IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA AD - 2016

CORAM: ANIN YEBOAH JSC
AKOTO – BAMFO (MRS) JSC
BENIN JSC
AKAMBA JSC
APPAU JSC

CIVIL APPEAL

NO. J4/2/2016

6TH JUNE 2016

INTERNATIONAL ROM LIMITED **PLAINTIFF/RESPONDENT**
H/NO.TPD TCD6-126 **/RESPONDENT**
COMMUNITY 6 NEAR NICK HOTEL
TEMA

VRS.

VODAFONE GHANA LIMITED **1ST DEFENDANT/APPELLANT**
MANET TOWER 2 **/APPELLANT**
AIRPORT CITY
ACCRA

FIDELITY BANK LIMITED **2ND DEFENDANT**
RIDGE TOWERS, RIDGE WEST ACCRA

JUDGMENT

AKAMBA, JSC

By a writ of summons issued on the 19th August 2009, in the High Court, (Commercial Division) Accra, the plaintiff/respondent/respondent (herein after simply referred to as the plaintiff) claimed against the 1st Defendant/appellant/appellant (herein after simply referred to as the 1st defendant) the following:
"(i) …..a total outstanding amount of US$4,893,057.08 being unpaid bills by the defendant on due dates arising from works executed by plaintiff as contained in the contract of 17th December, 2003 with its amendment and 13th May, 2008 respectively for works executed and already taken over by defendant but has refused to settle despite numerous reminders.

(ii) An order for accounts or reconciliation of accounts between the two parties in respect of the two named contracts to verify the outstanding unpaid bills.
(iii) Declaration that the said termination of the contracts of 13th May, 2008 and 28th May 2009 is illegal.

(iv) Special and General Damages for breach of contract.

(v) Interest at the prevailing interest rate up to the date of final payment.

(vi) Cost."

The High Court, Accra (Commercial Division) after a full trial entered judgment on 15th May 2013 in favour of the Plaintiff as against the 1st Defendant. On appeal, the Court of Appeal affirmed the decision of the trial court and dismissed the appeal in its entirety. This further appeal to this court demonstrates the appellant's dissatisfaction with the outcome from the Court of Appeal.

BACKGROUND

On 17th December 2003, 1st Defendant entered into a contract with International Rom Ltd ("International Rom, Mauritius"), a company registered under the laws of Mauritius with its registered office in Port Louis, Mauritius. The Company's Directors were Messrs Eli Bonzaglo and Sundaraparipirnom Varadaranjon, while Mr. Eli Bonzaglo was the shareholder, thereof. The Company was thereafter

registered in Ghana as an external Company with Registration Number EXT. 900. It carried out civil works for 1st Defendant between 2003 and 2006 until the directors ended their operations in Ghana. It is the 1st Defendant's case that it paid all amounts due this company through their local and foreign accounts. In or about 5th July, 2007, Plaintiff was registered in Ghana as a limited liability company under the Companies Act, 1963 (Act 179), long after the expiry of 1st Defendant's contract with International Rom, Mauritius. Its first directors were Martin Asiedu, Nii Amoo Cudjoe and Moshe Ben Kalifa. These directors are also the shareholders of Plaintiff Company. On May 13, 2008, the Plaintiff, the Ghanaian registered International Rom Limited, entered into exhibit C, an agreement with 1st Defendant, effective 1st October 2007 to 31st December 2008 under which Plaintiff was awarded 41 sites for the construction of telecommunication towers.

The number of sites was drastically reduced to 27 on account apparently, of failure by Plaintiff to meet its targets. On August 12, 2008, 2nd Defendant extended a GH¢1.5 million facility to the Plaintiff to finance the construction of the 41 sites against an undertaking by the 1st Defendant to pay all proceeds from the contract in the joint names of the Plaintiff and 2nd Defendant.

The 1st defendant apparently failed to comply with the undertaking. Subsequently the 1st defendant terminated the contract between it and the plaintiff culminating in the action before the High Court, Accra (Commercial Division).

GROUNDS OF APPEAL

The 1st defendant filed the following as his grounds of appeal for our determination:

"1. Having held that the official email sent by N.B. Auckbarally stating that International Rom, Mauritius ceased to exist on March 25, 2009 constituted a correct statement of the status of International Rom, Mauritius as a registered company in Mauritius, the Court of Appeal erred in holding that the trial court was correct in not attaching the probative value to the effect of that email.

2. The Court of Appeal erred in failing to consider adequately or at all, the implications of its findings to the effect that the email of N. B. Auckbarally constituted formal and accurate communication of the status of Rom International Limited, Mauritius as a registered company in Mauritius.
3. In the face of the evidence on record and clear legal authority to the contrary, the Court of Appeal fell into the same error as the trial High Court, in treating Plaintiff/Respondent/Respondent (Plaintiff) and Rom International Limited, Mauritius as one and the same legal entity in respect of Exhibits A, B, C and D, when all the evidence on record showed (among others), that Plaintiff Rom International Limited, Mauritius were separate and distinct legal entities, incorporated in different jurisdictions and at different times and signed and performed separate contracts at different times with 1st Defendant.

