

THE SUPERIOR COURT OF JUDICATURE  
IN THE COURT OF APPEAL  
ACCRA - AD 2023

CIVIL APPEAL NO H1/148/2022

DATE: THURSDAY, 23<sup>RD</sup> FEBRUARY, 2023

CORAM: SENYO DZAMEFE J.A (PRESIDING)

MERLEY A. WOOD (MRS) J.A

AMMA GAISIE (MRS.) JA

CRYSTAL CITY LIMITED

= PLAINTIFF/RESPONDENT/APPELLANT

VRS

BCM GHANA LIMITED

= DEFENDANT/APPLICANT/RESPONDENT

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JUDGMENT

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MERLEY WOOD JA

On or about 5<sup>th</sup> November, 2010, the Plaintiff/Respondent/Appellant and the Defendant/Applicant/Respondent entered into a sale and purchase agreement over a parcel of land owned by the Appellant on the agreed consideration of One Million Seven Hundred Thousand United States Dollars (US\$1,700,000). The Defendant/Applicant/Respondent paid a deposit of Eight Hundred and Fifty Thousand United States Dollars (US\$850,000.00). When the outstanding payment was not made due to a misunderstanding, the Plaintiff/Respondent/Appellant sued at the High Court for a declaration that the failure, refusal and/or neglect of the Defendant to pay the amount of US\$850,000.00 to the Plaintiff offends the terms of the contract between the parties and therefore constitutes a breach of the contract between the parties; a declaration that the claim to title to the disputed land without recognition of the right and interest of the Plaintiff as its grantor constitute a denial of the right and title of the Plaintiff; an order for recovery of possession of the disputed land upon the Plaintiff's refund of the deposit of an amount of US\$850,000.00; an order directed at the Land Title Registry to cancel any certificate of title issued to the Defendant in respect of the disputed land and the restoration of the title of the Plaintiff in the records of the Land Title Registry; General damages and costs.

After a full trial, judgment was given on 28<sup>th</sup> October 2014 in favour of the Plaintiff/Respondent/Appellant and the court ordered the Defendant/Applicant/Respondent to pay the outstanding balance with interest thereon from *"1<sup>st</sup> January 2013 to the date of payment only."* The High Court did not state the interest rate to be applied.

Dissatisfied with the judgment of the High Court, the Defendant/Applicant/Respondent appealed to this Court. The grounds of appeal among others included the order of payment of interest on the outstanding amount of US\$850,000.00.

Meanwhile, the Plaintiff/Respondent/Appellant following the decision of the High Court filed an Entry of Judgment dated 14<sup>th</sup> December 2014 found at pages 109 and 110 of the record of appeal. The Entry of Judgment included interest calculated on the judgment sum at LIBOR rate plus a margin of six per centum (6%) based on the 91 day Treasury Bill rate prevailing at the time and was duly served on the Respondent. The Defendant/Appellant/Respondent consequently paid to the Appellant Seven Hundred and Fifty Thousand Dollars (\$750,000.00) on 8<sup>th</sup> January 2015 and paid another One Hundred Thousand Dollars (\$100,000.00) on 9<sup>th</sup> March 2018 which is the total debt owed to Appellant. Thus the Respondent eventually paid the judgment sum without the payment of the interest.

The Court of Appeal on 21<sup>st</sup> January 2021 dismissed the appeal against the payment of interest and affirmed the judgment of the High Court. This Court did not state the rate to be applied in the calculation of the interest.

Henceforth, the Plaintiff/Respondent/Appellant will be referred to as Appellant and the Defendant/Appellant/Respondent will be referred to as the Respondent.

The Appellant consequently filed an another Entry of Judgment dated 21<sup>st</sup> January 2021 on 8<sup>th</sup> February 2021 claiming an amount of One Hundred and Seventeen Thousand Nine Hundred and Forty One United States Dollars Ninety Cents (\$117,941.90) as the accrued interest on the principal sum of \$850,000.00 and commenced execution to recover the interest. See pages 98 and 99 of the record of appeal. The Respondent's accounts with Ecobank and Access Bank were consequently attached and a garnishee order nisi made against them. The garnishee proceedings commenced and evidence was taken from the garnishee banks including a recall of the witness for Ecobank who indicated that Respondent indeed had some funds with the bank.

The Respondent subsequently filed a motion to set aside the Entry of Judgment filed on 8<sup>th</sup> February 2021 and/or the garnishee order nisi dated 17<sup>th</sup> March 2021 on the basis that the amount claimed was inaccurate and did not reflect its true indebtedness. See page 94 of the record of appeal. The application was vehemently opposed by the Appellant but the Court ruled that the interest calculated was excessive and directed the Registrar of the Commercial Court to calculate interest on the balance using LIBOR of 0.23823% instead of 6.585% which included a margin of six per cent as endorsed on the Entry of Judgment.

