trial court directed the Defendants to go and stamp the documents before they would be formally admitted. They failed or refused to do so. When a party has blatantly refused to comply with a legitimate directive, order or instruction of a court to pay stamp duty, that court, in our view, would be justified to reject the party's request to admit those documents in evidence. Indeed this has statutory backing in section 32 of the Stamp Act, 2005 (Act 689). It provides:

1) *Where an instrument chargeable with a duty is produced as evidence*
   (a) in a court in a civil matter; or
   (b) before an arbitration or referee,
   the judge, arbitrator or referee, shall take notice of an omission or insufficiency of the stamp on the instrument.
2) *If the instrument is one which may legally be stamped after its execution, it may, on payment of the unpaid duty to the registrar of the Court or to the arbitrator or referee, and the penalty payable on stamping that instrument, be received in evidence subject to just exceptions on other grounds.*
3) *An instrument which is sufficiently stamped under this Act shall be receivable in evidence although that instrument may not have been stamped or is insufficiently stamped according to the law in force in the place where that instrument was executed.....*
6) *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 or be available for any purpose unless it is stamped in accordance with the law in force at the time when it was first executed. *(emphasis supplied)*

This provision is so clear and unambiguous and requires no interpretation. 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 the party to pay the duty and penalty after judgment. Thus the trial court would have been perfectly justified to reject the receipts without stamping. The case of ANTIE etc v. OGBO supra, is inapplicable here for in that case the duty was paid at the time of the hearing. Whatever this court said in that case will not apply here in view of the new, clear and unambiguous provisions introduced by section 32 of Act 689.

Be that as it may the trial court could have followed the strict dictates of the law but it did not but rather it allowed the Defendants the chance to stamp the documents and have them admitted and yet they did not comply. That was sufficient reason to reject them in his judgment. The Court of Appeal, to our mind, should have castigated the Defendants for not complying with the High Court's directive to them to pay the duty which they refused to pay. Rather the High Court came at the receiving end of the blame. It is unfortunate, for the Court of Appeal decision sends wrong signals that parties could decide not to accept a court's order or directive and expect to receive another court's blessing. Judicial comity dictates that the courts operate as one entity to fight against disrespect and disregard to every court's decisions, however low or high the court is placed on the judicial hierarchy.

The rather wrong posture adopted by the Court of Appeal made them to even gloss over the fact that the trial court went to some length in rejecting the documents and the evidence on the supply of materials for reasons other than failure or refusal to stamp the documents. Those findings of fact are unchallenged and still stand. At any rate what weight to attach to a piece of evidence is for the trial court to decide, unless there was no acceptable and/or legitimate evidence to be found on the record. Here there was evidence from which the trial court could decide to reject the introduction of evidence on supply of materials as an afterthought. This court will not interfere with that even if given the same facts it would have reached a different conclusion.

The Court of Appeal clearly misdirected itself on the law on stamping. The position of the law as stated in section 109 of the Courts Act, 1993, (Act

459) is that a court's decision shall not be reversed only on account of the fact that it gave a wrong decision as to stamp duty. In other words even if the trial court was wrong in rejecting the receipts on account of non stamping, the Court of Appeal should not have rested its decision on that alone; it should have proceeded to consider other evidence on record on what weight to attach to those documents. If that were not done, it would mean that once a document is received in evidence the court is bound by it and give judgment accordingly. No, it does not work that way. A document, like any other kind of evidence that is introduced in a case, is subject to the process of evaluation of evidence before arriving at a decision. Thus where the trial court errs in rejecting a document on account of non stamping, the appellate should treat it as wrongfully excluded evidence and admit it. But then since the appeal is by way of re-hearing it must then place itself in the position of the trial court and evaluate the wrongfully rejected evidence in the light of the totality of the evidence and arrive at a decision. The Court of Appeal failed to do that when it decided to include the receipts; it just adopted them as though they provided conclusive proof. The Court of Appeal failed to take into account the fact that the trial court actually considered the evidence proffered by the defendants on materials supplied including the receipts and rejected same as an afterthought and thus failed to attach any weight to the unstamped documents and evidence; hence the error it committed in its decision. These grounds of appeal therefore succeed.

The final ground of appeal is numbered vii. The Court of Appeal reduced the trial court's award of damages from ¢300,691,431.00 to GH¢10,000.00 that is ¢100,000,000.00, old currency. The Plaintiff contends that the Court of Appeal erred in reducing the award. Both the trial High Court and the Court of Appeal gave reasons for their own award, which we will examine in a moment. But before then a brief remark on the High Court's award, which we repeat here: *"I shall also grant the plaintiff ¢300,961,431.00 for breach of contract and cost."* Costs in the action are not damages and should thus not be awarded together with general damages. Costs and general damages are distinct items of claim with different considerations applicable to each of them, and must necessarily be kept separate. As it were, it is difficult to find out how much of the trial court's award represents general damages,

and how much represents the costs. And if the trial court was treating the cost as damages it ought to have said so with reasons. But it is clear that it was not treating costs as damages, it just put the two together which is not the right thing to do. The Court of Appeal ignored the award based on the two items that is general damages and costs and treated it as general damages only. In a situation where an appellate cannot attribute an award to a specific head of claim, it will be at liberty to set aside the award and make an award of its own having regard to the evidence on record and the applicable law/s. The Court of Appeal's decision will thus be regarded as an award based on general damages, without the element of costs.

