

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE
WINNEBA, HELD ON WEDNESDAY THE 26TH DAY OF OCTOBER, 2022, BEFORE
HIS LORDSHIP, JUSTICE ABOAGYE TANDOH, HIGH COURT JUDGE.

SUIT NO. E11/002/2022.

DATE: 26THOCTOBER, 2022.

FRANCIAM SERVICES ...

PLANTIFF/APPELLANT

VRS.

WAFAYAW ...

DEFENDANT/RESPONDENT

JUDGMENT

The Plaintiff/Appellant on the 27th day of January, 2020, filed a Notice of Appeal against the Judgment of the District Court, Kasoa, in the Central Region delivered on the 26th day of September, 2018, in favour of the Defendant/Respondent against the Plaintiff/Appellant.

For ease of reference the Plaintiff/Appellant will be referred to as the Appellant whilst the Defendant/Respondent will be the Respondent.

The Appellant's action against the Respondent at the Court below and per its amended Writ of Summons filed in Court dated 11th of July, 2018, was for the following reliefs:

- a. Recovery of cash the sum of Eight Thousand Seven Hundred and Twenty Ghana Cedis (GH¢8,720,000.00) being the remaining amount of 850 bags of cement supplied to the Defendant on 13/02/18.*

- b. An order compelling the Defendant to pay 5% on Eight Thousand Eight Hundred and Twenty Ghana Cedis(GHC8,820.00) weekly as agreed from 13/02/18 to the date of final payment.*
- c. An order directed at the Defendant to pay Four Hundred Ghana Cedis (GHC400.00) being the cost of conveying 264 bags of cement from the Defendant's store back to Plaintiff depot.*
- d. Costs.*

BRIEF FACTS OF THE CASE

The Plaintiff is a businessman and a Chief Executive Officer of Franciam Services of Kasoa whilst the Defendant is also a businessman and lives at Kasoa.

The Plaintiff avers that on the 13th February, 2018, he supplied the Defendant with 850 bags of cement at a unit price of Twenty Seven Ghana Cedis (GHC27.00) and all totaling Twenty-Two Thousand Nine Hundred and Fifty Ghana (GHC22,950.00) The Plaintiff stated that it was agreed that the cost of the 850 bags of cement would be paid in full within a week but the Defendant failed to do so.

The Plaintiff contends that the Defendant rather paid Five thousand Ghana Cedis (GHC 5000.00) on the 20th day of February 2018 and thereafter paid Two Thousand Ghana Cedis (GHC2000.00) on the 27th day of March 2018, all totaling Seven Thousand Ghana Cedis (GHC 7000.00).

According to the Plaintiff, the Defendant asked him to come for the remaining 264 bags of cements which he did, because he could not pay for the remaining balance when he requested for same. The Plaintiff further contends that they both agreed that every one week of default in paying for the cements will attract five percent (5%) penalty.

The Defendant denied owing the Plaintiff even though he admitted having bought 850 bags of cement from the Plaintiff. The Defendant states that the unit cost for a bag of cement was Twenty Six Ghana Cedis (GH¢26.5)

and not Twenty Seven Ghana Cedis (GH¢27.00) as stated by the Plaintiff in his statement of claim.

The Respondent averred that prior to taking the goods, he paid Nine Thousand Ghana Cedis (GH¢9000.00) to the Appellant after they had bargained from Ten Thousand Ghana Cedis (GH¢10, 000.00). According to the Respondent he also paid Seven Thousand Ghana Cedis (GH¢ 7,000.00). Fifty Ghana Cedis (GH¢50) which the Plaintiff collected from his store boy. Also, the Respondent stated that, the 264 cement bags the Appellant came for amounted to Six Thousand Nine Hundred and Ninety-Six (GH¢6,996.00) bringing the total amount he allegedly paid to the Appellant to Twenty-Three Thousand and Forty-Six Ghana Cedis (GH¢23, 046.00). As a result the Respondent said he does not owe the Appellant any money and that it is the Appellant who rather owes him Five Hundred and Twenty One Ghana Cedis (GH¢521.00).

The Respondent therefore, counterclaimed for the Five Hundred and Twenty One Ghana Cedis (GH¢521.00) which is in contrast to the Appellant's assertion that the Respondent owes him Nine Thousand Two Hundred and Twenty-One Ghana Cedis (GH¢9,220.00).