4. The Court of Appeal erred in failing to consider adequately or at all the numerous pieces of evidence and legal authority in proof of plaintiff's lack of capacity to institute the action.

5. The Court of Appeal erred in holding that the determination of Grounds 2-10 of the Grounds of Appeal required merely an evaluation of factual matters.
6. The Court of Appeal erred, in the face of evidence on record to the contrary, that the evidence of DW5 did not challenge the figures stated in exhibit L, and that DW5's evidence stood along, was selective, unsatisfactory and was uncorroborated by any other evidence.

7. The Court of Appeal erred in holding that 1st Defendant did not cross-examine or discredit Plaintiff's Exhibit L when there was clear evidence on record to the contrary.

8. The Court of Appeal, in affirming the various heads of awards made in favour of Plaintiff, erred in failing to consider adequately or at all relevant authority and the numerous pieces of evidence on record of monies paid by 1st Defendant and received by Plaintiff."

The above eight narratives were filed as constituting the grounds of appeal for our determination. This court is the highest court of the land. Its jurisdiction is conferred by the Constitution of Ghana 1992, the supreme law of the land. It is also governed in its day to day deliberations by enactments made under the authority of Parliament established by the Constitution; any orders rules and regulations made by any authority or person under powers conferred by the constitution; the common law and existing law. (See article 11 of the Constitution 1992.) By this undertaking, every step or application before our courts should be measured against the appropriate law, statute, regulation, instrument or legal principle which permits the step. The present application before us is an appeal from the decision of the Court of Appeal. Appeal is the creature of statute as no one has an inherent right of appeal. Thus the statute that created this right of appeal has also provided rules of procedure for seeking or obtaining this remedy. The governing statute or instrument for mounting an appeal to this court is the CI 16, the Supreme Court Rules. Do the grounds stated (supra) constitute grounds of appeal as envisaged by our relevant rules, the same being rule 6 sub-rules 4 and 5 of CI 16 which I quote here below to ascertain compliance:

C.I. 16 Rule 6 sub-rules 4 and 5

"(4) The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal, without any argument or a narrative and shall be numbered seriatim; and where a ground of appeal is one of law, the appellant shall indicate the stage of the proceedings at which it was first raised.

(5) A ground of appeal which is vague or general in terms or does not disclose a reasonable ground of appeal is not permitted, except the general ground that the judgment is against the weight of evidence and a ground of appeal or any part of it which is not permitted under this rule may be struck out by the Court on its own motion or on application by the respondent."

Thus the 1st defendant's so called grounds of appeal when juxtaposed with the above requirement reveals an obvious non-compliance with the rules of court. Undoubtedly it is only in an atmosphere of compliance with procedural rules of court would there be certainty and integrity in litigation. All the so called grounds filed by the appellant (above) are general, argumentative and narrative and to that extent non-compliant with Rule 6 sub-rules 4 and 5 of CI 16. They are struck out. In order not to yield overly to legal technicalities to defeat the cries of an otherwise sincere litigant we would and hereby substitute them with what actually emerges as the core complaint and general ground which is that 'the judgment is against the weight of evidence'. It does appear that the magnanimity exhibited by this court over these obvious lapses and disrespect for the rules of engagement is being taken as a sign either of condoning or weakness hence the persistence of the impunity. It is time to apply the rules strictly.

It is good law that a party seeking redress from the court for a specific remedy provided by statute, shall resort to the remedy or the tribunal specified for it. This general principle of law was concisely stated by Lord Justice Asquith in **Wilkingson v Barking Corp (1948) 1 K.B. 721 @ 724** as follows: *"It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others."*

To the above I would add the procedure specified by the statute.

In **Ayikai v Okaidja III (2011) SCGLR 205** this court did stress that non-compliance with the rules of court have very fatal consequences for they not only constitute an irregularity but raise issues that go to jurisdiction.

This appeal being premised upon the contention that the judgment is against the weight of evidence, among others, is a call on us to rehear this appeal by analyzing the record of appeal before us, taking into account the testimonies and documentary as well as any other evidence adduced at the trial and arriving at a conclusion one way or the other. This is the import of the numerous decisions of

this court on the point. Notable among these are **Tuakwa vs Bosom (2001-2002) SCGLR 61; Djin vs Musah (2007-2008) 1 SCGLR 686.**

In the Djin case (above), this court per Aninakwa JSC at page 691 of the report held that when an appellant complains that the 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."

Under this omnibus ground I intend to determine the following particulars which the appellant has raised as lapses arising from the decisions appealed from:

(i) What was the status of International Rom Mauritius as a registered company as at 25th March 2005? What value could derive from the e-mail?

(ii) What implications emerge from the Court of Appeal's finding that the e-mail communication was a formal and an accurate communication of the status of Rom International Ltd, Mauritius as a registered company in Mauritius?

(iii) Was the Plaintiff (International Rom Ltd) and Rom International Ltd, Mauritius one and the same legal entity in respect of exhibits A, B, C and D in the light of the evidence on record?

(iv) Did the DW5 by his evidence challenge the figures in exhibit L if so to what extent?

(v) Did the 1st Defendant cross-examine Plaintiff on the exhibit L and if so to what effect?

