IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: SENYO DZAMEFE JA (PRESIDING)

MERLEY WOOD JA

RICHARD ADJEI-FRIMPONG JA

SUIT NO H3/173/2019

DATE: 12TH MAY, 2022

SAMUEL ANKRA ..... 1ST DEFENDANT/APPELLANT

VRS

WILLIAM APIETU AMPOFO ..... PLAINTIFF/RESPODENT

J U D G M E N T

RICHARD ADJEI-FRIMPONG JA:

The facts of this case are not unusual. The protagonists of the dispute were two great friends who, for reasons not too relevant to explore for now, fell out in the course of time.

The respondent, at all times material to the suit, resided in the United States but owned House No. C140 /20, Abelemkpe, Accra. He had succeeded to this property as the only child and sole beneficiary of the estate of his mother, Christiana Naah-Amerley Tay.

Not living in Ghana though occasionally visiting home, the respondent appointed his friend the appellant as caretaker of the property. Among other tasks, the appellant was to receive rents from tenants occupying certain parts of the property and account for the proceeds to the respondent.

Whilst it was contended at the trial that the appellant failed to render proper account of his stewardship, little turns on the point in this appeal. Indeed, the respondent had found it necessary in the course of the trial, to discontinue the action against some of the tenants whom he had sued jointly and severally with the appellant over payment of rent.

Now, in the course of his caretakership, the appellant put up a two-storey building on a portion of the property. This building was to become the main bone of contention between the parties.

According to the respondent, the appellant erected the said building without his consent and rented same to tenants (whom he sued as 2nd and 3rd defendants) without reference to him. He claimed the appellant had enjoyed the proceeds of the rent and also failed to yield vacant possession to him. From all indications, the appellant was bent on remaining in control of the land and collecting rents from tenants occupying the storey-building to his total exclusion. He thus commenced the instant suit seeking the following reliefs at the trial court:

a. *An order for recovery of possession of the two-storey building situate on a portion of the property known as House No. C. 140/20. Abelemkpe, Accra.*
b. *Mesne profit.*
c. *Perpetual injunction restraining the defendants whether by themselves, servants, agents, privies whomsoever from remaining on or entering the property.*

Per contra, the appellant pleaded that he put up the two-storey building upon a licence granted to him by the respondent himself. According to his account, whilst taking care

of the Abelemkpe property, the respondent who decided to construct another property in Kibi engaged him to supervise the construction of that project. The respondent provided money for materials and workmanship, but he supervised the works. He was trekking from Accra to Kibi three times a week at cost to him to oversee the construction. The project got to the roofing level of the first floor when works stalled due to ceasure of remittances from the respondent. The licence therefore was in consideration of the task he performed on the Kibi project.

Yet, the appellant gives another reason which made the grant of the licence necessary. It was that whilst he was occupying one apartment in the Abelemkpe property, the respondent's wife shipped boxes of items (about 100 of them) and hospital beds all of which were kept in the apartment. This made a scanty space for him to occupy and to cater for him, the respondent permitted him to develop the two- storey property.

Roundly denying want of respondent's consent to develop the subject two-storey property, appellant pleads that in 2008 whilst the respondent and his wife were on vacation in Ghana, he accommodated them in the said property.

Again, two years later in December 2010 when the respondent visited Ghana and when he (the appellant) had rented the subject property to tenants, he accommodated the respondent in his own newly constructed house at Prampram where he had relocated to.

He pleads that for having granted him the licence and made him believe that he could have the subject property constructed on a portion of his land, the respondent was estopped from demanding his vacation of same.

By way of counterclaim, the respondent sought recovery of a total sum of US$ 103, 277. 36 made of various monies owed to him by the respondent which became due in the course of their friendship.

Except in few instances, the respondent did not deny the substance of the transactions that resulted in his indebtedness to the appellant. He however claimed to have by various means, refunded the monies to the appellant. He therefore denied owing the appellant any money.

At the trial the respondent gave evidence and tendered several documents particularly, to substantiate the repayment of the monies to the appellant. He however called no witness.

The appellant testified and called two witnesses including his wife. His belated attempt to call a third witness failed. Later in this delivery, we shall touch on the point about the failed attempt to call the third witness, as it was the subject of an interlocutory appeal which we find in the record before us.

At the conclusion of the trial, the learned trial judge decreed judgment for the respondent for the recovery of the two-storey property and dismissed the appellant's counterclaim for the monies. In short, she found unproven the licence that anchored the appellant's claim to the property and determined also that there was evidence to establish the refund of the monies to the appellant.

