IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – GHANA

CORAM: WOOD (MRS.) CJ, PRESIDING
ANSAH, J.S.C
DOTSE, J.S.C
BENIN, J.S.C
AKAMBA, J.S.C

CIVIL APPEAL
NO. J4/41/2014

29TH JULY 2014

MOHAMMED WOLLEY ….. PLAINTIFF/RESP/RESPONDENT

VRS

SALAMI FATAL ….. DEFENDANT/APPLT/APPELLANT

REASONS FOR JUDGMENT

WOOD (MRS.) CJ:-

On the 29th July, 2014, we decided this appeal in favour of the Respondent. These are the reasons for our decision in respect of the appeal against the judgment of the Court of Appeal dated 22nd May, 2008. By it, the lower appellate court affirmed in every material particular, the detailed and well-reasoned decision of the trial court. A

careful reading of the judgment reveals that all the findings of fact received the appellate court's full endorsement.

The legal position on the circumstances under which a second appellate court may interfere with the concurrent findings of fact of two lower courts, places a herculean task on the appellant, as the grounds which may justify an interference with such findings are rather limited. The following cases represent only a few of the long line of cases on thiswell-established legal principle which admits of no controversy. These are Achoro v Akanfela [1996-97] SCGLR 209; Koglex Ltd (No. 2) v Field[2000]SCGLR 175; Ntiri v Essien [2001-2002]SCGLR 459; Sarkodie v F K A Co Ltd [2009] SCGLR 79; Jass Co Ltd v Appau [20009] SCGLR 266 and Awuku-Sao v Ghana Supply Co Ltd [2009] SCGLR 713.

That legal proposition is expressed thus:

"(2) [I] In an appeal against findings of facts to a second appellate court like… [the Supreme Court], where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject-matter of which was peculiarly within the bosom of the two lower courts or tribunals, this court would not interfere with the concurrent findings of the two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower tribunals had dealt with the facts. It must be established, e.g. that the lower courts had clearly erred in the face of a crucial documentary evidence, or that a principle of evidence had not been properly applied; or, that the finding was so based on erroneous proposition of the law that if that proposition be corrected, the finding would disappear… It must

be demonstrated that the judgments of the courts below were clearly wrong. *Thakur HariharBuksh v Thakur UmonParshad*(1886)LR 141A7; *Allen v Quebec Warehouse Co* (1886)12 App Cas 101and *Robins vNational Trust Co* [1927] *AC* 515 cited".

This appeal is based on as many as six separate grounds. It includes the oft used omnibus ground, which though in broad and general terms, is nevertheless permitted under the Supreme Court Rules C.I.16. The grounds are that the:

"**ORIGINAL GROUNDS**

1. Court misdirected itself when it agreed that the burden of proof shifted unto the Appellant when it was the Respondent who had to prove that Defendant owed him GH¢45,000.00.

2. …judgment is against the Weight of Evidence.

3. …Court erred or misdirected itself when it in effect ruled that because the Appellant did not object to Exhibits A, B, C, D, E, F, G, H at the trial court he was bound by the contents of the Exhibits."

"**ADDITIONAL GROUNDS**

a. …Learned Judges failed to address on the issue of capacity and made no decision on that ground.
b. …Learned Judges failed to address again on the Ground of Appeal that the trial judge erred when she distilled Plaintiff's case for him instead of giving her judgment based on the evidence.
c. …Appellant was not the proper person to be sued in this matter hence there was no defendant in the Suit."

The facts on which this appeal is premised are straightforward. As aptly put by the court below, this is a simple case of a creditor and debtor. The Plaintiff/Respondent/Respondent(Respondent) sued the Defendant/Appellant/Appellant (Appellant) in the Commercial Court, Accra, in his personal capacity for the sum of ¢450,000,000 and interest on the amount at the prevailing bank rate till date of final payment." The accompanying statement of claim, which statedin crystal clear terms that he was suing in his personal capacity and against the defendant personally,disclosed that the debt arose out of monies paid to the Appellant for the supply of scrap and lead ingots, but which were never supplied.

Appellant per his statement of claim denied owing the said amount. He however admitted doing business with the Respondent. His case, as explained in the paragraph 5 of his statement of defence is that:

"The Defendants, in answer to paragraph 7 of the statement of claim will contend that sometimes they supply the Plaintiff with lead and scrap material before payment; other times the Plaintiff will pay in advance or up-front for the material to be processed and supplied to the Plaintiff."

The actionwhich was instituted on the 10th of October 2006 was initially against two Defendants, with the claim against the 2nd Defendant being subsequentlydiscontinued, leaving the Appellant herein as Defendant. Having regard to the state of the pleadings, it is no surprise that at the pretrial conference,the following were the issues which were set down for trial at the pre-trial conference.

1. "Whether or not Defendant is indebted to Plaintiff in the sum of ¢450,000,000.00 as claimed.

