IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT,

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL

NO. J4/04/2017

17TH OCTOBER, 2018

2000 LIMITED ……. PLAINTIFF/APPELLANT/RESPONDENT

HALL AVENUE
NEAR BHC, ADABRAKA-ACCRA

VRS

FRANCIS OTOO ……. DEFENDANT/RESPONDENT/APPELLANT

H/NO. 10, CANDLES STREET
HOUSING DOWN, ADENTA-ACCRA

JUDGMENT

APPAU, JSC:-

This is an appeal from the decision of the Court of Appeal dated 17th December, 2015. The appellant (i.e. defendant/respondent/appellant), was the defendant-counterclaimant in the trial High court. He succeeded in his counterclaim in the trial

court but lost on appeal at the Court of Appeal when the respondent herein (i.e. plaintiff/appellant/respondent) appealed against the decision of the trial High court. For ease of reference, the designation of the parties herein, i.e. '**appellant'** for defendant/respondent/appellant and '**respondent'** for plaintiff/appellant/respondent, would be maintained.

Background to the appeal

The respondent sued the appellant in the trial High Court claiming for the recovery of an amount of GHc36,000.00 as appellant's indebtedness to it. The appellant denied the claim and counterclaimed against the respondent for the sum of GHc80,000.00, which he later amended to GHc223,620.24. The trial High Court dismissed respondent's claim and granted appellant's counterclaim. The respondent appealed to the Court of Appeal against the whole decision of the trial High Court. The Court of Appeal granted the appeal in part. It affirmed the trial court's judgment dismissing respondent's claim but set aside that part of the judgment that granted appellant's counterclaim. The respondent who had lost twice, decided not to pursue the matter on a further appeal. The appellant, however, was not satisfied when the Court of Appeal set aside the judgment of the trial High Court in his favour on his counterclaim. He therefore decided to climb the appeal ladder to its apogee by appealing against that decision to this Court.

Appeal to the Supreme Court

The only ground of appeal in the notice of appeal which the appellant filed on 15/02/2016 was the omnibus ground that the judgment was against the weight of evidence. In a situation like this, our task as a second appellate court, is as set out in a plethora of cases including but not limited to the following: **KOGLEX (NO.2) v FIELD (NO.2) [2000] SCGLR 175; TUAKWA v BOSOM [2001-2002] SCGLR 61**; **DJIN v MUSAH BAAKO [2007-2008] SCGLR 728** and **OPPONG KOFI & Ors v ATTIBRUKUSU III [2011] 1 SCGLR 176.** The duty the law imposes on us as a second appellate court is that, we must satisfy ourselves that the judgment of the first appellate court was justified or was supported by the evidence on record and if not, to depart from it or hold otherwise. However, before embarking on this exercise, it is for the appellant first of all, to clearly, properly and positively demonstrate to us in his statement of case, the lapses in the judgment being appealed against which, when corrected, would result in a judgment in his favour. The appellant did not do this. The appellant, in his statement of case, only recounted the evidence he led and that of C.W.1 and then concluded that there is enough evidence on record that would support the judgment given in his favour by the trial court.

The Court of Appeal in setting aside the trial court's findings in support of the counterclaim, held as follows: - ***"With regard to the counterclaim, however, the burden placed on the respondent as counterclaimant to prove his claim seemed to have been relaxed unduly. It is apparent that the respondent's accounts which were not supported by corroborative evidence such as receipts were relied upon by the trial judge. The learned trial judge further indicated that the report exhibit 'C.E.1' and the evidence of C.W.1 based thereon were corroborative of the respondent's assertions. This was unfortunate as the report exhibit 'C.E.1' had been discredited by its author who acknowledged that it was not produced in accordance with the proper auditing standards of getting inputs from both parties……..Moreover, the entry of judgment against the appellant upon a counterclaim in the circumstance when the respondent in his pleading had denied the operation of the contract between the parties, but had indicated that what transaction there was, had been between him and the said Majid in his personal capacity, is difficult to understand or justify in the absence of documentary proof of his particular dealings with the appellant….As a counterclaimant, the respondent assumed a plaintiff's burden of persuasion and of producing evidence regarding the indebtedness he asserted in accordance with S.10(1), 11(1) and 14 of the Evidence Act, [NRCD 323]. On the evidence, he failed to produce evidence to substantiate what he asserted to be due and owing to him, for he simply repeated on oath, what he had produced as his accounts, and captured in exhibit 'C.E.1' without demonstrating through the use of corroborative evidence documentary or otherwise, how the accounts came to read thus. This was insufficient to result in a finding in his favour; see MAJOLAGBE V LARBI [1959] 1 GLR 190".***