The High Court on 14<sup>th</sup> May 2021 ruled that the Court did not go into the calculations of what was due to the Appellant herein and was of the view that there might have been a mistake in calculating the interest by the use of 6.585 instead of 0.23823%. Accordingly, the Court set aside the Entry of Judgment but not the garnishee nisi. See page 126G of the Record of Appeal.

The Appellant being dissatisfied with and aggrieved by the said Ruling, filed a Notice of Appeal on the following grounds:

- a. The ruling of the High Court, Criminal Division 4, Accra is against the weight of evidence on record.
- b. The trial court erred when she directed that interest on the amount subject matter of the suit (USD850,000.00) be calculated by the Registrar using the LIBOR rate of 0.23823% without any margin.
- c. The learned trial judge erred when she set aside the interest rate of 6.585% used in calculating interest on the judgment sum of Eight Hundred and Fifty Thousand United States Dollars (USD850,000.00) on the basis that the same was high and thereby occasioned grave miscarriage of justice to Appellant.

d. Additional grounds of Appeal shall be filed on receipt of the Record of Appeal.

The relief sought from this Court is that the ruling dated 14<sup>th</sup> May 2021 be set aside and the Entry of Judgment restored.

It is to be noted that no additional grounds of appeal were filed.

Counsel for the Appellant opted to argue grounds (b) and (c) together before concluding with ground (a).

In arguing grounds (b) and )c) together, Counsel for the Appellant invites this court to rehear the matter as held in the cases of *King vrs Gyan [2017-2020] 1 SCGLR 912 at 918; Koglex Ltd (No 2) vrs Field [2000] SCGLR 175; Evelyn Asiedu Ofei vrs Yaw Asamoah Odehye Kwaku Gyapong [2018] DLSC 1*.

He further argues that even though the interest rate applicable in calculating interest as adjudged was not stated, the Court (Award of Interest and Post Judgment Interest) Rules, 2005 (CI 52) is relevant. Per rule (1) of C.I. 52, interest on a sum adjudged is calculated at the bank rate prevailing at the time of judgment and at simple interest. Rule 2(1) provides that the judgment debt must bear interest at the statutory rate subject to sub-rule (2) while Rule 4 defines statutory rate of interest as “the bank rate prevailing at the time the judgment or order is made by the court” or in case of doubt “the 91 days Treasury Bill rate as determined by the bank of Ghana...” He cites the following cases *Delle & Delle vrs Owusu Afriyie [2005-2006] SCGLR 6* and *Daniel Ofori vrs Ecobank Ghana Ltd, Securities and Exchange Commission and Ghana Stock Exchange [2021] DLSC 10682* at page 2.

It is Counsel’s submission that when the transaction is denominated in currency other than cedis, the situation is different and he refers to the case of *Holland West Africa &*

*Anor vrs Pan African Trading Company & Anor (1976) 2 GLR 179; National Investment Bank Ltd vrs Silver Peak Ltd [2003-2004] SCGLR 1008 and Royal Dutch Airlines (KLM) vrs Farmex Ltd [1989-1990] 2 GLR 623.*

Counsel posits that it is not a novelty for the interest to be calculated at LIBOR plus a margin of 6%. He referred to cases such as *Sam Jonah vrs Richmond Aggrey, Yoni Kulendi and Kulendi @ Law [2013] DLSC 2756; Export-Import Bank of the United States of America (USA) vrs Bibiani Logging [2016] DLCA848; The Dutch African Trading Company BV vrs The West African Mills Company Ltd [2016] DLHC 4277 and Andrea Maria Orlandi (Plaintiff) vrs MAP Consult Limited (Defendant) [2016] DLHC*. However, Counsel admits that some of the cases he has cited are not binding on this Court but merely of persuasive effect since the reasoning upon which they were decided is not the crux of the instant appeal.

In arguing whether the calculation of interest at LIBOR plus a marginal percentage of 6% was high and excessive as ruled by the Court below, Counsel submits that when the Entry of Judgment was filed in 2014, it was never challenged by the Respondent in the earlier appeal and started to make instalmental payments of the judgment sum and cannot now seek to resile from same having changed solicitors and refers to section 26 of the Evidence Act 1975, NRCD 323. If the interest, he argues, is calculated at 0.2383% as determined by the High Court, it would occasion grave injustice to the Appellant as he would not have value for its money which had been wrongly kept by the Respondent for all these years without any just cause.

