IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA 2011

CORAM: ATUGUBA, JSC (PRESIDING)

DR. DATE-BAH, JSC

OWUSU, JSC

ARYEETEY, JSC

AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
SUIT NO. J4/40/10

DATE: 10TH FEBRUARY, 2011

YAW OPPONG .... DEFENDANT/APPELLANT

VRS.

CHARLES ANARFI .... PLAINTIFF/APPELLANT/RESPONDENT

J U D G M E N T.

AKOTO-BAMFO JSC:

Yaw Oppong, the respondent hereafter referred to as the plaintiff, commenced an action in the High Court against Charles Anarfi, the appellant now simply referred to as the defendant for this relief:

"An order for the defendant to yield vacant possession and hand over House No_ Plot 35 Block AB Patase, West Kumasi to the Plaintiff".

Briefly ,the Plaintiffs case, as gleaned from the accompanying Statement of Claim, was that he purchased House no Plot 35 AB Patase, the subject matter of this appeal from the defendant at an agreed sum of GH¢40,000. According to him the transaction was reduced into writing; that even though the 6 month period granted the defendant to yield vacant possession expired; he remained in possession despite repeated demands.

The defendant resisted the Plaintiff's claim. The gist of his case as per the Statement of Defence filed was that he sought financial assistance from the Plaintiff in the sum of GH¢40,000 cedis to recapitalize his 2nd hand clothing business. He used the house in issue as security. When, however, the Plaintiff's agent produced a document supposedly evidencing the transaction for his signature, he realized it was a purchase agreement as opposed to the loan transaction. He protested but subsequently signed upon the assurances given by the agent that the terms of the agreement would not be enforced since they were good friends.

According to him, the disbursement of the loan was made in tranches and not one -time as asserted by the plaintiff. In the course of time, the Apagyahene had to

intervene. He invited the Plaintiff for a discussion on the matter as a result of which the Plaintiff offered to take interest on the borrowed sum. The issues for determination before the High Court were:

1. Whether or not the house was sold to the Plaintiff
2. Whether House No_ 35, Block AB was used as a security for the grant of financial assistance

After a full trial, the learned High Court Judge found that the transaction between the plaintiff and the defendant was a loan transaction and not a purchase agreement. He therefore entered judgment for the defendant against the plaintiff. After an expatiation of the principles of unjust enrichment, he delivered himself in these terms:

"I therefore order the defendant herein based on the principles above cited to pay to the Plaintiff an amount of GHc37000 to the plaintiff with interest at the prevailing Bank rate from the 6th of June when the amount was due to the date of the issuance of the writ till date of payment."

The Plaintiff registered his protest against the decision by filing a Notice of Appeal consisting of 5 grounds namely:

1. The Learned Judge erred when he held that there was no burden of proof on the Defendant/Respondent to prove matters canvassed in his defence to the action
2. The Learned Judge erred when he held that the transaction between the parties to the suit was not a sale of House Number Plot 35 Block AB Patasi and was rather a loan advanced to the Defendant/Respondent in installments.

3. The Learned Judge erred when he discarded the clear legal effect of Exhibit A
4. The Learned Judge erred when he made findings of fact not borne out by the evidence on record
5. The Judgment is against the weight of evidence
6. Additional Grounds of Appeal to be filed on receipt of the record of proceedings

On the 26th of March 2009, the Court of Appeal by a 2-1 majority allowed the appeal and set aside the judgment and consequential orders made by the learned trial Judge.

Dissatisfied, the defendant mounted a challenge against the decision of the Court of Appeal.

He premised his attack on these grounds:

a) The Learned Judges in the majority failed to consider adequately the effect of the alleged sale document exhibited at the trial in the High Court
b) The majority judgment is against the weight of the evidence;
c) Additional grounds may be filed on receipt of the judgment and Proceedings

It must be noted that no additional grounds were subsequently filed.

Arguing Ground A- namely that the learned Judges in the majority failed to consider adequately the effect of the alleged sale document, he submitted that since the whole case for the defendant hinged on Exhibit A whose admission into evidence was challenged albeit unsuccessfully; the said Exhibit could not legally form part of the evidence owing to its erroneous

admission. He contended that the admission of Exhibit A into evidence occasioned a substantial miscarriage of justice.

According to him, both the trial court and the Court of Appeal erred in finding that Exhibit A was a receipt. He submitted that since Exhibit A was an instrument affecting land, non registration thereof was fatal and therefore constituting an instance in which the Court could properly depart from the findings of fact concurrently made by both the trial and appellate Courts.