We do not see where the Court of Appeal erred in coming to this conclusion. The appellant did not say anything about this finding by the Court of Appeal. It was for the appellant to demonstrate firmly where the Court of Appeal went wrong in disagreeing with the conclusions of the trial judge but in our view, the appellant was not convincing in his statement of case filed on 14/11/2016 that the findings of the Court of Appeal were not supported by the evidence on record. We agree with the Court of Appeal that the auditor or accountant who was appointed on the orders of the trial court to reconcile the accounts of the two parties did not do a good job. It is surprising that the trial court did not find anything wrong with his report exhibit 'C.E.1'. His assignment was to reconcile accounts in respect of the transactions between the parties. The order of the trial court made on 27th July 2009 was; ***"IT IS HEREBY ORDERED that The Registrar of this court is to appoint a firm of Accountants to go into the***

accounts with regard to the transaction between the parties and submit a report by 31st August, 2009. Each party is to file his documents needed for the account on or before 19-8-2009".

The contention that the respondent did not co-operate with C.W.1, the reason for which the trial court appeared to have dealt unfavourably with it, could not be wholly true. This is because, when the trial court made its order requesting the registrar to appoint an accountant to go into the accounts of the parties as agreed to by the parties; it was the respondent which filed its documents at the registry of the court first. The respondent filed its documents on 18/08/2007, a day before the timeline given by the court (**See p. 39 of RoA**). The appellant could not file his documents within time so he filed a motion for extension of time to do so on 06/11/2009, several months beyond the time the 'C.W.1' was to submit his report. His application was granted and he finally filed his documents on 20/11/2009. The misunderstanding that ensued between the respondent and C.W.1 which generated into the so-called uncooperative attitude of the respondent had to do with the fees unilaterally charged by C.W.1 for the work assigned to him. What we know from practice is that it is the courts, in agreement with the parties, that always determine fees to be paid to court-appointed expert witnesses like surveyors, accountants, etc. Why the trial court failed to do this, though same was brought to its notice, beats our imagination and we do not deem it fair to blame the respondent for the poor performance of C.W.1.

During cross-examination by counsel for the respondent, C.W.1 admitted that the way he went about his assignment was contrary to normal accounting practice. To a question whether it was normal accounting practice and principles for an accountant to rely on information supplied by one side without due verification he answered thus: *"My Lord, it is not".* The next question was: *"Q. And yet, after your sixteen years of experience, you did that, isn't it?* And the answer was: *"A. My Lord, we did that with an explanation. There is a time factor; in fact we are dealing with the Fast Track High Court. My Lord, we had to present a report; we extended our hand to the other side, they weren't coming and there is a time limit that we had to submit this report".* {**Page 181 of RoA**}

The question is; what time limit was C.W.1 talking about? He was given up to 31st August 2009 to submit his report but by then the appellant had not submitted his accounts to him. He therefore could not comply with the time and since then; no specific time was given to C.W.1, from the records, to submit his report. In our view, the above answer by C.W.1 cannot be justified. This was no sound reasoning for presenting a one-sided report as a referee. Justice must not be slaughtered on the altar of time. As a court appointed expert witness, if in the course of his assignment C.W1

encountered any difficulties that were making the proper accomplishment of his assignment near impossible, he was duty bound to report back to the appointing authority, which is the court, for further direction which he never did. He accepted everything the appellant told him; even about the documents the respondent had already filed, without any verification and thereafter presented a one-sided report which he himself admitted did not conform to accounting principles.

Events at the trial show that C.W.1 who was supposed to be a court witness by his designation, was treated as if he was appellant's witness. Since C.W.1 prepared his report with the collaboration of the appellant only, he was not cross-examined by the appellant. Rather, after the respondent had finished with his cross-examination of C.W.1, the appellant was invited to re-examine him as if C.W.1 was his witness – *Please refer to pp.205 -206 of the RoA.* The accounting firm that C.W.1 represented expressly stated at page 4 of its report (Exhibit 'C.E.1') that; ***"The scope of our review was limited due to the insufficiency of information submitted"***. This is an admission that C.W.1 who represented the accounting firm came out with his report on the basis of insufficient information. If that is so, did C.W.1 report any difficulties to the trial court or make the court aware of any such difficulties before submitting the one-sided report? From the record, no report was ever submitted to the court by C.W.1 about the difficulties allegedly faced by him. It could not therefore be asserted positively that Exhibit 'C.E.1' was a proper outcome of a reconciliation of accounts between the parties.