(vi) Did the Court of Appeal fail to consider adequately all relevant authority and evidence of payments by 1st defendant and received by plaintiff?

What then was the status of International Rom, Mauritius, as a registered company as at 25th March 2009 and what value could derive from the e-mail?

During the trial before the High Court, the plaintiff herein was obliged to lead evidence to establish the registration status of International Rom, Mauritius as at 25th March 2009. This is so because, as the plaintiff in the contest, it bears the

burden of production of evidence and persuasion concerning the issue as to whether or not International Rom, Mauritius was liquidated as at 25th March 2009. These two burdens, that of persuasion and production of evidence are defined in section 10 and 11 respectively of the Evidence Act, NRCD 323 as follows:

"10 (1) For the purpose of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

(2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond reasonable doubt.

11. (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."

Also significant to the discussion is section 14 of NRCD 323 which enacts that:

"14. Except as otherwise provided by law, unless and until it is shifted a person has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."

These evidential requirements (supra) are meant to satisfy the tribunal of fact on a preponderance of evidence on an issue in contention. As clearly stated by this court per my esteemed brother Anin-Yeboah, JSC in **Acquie v Tijani (2012) 2 SCGLR 1252 at 1258** thus:

"In any case, the law does not require a party to prove his case with absolute certainty in civil proceedings. A court must, however satisfy itself that the evidence led on a particular issue is proved in accordance with the requisite standard required by law. In **Hawkins v Powells Tillery Steam Coal Co Ltd (1911) KB 988 at 996,** Buckley, L.J said: 'When it is said that a person who comes to the Court for relief must prove his case, it is never meant that he must prove it with absolute certainty. No fact can be proved in this world with absolute certainty. All

that can be done is to adduce such evidence as that the mind of the tribunal is satisfied that the fact is so. That may be done either by direct evidence or by inference from facts. But the matter must not be left to rest in surmise, conjecture or guess."

It is equally beneficial to refer to the **Commentary on the Evidence Decree, 1975 NRCD 323** which contains a detailed analysis and explanation by the Law Reform Commission as required under the memorandum to the Decree. Commenting on section 11 (4) of NRCD 323 it states that:

"The party with the burden of producing evidence is entitled to rely on all the evidence in the case and need not rest entirely on evidence introduced by him. The party with the burden of producing evidence on the issue may point to evidence introduced by another party which meets or helps meet the test of sufficiency. It is for this reason that the phrase 'on all the evidence' is included in each of the tests of sufficiency."

What evidence did the plaintiff lead in proof of the issue in contention, i.e. the registration status of International Rom, Mauritius as at 25th March 2009?

Plaintiff called DW4 Marian Plange an official of the Registrar General's Department to testify as to its cause. Emerging from the cross-examination of DW 4 on 19th January 2012 are the following:

"Q. Is International Rom, Mauritius still operating as International Company Ghana?

A. My Lord *according to my documents, it is operating because there is nothing which shows that it is been cancelled on file or liquidated on file.*

Q. Do you agree with me that it is a requirement that it should file a profit and loss account and balance sheet in every year after the exploration (sic) of its financial year?

A. Yes My Lord.

Q. Tell the court the last time it filed such a process?

A. My Lord since its incorporation in Ghana, noting (sic) has been filed.

Q. Now International Rom Limited was incorporated subsequent to the registration of the International Rom Mauritius in Ghana, is that correct?

A. My Lord International Rom Ghana Limited is a company incorporated in Ghana.

Q. And was it incorporated after International Rom Mauritius?

A. Yes My Lord International Rom Mauritius was incorporated in 2004 and International Rom Ghana Limited was incorporated in 2007.

Q. Now International Rom Ghana Limited do you agree that it has linkage with International Rom Mauritius?

A. My Lord I cannot tell. According to my records on International Rom Ghana, International Rom Mauritius and International Rom Engineering, they are three (3) separate files.

Q. There is a company called International Rom Limited then this was a company registered in 2004, is that correct?

A. Yes My Lord it was incorporated in Mauritius in 2004 as an external company. "(See pages 21-22 of ROA Volume 2).

The DW4's testimony was followed by DW5 who tendered the 'Report of Accountant' - exhibit 21. In this report exhibited at page 518 of Volume three (3) of the Record of Appeal, it is stated at page 526 item 8.0 on the status of International Rom Limited (Mauritius) as follows:

"*The company was said to have been struck off the register in Mauritius on 26th March 2009. This was as per an email confirmation received from the Company Registry in Mauritius."*

The trial judge, faced with these conflicting pieces of evidence by two of the appellant's witnesses ruled as follows:

"DW5 referred to an email contained in Exhibit 21 to support his claim. The contents of the email are: Dear Sir, your mail dated 24th of January 2012. The Company International Rom Limited was struck off N.B. Auckbarally. Chief Compliance Officer…

I take notice that this information contained in Appendix 1 of exhibit 21 is of foreign origin. It has neither been certified nor attested to as information reliably from Mauritius. It is at best a self-serving document embodied in exhibit 21 which cannot be given any probative value in preference to the

testimony of DW4 with respect to the status of International Rom Mauritius and without prejudice to the other contents of exhibit 21. I reject it."