Unhappy with the above conclusions, the appellant appeals in this court. His dual grounds as contained in his amended notice of appeal are:

(i) *The judgment is against the weight of evidence adduced at the trial*

(ii) *The learned trial erred in law when she failed to apply the provisions of Section 3 (g) of the Conveyancing Act 1973 (NRCD 175) which exempts a licence from writing which licence was what the 1st defendant/appellant relied upon at the trial to as basis for the construction of the building on plaintiff/Respondent's land.*

We do apprehend that, the general ground of appeal contained in ground (ii) imputes the presence of mixed law and fact and invites us as an appellate court to examine the record

and where relevant, resolve issues anew. In this sense ground (i) is built in ground (ii) and could conveniently be resolved together. We approach the discourse this way because, as will be observed, whether or not the trial judge erred in the application of Section 3 of the Conveyancing Act was only an aspect of the matters that will show whether her conclusion was right or wrong. Other matters of law and fact account for the determination.

To begin with, we do know that presently, the Conveyancing Act, 1975, (NRDC 175) has been repealed by Section 282 of the Land Act, 2020, (Act 1036). However, the former was in force at the time the trial judge delivered the impugned decision. The passage below shows how the judge applied the statutory provisions as part of her reasons why the appellant's claim based on licence had to fail.

> *"The 1st defendant during cross-examination on the 15th of May 2018 admitted that he did not have any documents covering the property on the plaintiff's land he claims to own. The plaintiff who 1st defendant alleged authorized and licensed him to build also never gave the 1st defendant any documents evidencing any transfer of that portion of his land to the 1st defendant. It has also never been the case of the 1st defendant that he prevailed on the plaintiff to document his alleged 'authorization' which would have been the most prudent thing to do particularly when the plaintiff lives outside the jurisdiction."*

Pausing for a moment, we ask whether, as the trial judge portrayed in the beginning of the passage, the respondent claimed ownership of the land on which the two-storey building was constructed. If the respondent's case as was based on the licence is understood, he was claiming ownership of the building and not the land. Within the

context of the law on building licence, the distinction ought not to have been lost in the analysis. We shall revisit the point later.

Continuing, the trial judge reproduced *in extenso* the provisions in Sections 1 and 3 of NRCD 175 and opined:

> *"Clearly, the 1st defendant cannot claim ownership of the property as there was no transfer of the land to him. He also did not lead evidence to establish any of the exceptions under Section 3 of then Act 175…"*

At this stage and for ease of reference, we reproduce the provisions in Sections 1 and 3 of the Conveyancing Act (NRCD 175) as follows:

"(1) A transfer of an interest in land shall be by a writing signed by the person making the transfer or by his agent duly authorized in writing, unless relieved against the need for such a writing by the provisions of section 3.

(2) A transfer of an interest in land made in a manner other than as provided in this Part shall confer no interest on the transferee."

Section 3. Transactions Permitted Without Writing.

"(1) Sections 1 and 2 shall not apply to any transfer or contract for the transfer of an interest in land which takes effect—

(a) By operation of law;

(b) By operation of the rules of equity relating to the creation or operation of resulting, implied or constructive trusts;

(c) By order of the court

(d) By will or intestacy

(e) By prescription

(f) By a lease taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term

(g) By a licence or profit other than a concession required to be in writing by section 3 of the Concessions Ordinance (Cap. 136).

(h) By oral grant under customary law

(2) Sections 1 and 2 shall be subject to the rules of equity

including the rules relating to unconscionability, fraud,

duress and part-performance."

The learned trial judge made reference to the above provisions and yet thought that the licence the appellant was talking about could not come under any of the exceptions set out under Section 3. This position we find strange to relate. For, if anything must be clear from above provisions, it is that, licence is excused from writing under the sub-section (g) above.

Learned Counsel for the appellant on this point submits:

> *"My submission is that the 1st defendant/Appellant spoke about plaintiff granting him licence to build on his land. He did not say plaintiff transferred part of his land to him by deed which will be in writing. So the question is whether Section 3(1)(g) of the Conveyancing Act exempts such a transaction from the need for writing. It is our submission that Section 3(1) (g) specifically refers*

> *to licence as an exempted transaction, yet the learned trial judge after reading the said section still held that the 1st defendant/appellant was unable to show any transfer of the land to him"*

The above submission is simply unanswerable. Licence does not require writing under the law. The reason is that licence is not a conveyance of an interest in land. Generally, it does not create a proprietary interest in land. This is a key feature differentiating licence from leases and tenancies.

The Land Act (Act 1036) under Section 281, defines licence in the following terms:

> *"licence means a permission other than easement or profit given by a proprietor of land or an interest in land which allows the person granted the permission to do certain acts in relation to the land which would otherwise be a trespass."*

The Land Title Registration Act, 1986 (PNDCL 152), which has also suffered a repeal by Section 282 of the Act 1036 contained a similar definition under Section 139 thus:

> *"Licence means a permission given by a proprietor of land or of an interest in land which allows the licensee to do certain acts in relation to the land which would otherwise be a trespass, but does not include an easement or a profit"*

These statutory definitions are but *ipsissima verba* of the common law meaning of licence which is traceable to the Sir John Vaughan C.J's statement of old in **THOMAS VRS SORREL (1673) VAUGH. 330,351; 124 E.R. 1098, 1109** which he couched as:

> *"A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful."*

The above statement is re-echoed by the learned authors of Halsbury's Laws of England when they write that a licence does not create any estate or interest in the property to which it relates and that it only makes an act lawful which otherwise would be unlawful. The long list of cases the authors cite includes **WELLS VRS KINGSTON-UPON-HULL CORPORATION (1875) LR 10** which decided that an agreement for a licence is not an agreement for an interest in land such as is required to comply with the Law of Property (Miscellaneous Provisions) Act 1989. See Vol 27(1), 4th edition Reissue para 10, page 27-28.