Since Exhibit 'C.E.1' had no value, and even the trial court was not bound by it on the authority of sound judicial reasoning as espoused in cases like **SASU v WHITE CROSS INSURANCE CO. LTD [1960] GLR 4** and **TETTEH & Another v HAYFORD (Substituted by LARBI & DECKER) [2012] 1 SCGLR 417**; the appellant could only succeed in his counterclaim on the strength of his evidence as he called no witness. Though we do not deny the fact that the appellant's success or failure did not depend on whether he called a witness or not, the standard of proof required that for the appellant to succeed on his counterclaim, he must lead satisfactory evidence, either by himself or otherwise which, on the balance of the probabilities, makes his case more probable than not. Appellant did not satisfy this test at the trial

It must be emphasized that before C.W.1's firm was solicited to reconcile the accounts between the two parties, appellant's allegation was that Majid owed him the sum of GHc80,000.00 which was an over withdrawal of the value of goods supplied and received by him from Majid. It was C.W.1 but not the appellant who came to the conclusion that the respondent owed the appellant the sum of **GHc224,320.24** described as over-withdrawals of moneys from appellant's account. This was the very

amount the respondent contended the appellant originally owed it but which he had paid leaving a balance of GHc36,812.00 in his claim which he lost. Though C.W.1 admitted the name Awudu Inusah appeared on some occasions as the one who made some of the withdrawals, there was nothing in the bank statement he examined which identified specifically that the said payments were made to the respondent. He told the trial court that he accepted what the appellant told him that the monies were paid to the respondent. In fact, in his own answer to a question by counsel for the plaintiff to demonstrate to the court how on the face of the bank statement presented by the appellant he could come to a firm conclusion that all the monies listed therein were actually paid to the respondent, this was what C.W.1 said:

"A…My Lord, that is what I am going to do. I want to pick out instances where we have debit on the bank statement of Mr. Francis Otoo, meaning amounts had been paid out of his bank account. On the 23rd of October, 2007 GHc30,000.00 was taken out of his account. My Lord, I have the transaction described that cheque cashed… ..Awudu Inusah. We wanted clarification and he said it was given to 2000 Ltd. There was another cheque of 24th October, 2007 GHc20,000.00 that also went to 2000 Ltd according to Mr Francis Otoo. My Lord, I am afraid the descriptions on the Bank Statement do not specify that the amount was going to 2000 Ltd. Names like Awudu Inusah, Awudu Inusah, that is what have been used but when we sought clarification, he pointed out to us that it was paid to 2000 Ltd and we were able to trace something to his ledger that he deals with 2000 Limited, that confirmed our stand that he paid some amount of money to 2000 Ltd". {Emphasis added)

So, left to the appellant alone, Majid owed him GHc80,000.00 which he alleged Majid cashed from his accounts with signed blank cheques he gave to Majid, without authority. This was appellant's claim in his original counterclaim filed on 28th February 2008, which the respondent denied. It was after C.W.1 had presented to the appellant a copy of his one sided report in which he indicated that the actual indebtedness of respondent to appellant was GHc224,320.24 that appellant applied to the trial court to amend the amount stated in his counterclaim to read **GHc223,620.24** to reflect the one in exhibit 'C.E.1'. His amended statement of defence was filed on 29th April, 2010, pursuant to leave granted him by the trial court on 22nd April 2010 and even the amount stated therein, i.e. **GHc223,620.24** is different from the one stated in Exhibit 'C.E.1' which is **GHc224,320.24**. There is therefore no doubt to the fact that before C.W.1 submitted his one-sided report (Exhibit C.E.1), the appellant didn't know that either Majid or the respondent, granted Majid acted for the respondent, owed him so much.

Again, in his testimony, appellant contended that he paid for the MTN cards supplied him by the respondent by either cash or through signed blank cheques. This was what the appellant said when led by his lawyer to testify in-chief:

"Q. Tell the Court the kind of business transaction you had with the plaintiff company.

A. My Lord, I used to receive MTN Products from the plaintiff company.

Q. How were you paying for the goods supplied?

A. I paid in physical cash and sometimes in cheques.

Q. And in respect of the cheques, how were you issuing cheques?

A. My Lord, I gave him signed cheques, so whenever transactions are done, he fills it in and then go and cash them" {Emphasis added}

The question which C.W.1 did not resolve was; in whose name were the blank cheques issued; the respondent or its Managing Director Majid El Jamal? Nothing was said about that. If C.W.1 had done prudent job he could have found out in whose name the alleged blank cheques were written granted appellant did issue out signed blank cheques and the quantity issued. The tabulation made by C.W1 as the indebtedness of respondent to appellant on monthly basis was as follows: **i.** October 2007 - **GHc88,000.00 (**six withdrawals**)**; **ii.** November 2007 – **Ghc120,000.00 (**six withdrawals**)**; **iii.** December 2007 – **GHc6,405.00** (one withdrawal) and **iv**. January, 2008 **GHc9,212.74 (**one withdrawal**)**. What C.W.1 did was to tabulate all the cash withdrawals made by cheques as shown on appellant's bank statement from 20th October 2007 to 3rd January 2008 and described them as monies or cash withdrawn by the respondent from appellant's account without authority, when there was no evidence whatsoever to support the allegation that the said amounts were withdrawn by whoever cashed them, without authority.