The Court of Appeal for its part disagreed with the trial judge on the applicability of section 161 of the Evidence Act to the email but affirmed the trial judge's refusal to admit the email in evidence as proof of the liquidation of International Rom, Mauritius. We find the true position to be that the email which was received from the Chief Compliance Officer of Mauritius was intended to be an official record which if it were an ordinary writing would be covered under section 126 (1) of NRCD 323.

I quote section 126 (1) of NRCD 323 here below:

"126. (1) Evidence of a hearsay statement contained in a writing made as a record of an act, event or condition is not made inadmissible by section 117 if-

(a) The writing was made by and within the scope of duty of a public official;

(b) The writing was made at or near the time the act or event occurred or the condition existed; and
(c) The sources of information and method and time of preparation were such as to indicate that the statement contained in the writing is reasonably trustworthy."

By virtue of sections 5, 6 and 10 of the Electronic Transaction Act, (2008) Act 772 the requirement of s. 126 (1) of NRCD 323 would be deemed satisfied by an electronic record which meets the stipulations of the section.

Section 10 of Act 772 states that:

"10. (1) Where a law requires the signature of a person, that requirement is deemed to be satisfied in relation to an electronic record if a digital signature is used."

Section 12 of the same Act elaborates on signing electronic records. It states that:

"12. A person may sign an electronic record by affixing a personal digital signature or using any other recognized, secure and veritable mode of signing agreed by the parties or recognized by the industry to be safe, reliable and acceptable."

The courts below were therefore right, albeit for different reasons, in accepting the email in evidence on the basis of its relevance to the determination of the issue sought to be proved. Evidence is said to be relevant if it renders a fact in issue in a case more likely or less likely as the case may be or if it affects an issue that goes to the credibility of the witness. (See Evidence Law and Practice 2nd Edition by Eric Cowsill and John Clegg, page 72). This however did not bring the issue to a close because admissibility is one thing and the weight to be attached or accorded the admitted evidence is another.

In **Antoh v The State 1965 GLR 676** this court pointed out that the admissibility of a statement by a court does not necessarily mean that the statement is of evidential value so as to automatically result in conviction. A statement that is admitted into evidence must be weighted to determine whether it is valuable enough to sustain the point sought to be proved. Thus the admissibility of evidence must not be confused with the value or the weight to be attached to the evidence so admitted.

As indicated as per the **Commentary to the Evidence Act** (supra) the test of sufficiency refers to 'all the evidence' on the issue. It is in that context that we note that the appellant's evidence on the registration status of International Rom Mauritius as at 25th March 2009 is discernible from a consideration of all the evidence on the issue in contention in order to determine the appropriate weight to attach to any testimony or evidence led. Consequently the testimonies of DW4, DW5 and exhibit 21 would be evaluated to ascertain their value or weight. In this context whereas DW5 relies on exhibit 21 to state that International Rom, Mauritius had been struck off the companies register in Mauritius, DW4 testified to the contrary based upon the records she had.

It is instructive to refer to section 7 of the Electronic Transactions Act, Act 772 which states as follows:

"7 (1) The admissibility of an electronic record shall not be denied as evidence in legal proceedings except as provided in this Act.

(2) In assessing the evidential weight of an electronic record the court shall have regard to

(a) the reliability of the manner in which the electronic record was generated, displayed, stored or communicated.

(b) the reliability of the manner in which the integrity of the information was maintained.

(c) the manner in which its originator was identified and

(d) any other facts that the court may consider relevant."

The internal conflicting evidence presented by the 1st defendant's two witnesses, DW4 and DW5 was so material as to render the issue unproven. In the instant appeal this court and those below are not determining the reliability of the manner in which the email was generated or the maintenance of the integrity of the information but on other facts that are considered relevant in assessing the weight to attach to the email. This requires that any other pieces of evidence on the same issue be considered in order to arrive at a conclusion on the weight to attach to the issue. The point of divergence between DW4 and DW5 is not on an issue which was not material to the 1st defendant's case but on a material issue pertaining to the true status of International Rom, Mauritius at the material time hence the courts below rightly rejected the evidence.

The Companies Act, 1963, Act 179 stipulates particularly in section 311 (1) [c] that upon the dissolution of the external company, the Registrar must be notified within twenty-eight days of the event. The section 311 of Act 179 enacts that:

"311. (1) Where, in the case of an external company,

(a) a winding up order is made by a court of the country in which the company is incorporated, or

(b) a resolution is passed or any other appropriate proceedings are taken in that country to lead to the voluntary winding up of the company, or

(c) the company is dissolved or otherwise ceases to exist according to the law of the country in which it was incorporated,

the local managers and process agents of the company shall, within twenty-eight days after that event, give notice in the prescribed form of that event to the Registrar who shall register the same and publish the particulars contained in the Gazette.

(2) Where any of the events that are referred to in paragraph (a) or (b) of subsection (1) has occurred, the local managers of the company shall, on every invoice, order or business letter issued in Ghana by or on behalf of the company, which is a document on or in which the company's name appears, cause a statement to appear in legible letters to the effect that the company is being wound up in the country where it is incorporated.