Finally, on this point, the words of the learned AKP KLUDZE in his seminal work GHANA LAW OF LANDLORD AND TENANT (Lephant Academic Publishers, New York, 1993) page 17 are that:

> *"It follows that, unlike a lease a licence does not per se create any proprietary interest in the land. A licensee therefore, has no estate in the land. A licence is only a personal, even if contractual, arrangement between the licensor and the licensee."*

The foregoing being our understanding, we can only posit that the learned trial judge committed a fundamental error of law. The error clearly manifested itself in the following material respects:

First, by failing to appreciate that Section 3(1)(g) of the Conveyancing Act excuses licence from writing; second and following from the first, by looking out for a documentary evidence from the appellant for purposes of establishing his claim based on licence; and

third, by misconceiving the point about licence that the appellant was not claiming land *per se* but the house built on it upon the alleged licence.

This conclusion of ours, however, is not by itself dispositive of the issue about the appellant's licence to construct the building in question. We should consider the issue in broader terms. Beyond the issues of law, the learned trial judge considered other factual matters in reaching her conclusion. For our purpose, the quest at this stage is to determine whether or not absent document, the appellant, on a balance of probabilities, adduced sufficient evidence to establish a grant of licence by the respondent to build on the land.

The appellant's testimony in chief was that the respondent engaged him to act as a contractor for the construction of a two (2) storey building at Kibi for which the respondent provided resources to purchase building materials and to pay for workmanship. He said he travelled between Accra and Kibi at his own expense and to see to the construction up to the first floor roofing stage at which point respondent stopped the remittances. Whilst supervising the Kibi project, he started the construction of the subject two (2) storey upon the respondent's permission.

He also testified that the respondent's wife shipped a lot of items made up of about hundred (100) boxes twenty (20) hospital beds as well as one (1) Rav 4 Toyota vehicle. The wife directed him to keep the goods for her within the premises. He therefore put some of the items in the kitchen and others in the hall. In view of the large space taken by the items, he 'felt crammed in'. The respondent agreed to his request to build the property by relocating the septic tank and the electric pole on the premises.

Under cross-examination, he said:

> *"Q. So your evidence that when the plaintiff's wife shipped the things you felt crammed in, and the plaintiff gave you the licence to build a two-storey building. It is not true, I am putting that to you.*

A. It is true. The things were brought early 2005. I spoke with the plaintiff about the situation in the room and I told him that if he gave me the permission, I can put up a building on the land. The plaintiff said he is not going to stay here and that he will stay at Kibi and that he will give me money to build at Kibi for him. After that I can come and build on the land. When he gave me the money for the Kibi building I started the building but later the money was not forthcoming.

Q. I am putting it to you that the plaintiff gave you no such authorization or licence to put up the two-storey building on his land.

A. He authorized and gave me licence to put up the building."

In further testimony, the appellant said he completed the subject building in 2006 and moved in. In 2008 when the respondent and the wife visited Ghana, he accommodated them in the very building. Later, he completed his own house at Prampram, relocated into it and rented the subject property to tenants.

In 2010, the respondent visited Ghana on holidays and due to the fact that his tenants were in occupation of the building, he accommodated him in his Prampram house. Again, in 2012, the respondent visited, and he accommodated him in his Prampram house. Additionally, he said:

> *"I say that from 2006 when I completed the building at Abelemkpe and moved in until I built the Prampram property and moved out and let out the Abelemkpe property, the plaintiff who came to stay with me never raised any issue regarding my control and ownership of the two (2) storey I built referred to as the Abelemkpe property. He also never asked me for any rent."*

Significantly, the respondent admits visiting Ghana and being accommodated in 2008, 2010 and 2012 in the manner narrated by the appellant. There is no evidence that on any

of the visits, the respondent objected or protested the construction of the building, neither is there any evidence of demand of rent from the appellant or his tenants during that period. Also not clearly denied is the fact that the respondent's wife shipped the mentioned items which were kept in the premises previously occupied by the appellant.

In his testimony in-chief, the respondent merely denied ever granting licence to the appellant to build the subject property. He only added that the appellant abandoned the Kibi building project midstream in 2010. He had to contract one Mr. Afotey to plaster the building and in any event, the building was not yet habitable.