Furthermore, the Appellant would suffer grave diminution in value of the amount due and payable by the Respondent without taking into account the depreciation of the cedi against the dollar as well as the economic indices prevailing on the currency. This he

concludes will defeat the essence of paying interest on money adjudged a judgment creditor in foreign currency and thus the Ruling is against the evidence before the Court.

The Respondent who holds a contrary view, began his submissions by responding to ground (c) of the grounds of appeal first. Counsel submits that it is simplistic for the opposing side to state that the court below set aside the rate of 6.5% used in computing the interest on the judgment sum because it was too high. He submits that the reason why the rate was set aside was because it was totally different from the rate of 0.23825% provided by the Bank of Ghana and exhibited by the Appellant. It is Counsel's further submission that the Appellant failed to show the legal basis for the said interest rate. Counsel further posited that the Bank of Ghana rate as at October 2014 was 0.23138% and not 0.585%.and that there was no agreement supporting the imposition of any margin to the prevailing bank rate. He further submits that the Appellant used compound interest rather than simple interest in the computation thus sinning against Rule 1 (1) of C.I. 52.

Regarding the issue of estoppel by conduct under Section 26 of the Evidence Act, 1975 (NRCD 323) raised by Counsel for the Appellant, it is the response of Counsel for the Respondent that the court below provided the answer by holding that with the Respondent appealing because of the disagreement with the payment of interest, it would be misleading to submit that it never challenged the interest calculation. He contends that the entry of judgment is not accurate and lawful.

## ANALYSIS

We will deal with all three grounds together.

- a. The ruling of the High Court, Criminal Division 4, Accra is against the weight of evidence on record
- b. The trial court erred when she directed that interest on the amount subject matter of the suit (USD850,000.00) be calculated by the Registrar using the LIBOR rate of 0.23823% without any margin.
- c. The learned trial judge erred when she set aside the interest rate of 6.585% used in calculating interest on the judgment sum of Eight Hundred and Fifty Thousand United States Dollars (USD850,000.00) on the basis that the same was high and thereby occasioned grave miscarriage of justice to Appellant.

Every appeal is by way of rehearing and the authorities abound on this. Rule 8(1) of the Court of Appeal Rules CI 19 provides that any appeal to the Court shall be by way of rehearing. In the case of *Tuakwa vrs Bosom (2001-2002) SCGLR 61* it was stated that:

*“an appeal is by way of re-hearing particularly where the appellant alleges in his notice of appeal that, the decision of the trial court is against the weight of the evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence.”*

Also, in the case of *Djin vrs Musah Baako (2007-2008) SCGLR 686* Aninakwa JSC stated as follows:



*“It has been held in several decided cases that where an appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on the record which if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against.”*

See also the case of ***King vrs Gyan [2017-2020] 1 SCGLR 912.***

The calculation of interest due is the crux of this appeal. As submitted by Counsel for the Appellant, the question is whether the calculation of interest on the sum of Eight Hundred and Fifty Thousand United States Dollars (\$850,000.00) at LIBOR plus a marginal percentage of 6% was high and excessive as ruled by the Court below on 21<sup>st</sup> January 2021.

In ***Holland West Africa & Another vrs Pan African Trading Company & Another [1976] 2 GLR 179*** holding 3 states that *“if a breach of contract by a defendant had deprived a plaintiff of the use of a sum of money or other capital asset, the defendant must be presumed to have agreed to pay interest for the period between the date when the cause of action arose and the date of judgment.”*

In the case of ***National Investment Bank Ltd vrs Silver Peak Ltd [2003-2004] SCGLR 1008*** the Court speaking through Date-Bah JSC stated thus: *“It is already settled law that where a debt is contracted in a foreign currency, the interest rate attached to that debt is that applicable to the currency in question.”* He further held at page 1013 that *“It makes commercial sense for a dollar debt to attract a dollar interest rate because that interest rate (influenced by the rates set by the Federal Reserve Board) reflects the macroeconomic conditions of the Unites States, which determine the rates applicable to dollar-denominated debts*

*worldwide. Similarly, it makes commercial sense for a cedi debt to attract a cedi interest rate since that interest rate reflects Ghanaian macroeconomic conditions (including, for instance, the rate of depreciation of the cedi against the leading foreign currencies and high interest rates.) Thus, if a cedi interest rate is applied to a dollar obligation, the" oblige (that is the creditor) will be overcompensated because the cedi interest rate, which necessarily reflects the high inflation rates in Ghana, will be applied to a dollar obligation which has not been subjected to that high inflation rate. See also the cases of **Royal Dutch Airlines (KLM) vrs Farmex Ltd [1989-90] 2 GLR 623** and **Butt vrs Chapel Hill properties Ltd {2003-2004} SCGLR 636**.*

The power of the courts to award interest is derived from CI 52 which prescribed the rate of interest to be awarded as being the bank rate prevailing at the time the order was made by the courts.