(3) A person who in Ghana carries on, or purports to carry on, business on behalf of the company after the date on which it was dissolved or otherwise ceased to exist in the country in which it was incorporated, is liable to a fine not exceeding [twenty-five penalty units] for each day during which that person continues so to do."

There being no evidence that the above stated requirements had been complied with, more particularly s. 311 (1) [b] and [c] above, the DW5 could not have stated anything contrary to what she stated in court. The effect of the 1st defendant's witnesses presenting conflicting evidence on the status of International Rom, Mauritius as at 25th March 2009 is to render the point unproven. In the same vein whatever probative value that could be attached to the email was eroded or cancelled by the contradictory evidence by DW4 under cross examination on 13th January 2012. Were it indeed the case that as at March 26, 2009, International Rom, Mauritius had ceased to exist, what prevented this piece of information from being communicated to the Registrar General as required under section 311 [b] and [c] of Act 179? The Court of Appeal correctly dismissed this ground of contention. We equally find no merit in this ground of dissatisfaction and same is dismissed.

What implications emerge from the Court of Appeal's finding that the e-mail communication was a formal and an accurate communication of the status of Rom International Ltd, Mauritius as a registered company in Mauritius?

This issue has been dealt with in the preceding discussion. We would however elaborate on a few areas for more clarity. While the email apparently satisfies the requirement for admitting an electronic record in evidence this satisfaction alone does not decide what probative value or weight to be attached to it. It does not at that stage determine whether or not the party on whose behalf the email was tendered has met the requisite burden of proof required of him on the issue sought to be proved. This can only be determined upon considering all the evidence on the issue in contention. The evidence proffered by the 1st

defendant's two witnesses (DW4 and DW5) as to the existing registration status of International Rom Ltd, Mauritius as at March 26, 2009 was conflicting. The result was to render the issue not proven because no court would construe such obvious conflict on a material issue otherwise. In conclusion, whereas the email, standing by itself, could have proved the status of International Rom, Mauritius one way yet in the light of the conflicting evidence given by the 1st defendant's other witness it negated whatever probative value that could attach to the email. The implication of the conclusion is that parties and their counsel must be certain of the evidence they lead in proof of their claims in order not to embark on fruitless expeditions.

Was the Plaintiff (International Rom Ltd) and Rom International Ltd, Mauritius one and the same legal entity in respect of exhibits A, B, C and D in the light of the evidence on record?

From the record of appeal before us, it is obvious that the Plaintiff was registered in Ghana as an external company with registration No Ext. 900 on 13th January 2004. (See page 470 Vol. 3 of ROA). An external company is defined in s. 302 of the Companies Act, 1963, Act 179 as:

"a body corporate formed outside the Republic which, at or subsequently to, the commencement of this Act has an established place of business in Ghana."

Established place of business means:

"a branch, management, share, transfer, or registration office, factory, mine, or any other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which the agent regularly fills orders on its behalf."

The fact however that a body corporate has a subsidiary which is incorporated, resident, or carrying on business in the Republic, whether through an established place of business or otherwise, shall not of itself constitute the place of business of that subsidiary an established place of business of that body corporate.

International Rom, Mauritius, on 27th October 2003 granted a General Power of Attorney in favour of a Mr Raju with Indian passport number A3996530 to among other things "demand and receive from all persons, firms, companies or other bodies indebted to the Company all debts and other sums of money now or at time hereafter owing from them, and to give and execute all necessary receipts and discharge from the same with power to accept security and give time for payment of any debt……." (See page 472 Vol. 3 of ROA). Having combed the mass of exhibits tendered between the parties in this dispute there is nothing to suggest that the power of attorney granted Mr. Raju, the Local Manager of International Rom, Mauritius (See Exhibit 18 particularly page 469, Vol 3 of ROA) had been revoked. There is also no evidence of any dealings between this Attorney and the 1st defendant in respect to the matters in contention or arising from the dealings between the parties.

However on 21st January 2008 a purchase agreement was entered between Mr Eli Bouzaglo, on one side and Martin Asiedu and Nii Amoo Cudjoe, on the other side, whereby the former agreed to transfer ownership of Rom Engineering Limited and International Rom (Mauritius) operating in Ghana to the latter subject to the payment of a sum agreed by the parties. (See Exhibit Q at page 207).

There are remarkable records of dealings between the 1st defendant and the plaintiff. By these records the Chief Executive Officer, Oduro Nyaning and the Acting Chief Financial Officer Joe Owusu-Ansah both of the 1st defendant company confirmed the release of sums specified therein into the plaintiff's bank accounts at Stanbic Bank, Accra Main and Fidelity Bank, Accra. These are evidenced by the exhibit 15 series (Pages 438 to 452 Vol. 3). The payments evidenced by the exhibit 15 series were made from 24th September 2007 to 18th December 2008. These dealings by the 1st defendant with the plaintiff at a time it had no contractual dealings with plaintiff surely affirms the plaintiff's assertion that 1st defendant regarded it as the same entity as International Rom, Mauritius.