However, when confronted during cross-examination with his apparent non-objection to the construction of the subject property, the respondent for the first time found the following account to give:

> *"Q. Between the year 2006 and 2012 being aware of the storey building on the Abelemkpe property you did not raise any objection as to the control and ownership to the storey building put there by the 1st defendant.*
>
> *A. That is false. When the 1st defendant came to USA to visit, I questioned him about the property at the time he was building it at Abelemkpe. I asked him* ***"Sammy shia nie omaa te eshishie hu****" In other words (What is the meaning of what you are doing on the Abelemkpe property) and he answered,* ***"my brother I am doing it for you."*** *Therefore, with such an answer I did not do anything else because he had told me he did it for me.*

This account of the respondent, crucial as it was to his case, seems to have come too late in the day to make any good impression. It was never pleaded nor adduced in testimony in-chief.

Learned Counsel for the appellant describes the explanation as an afterthought. We decline to disagree with him. Such a bulwark of his case could not have been a latecomer.

If the encounter actually took place, it would have been pleaded and attested to in the respondent's testimony in-chief.

From our standpoint, it was not a testimony worthy of belief and for it to have, as we observe, found favour with the learned trial judge to ground a finding in favour of the respondent on the question of whether the appellant put up the property upon the respondent's permission or licence, is unacceptable.

Assuming *arguendo* that the said encounter took place, how would anyone expect the respondent to take the answer attributed to the appellant with any gravitas, given that the respondent had not provided money for the construction of any such project? We make no apology to say that had the respondent taken the said answer for anything, assuming it was given, then he was daydreaming.

To our minds, the fact that the respondent put up the subject property and moved in without any objection from the respondent, coupled with the subsequent chain of events, whereby he accommodated the respondent in it, rented it out subsequently for rent which he took in his own right and also twice accommodated the respondent in his Prampram property whilst his tenants occupied the property, lent huge credence to his oral evidence that the respondent licenced the construction. The learned trial judge ought not to have overlooked these pieces of evidence.

In her deliberation, the learned judge had indicated that the fact that the respondent was accommodated in the appellant's Prapram house was not relevant to the issue before her. We differ and state that it was relevant. The respondent was accommodated in Prampram because at the time, the appellant had rented the subject property to tenants in his own right as owner.

And why was the learned trial judge adamant that there was no licence aside her conclusion on the legal point which we have found erroneous?

At page 12 of the judgment [page 446 of ROA] she noted:

"On the Kibi project the 1st defendant stated per paragraph 8 [sic] that:

> *"18: He told me further that I should act as contractor for the construction of a two storey building at Kibi for him with resources provided by him for the acquisition of building materials and for workmanship." The above averment implies that the defendant was provided with resources meant from the Kibi building as well as the workmanship. It will therefore be false for the 1st defendant to allege that his going to work at Kibi, his reward was the land in front of the boy's quarters in Abelemkpe. Again, the defendant's assertion that he travelled to Kibi at his own expense is false because the money given him, the thirty thousand dollars (US$30,000.00) was to cover his workmanship. After having deducted his workmanship, he cannot complain or expect the plaintiff to pay for his travelling expenses."*

Clearly, the trial judge misapprehended the case put up by the appellant. What the appellant said was that the thirty thousand dollars (US$ 30,000.00) was to buy building materials and pay for workmanship. However, for him to supervise the work, he was trekking three times a week from Accra to Kibi at his own cost. The trial judge wrongly, in our view, stretched the meaning of workmanship to cover the cost the appellant incurred on transportation from Accra to Kibi to supervise the work. Certainly, the transportation cost was not workmanship. Workmanship could only refer to fees charged by the artisans such as masons, carpenters, steel benders etc. who were to work on the project. The appellant was not, as it were, a workman on the construction. He went there to supervise the work. He therefore could not have, as the trial judge put it "deducted his workmanship".

Therefore, in the absence of any evidence to show that he was paid a form of imprest to meet his cost of transportation, feeding and other out-of-pocket expenses, the trial judge could not have properly found that the appellant was paid for what he did on the Kibi project.

On the same issue, and on making reference to the appellant's account that the construction of the building was his reward for supervising the Kibi project, the trial judge made the following observation at page 14 of the judgment [page 448 of ROA]:

> *"Clearly, on 1st defendant's own showing, the plaintiff gave him not less that USD 30,000.00 for the Kibi project. The Kibi project at the time the 1st defendant stopped to supervise was nowhere near completion. Therefore, if the defendant is alleging that his reward for putting up the Kibi project was the land on which he erected the disputed property, he will not be candid to the court. The court takes judicial notice of the fact that USD 30,000.00 was enough to complete a building in Kibi in the year 2009…"*

We must swiftly confess our difficulty, appreciating the basis of the judicial notice the trial judge took and hence the conclusion she drew on the point. Generally understood, judicial notice is taken of a fact which is obvious and notoriously known to everyone. The statutory provisions for it are contained in Section 6(2) of the Evidence Act (NRCD 323). It states:

> *"(2) Judicial notice can be taken only of facts which are either:*
>
> *(a) So generally known within the territorial jurisdiction of the court, or*
>
> *(b) So capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned that the fact is not subject to reasonable dispute."*

How did the trial judge get to know the cost of constructing a building in the Kibi area? And did she know the plan and make of the building that was being constructed for the respondent? Is the cost of constructing a building in the Kibi area a fact commonly known or was she apprised of any sources whose accuracy could not be questioned in making the determination? These are critical questions the answers to which are unfounded. Once again, the trial judge did not get the law right in taking judicial notice of a fact that obviously required evidence to prove.