CI 52 is hereby reproduced as follows:

"Court (Award of Interest and Post Judgment Interest) Rules, 2005 C.I 52

Rule 1---Order for payment of Interest

1. If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated
  - (a) At the bank rate prevailing at the time the order is made, and
  - (b) At simple interest

But where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner the court shall award that rate of interest calculated in that manner.

## Rule 2---Post Judgment interest

2. (1) Subject to sub rule (2) each judgment debt shall bear interest at the statutory interest rate from the date of delivery of the judgment up to the date of final payment.

(2) Where the transaction which results in the judgment debt is

(a) contained in an instrument,

(b) evidenced in writing, or

(c) admitted by parties

And the parties specify in the instrument, writing or admission the rate of interest which is chargeable on the debt and which is to run to the date of final payment, then that rate of interest shall be payable until the final payment.”

Per rule (1) of C.I. 52, interest on a sum adjudged is calculated at the bank rate prevailing at the time of judgment and at simple interest. Rule 2(1) provides that the judgment debt must bear interest at the statutory rate subject to sub-rule (2) while Rule 4 defines statutory rate of interest as “the bank rate prevailing at the time the judgment or order is made by the court” or in case of doubt “the 91 days Treasury Bill rate as determined by the Bank of Ghana.

We note that the London Inter-Bank Offered rate (LIBOR) is the interest rate average calculated from estimates submitted by the leading banks in London. Each bank estimates what it would be charged were it to borrow from other banks. It is the primary benchmark, along with the Euribor for short-term interest rates around the world. It is the rate at which banks lend to each other.

We are also aware that the calculation of LIBOR plus a margin is not a novelty in Ghana as submitted by Counsel for the Appellant. In the case of *Export-Import Bank of the United States of America (USA) vrs Bibiani Logging [2016] DLCA848* the Respondent claimed others interest at the rate of 4.5 per annum above LIBOR on the sum of USD 1,622,732.00 being the total credit facility plus ordinary accrued interest and post maturity interest. Also, in the case of *The Dutch African Trading Company BV vrs The West African Mills Company Ltd [2016] DLHC4277* the court accepted interest on the basis of LIBOR plus a margin of 2% on a sum denominated in British Pounds. However, as Counsel for the Appellant submitted some of the cases are not binding on this Court but merely of persuasive effect since the reasoning upon which they were decided is not the crux of the instant appeal.

The question we ask ourselves is how do we calculate the margin to be added to the LIBOR. What factors go into the percentage of the margin? Is the percentage of 6% high and excessive? The fact that the Appellant added a percentage of 6% in the Entry of Judgment filed in December 2014 and the Respondent subsequently paid the judgment debt by installments does not mean that it is so entitled. We find that the issue of estoppel does not arise.

A margin is normally agreed upon by the parties. Where there is no agreement as in this case, then we have to use CI 52. Rule 1(1) of CI 52 states that payment of interest shall be calculated at the prevailing bank rate prevailing at the time the order was made and at simple interest. In the instant case the order was made on 14<sup>th</sup> October 2014 and the interest rate given by Bank of Ghana which is found at page 115 of the Record of Appeal is 0.23138%. We find that the Appellant did not provide any basis for the calculation of the interest by the use of 6.58% instead of 0.23138%. Was the calculation of the interest by the use of 6.58% grounded in law? We think not.

Accordingly, we find what the relief the Appellant is seeking is not grounded in law. It is therefore our opinion that the appeal has no merit and it is accordingly dismissed. The appeal fails in its entirety and the High Court Ruling dated 21<sup>st</sup> January 2021 is hereby affirmed.

*(SGD)*

**MERLEY A. WOOD (MRS.)**

**(JUSTICE OF APPEAL)**

*(SGD)*

**I AGREE**

**SENYO DZAMEFE**

**(JUSTICE OF APPEAL)**

*(SGD)*

**I ALSO AGREE**

**AMMA A. GAISIE (MRS.)**

**(JUSTICE OF APPEAL)**

**COUNSEL:**

- JUSTICE TSAKPOE FOR PLAINTIFF/RESPONDENT/APPELLANT
- DORIS BANFO DEFENDANT/APPLICANT/RESPONDENT