The Court of Appeal held that since the Plaintiff had recovered the full value for work done with interest, it had received full compensation; therefore, any award for general damages must be nominal. The Plaintiff prays this Court to restore the award made by the High Court. In awarding the amount that it did the High Court took the difference between the total contract sum on one side and what had been paid and the outstanding payment on the other side and awarded it as general damages and costs. The High Court's award is based on the fallacious assumption that but for the breach of the agreement by the Defendants, the Plaintiff would have been entitled to receive all that sum of money remaining on the contract as profits. This method employed by the trial court failed to take into account the fact that the total contract sum included the cost of building materials on which the Plaintiff had not yet spent any money to acquire. See Exhibit A as well as Exhibits 2-2N. It would thus be clearly unjust and too harsh on the Defendants to allow the Plaintiff to recover the total sum including cost of materials. At best they could recover the profits from labour, supervision and allied matters if they had executed the project in full; but there must be evidence on the record to guide the court. It behoved the Plaintiff to tell the court how much of the outstanding contract sum would have gone into the purchase of materials, how much represented labour costs, how much represented their profits, whether they were entitled to commission for materials purchased and if so how much. But there was no such evidence; indeed the Plaintiff did not even allude to it in evidence. In the absence of any such evidence, having awarded them full compensation for outstanding payments plus interest from the date of breach to date of final payment,

the award of general damages should be nominal, as the Court of Appeal rightly held. Indeed as S. M. Waddams expressed it in his work titled The Law of Damages, 3rd edition, 1997, at pages 477-478, "nominal damages are awarded if the plaintiff establishes a breach of contract.....but fails to establish a loss caused by the wrong....."

The next question to determine is the amount of nominal damages to be awarded by the court. Counsel for the Defendants submitted that GH¢10,000.00 representing the award of about ten per cent of the total contract sum is too huge to be described as nominal. We think the scope of nominal damages cannot be defined with any degree of certainty; thus the court will not be restricted as to how much to award as nominal damage, but as the name implies it must not be a huge or substantial award since its main purpose is to vindicate the right of the successful party in the action. At various times in England the award has ranged between £1 and £5. This is how it is stated in McGGREGOR on Damages 18th edition, paragraph 10-006: 'Nevertheless a token sum is awarded, which, after an early period in which the amount could be miniscule, eventually crystallised at the figure of £2, a figure that lasted for a hundred years. For some time at the end of the last century £5 had become common if not the norm, but the new century has seen a reversion to £2 which amount has even been said to be "the traditional sum", while the House of Lords in Grobbelaar v. News Group Newspapers Ltd. (2002) 1 W.L.R. 3024, unaccustomed to having to set a figure for a nominal damages award, has reverted to £1'. But in the case of **Douglas v. Hello! Ltd (2003) 3 All E.R. 996; (2004) E.M.L.R. 2** each of the two claimants was awarded a token sum of £50, for breach of the Data Protection Act of 1998. The foregoing is merely indicative of the scope of award based on nominal damage. In the words of Charles T McCormick, in his Handbook on the Law of Damages, chapter 20 at page 85, it is "merely

symbolic". The editors of Black's Law Dictionary, Deluxe 9th edition, at page 447 variously describe nominal damage as 'a trifling sum' 'small amount'.

Can the award of GH¢10,000 by the Court of Appeal be described as nominal? The award by the Court of Appeal is not the subject of a cross appeal. However, having upheld the principle upon which the Court of Appeal made that award this court will have to examine the award in the light of the principle. Moreover, there is this ground of appeal which urges the court to restore the High Court's award; this enables this court to re-examine the award. When an award is based on a particular principle of law, it is the court's duty to ensure that the final award is justified in terms of the particular principle of law. The award of GH¢10,000.00 represents over 30% of the balance of the contract sum which had not been executed, and represents about 10% of the total contract sum. This cannot be described as nominal; it is a substantial amount of damages and it defeats the purpose of such an award. This court will accordingly vary the award.

In conclusion the appeal on grounds i, ii, iii iv, v, and vi is allowed. The appeal in respect of ground vii is disallowed. Judgment is entered for the Plaintiff against the Defendants to recover all the sums adjudged by the High Court, save the award for general damages which is varied to read GH¢1,000.00. All sums of money found due to the Plaintiff will attract interest, at the prevailing bank rate, which is the date of the High Court judgment, on simple interest basis, from the date of the breach of the contract, being March 2004 as found by the trial court, to date of final payment.

A.

(SGD) **A. A. BENIN**
JUSTICE OF THE SUPREME COURT

(SGD) **DR. S. K. DATE BAH**
JUSTICE OF THE SUPREME COURT

(SGD) **ANIN YEBOAH**
JUSTICE OF THE SUPREME COURT

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

(SGD) **J. B. AKAMBA**
JUSTICE OF THE SUPREME COURT

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