As a matter of practice, which this Court has taken judicial notice of, the banks would not normally allow huge withdrawals to be made by strangers from an account-holder's accounts without due notice to or verification from the account holder. These so-called unauthorized withdrawals included the withdrawal of 8th November 2007, which the respondent was able to establish during cross-examination that it was made by appellant himself but not by either the respondent or Majid. With regard to that cash withdrawal, appellant said when Majid tried to cash the amount, he was unsuccessful so he called him to assist him cash the amount for one Awudu Inusah. He therefore went to the bank in the company of his friend by name Kelvin Neequaye Quartey to cash the

money for Awudu Inusah to be given to Majid El Jamal. It was because of this testimony that appellant called this Kelvin Neequaye Quartey as a witness in the first trial which was later aborted.

So the question is, if the 8th November withdrawal was done by the appellant himself and handed over to the agent of Majid, then why did the appellant say all those withdrawals, including the 8th November one, were done by Majid without his authorization? And why did he have to cash the GHc20,000.00 to be given to Majid when according to him, as at that time the respondent was indebted to him to the tune of over GHc88,000 and no goods had been supplied to him by the respondent? Was the appellant saying that between 20th October 2007 and 3rd January 2008, he never received any statement at all from his bankers indicating the withdrawals made in connection with his business transactions for that period?

It also turned out that two of the alleged withdrawals which were allegedly made in December 2007 and January 2008 in the sums of **GHc7,105.50** and **GHc9,214.74** respectively, were not payments made by the appellant to the respondent but rather they were payments, which were bank drafts, made by another agent of V. Mobile called 'A. Mobile' to 'V. Mobile'. Appellant's contention was that he gave Majid two blank cheques to secure the bank drafts of **GHc7,105.50** and **GHc9,214.74** in favour of V. Mobile on 31st December 2007 and 3rd January 2008. All these sums were tabulated in Exhibit 'C.E.1' as sums respondent wrongly withdrew or cashed from the account of appellant and form part of the amount appellant claimed in his counterclaim. However, this contention by the appellant is at odds with his own testimony that in November 2007, he wrote to his bankers (Ecobank) not to honour any cheque presented to it by the respondent. So how come that the bank ignored this advice by the appellant and made further payments to the respondent in December and January?

Again, it is an incontrovertible fact that no stranger to a bank account in Ghana could secure banker's draft on any account assuming he is in possession of signed blank cheques from the account holder. In appellant's own words, Majid was to fill in the blank cheques to cash the value of goods supplied only after a transaction had taken place between them. This means that granted Majid was supplied with signed blank cheques, he could only fill the blank cheques for the purpose of withdrawals only after a transaction had taken place between the respondent and the appellant. So how did it happen that Majid or the respondent could withdraw monies totaling **GHc224,320.24** continuously from appellant's account without any protests whatsoever from appellant, when no transaction had taken place between them during that period spanning over two months? Though the respondent denied all these allegations during cross-

examination, the appellant could not confirm them with tangible evidence apart from his reliance on the discredited Exhibit 'C.E.1'.

Again, the appellant did not exhibit credibility throughout the trial. Just as the respondent could not establish with certainty its case due to the contradictory testimony of P.W.1 on the alleged indebtedness of the appellant to the respondent, the appellant too did not exhibit candour throughout the proceedings which places his counterclaim off balance on the probability scale. First of all, in his pleaded case in defence as amended, the appellant denied ever dealing with the respondent company in any way since 2007. His case was that he had personal dealings with one Majid El Jamal, a director of the respondent in 2004 prior to the agreement he signed with the respondent on 6th October 2007 which never materialized. His counterclaim was therefore against Majid but cynically included the respondent. In his evidence, however, he admitted having dealings with the respondent in 2007, which was at variance with his pleaded defence. The trial court ignored this contradiction on the part of the appellant contrary to our decision in **DAM v J. K. ADDO & Brothers [1962] 2 GLR 200** and resolved the matter as if it was between the appellant and the respondent only without saying anything about the counterclaim against Majid personally, who was not made a party. This was where appellant's credibility was first shot in the leg because his entire testimony was at variance with his pleadings.

Conclusion

We agree with the Court of Appeal that the appellant did not lead sufficient evidence credible enough to satisfy the reliefs he claimed in his counterclaim so the learned trial judge erred when in the circumstances, he failed to apply the same yardstick he used in dismissing respondent's claim, to dismiss appellant's counterclaim since he also carried the same or equal burden as the respondent. From the record however, we find that like the respondent, the appellant was not able, on the balance of the probabilities, to establish his counterclaim. We accordingly uphold the Court of Appeal's dismissal of appellant's counterclaim and upon that, we dismiss the appeal.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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FOR THE DEFENDANT/RESPONDENT/APPELLANT.

FOR THE PLAINTIFF/APPELLANT/RESPONDENT.