Based upon these facts the Court of Appeal made these profound findings as follows: "Indeed, exhibit 15 series of the record show that the 1st defendant made some payment to the plaintiff's (sic) company in respect of contract works under exhibits A and B which preceded the execution of exhibit C and D. The payment which was voluntarily made by the 1st defendant without an order of the court was clearly inconsistent with the conduct of a legal entity which believed it had no contract nor owed any money to the plaintiff. Put differently, payment by 1st defendant to plaintiff for works done under exhibit A and B which preceded the

execution of exhibits C and D, (that is, contract works between plaintiff and 1st defendant) is inconsistent with the position of a legal person or entity who claimed the plaintiff's (sic) company lacks capacity to claim any monies referable to exhibits A and B."

It is appropriate to infer that the 1st defendant's Chief Executive Officer and its Acting Chief Financial Officer acted both in their own behalf and on behalf of the 1st defendant company in their capacities as Chief Executive Officer and Acting Chief Financial Officer respectively when they issued out those correspondences confirming payments to International Rom Ltd as per the exhibit 15 series. Under these circumstances, unless the 1st defendant is able to demonstrate that the plaintiff had knowledge, before the issuance of the exhibit 15 series, of any defect in the Chief Executive Officer's authority to bind his 1st defendant company or that he had acted in an irregular manner, including awareness of the previous power of Attorney to Mr Raju, then the 1st defendant company would be bound. This accords with section 139 of Act 179 (1963) which states as follows:

"139 (1) An act of the members in general meeting, the board of directors, or a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself; and accordingly the company shall be criminally and civilly liable for that act to the same extent as if it were a natural person.

(2) For the purpose of subsection (1),

(a) the company shall not incur civil liability to a person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of directors, or managing director, did not have the power to act in the matter or had acted in an irregular manner or if, having regard to the position with, or relationship to, the company, that person ought to have known of the absence of power or of the irregularity;

(b) if in fact a business is being carried on by the company, the company shall not escape liability for facts undertaken in connection with that business merely because the business in question was not among the businesses authorized by the company's regulations."

In the case of **Oxyair Ltd & Darko vs Wood & Ors (2005-2006) SCGLR 1057 at 1069** my respected brother Dr. Date-Bah, JSC highlighted upon the rule, well known to students of company law, as the rule in *Turquand's Case*, formulated in

the case of **Royal British Bank v Turquand (1856) 6 EI & BI 327** which has been codified and amended in sections 139 (supra) to 143 of our Companies Act, Act 179, (1963). At page 1069 he stated:

"In this connection, it should be noted that section 141 of the Companies Code, 1963 effects a change in the pre-existing common law rule. The common law rule was that a party dealing with a company was deemed to have constructive notice of the contents of all the company's public documents filed at the Companies Registry. Section 141 abolishes this rule. It provides as follows:

'141. Except as mentioned in section 118 of this Code, regarding particulars in the register of particular charges, a person shall not be deemed to have knowledge of any particulars, documents or the contents of documents by reason only that such particulars or documents are registered by the Registrar or referred to in any particulars or documents so registered.'

This provision implies that at the time that the plaintiffs entered into their parol contract with the defendants they had no constructive notice of the contents of the regulations of the company. Accordingly, any restrictions on the authority of the managing director contained in the regulations do not affect the validity of the contract entered into by him, unless the plaintiffs' actual knowledge of such restrictions is proved. "

Section 142 of Act 179 provides that any person having dealings with a company or with someone deriving title under the company shall be entitled to assume that the Company's regulations have been duly complied with.

Further dealings between the parties can be found in Exhibit A (See page 1 to 26 of Vol. 3 ROA) a 'Civil Works Frame Contract' entered between Ghana Telecommunications Company Ltd (predecessor of the 1st Defendant) and International Rom Limited, the plaintiff on 17th December 2003; Exhibit B (See page 27 of Vol. 3 of ROA) was made on 26th January 2005 between the same Ghana Telecommunications Company Ltd and International Rom Limited as an amendment to the 'Civil Works Frame Contract'; Exhibit C (at page 31 of Volume 3 of the ROA) was entered between Ghana Telecommunications Company Ltd and International Rom Limited for the 'Supply, Delivery, Installation, Testing, Commissioning, Maintenance and Support Services' for the Civil Works in respect of Ghana Telecom's Network Expansion (Phase Zero of PO2); Exhibit D (at page 60 of Volume 3 ROA) was also made on 2nd October 2008 between Ghana

Telecommunications Company Ltd (GT) (predecessor of 1st Defendant) and International Rom Ghana Ltd for the 'Supply, Delivery, Installation, Testing, Commissioning, Maintenance and Support Services for the Civil Works' in respect of GT's network expansion. It is worth noting that exhibit C was executed by Dickson Oduro Nyaning, Chief Executive Officer for Ghana Telecom and Nana Opeabre Awuah Asiedu I, Director of Operations for International Rom Ltd. In the case of exhibit D the execution was by the same officers except that Nana Opeabre Awuah Asiedu I signed as Director of Operations for International Rom Ghana Ltd. (See page 81). Equally striking is the fact that International Rom Limited (the plaintiff) and International Rom Ghana Limited have the same principal place of business the same being House No TPDTCD 6-126, Community 6, Opposite Nick Hotel, Tema in the Greater Accra Region of the Republic of Ghana as evidenced by exhibits C and D. (See page 34 of exhibit C and page 63 of exhibit D of Vol. 3). This is no sheer coincidence. Besides, exhibit W which was issued on 17th August 2006 from Ghana Telecom to International Rom admitted their indebtedness to the latter and this was confirmed as per exhibit Z (at page 275). The confirmation letter (exhibit Z) from International Rom Ltd bore the same office No H/No TPDTCD6-126 (CM. 6), Tema, Opp. Nick Hotel, used by International Rom, Ghana.

