IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: APPAU, JSC (PRESIDING)
OWUSU (MS.), JSC
LOVELACE-JOHNSON (MS.), JSC
HONYENUGA, JSC
PROF. MENSA-BONSU (MRS.), JSC

CIVIL APPEAL
NO. J4/02/2021

1ST DECEMBER, 2021

MR. JOSEPH MUSTAPHA MOHAMMED ….. DEFENDANT/APPELLANT/APPELLANT

VRS

MR. LAURENT BERUBE ….. PLAINTIFF/RESPONDENT/RESPONDENT

J U D G M E N T

LOVELACE-JOHNSON (MS.) JSC:-

The background to this case is that the plaintiff gave some money to the defendant per three agreements to be repaid with interest charged thereon. The defendant defaulted on the repayment terms. Cheques given by the defendant to defray amounts due were dishonoured so the plaintiff made a report to the police where some agreement was

reached. According to the defendant, it was agreed that he would only pay the principal amounts and be discharged from all liability. According to the plaintiff, what the defendant paid upon being reported to the police was some of the interest. Failure to recover the amounts allegedly due him led to his lawyers sending a demand letter to the Defendant and him filing a writ on 20th June 2016.

On the 21st day of June 2019, the high court sitting at Koforidua in the Eastern region gave the plaintiff judgment on his claims for

(a) A declaration that as at 30th April 2016 the defendant owed the plaintiff the following sums of money being financial assistance the plaintiff gave to the defendant on 28th May 2008, 15th June 2008 and 11th August 2008 respectively:
    (i) GHC60,000.00
    (ii) USD120,000.00 (ie cedi equivalent of GHC480,000.00as today)
    (iii) GHC100,000.00
(b) An order for the recovery of these monies (totaling GHC640,000.00) and all accrued interest thereon to the date of final payment.
(c) General damages for breach of contract
(d) Costs, including legal costs

Being dissatisfied with this judgment the defendant appealed to the court of appeal on the following grounds

1. The judgment is against the weight of evidence
2. The learned judge erred in his appreciation of the laws on borrowing and lending in Ghana
3. Other grounds of appeal may by leave be filed upon receipt of the Record of Appeal

The Court of Appeal struck out the second ground of appeal for stated reason (see page 253 of the record of appeal (ROA) and determined the appeal on the omnibus ground that the judgment is against the weight of evidence. At the end of the hearing, the court delivered itself thus in the summary of its judgment

"In summary, plaintiff is adjudged to recover from the defendant the total sum of GHc640,000.00

Post judgment interest calculated at the prevailing bank rate and at simple interest shall be paid on this sum from the date of the judgment of the trial court, that is, 21st June 2019.

The award of General damages of GHc20,000.00 for breach of contract is affirmed.

The appeal by the defendant is thus upheld in part and dismissed in part"

It is against this judgment that the present appeal has been brought by the defendant.

The designation of the parties at the trial court will be maintained in this judgment. The grounds of appeal before us, found at page 278 of the Record of Appeal (ROA) are as follows

a. The Court of Appeal erred in failing to hold that the lending of money to the defendant/appellant/appellant by the plaintiff/respondent/respondent was in breach of the provisions of the Foreign Exchange Act, 2006 (Act 723) and therefore illegal and unenforceable since the plaintiff/respondent/respondent was not licensed to borrow or lend in foreign currency
b. The Court of Appeal erred in fact, equity and in law in ordering the defendant/appellant/appellant to pay an amount of GHC 640,000.00 when from its own findings that amount had been paid except the amount of GHC60,000.00 which the defendant/appellant/appellant could not substantiate payment by the production of receipt
c. The Court of Appeal erred in fact, in law and in equity when it affirmed the award of GHC20,000.00 as general damages for breach of contract after holding that the contract was illegal and also amounted to over-compensation
d. The judgment is against the weight of evidence
e. Additional grounds of appeal shall be filed upon receipt of the record of proceedings

The ROA does not reveal the filing of additional grounds of appeal.

The Defendant argued the first three grounds of appeal, which grounds allege errors of fact and law on the part of the court of appeal. He did not argue the fourth ground of appeal. It is his duty as an appellant to substantiate these alleged lapses in the judgment on appeal by references to the law and evidence on record. On an appellant's duty in such circumstances, see the case of

Djin v Musa Baako (2007-2008) SCGLR 685

In determining whether he has been successful in discharging this duty, this court by virtue of its statutory power of rehearing can look at the entire evidence led, both oral and documentary, irrespective of the fact that he has failed to argue the fourth ground of appeal which is that the judgment is against the weight of evidence.

The crux of the submissions by counsel for the defendant on the first ground of appeal is that, having found that the plaintiff lent money to the defendant in dollars for interest without the required license and having made a finding that he was in the money lending business, the transactions between the parties could only be illegal under the provisions of the Foreign Exchange Act, 2006 (Act 723) and so should not have been enforced by the court of appeal.