2. If so, when the said sum became due and owing to Plaintiff

3. Whether or not Plaintiff has been pre-financing supplies of lead and battery dust from Defendant.

4. Whether or not Exhibit "1" attached to the Statement of Claim was made by the Defendant

5. Whether or not Defendant approached plaintiff for time to settle his indebtedness.

6. Whether or not Defendant voluntarily admitted his indebtedness to the Plaintiff at the police station."

The appeal grounds relating to capacity is so fundamental that we proceed to address that and the additional ground (c) first.The only argument upon which the Appellant based the challenge to capacity and consequently that he was not the proper person to be sued is that:

"All the invoices, payment receipts (**SEE PAGES 196-248**) bore the Koala Shopping Centre logo or stamp indicating that it was Koala Shopping Centre that was dealing with the Defendant. Paragraph 1-4 of the Statement of Claim leaves no doubt that the business was between the two companies and not the Managing Directors of the respective companies who in the circumstances had no capacity to sue as Plaintiff which the Defendant was wrongly added to the Suit. Since the Court of Appeal did not pronounce of (sic) this Ground or give any reasons for not doing so, it is our submission that this failure may be due to inadvertence and therefore calling on this Court to pronounce on it.

Secondly, the plaintiffs Manager at page 80 of the record admitted that he acted on behalf of the company. Again, reference is made to the cashier and managers of both companies. The issue of capacity can be

raised as an issue of law and it is no answer to say that since it was not raised in the Court below it was too late to be raised. **SEE MORO V HUSEINE (2013) 59 GMJ 1 (SC).”**

We concede that the legal question of capacity, like other legal questions, such as jurisdiction, may be raised even on appeal. But it is trite learning that the principle is clearly circumscribed by law. The right to raise legal issues even at such a late stage is legally permissible only if the facts, if any, upon which the legal question is premised, are either undisputed, or if disputed, the requisite evidence had been led in proof or disproof of those relevant facts, leading to their resolution by the trier of facts;failing which the facts could, and based purely on the evidence on the record and without any further evidence,decidedly be resolved by the appellate court.

In this instant case, we had little difficulty in rejecting these two grounds of appeal. The charge that the court below failed to address the issue of capacity and made no decision on it and further that he was improperly sued and therefore that “there was no defendant in the suit”, is wholly untenable. Contrary to these assertions, the learned justices of appeal unanimously ruled:

“With regard to the issue of capacity, I think this issue was settled when the appellant admitted in paragraph ‘3’ of his statement of Defence that he dealt with the respondent in the latter’s personal capacity.

“paragraph ‘4’ of the statement of claim is admitted.”

The paragraph ‘4’ of the statement of claim stated as follows:

“4. The plaintiff avers that the 1st defendant is a business partner who supplies him with scrap and lead ingot products for his business.”

From the above, we are of the opinion that whatever transaction took place resulting in this indebtedness was between two individual persons –Wolley and Fattal and not between Koala Company and Fattal."

These findings and conclusions are so clearly supported by the record that we cannot by any stretch of imagination justify their reversal. As rightly found by the court below, the Appellant did not in his pleadings challenge the capacity in which the Respondent instituted the action nor the capacity in which he, the appellant was sued. This accounts for the reason why these two critical issues were never included in the agreed issues set down for resolution.

Admittedly, it is indeed sound basic learning that courts are not tied down to only the issues identified and agreed upon by the parties at pre-trial. Thus, if in the course of the hearing, an agreed issue is clearly found to be irrelevant, moot, or even not germane to the action under trial, there is no duty cast on the court to receive evidence andadjudicate on it. The converse is equally true. If a crucial issue is left out, but emanates at trial from either the pleadings or the evidence, the court cannot refuse to address it on the grounds that it is not included in the agreed issues.

However, on the facts, the argument that the court had a duty to determine the issue of capacity iswithout merit.The issue was not raised when the Respondent, the initiator of the action was cross-examined. Indeed, the invoices and payments receipts bearing the Koala Shopping Centre logos which counsel relies on to buttress the argument in relation to capacity were introduced at a rather late stage of the proceedings-during the Appellant's testimony. They were never introduced during the cross examination of the Respondent, which would then have enabled the Respondent to respond appropriately to the challenge and offer explanations, if any, as to why the receipts bore those logos.The

case thus proceeded on the basis that that the parties were the proper persons to sue and be sued respectively. Indeed the following exchanges between the judge and counsel confirms this conclusion.

“JUDGE: Mr Turkson, is your client denying that he took the money?

Counsel for Defendant: My Lord we are denying that we received ¢450,000,000. We admit that we received certain sums of money. My Lord I have seen a record showing about ¢250,000,000or thereabout, but he has also made some supplies to them. And that is all what we saying.

JUDGE: So what you are disputing is the amount?

COUNSEL FOR DEFENDANT: The amount, that is all. The amount.”

Indeed, as is borne out by the record reproduced hereunder, the Defendant’s line of cross-examination does confirm their position that the transaction was a straightforward transaction between the two.

“Q Mr Wolley, the defendant never approached you to pre-finance the business.

A He did on so many, many occasions.

Q In fact the arrangement was that he will produce the material and you will value it by negotiation and pay for it, that is how it started not so?

A Not so my Lord.”