It is instructive to refer to the invaluable decision in the case of **Amalgamated Investment and Properties Co. Ltd (In Liquidation) v Texas Commerce International Bank Ltd (1981) CA, 3 AER 577 @ 581** wherein the court per Denning M.R succinctly stated the principle that:

> "When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law, whether due to misrepresentation or mistake makes no difference on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it will be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. And if parties to a contract by their course of dealing, put a particular interpretation on the terms of it on the faith of which each of them, to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not or whether they were mistaken or not or whether they had

in mind the original terms or not. Suffice it that they have by their course of dealing put their own interpretation on their contract, and cannot be allowed to go back on it."

Thus, when the parties to a contract are both under a common mistake (even if there was a mistake) as to the meaning or effect of it and thereafter embark on a cause of dealing on the footing of that mistake thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis and either party can sue or be sued just as if it had been expressly agreed by them. This statement of the law is in accordance with s.139 of Act 179, the Companies Act.

For all the preceding reasons we find that the 1st defendant dealt with and treated International Rom, Mauritius and the plaintiff company as one and the same company. They cannot now turn round to renege on their contract obligations using flimsy technical arguments which simply lack any merits. The Court of Appeal rightly concluded that by the nature of their dealings, the 1st defendant regarded the plaintiff and International Rom, Mauritius as the same. This contrary contention advanced by the 1st defendant is without merit and is dismissed.

Did the DW5 by his evidence challenge the figures in exhibit L if so to what extent?

Did the 1st Defendant cross-examine Plaintiff on the exhibit L and if so to what effect?

Exhibit L was tendered in evidence by the plaintiff on 26th May 2010. It is a detailed report, from the plaintiff's perspective, of reconciliation of accounts between the parties in this dispute. It also includes a summary of services and works done, accessories and services and summaries of monies paid and outstanding balances. (See page 56 to 85 of Vol 1)

Two issues have been raised concerning this exhibit which would be determined together since they arise from the same exhibit L. I would refer to the record of appeal in order to put the issue into proper perspective.

The two issues of dissatisfaction arise from the Court of Appeal's finding to the effect that:

"In its attempt to prove its case that the 1st defendant owed them US$4,847,987.08, the plaintiff tendered exhibit L which is a detailed account of works done by the plaintiff from year 2004 to 2008 and the amount that the 1st defendant have paid to plaintiff from 2004 to 2008. The plaintiff in exhibit L gave the breakdown of work that is, the quantum/values of amount involved as well as site preparation, partially completed values of works, accessories, etc. and summary of money paid by 1st defendant and receipted."

DW5 is Ben Korley a Consultant engaged by the 1st defendant and who testified at the trial. Regarding specifically to any reference to exhibit L in his deliberations DW5 stated (at page 29 of Vol 2 of ROA) among others, that:

"Having separated those two accounts, I made reference to the Exhibits before the court that Exhibit L presented by the plaintiff which indicated the summary of their interaction of their relationship with the 1st defendant and separated the two. My conclusions are that from 1st of October 2007 to the end of December 2008, the plaintiff performed assignments, contracts and services with $2,230,193.65 and the receipts payment from the 1st defendant in the sum of $3,289,685.98 that is there is an over payment by the 1st defendant to the plaintiff……."

Under cross-examination by counsel for the plaintiff at page 41 of Vol 2:

Q. Did you prepare these documents on your own?

A. **I prepared them from the information that the 1st defendant gave me including exhibit L.**

Q. Now you have alleged that the payments for the transactions between the Plaintiffs and the 1st defendant started from 2007 to 2008 is that correct?

A. The contract periods (sic) says 1st of October 2007 to 31st December 2008.

<u>At pages 42 to 43</u>

Q. Were you shown invoices for specific payments made?

A. I didn't need to see the invoices.

Q. I am suggesting to you that these figures you have put there are not authenticated?

A. I disagree with you My Lord. They are all in the exhibits that were before the court.

Q. Lets go back to page 11 of your report?

A. I am there my lord

Q. Look at exhibit L which you have attached to your report?

A. Yes I am there.

At Page 45 to 46

Q. You confirmed that you used exhibit L in preparing the report?

A**. Partially**.

Q. Now look at year 2007 in exhibit L the figure 647000?

A. Yes I have seen it.

Q. That figure is not reflected (sic) your table with the reconciliation on page 11?

A. **That is correct because some of them were dated before the 1st of October**. As I mentioned my lord, the transactions for 2007, I split them between the periods from January to September and then from October to December so that which is related to December is what you are seeing there.

Q. Now look at exhibit L again you will find that under other words 'Services' for all the years figures have been provided.