In reply learned Counsel for the Plaintiff contended that the submission should not be countenanced since the defendant failed to appeal against the ruling in the course of the trial; and that having failed to avail himself of the opportunity, it was too late in the day for him to raise same.

Section 6 of the Evidence Decree NRCD 323 provides:

1) In every action and at every stage thereof, any objection to the admissibility of evidence by a party affected thereby shall be made at the time the evidence was offered.
2) Every objection to the admissibility of evidence shall be recorded and ruled upon by the Court as a matter of Course.

Undoubtedly, the Counsel for the defendant complied with the rules, his objection was however overruled.

The Court in delivering its ruling stated as follows “this Court shall consider the validity or otherwise of the said document as judgment; at most the document is just like a receipt and the intention behind the

maker of the document is another matter to be determined by the Court".

What remedies were open to the defendant then?

He should have appealed within 21days of the date of the ruling since it was clearly an interlocutory order; for as provided for under Rule 9 (1) (a) of C1 19 the Court of Appeal Rules,:

9(1) subject to any other enactment governing appeals, an application shall not be brought after the expiration of

(a) 21 days in the case of an appeal against an interlocutory decision.

The defendant cannot be heard to complain. Assuming Exhibit A was wrongly admitted could that fact by itself result in a reversal?

The answer is in the negative; for the Evidence Act Sec 5 (2) sets out the circumstances under which a judgment will be set aside on account of an erroneous admission of evidence.

5.2 In determining whether an erroneous admission of evidence resulted in a substantial miscarriage of justice, the Court shall consider

a) Whether the trial court relied on that inadmissible evidence, and
b) Whether an objection to, or a motion to exclude or to strike out, the evidence could and should have been made at an earlier stage in the action, and

c) Whether the objection or motion could and should have been so stated as to make clear the ground or grounds of the objection or motion, and
d) Whether the admitted evidence should have been excluded on one of the grounds stated in connection with the objection or motion, and
e) Whether the decision would have been otherwise but for the erroneous admission of evidence.

It is therefore evident that the only criterion for a reversal is that the erroneous admission must have resulted in a substantial miscarriage of justice.

Factors which should weigh on the Court in arriving at such a decision are clearly set out above.

It is necessary at this stage to consider whether Exhibit A was erroneously admitted into evidence. In other words what was the exact nature of Exhibit A; was it a receipt as found by both the trial Court and the Court of Appeal, or an instrument affecting land, the non registration of which is fatal and therefore cannot be the basis of a judicial decision? Agyei Osae V Adjeifio 2007/2008 SCGLR 499.

Exhibit A was described as a sale agreement; the parties were described as vendor and vendee; the agreed sum was set out and the subject

matter of the sale was clearly stated. Indeed in the 3rd paragraph appears the following: “the vendor agreed to sell his above described property at the total cost of ¢400,000.00 (FOUR HUNDRED MILLIONS) and the said vendee (Yaw Oppong) has agreed to purchase the said House No plot_ 35 Block AB Patase-West-Kumasi”.

One would say the document speaks for itself. The said paragraph leaves none in any doubt as to not only its form i.e. a sale transaction but equally that the property on plot no 35 Patasi was the subject of the transaction. There was an agreement on the contract sum

The defendant does not deny that on the face of Exhibit A, the transaction could be described as a sale agreement. His case was that he should be allowed to lead extrinsic evidence, as it were, to contradict the terms of the written document. The Court of Appeal dealt adequately with the issue and came to a conclusion and rightly so in our view that there was a sale agreement and that the circumstances of this case do not afford an exception to the general rule as lucidly stated in Wilson v. Brobbey (1974 1 GLR.250 at 251 in these terms:

“Where parties have embodied the terms of their contract in a written document extrinsic evidence or oral evidence will be inadmissible to add to, vary, subtract from or contradict the terms of the written instrument”

Indeed in Gallie v. Lee (1969) 2 Ch. 17 at p. 36, C.A. Lord Denning M.R. stated the principle that mere negligence in not reading a document before signing cannot amount to a defence of non est factum thus:

"Whenever a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature—by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences—then, if he does not take the trouble to read it but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document".

It is therefore settled that a party of full age and understanding would normally be bound by his signature whether he reads, understands it or not particularly in the absence of the requisite evidence that the other party misled him.

On the nature of EXH A we are of the view that it is a receipt as found by both the trial court and the Court of Appeal.