By reason of the foregoing, we think the trial judge's conclusion that no licence was granted to the appellant was based on factual errors and misconception of law. Had she properly applied herself to the law and adverted her attention to certain crucial pieces of evidence on record, as we have sought to demonstrate, her conclusion on the issue would have been different.

The point bears emphasizing that no law requires a writing to create a licence. We think in this case there are facts on record including the conducts of the parties that establish that the appellant built the subject property upon the licence or permission of the respondent. The respondent's own conduct during and after the construction of the property whereby the appellant was made to believe to be the owner of the property is sufficient to estop him from claiming that he did not permit the construction. We have come to understand the estoppel pleaded by the appellant in this context. The respondent's almost bare denial that he did not permit the construction should not have swayed the learned trial judge to accept his case.

On the question of plea of estoppel, Learned Counsel for the respondent takes the appellant on by saying the plea was made without giving particulars. In paragraphs 9 and 10 of the appellant's defence and counterclaim [page 8—11 of vol 1 of ROA] this was how the plea was set down:

"9. In answer to paragraphs 6 & 7 of the plaintiff's statement of claim, 1st defendant says that he is the owner of the and therefore the plaintiff is estopped from asking him to vacate the premises.

10. In further answer to the said paragraphs, the 1st defendant says that the plaintiff having granted him a building licence and made him to believe that after constructing the building he can have the land and building, plaintiff is estopped from asking this court to order him to yield vacant possession."

In our assessment, the above averments contain such sufficient information about the case that was being made against the respondent. It could not be said of them as mere insinuation of estoppel.

The essence of pleading specific matters like estoppel etc. and giving particulars thereof is to give to the opposing side notice of the case that will be met at the trial to enable it prepare adequately, so as to eliminate surprises at the trial. See **MENSAH VRS APPAIH (1964) GLR 248; ASARE VRS BROBBEY (1971)2 GLR 331**.

In our considered opinion, where therefore, an averment of any such matters as estoppel etc. contains such sufficient information about the case being made, so as to notify the other side and indeed the court itself of the case to be met at the trial, that would suffice even though it was not followed by an item-by -item particulars as Counsel appears to have anticipated. As it was to occur in this case, a look at the reply and defence to counterclaim filed by the respondent subsequent to the plea reveals specific responses to it. Thus, the argument by Counsel for the respondent on the point does not advance the case of his side in any way.

In the final analysis, we find sufficient grounds both in fact and law to disturb the trial judge's conclusion that the subject property was built without the respondent's licence or permission.

We know of a considerable body of case law on the subject of building licence. The case cited to us by Counsel for the appellant, the facts of which Counsel for the respondent has sought to distinguish from what are on hand is **TOURE VRS BAAKO (193-94)1 GLR 342** where at page 347, AMUA -SEKYI JSC opined:

> *"The resulting legal position explained in **Asseh v Anto (1961) GLR 103,** SC where Korsah CJ said at 106 "There is ample authority for the view that the legal maxim quidquid plantatur solo credit is not applicable to land held under native tenure. Once permission of the owner has been obtained to build a house or to farm on family land the house or farm remains the property of the licensee and his heirs and successors until the house is demolished or destroyed, when the land would revert to the owners. The cases of **Attopee v Nancy (1853) Sat FCL 149**; **Boun v Steele (1884) Sar FCL 149** which were also reported in Griffith's Law Digest were quoted in support. Thus, unless the transaction is covered by an English-style lease agreement, a person who is permitted to build on land belonging to another retains ownership of the building so long as it stands."*

Counsel for the respondent posits that the above decision is inapplicable to the case at bar. His chief reason is that the facts in **TOURE VRS BAAKO** show that the parties had in fact agreed for the licensee to build on the land. To him, this was not the case with the situation on hand.

In our discourse, we have found reasons to hold there was licence, and we think **TOURE VRS BAAKO** is applicable. In any event, authorities on the subject are not limited to **TOURE VRS BAAKO**.

In **KANO VRS ATAPKLA (1959) GLR 387** the principle as espoused by Ollenu J appears at the headnote of the report thus:

"(1) Under customary law, a grantor or licensor of land who has permitted his grantee or licensee to occupy and build on his land, or to incur expenditure to improve it is not entitled to eject the grantee or licensee at will. He can only do so on terms that to be agreed upon between them, example payment of compensation or alternative accommodation.