The matter went to full trial and the court below in its judgment dismissed the Plaintiff/Appellant's claims and granted the Defendant's counterclaim per pages 37-42 of the records of appeal.

Dissatisfied, the Appellant filed a notice of appeal before this court for redress.

GROUNDS OF APPEAL

1. *The judgment is against the weight of evidence*
2. *Additional grounds of appeal would be filled upon the receipt of the records of proceedings.*

In the instance appeal there was only one ground which ground was the judgment being against the weight of evidence even though the Appellant had earlier indicated he was going to file additional grounds which he failed so to do.

THE BURDEN OF PROOF IN A CIVIL ACTION

It is trite that an Appeal is by way of re-hearing. This principle was reaffirmed by the Supreme Court speaking through Appau JSC in the case of EVELYN ASIEDU OFFEI VRS YAW ASAMOAH ODESHE KWAKU AGYAPONG¹ the court stated thus:

"... An appeal is by way of rehearing, particularly where the appellant alleges his notice of appeal that the decision of the trial court was against the weight of evidence. In such a case, it is the duty of the appellate court to analyse the entire record of appeal, take into account the testimonies...it is immaterial whether the appeal is a second one from the Court of Appeal to the Supreme Court."

See: TUAKWA VRS BOSOM (2001-2002) SCGLR 61.

¹(2018) 122 G.M.J 186 S.C

SECTION 11(1)(4) OF THE EVIDENCE ACT, 1975 (NRCD 323) deals with the burden of producing evidence and defines same thus:

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

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

FOSUA & ADU-POKUVRS. DUFIE (DECEASED) & ADU-POKU MENSAH²

Also, **Section 12(1)(2) NRCD 323** provides for the proof by a Preponderance of the Probabilities thus:

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

See: **SARKODIE VRS FKA COMPANY LTD³**, **ZABRAMA VRS. SEGBEDZI,⁴MAJOLAGBE VRS. LARBI AND ORS⁵** and **BAKERS – WOODE VRS NANA FITZ.⁶**

²[2009] SCGLR 310 @ 325 - 327

³[2009] SCGLR 65

⁴[1991] 2 GLR 223

⁵[1959] GLR 190 – 195

⁶[2007 – 2008] 2 SCGLR 879

The Plaintiff has a duty to establish his case by leading evidence sufficient enough to meet the legal standard set by law in a civil discourse.

From the pleadings of the parties in this suit, the onus of proof is on both parties to prove their claim and counterclaim respectively. The nature of the onus is explained in the case of **BANK OF WEST AFRICA LTD. VRS. ACKUN (1963) 1 GLR 176** where the Supreme Court stated that, the onus of proof in civil cases depends upon the pleadings and that a party who in his pleadings raises an issue essential to the success of his case assumes the burden of proof.

SUMMARY OF THE EVIDENCE

In his evidence before this court, the Plaintiff stated that the Defendant is his customer and he supplies cement to him on credit. According to the Plaintiff he supplied 850 bags of cement on the 18th April, 2018 at a unit price of Twenty Seven Ghana Cedis (GH¢27.00) all totaling Twenty-Two Thousand Nine Hundred and Fifty Ghana Cedis (Ghc22,950.00) to be paid within one week. The Plaintiff averred that after paying Five Thousand Ghana Cedis (GH¢,5000.00) through his Fidelity Bank account (Franciam Services), he told the Defendant to pay the balance in full but the Defendant paid Two Thousand Ghana Cedis (GH¢2,000.00) into his Fidelity accounts.

The records shows that the Plaintiff tendered in evidence, Exhibits 'A, waybill dated 18th February, 2018 per page 11 of the record, Exhibit 'B' being receipts covering the

payment of Five Thousand Ghana Cedis(GHC5,000.00) and Two Thousand Ghana Cedis (GHC2,000.00) per page 10 of the record and Exhibit 'C' cash Sales invoice dated 15th March, 2018 covering 264 bags of cement.

The Respondent admitted having paid Five Thousand Ghana Cedis (GHC5,000.00) and Two Thousand Ghana Cedis (GHC2,000.00) respectively to the Appellant through the Appellant's bank account. According to the Respondent, he had earlier paid Nine Thousand Ghana Cedis (GHC9,000.00) cash to the Appellant prior to taking the goods away and tendered Exhibit '1' to support same. The Respondent further stated that he paid GHC521.00 to the Appellant which includes money he took from his shop attendant.