The record is replete with this line or pattern of cross examination in which the Defendant affirms their relationship as asserted by the Respondent, but the above will suffice. It is to be noted that the pattern of cross-examination is clearly indicative of the party’s case.

We found that the other appeal grounds, which were all argued together under the omnibus ground of the judgment being against the weight of evidence, because they are all inter related, cannot succeed.

The central question arising from all these grounds is whether the Respondent was able to prove the amount claimed, i.e. the sum of ¢450,000,000. In a judgment claim such as the one before us,the appellate court rightly concluded that the legal position is that the initial burden of proof fell on the Respondent to establish a prima facie case, after which the burden shifted on to the Appellant to lead contrary evidence. The learned justices of Appeal, commendably, set out the legal principles on the burden of proof in civil litigation, as statutorily provided undersections 10, 11 and 14 of the Evidence Decree NRCD 323.

The court rightly in our view made the following sound findings and drew conclusions therefrom, which cannot be disturbed since the findings are supported by the available record.

The first is the admission by the Appellant that he owed the Respondent the sum of ¢45,000,000. This finding, contrary to the Appellant's argument, is clearly supported by the record, the transcript of which is produced hereunder.

"…My Lord I owe him but not that much and I was in the process of supplying him when the disaster occurred.

By Court: How much do you owe him?

A The current balance we signed in the ledger books is ¢45 million"

"I have gone to great lengths to produce the above sections of the Evidence Decree to establish the fact that once the Appellant in this instance agreed that he owed the Respondent ¢45 million [forty –five

million] instead of ¢450, 000,000 [four hundred and fifty million cedis being claimed by the latter, the burden of persuasion shifted on him to provide the necessary or requisite evidence to rebut the Respondent's claim. Failure to produce the evidence, no reasonable mind could conclude that the existence of the ledger was more probable than its non-existence.

Since the Appellant raised the issue of a "ledger" in which all transactions with the Respondent were recorded and acknowledged by him, he had the burden of persuasion as to this fact which was essential to the defence he was asserting."

At the trial, and in answer to a direct question from the court, the Respondent had emphatically stated that:

"That is so my Lord, these two made up the ¢450,000,000.

In coming to the firm conclusion that the Respondent succeeded in proving that he was owed the sum claimed,the Court of Appeal made the following definitive finding:

"From the record of appeal we find the combined effect of exhibit A,A1, B D, G, and H, was to prove the Respondent's case as to the Existence of the fact that the appellant owed him ¢450, million. Strangely as stated supra the Appellant never rejected nor denied the any of these recordings in these documents."

This primary finding which is supported by the record is an affirmation of the trial court's own finding which reads:

"The defendant made no effort to challenge any part of the record presented to him in exhibits A, A1, B, D, H and G. He did not single out for denial any of the sums debited against his name as money he had collected and show that it was not collected by him by showing contrary

evidence. He let all the records be admitted by the court and stand unchallenged and corroborated the first balance shown on exhibit A by admitting signing Exhibit B.

The Appellant failed to demonstrate that his case fell within those exceptions or instances where the second appellate court may interfere with the concurrent factual findings of the courts below.The findings and conclusions thus stand and will not be overturned.

Allied to the argument that the claim was not proven, is the charge that the court erred in failing to "appoint a referee to resolve the accounts…when the action was in substance one for accounts."

This argument lacks merit. No mandatory duty is cast on a court to appoint a referee, or for that matter an expert witness, whose evidence in any event is classified at law as opinion evidence, and so clearly not sacrosanct or conclusive, if from the available evidence, the court is in a position to resolve the fact at issue.

The decision of the appellate courtwas criticized on the ground that it had endorsed the trial court'swrongful reliance on inadmissible evidence to impeach the credibility of the Appellant.Again, this is a wholly unsubstantiated charge. The trial judge plainly stated her reluctance to rely on two written statements, Exhibits E and F, allegedly made by the Appellant in admission of the claim, and produced by the two policemen, PW2 and PW3. Commendably, their Lordships of the Court of Appeal, observed that:

"There is evidence on the record that the learned trial judge disallowed the evidence and chose to ignore the statements made at the police station by the appellant.

In respect of impeaching the credibility of the Appellant, the learned trial judge in her judgment stated that she was not placing any reliance on the evidence of the two policemen, so where did she err by impeaching the credibility of the Appellant? She never considered the evidence of PW2 and PW3 and never placed any weight on them to form her decision."

We found no merit in any of the appeal grounds and hence our decision of 29th July, 2014 to dismiss the appeal in its entirety.

(SGD) G. T. WOOD (MRS.)

(CHIEF JUSTICE)

(SGD) J. ANSAH

(JUSTICE OF THE SUPREME COURT)

(SGD) V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

(SGD) A. A. BENIN

(JUSTICE OF THE SUPREME COURT)

(SGD) J. B. AKAMBA

(JUSTICE OF THE SUPREME COURT)

COUNSEL

THOMAS HUGHES ESQ. FOR THE DEFENDANT/APPELLANT/APPELLANT.

OSUMAN MOHADEEN ESQ. FOR THE PLAINTIFF/RESPONDENT /RESPONDENT.