(2) That this rule is subject to the sole exception that the grantor or licensor may eject if the grantee or licensee denies the former's title."

Then in **ASSEH VRS ANTO (1961) GLR 103**, cited in **TOURE VRS BAAKO**, KORSAH CJ chronicles a line of cases to drum home the same principle. He said at page 106—107 of the report:

> *"In Attopee v Nancy the plaintiff gave the defendants land on which to build a house. A house having been built the plaintiff claimed the land back. Held: The plaintiff must either pay the cost of the house or accept payment for the land. In Boun v Steele the plaintiff bought land on which was a house erected by permission of the vendor. Held: That the plaintiff had no right to the house. In Amma v Nelson, the plaintiffs built houses on land which apparently belonged to another member of family and remained in undisturbed occupation for years. Held: That by Ga custom, they had acquired the right to occupy the houses for as long as they kept them up. In Lyall v Dougan, it was held that where the house belonged to the judgment debtor but not the land on which it stood, execution could issue against the house only. In Roberts v Awortchie, execution having been issued against the defendant who had a house on company (Asafo) land and the land having been attached, it was held that the land could not be attached but the house and materials could."*

Thus far, we think that trial judge's verdict that the respondent was entitled to recover the subject building was unsupportable by the evidence on record and the relevant legal principles. We find sufficient basis to reverse it.

We now turn our attention to the issue of the respondent's indebtedness to the appellant. The appellant had sought to recover an aggregate sum of US$ 103,277.36. The debt was supposed to have arisen out of various transactions and events that occurred between the parties in the heydays of their friendship.

From paragraphs 16, 17, 18 19, 20 and 21 of his defence and counterclaim, where the appellant pleaded the respondent's indebtedness to him, the three events or transactions that resulted in the debt may be summed up as follows:

> *(1) The sum of USD$32,777.36 resulting from the respondent's fraudulent withdrawal of a bank draft issued in respect of a bank account operated by the appellant and his wife at the Chevy Chase Bank in the Unites States. For the sake of convenience, we shall call this the Chevy Chase's debt.*
>
> *(2) Various sums of money amounting to USD$52,000 which the respondent instructed the appellant to pay to the respondent's Aunt one Auntie Ama but which the respondent failed to refund to the appellant. (Auntie Amma's debt)*
>
> *(3) The sum of USD$18,500 which the respondent instructed the appellant to pay to one Sam Adofo which the respondent has failed to refund to the appellant (Sam Adofo's debt).*

These three debts amounted to the sum of USD$103,277.36 which the appellant sought to recover by his counterclaim.

The respondent in his reply and defence to counterclaim vehemently denied the Sam Adofo's debt and put the appellant to strict proof.

In respect of the Chevy Chase and Auntie Ama's debt, the respondent pleaded as follows in paragraphs 9 and 10 of his reply and defence to counterclaim:

> *"(9) The plaintiff vehemently denied paragraphs 17 and 18 of the statement of claim [sic] and in answer thereto says that the amount of USD32,777.38 was paid to the 1st defendant's wife, Mrs. Esi Ankrah when she travelled to the United States to deliver a baby.*
>
> *(10) Plaintiff denies paragraph 19 of the statement of defence and says that all monies paid to his Auntie Ama were fully paid back into 1st defendants' Bank of America account."*

In effect, the respondent denies liability to the two debts on the basis that he had refunded the USD$32,777.36 to the appellant's wife and paid back all monies the appellant paid to Auntie Ama through the appellant's Bank of America account.

On the state of the pleadings, it is clear to us that apart from the Sam Adofo's debt the burden of proof of which the appellant assumed, the respondent who alleged a refund of the Chevy Bank and Auntie Ama's debts bore the burden of proof of the refund. True to this, the respondent testified as follows by paragraphs 16 and 17 of his witness statement:

> *"16. I deny the allegations by the 1st defendant that I owe him USD32,777.38. This amount of money was paid to 1st defendant's wife, Mrs. Esi Ankra when she travelled to the United States to deliver her baby. Exhibits D to D9 series are evidence of payments I made into the account of Mrs. Ankrah.*
>
> *17. It comes as a surprise to me that the 1st defendant says I owe him the monies he paid to my auntie Ama on my behalf because I repaid him in full into his bank of America account. Evidence of these payments can be found in Exhibit D series."*

The learned trial judge after examining the testimonies adduced on record found that the respondent was not indebted to the appellant. Ostensibly she was satisfied on the evidence that the respondent refunded the monies as claimed. But was this finding supportable by the evidence on record?

By the respondents' own showing, the refund was evidenced by Exhibit D series. What are Exhibit D series? They are copies of issued cheque leaflets of the respondent's account with the same Chevy Chase bank. The respondent's explanation essentially was that he made the refund through the issuance of cheques drawn on his account and paid to either the appellant or the wife.

He said he went for copies of those cheques from his bankers to show that he issued them to make payment. According to him because the cheques had been honoured by his bank, they were all cancelled.