ANALYSIS OF THE EVIDENCE AND THE APPLICABLE LAW

Having examined Exhibit 'A' and Exhibit 'C', I find that the signatures were different though no reason was given to that effect. Also whilst the 264 bags of cements were stated to have been returned to the Appellant which was not in doubt, the unit and total cost of cement was not stated. The absence of the unit cost of cement of Twenty Seven Ghana Cedis (GHC27.00) raises a serious doubt.

Again Receipt number 0004, dated 20th March, 2018 and receipt number 0005 per Exhibit 'B' creates the impression that no other receipt was issued to any other customer between 20th March and 27th March, 2018 per page 10 of the record.

From the foregoing, I find that Exhibit 'A', 'B', and 'C' were not authentic and were a creation of the Appellant to simply to throw dust in the eyes of the court. I further find that the unit cost for a cement at the time of the transaction was Twenty Six Ghana Cedis Five Pesewas (GHC26.5) and not Twenty Seven Ghana Cedis (GHC27.00) I also find that the Respondent paid Nine Thousand Ghana Cedis(GHC9,000.00) to the

Appellant the day the 850 bags of cement was supplied to the Respondent and hold that Exhibits 'A', 'B' and 'C' were an attempt to create the impression that monies paid by the Respondent were covered by receipts and that the Nine Thousand Ghana Cedis (GH¢9,000.00) was not paid to him because there was no receipt to cover same.

The next issue to consider was whether or not the transaction between the parties had any 5% default clause?

Granted without admitting that the goods were sold on the 13th February 2018 and payment was expected within a week (7 days) per paragraphs 3 and 4 of the Appellant's Statement of Claim on pages 3 to 4 of the record, the payment made on 20th March, 2018 was Twenty Seven (27) days in default. As a result, the outstanding balance should have included the 5% default payment but strangely, the receipt issued(Exhibit B)mentioned the balance as Eleven Thousand Two Hundred and Twenty-Two Ghana Cedis (GH¢ 11,222.00) without the 5% default payment.

From the foregoing, I find that the alleged 5% default was non – existent and just an afterthought, and I hold same.

In the case, of JASS CO. LTD. & ANOR⁷.the Supreme Court speaking through Dotse JSC stated thus:

“Findings made by a trial Judge who heard and observed the witness when they testified before him or her are generally not departed from by the appellate court save where those findings are clearly unsupportable, having regard to the evidence on record; or as has been stated by the Supreme Court in the case of ACHORO V AKANFELA [1996-97] SCGLR 209, holding (2) where the principle was reemphasize as follows:

⁷[2009] SCGLR 265 AT 275

'(2) in an appeal against findings of fact to a second appellate Court like [the Supreme Court], where the lower appellate Court had occurred 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 [page276] lower tribunal 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 findings was so based on erroneous proposition of the law that proposition be corrected, the findings would disappear, It must be demonstrated that the judgments of the courts below were clearly wrong, we are of the firm opinion that an appellant court should be slow in dismissing findings and conclusions reached by trial court based on the observations made during the trial of the case as a result of the advantages enjoyed in seeing, hearing and observing the demeanor of the witnesses by the trial court. Any attempt by an appellate court such as ours to come to different conclusions on the facts, and not on the law, must be based on strong evidence which is apparent from the appeal record''.

In the instant appeal, there is a serious doubt as to the case of the appellant compared to that of the Respondent. Having perused the records, I find that the decision of the trial court was consistent with the evidence.

CONCLUSION

I have critically perused the record of proceedings including the Judgment delivered by the court below having considered the trial Judge's approach to the valuation of the

evidence. I am of the candid view that the Judgment of the trial court is supported by the evidence on record and correctly applied the law and do not warrant any interference.

Accordingly, the appeal is dismissed.

Costs of Four Thousand Ghana Cedis (GH¢4,000.00) is awarded against the Appellant in favour of Respondent.

(SGD)

**JUSTICE ABOAGYE TANDOH
HIGH COURT JUDGE.**

COUNSEL

MR. THEOPHILUS ADEPOJU, FOR THE PLAINTIFF/APPELLANT.

MR. ROBERT TWENE, FOR THE DEFENDANT/RESPONDENT.

/MK/