In Donkor v. Alhassan 1987-88 2GLR 253 at 256 Ampiah JA as he then was faced with a similar situation stated "These receipts were not meant to transfer, by themselves any interests in land. They only evidenced payment in pursuance of an agreement to transfer an interest in the land." Exh A was therefore not required to be registered under the Land Registry Act, 1962(Act 122 Sec.24 (I) to be effective.

Exhibit A was not tendered to prove the respondent's title to the property .The learned Judge rightly overruled the objection.

It is pertinent to note that in his submissions before the High Court; Counsel for the respondent (now appellant) described Exhibit A as a receipt.

At page 60, of the Record of Proceedings, this is what he stated "Even granted that the Plaintiff and the defendant duly signed Exhibit A; at best Exhibit A can be regarded as a **receipt** evidencing a loan that has given to the defendant".

The appeal fails on this ground and is hereby dismissed.

Learned Counsel for the appellant submitted that the judgment is against the weight of the evidence adduced. According to him contrary to the view held by the majority in the Court of Appeal, the defendant's evidence on the nature of the transaction was amply corroborated.

There is a wealth of authorities on the burden allocated to an appellant who alleges in his Notice of Appeal that the decision is against the weight of the evidence led.

Even though it is ordinarily within province of the trial court to evaluate the veracity or otherwise of a witness, it is incumbent upon an appellant court in such a 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 the preponderance of the probabilities, the conclusions of the trial Judge are reasonable or amply supported by the evidence. Tuakwa v Boson 2001/2002 SCGLR 61.

In Charity v EMS 2007/2008 SCGLR 985, Georgina Wood CJ stated "the well-established rule is that an appeal is by way of rehearing and an appellate Court is therefore entitled look at the entire evidence and come to the conclusions on both the facts and the law.

Learned Counsel for the appellant submitted that contrary to the majority view of the Court of Appeal that the defendant's case was not corroborated; the pieces of evidence offered by the defendant's wife amply corroborated the defendant's case.

A reading of the record of proceedings show that this submission is not rooted in the record. The defendant called one witness, his wife, who obviously had no personal knowledge of the transaction. An excerpt of the cross-examination is relevant:

Q. You said that you were not part of the negotiations and you said That your husband asked for a loan so the issue of the loan was what your husband told you, it was your husband who told you he had been given a loan.

A. Yes.

Q. And it is your husband who told you that there a balance of ¢30,000.000.00 cedis.

A. Yes.

The evidence given by the witness for the defendant clearly did not advance the frontiers of the defendant's case since his wife admittedly had no personal knowledge of the events as stipulated under section 60 of the Evidence Act, 1973.

Again in both his Statement of Defence and evidence before the High Court

One Nana Agyapahene was named as having intervened in the matter and having succeeded in getting the plaintiff to agree to exact some interest on the loan. This piece of evidence was strenuously denied by the plaintiff; yet the defendant failed to call Nana Agyapahene. He is a material witness whose evidence would have assisted the Court immensely. Failure to call him clearly dealt a big blow to the defendant's case.

The Court of Appeal, after reviewing the evidence on record and the decision of the learned Judge of the High Court rightly came to the conclusion that the appeal lodged against the decision of the High Court, which entered judgment for the appellant herein, ought to succeed.

Kanyoke JA stated as follows:

"On the evidence and for the reasons given herein, I have come to the conclusion that the appellant had sufficiently established on a preponderance of probabilities and satisfied me that the judgment of the court below is clearly and manifestly and overwhelmingly against the weight of evidence. The serious omission by the trial judge to reject as inadmissible oral or extrinsic evidence to subtract vary and contradict the clear, and express terms of and intention of the parties in Exhibit A, coupled with his erroneous placing of the burden of proof of issues raised by the respondent in his pleadings on the appellant and exacerbated by his cursory scrutiny and evaluation and assessment of the totality of the evidence laid before him has resulted in a substantial miscarriage of justice in this case".

We are satisfied that the conclusions of the Court of Appeal were amply supported by the evidence on record. We would accordingly dismiss the appeal.

[SGD] V. AKOTO-BAMFO [MRS.]
[JUSTICE OF THE SUPREME COURT]

[SGD] W. A. ATUGUBA
[JUSTICE OF THE SUPEME COURT]

[SGD] DR S. K. DATE-BAH
[JUSTICE OF THE SUPREME COURT]

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[JUSTICE OF THE SUPREME COURT]

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YAW BOAFOR PLAINTIFF/APPELLANT/RESPONDENT.