The learned trial judge accepted explanation proffered by the respondent which led to her finding that he was not indebted to the appellant.

A perusal of the cheques in Exhibit D series shows the following amounts on the face:

(i) Exhibit D1 ---------USD 600 issued to William A. Ampofo (appellant)

(ii) Exhibit D2------USD 1000 issued to Agnes Ankrah (appellant's wife) (Auntie Ama noted)

(iii) D3-----(2 chqs)---USD 2000 and USD 3000 issued to Samuel Nii Otu Ankrah (Auntie Ama (noted)

(iv) Exhibit D4-----USD 1000 issued to Agnes Dagbedo (appellant's wife)

(v) Exhibit D5------USD 15, 568 issued to Agnes Dagbedo (appellant's wife)

(vi) Exhibit D6------USD 6000 issued to Samuel Nii Otu Ankra (appellant) (Auntie Ama noted)

(vii) Exhibit D7-------USD 1000 issued to Samuel Nii Ankrah (appellant) (Auntie Ama noted)

(viii) Exhibit D8-------USD 800 issued to Samuel N. Ankrah (appellant) (Auntie Ama noted) and

(ix) Exhibit D9-----USD 1000 issued to Samuel Nii Ankrah (appellant) (Auntie Ama noted)

The sum total of all the above is USD 31,968.

Now on the cheques, Auntie Amma is noted on a number of them. The reasonable inference is that those payments were to refund Auntie Ama's debt. And as on the respondent's own account, Exhibit D series represented both the refund of Auntie Ama and Chevy Chase debts, the inference is that the others that bore no Auntie Ama went to refund Chevy Chase debt. By this, the sums capable of proof by Exhibit D series were USD 17,168 for the Chevy Chase debt and USD 14,800 for the Auntie Ama's debt. Out of the total sum of USD 103, 277.36 sought under the counterclaim Chevy Chase and Auntie Ama formed USD 84,777.36 the remaining being for Sam Adofo's debt. And if out of USD 84,777.36 Exhibit D series could prove USD 31,968, how then could the trial judge find that the respondent was not indebted to the appellant?

In making this analysis, we are not unmindful that Exhibit D series were not without challenges. For instance, it has been submitted on behalf of the appellant that there was nothing on the face of Exhibit D series to establish that the appellant and/or his wife were those that negotiated the cheques. Counsel for the appellant argues that the respondent could have procured a bank statement to prove those payments. Largely, we agree that a bank statement could have afforded a better proof. Nonetheless, a bank statement was not the only means of proving the payments.

Another challenge that comes with Exhibit D series as far as the refund of Auntie Ama's debt was concerned was that the respondent himself had testified earlier that he repaid Auntie Ama's debt by paying it into the appellant's account with the Bank of America. We hardly find anything on the face of Exhibit D series to show that they were deposited into an account.

In spite of these challenges, we have also had a fuller consideration of the reasons why the trial judge found Exhibit D series capable of proof of the payments and we do not intend to detract from them. To our minds, in all the circumstances of the case, we are unable to assume that the respondent fabricated Exhibit D series to throw them in evidence to prove payment.

We therefore agree that Exhibit D series evidenced payments for which they were tendered. We however diverge with the trial judge on the point that Exhibit D series proved the refund of the Chevy Chase and Auntie Amma's debt in full. Based on the calculation we have made supra, that finding is unsupportable.

The principle is well established that while findings of specific facts are within the competency of the trial court alone, a finding of fact which is an inference to be drawn from specific facts found is within the competency of an appeal court no less than the trial court. In other words, an appeal court is in as good position as the trial court to draw inferences from specific facts which the trial court may find. See **AGYENIM-BOATENG VRS OFORI & YEBOAH (2010) SCGLR 861**.

On the evidence, we find that out of the USD32, 776.36, Chevy Chase debt, the respondent refunded USD17,168 leaving a balance of USD15,608.36 unrefunded.

There is one thing to be said about the Auntie Ama's debt of USD52,000. It will be recalled that the appellant pleaded the sum of USD52,000. In the reply, the respondent did not

specifically dispute the quantum. All the respondent pleaded by way of defence was that all monies paid to Auntie Ama had been refunded.

As the allegation by the appellant was specific, one would expect that if a lesser amount was paid to Auntie Amma, the respondent would plead the lesser amount before indicating whether or not it had been refunded. This was not the case on the pleadings, and in the witness statement, the respondent repeated the same position. It was much later whilst the appellant was under cross-examination that Counsel for the respondent sought to challenge some of the components of the USD52,000.