A perusal of the pleadings filed in this matter shows that the issue of whether or not the plaintiff was a moneylender was never set down for determination. Plaintiff described himself in paragraph 1 of his statement of claim as a contractor and the defendant as a forex bureau operator in paragraph 2. The defendant admitted these in paragraph 1 of his statement of defence and indeed went on to state in paragraph 2 that plaintiff had come to his home to offer him financial assistance.

The issues set down for trial by the plaintiff were as follows

1. Whether or not at the time of executing the three financial agreements, the plaintiff was aware that the defendant was acting for and on behalf of a third party

2. Whether or not the defendant regularly serviced his duly acknowledged debts to the plaintiff

3. Whether or not the defendant has fully paid his debt to the plaintiff

4. Whether or not the Defendant owes the plaintiff any monies

5. Whether or not the plaintiff is entitled to his claim

6. Any other issues arising from the pleadings

There is no record of the defendant having filed additional issues. Clearly then, as stated by counsel for the defendant in his submissions, the issue of whether or not plaintiff was a moneylender was not raised by the pleadings.

The learned trial judge after discussing the failure to plead such an issue of fact by the defendant and the answers of defendant in cross examination stated at page 181 of the ROA that he found it strange that counsel for the defendant had come to a conclusion that the plaintiff was a moneylender.

It is trite that the purpose of pleadings is to give the opposing party notice of the case against him and thus give him the opportunity to respond to the said case.

At page 262 of the ROA, the court of appeal stated as follows

It is important to note that the pleadings and issues settled for trial did not include an issue as to whether the plaintiff is a moneylender. However, submissions were made by the defendants counsel in his written address that the transactions were money lending transactions.....

Thereafter the court, surprisingly embarked on a discussion which culminated in a finding that

From the evidence on the record in this case, the plaintiff was clearly into the business of money lending and operating without a license..

This is strange because on the issue of the nationality of the plaintiff which was raised by counsel for the defendant in his written submissions, the court of appeal rightly made a finding that that issue had not been pleaded, no admission had been made of it by the plaintiff, that it was not proper to spring this surprise at the address stage and that entertaining it would occasion a breach of the rules of natural justice. See **page 256 of the ROA.**

The issue of whether or not plaintiff was a moneylender should have been treated in like manner since it had also not been pleaded or evidence led thereon. This was not done.

The exercise by the court of appeal amounted to deciding an issue of fact which had never been set down for determination and thus setting up a new case for the defendant. The court's finding that plaintiff was a moneylender was not borne out of evidence led at the trial simply because it was not an issue raised and interrogated in the manner the law requires that it be done, that is, evidence led on it and a finding made in accordance with the burdens of proof set out in the Evidence Act. The court of appeal case of **Adehyeman Industrial Ltd v Mensah (2010/2011) 2 GLR 37**cited by counsel for the plaintiff is one of the many cases which make the point that it is improper and unjust to make findings of fact against a party when he has not had the opportunity to plead to or adduce evidence to rebut it. See also the case of

Dam v Addo (1962) 2 GLR 200

Having found that the court of appeal's finding that the plaintiff is a moneylender is unwarranted, does the evidence disclose that the plaintiff was engaged in the business of foreign exchange? Both the trial court and the court of appeal found that this was not so. What then is the contrary evidence on record provided by the defendant to prove that he was? It seems that to the defendant, the mere fact of the plaintiff lending money to the defendant and agreeing that interest be paid on the said money brings the transaction within the purview of the Foreign Exchange Act. On this premise, he takes the position that the failure to procure a license as required by the said Act before

engaging in that transaction with the defendant meant plaintiff had fallen foul of the law.

The plaintiff's position was always that the money he gave to the defendant was financial assistance. See **paragraph 1 of his statement of claim** at page 2 of the ROA. The defendant also describes the money as financial assistance at paragraph 2 of his statement of defence at page 8 of the ROA.

Both the trial court and the court of appeal after looking at the definition of a "Foreign exchange business" under section 3(4) of the Act concluded, rightly, that considering the facts of the transaction in question, it did not fall within the list of activities stated in the section and that the fact that the money advanced was in dollars was only incidental and did not convert it into a foreign exchange business. See **pages 258 and 260** of the ROA.

The defendant has not proffered any evidence from the record which contradicts this. The exhibits listed in the defendant's statement of case at page 5, show exactly what counsel states they show, that is, payments in dollars in transactions between him and the plaintiff. This without more does not transform them into one of those activities listed in section 3(4).

The defendant has failed to successfully discharge the arduous burden of proving clear errors in the concurrent findings of the two lower courts on this issue, which have resulted in a miscarriage of justice. The finding on the issue stands. A host of cases including

Koglex Ltd (No 2) vrs Field (2000) SCGLR 175

Achoro v Akanfela (1996-97) SCGLR 209

have set down the circumstances in which this court will interfere with such concurrent findings. This is not one of them. In the circumstances, neither the Court of Appeal's finding that the transaction in question did not amount to engaging in a foreign exchange business on the part of the plaintiff, nor its suo motu finding that the

transaction was one of money lending is sufficient basis for the complaint in the first ground of appeal.