A. That is correct.

Q. On what bases (sic) do you delete 647.000?

A. My Lord there is no deletion. There is a separation of figures. The report that I did separated the information between two companies. International Rom limited a company incorporated under the laws (sic) Mauritius which had a contract with Vodafone from the period 2004 to September 2007. And then International Rom Limited a company incorporated under the laws of Ghana

which had a contract effective date 1st of October 2007. And so in the year 2007 there were other works, 647,000 and looking at the date of the awards of those contracts, I separated between that which fell between the periods January to September and then October to December."

There is considerable justification for the conclusion arrived by the Court of Appeal viewed against the few excerpts quoted supra. The Court of Appeal determined as follows:

"However, the evidence of DW5 appears to be selective, stands alone, uncorroborated and unsatisfactory as the said witness admitted in his evidence and report, exhibit 21, that he did not have the benefit of all materials in his work. In effect, DW5's report lacks objectivity and substance. "

The appellate court further stated:

"Worse still, the record shows that DW5 did not challenge the figures contained in exhibit L submitted by the plaintiff as the basis of the 1st defendant's outstanding indebtedness. The position of DW5 on exhibit 21 was to the effect that the plaintiff was entitled to only the outstanding amounts, if any, from the year 2007 to 2008 and not the outstanding amounts from 2004 to 2006. But as noted earlier in this judgment, the payment by 1st defendant to plaintiff for works done under exhibits A and B at a time the 1st defendant claims it had no contractual dealing with the plaintiff confirms the assertion of the plaintiff that the 1st defendant dealt with plaintiff's company and International Rom Ltd, Mauritius as one legal entity with respect to contract works under exhibits A, B, C and D"

The Court of Appeal also remarked that:

"It is instructive to note that the record of appeal indicates that exhibit L tendered in evidence by plaintiff was not cross-examined or discredited in any way during cross-examination by the 1st defendant. Consequently, exhibit L was deemed to have been admitted by the 1st defendant as true."

It is quite striking to note that what DW5 succeeded in doing was to segregate the figures from a certain period. By his own admission the periods under consideration for him was from 2004 to 2007 and 2007 to 2008. From the DW5's reckoning therefore the plaintiff would be entitled to claim for the period of 2007 to 2008 but not 2004 to 2007. However, in the light of the

conclusion arrived by the trial court and affirmed by the Court of Appeal by which the 1st defendant had on its own volition made payments covering the earlier period to the plaintiff it would be inappropriate to sever the undertaking at this stage.

In conclusion we find no merit in these two issues. This is because there was no meaningful outcome from the 1st defendant counsel's cross examination of the plaintiff concerning the exhibit L.

The 1st defendant also expressed dissatisfaction with the Court of Appeal's affirmation of the award entitling plaintiff to recover credit facilities which plaintiff obtained from 2nd defendant to execute construction of cell sites for the 1st defendant when there was no evidence that 1st defendant had guaranteed the repayment of the loan.

To put the issue in context, the trial court made an award of US$2,280,000.00 representing a loan facility which, according to plaintiff, it had contracted from 2nd defendant in order to execute its contracts with the 1st defendant. The trial court granted the award in favour of the plaintiff on the basis of an undertaking given by the 1st defendant to pay the proceeds of the exhibit A in the joint names and into the joint accounts of 2nd defendants and the plaintiff. According to the trial court, it was the undertaking to make these payments in the manner promised by the 1st defendant that made the 2nd defendant to lend the monies to the plaintiff hence the plaintiff was entitled to claim the sum from 1st defendant as damages for breach of contract. The court rejected the 1st defendant's contention that the undertaking was not in the nature of a guarantee and also that the plaintiff had in fact received payments from the 1st defendant under the contract into other accounts designated by the plaintiff. The Court of Appeal affirmed the finding by the trial judge and dismissed the appeal brought against same.

Under the Contracts Act, 1960, Act 25, a promise is not invalid as a contract by reason only that the consideration for the promise is supplied by a person other than the promisee. The issue whether or not an undertaking as above facilitated is enforceable or not has received pronouncement by this court in our recent decision. In the Civil Appeal case No J4/23/2013 of NDK Financial Services Ltd vrs Ahaman Enterprises Ltd & 2 Ors, unreported decision of 28th November 2014 in which my esteemed brother Dotse, JSC, reading the unanimous decision of the court espoused as follows:

"This is to the effect that, the letters of understanding and guarantee written by the Ministry of Energy to the Plaintiffs and Ahaman Enterprises constituted sufficient legal basis for the Court of Appeal's decision to the effect that the Defendants herein, and Ahaman Enterprises Limited, (1st Defendants therein) pay the Plaintiffs, all sums (together with interest, at the rate of 6.5% per month) paid to Ahaman Enterprises by the Ministry of Energy……."

The payment, upon the instructions of the plaintiff of monies which should have been made to the 2nd defendant, to other banks rather than the 2nd defendant did not absolve the 1st defendant from its obligations under the Undertaking. The 2nd defendant is entitled to the outstanding balance from the undertaking from the plaintiff and 1st defendant jointly.

In the instant appeal, the Court of Appeal had affirmed the trial judge's award against the 1st defendant in the circumstance. We would substitute an award of the outstanding balance under the undertaking from both plaintiff and 1st defendant jointly.

In conclusion, save for the variations above, the appeal is dismissed.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO – BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

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