Accepting the case put across by the respondent, the trial judge found [page 461 ROA]:

> *"The court holds as a fact that 1st defendant could not lead credible, sufficient evidence to prove that he paid fifty-two thousand dollars to Auntie Ama, either directly or indirectly to her through Atsu Dela. The evidence on record supported by exhibits show that a total of fifteen thousand one hundred dollars paid to Auntie Ama by the 1st defendant had been paid by the plaintiff to the defendant before same were given to Auntie Ama."*

The above finding was clearly misplaced. First, it was never the case of the appellant that the USD52,000 was paid through Atsu Dela. According to the appellant, it was only USD1000 that was paid to Auntie Amma through her driver one Atsu Dela. For this the appellant tendered Exhibit SA4 as evidence of the payment. Second, we find it questionable that the trial judge would find a total of USD15,100 as the only amount paid to Auntie Ama. If the trial judge had paid due attention to Exhibit D series, she would have noticed that the amount the respondent himself claims to have refunded to the appellant for the refund of Auntie Ama's debt was way above the USD15,100 she talked about.

In the final analysis, we think the debt USD52,000 was established out which a refund of USD14,800 was made on the strength of Exhibit D series, leaving USD 37,200 unrefunded.

Our final consideration is the Sam Adofo's debt. To recap, the appellant had pleaded under paragraph 20 of the statement of defence and counterclaim thus:

> *"20. Again plaintiff requested the 1st defendant to pay an amount of US$18,500 to one Sam Adofo which he will refund by paying same into his bank account in the United States but which he has failed to so."* This averment the respondent denied in the reply.

In his evidence contained in his witness statement however, the appellant said the amount paid to Adofo was US$23,800. He tendered Exhibits SA5 and SA6 as receipts issued on the letter head of a company he ran with his wife SAM & AGIES LIMITED.

It is not clear from the appellant's account how the US$18,500 pleaded became US$23,800. Of course, if we are to accept the US$23,800, it will change the quantum of US$103,277.36 sought under his counterclaim. In any event, we think by the denial of paragraph 20 of the appellant's statement of defence and counterclaim, he assumed the onus of proof of the debt. He relied on Exhibits SA5 and SA6 to discharge the onus.

The appellant had belatedly applied to call Sam Adofo to testify but the trial judge refused the application. He then proceeded to file an interlocutory appeal against the refusal in this court. The appeal was not determined until the trial concluded.

In this appeal, the point has not been argued before us even though in our opinion, the rule of merger whereby all interlocutory rulings and orders in a matter merge in the final decision of the court would have allowed such argument to be made. See **R.T BRISCOE VRS AMPONSAH (unreported) (1999) CC 99**. In the event, nothing turns on that point before us.

The learned trial judge in rejecting the case of the appellant on the Sam Adofo's debt analyzed [page 464 of ROA]:

> *"Exhibit SA5 is headed "authentication of money" dated 8th September 2008, and written on a letter head of Sam & Aggies Ltd." It states: This is to state under oath that Mr. Samuel Adofo has been given an amount of $6,000 US dollars on behalf of Mr. William Ampofo by Mr. and Mrs. Ankrah of Abelmpke."*
>
> *It was stamped and signed by SAM & AGIES LIMITED by the director and the Managing Director. The said Samuel Adofo's name was written on the paper. Exhibit SA6 is similar to Exhibit SA5 save that the amount allegedly collected by Sam Adofo was $5800 US dollars. The alleged signature of Samuel Adofo on Exhibit SA5 is different from Sam Adofo's signature on Exhibit SA6. The 1st defendant alleged the total sum of money given to Sam Adofo was USD$23,000. However, when the figures on the two exhibits are totalled it comes up to US$11,800.00. Again, the court holds that 1st defendant could not lead sufficient evidence to establish the fact that the plaintiff owes him twenty- three eight hundred dollars paid through Sam Adofo."*

We think that the above analysis of the trial judge portends a sound judgment. We have ourselves questioned the inconsistency in the appellant's account on this Sam Adofo debt. We decline disturbing this particular finding of the trial judge.

In conclusion, having considered the evidence adduced on record, and examined the law applicable to the issues material to the case, it is our judgment that the decision of the trial judge decreeing judgement for the respondent to recover the subject two-storey building and dismissing the appellant's counterclaim was erroneous and unsupportable

by the evidence adduced and the law on the subject. It is our considered view that the evidence and the law did not support the judgment for the respondent and the dismissal of the appellant's counterclaim. We therefore allow the appeal and set aside the decision of the trial court in its entirety.

In its place, we decree judgment for the appellant on the counterclaim and order the recovery by the appellant against the respondent, the aggregate sum of USD $52,808.36 representing the unrefunded balance of the sums taken from the appellants account with the Chevy Chase Bank of the United States of America and that paid to the aunt of the respondent in Ghana. The appellant shall recover interest on the said amount at the statutory rate from January 2010 till date of final payment.

SGD

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JUSTICE RICHARD ADJEI-FRIMPONG

(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE .....

JUSTICE SENYO DZAMEFE

(JUSTICE OF THE COURT OF APPEAL)

SGD

I ALSO AGREE .....

JUSTICE MERLEY WOOD

(JUSTICE OF THE COURT OF APPEAL)

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EMUND HAMMOND FOR 1ST DEFENDNAT/APPELLANT