The second ground of appeal questions the Court of Appeal's order that the defendant pays an amount of 640,000 (six hundred and forty thousand) cedis to the plaintiff. A sum, which (according to the defendant), the court had earlier found to have been paid already.

To substantiate this alleged finding of fact, the plaintiff reproduces portions of the judgment of the court of appeal and highlights the following portion in support of his stand

This is despite the admission by the plaintiff that GHC 240,000.00 and $100,000 had been received from the defendant after the defendant's arrest.

See page 274 of the ROA. What defendant ignores is the latter part of that page where the court states as follows

What is clear from the claim of the plaintiff is that every dollar or cedi paid in respect of these loans had been credited to interest hence the claim for the GHC640,000.00 principal.

It is not in contention that the plaintiff gave the defendant some monies to be repaid with interest. The court of appeal recognized this in its judgment and at no point lumped the two aspects of the transaction together. The court of appeal after its suo motu finding that the plaintiff was a moneylender, proceeded to reopen the transaction and impose what it deemed were reasonable terms under the circumstances by disallowing all the accrued interest claimed by the plaintiff. The court did not at any point state that the principal amount had been paid.

What it stated was that the interest claimed by the plaintiff would not be granted since earlier payments made by the defendant had been used to offset what it deemed to be the unconscionable interest agreed to by the parties. It was the acceptance of this

position which led to the court of appeal's refusal to award interest on the principal amount on the grounds of equity.

It is to be remembered that the defendant's allegation that the interest on the principal amount had been waived by the plaintiff at the police station was found by the trial court not to have been proved by him. This was because the necessary evidence had not been called in support of it, after it had been denied by the plaintiff. The court of appeal did not impugn this finding.

It is clear then that the court of appeal never made a finding that the amount of 640,000.00 (six hundred and forty thousand) cedis had been paid and indeed the evidence on record does not support such a finding. The failure to prove such a finding means that the appellant has failed to prove the basis of his second ground of appeal.

In the course of responding to the arguments made by the plaintiff in support of this ground of appeal, counsel for the plaintiff while admitting that there is no cross appeal invites this court, in exercising its power of rehearing, to "relook" at the terms imposed by the court of appeal. In particular he prays the court to reconsider the date of calculation of, and the terms of the interest awarded on the above sum because these were influenced by the court's suo motu finding that the plaintiff was a money lender.

Rule 9 of the Supreme Court Rules,1996 C.I.16 requires a respondent who intends to cross appeal to give notice of his intention to do so within fourteen days of service of the notice of appeal upon him. This was not done by the respondent. The failure to file the required notice disables us from accepting this invitation. The said failure cannot be cured by the court's power of rehearing.

The third ground of appeal of appeal is anchored on an alleged finding by the court of appeal that the contract between the parties was illegal and an affirmation of damages the court itself had described as an overcompensation.

A reading of the judgment of the court does not reveal a finding that the contract between the parties was illegal even after making a finding of fact that the plaintiff was

a moneylender so that cannot be the basis for the error in fact, law and equity alleged in this ground of appeal. The question to be answered is whether the trial court rightly awarded the damages it did. These damages were affirmed by the court of appeal for the simple reason that the defendant did not make an issue of their award in their written submissions.

The trial court's basis for making the award for damages can be found at the last paragraph of page 189 of the ROA in the following words

Haven (sic) breached the agreement, by law I find the defendant liable with respect to the payment of damages to the plaintiff. This has been arrived at considering the period of the breach and losses the absence of plaintiff's money would naturally occasioned him. The records show that but for this breach the plaintiff would have gotten(sic) his money back as at 2008 or 2009

This reasoning is in line with the position of the law that general damages are those presumed to be a natural or presumed consequence of a defendant's act.

Delmas Agency Ghana Ltd vs Food Distributors International Ltd (2007/2008) 2 SCGLR 748

It is thus not surprising that the award of general damages was not made a basis of a ground of appeal against the judgment of the trial court. The trial court had the discretion to award both general damages in appropriate circumstances and interest on an amount found to be due and owing and it exercised that discretion on both issues. Indeed, the courts have not hesitated to award interest on damages awarded a party.

The grounds upon which a court will reverse an award of damages are when the judge has acted on some wrong principle of law or the amount awarded is so high or so low as to make it an entirely erroneous estimate. None of such have been raised.

Standard Charted Bank v Nelson (1998-1999) SCGLR 810

In any case, the opinion of the court that this award amounted to overcompensation was an opinion on a matter not before it. The opinion becomes irrelevant in this appeal because it did not lead to an interference with the said award.

In short, the first prong of the basis of this ground of appeal is not supported by the record and the second prong, that is, the issue of over compensation was an opinion of the Court of Appeal on a matter not before it, and so not a proper basis for the ground of appeal.

In conclusion, having failed to successfully argue the grounds set down in the notice of appeal filed on 1st December 2020, we find no merit in this appeal in the terms in which it was brought, and accordingly dismiss it. The judgment of the court of appeal is affirmed.

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA
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