IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

KUMASI AD. 2022

CORAM:

A. M. DOMAKYAAREH (MRS) J. A. PRESIDING

A. B. POKU-ACHEAMPONG, J. A.

S. K. A. ASIEDU, J. A.

SUIT NO.: H1/18/2020

DATE: 28th NOVEMBER, 2022

KWAME APEMASU } **DEFENDANT /APPELLANT**
OF AGOGOSO - NYINAHIN

VRS

MADAM LYDIA ADOMAH : PLAINTIFF /RESPONDENT
SUBSTITUTED BY MADAM YAA AGYEIWAAH

J U D G M E N T

POKU-ACHEAMPONG, J.A.:

This is an appeal against the judgment of the Circuit Court Kumasi dated 8th April 2016. It is a dispute over the ownership of a plot of land with a building thereon involving a mother in-law and a son in-law as Plaintiff and Defendant in the original suit.

In a writ of summons issued on 9th May 2003 against the Defendant the Plaintiff claimed the following reliefs:

(a) A declaration of title to plot number 9A Block F Asuoyeboa, Kumasi
(b) Recovery of Possession.
(c) Perpetual Injunction

The Defendant in his Statement of Defence filed on 19/06/03 also counterclaimed for:

a. Declaration that House No 9A Block F is the Defendant's self-acquired property.
b. Perpetual injunction restraining the Plaintiff, her agents and or assigns from claiming the property as hers.

For ease of reference the Plaintiff/Respondent shall be referred to as Plaintiff in this judgment and the Defendant/Appellant as the Defendant. They shall retain their original designations at the trial.

Facts of the Case/Background

The Plaintiff is the mother in-law of the Defendant who claims ownership of the disputed property known as House No 9A Block F Asuoyeboa-Kumasi. The Plaintiff's case is that she acquired the plot of land with funds remitted to her by her daughter who lived and worked in France for close to two decades. The Defendant and his wife, the daughter of Plaintiff, engaged in money lending business with these remittances sent to Plaintiff and this generated some income. The Defendant and his wife (Plaintiff's daughter) later on

urged Plaintiff to use the money together with the interest earned thereon to acquire a plot of land at Asuoyeboa.

The Plaintiff claims that in the company of the Defendant she went with one Kofi Agyemang, PW1, and one Ollabodey, PW5, and paid for the plot of land.

Plaintiff states further that she directed the Defendant to collect the Allocation Note issued in respect of the acquisition of the land and keep same for her. With the assistance of her daughter in France Plaintiff claims that she put up a house on the plot. She allowed the Defendant and his wife, her daughter, to live in the disputed house with Plaintiff's child and two grandchildren.

According to the Plaintiff when she wanted to move into her house upon completion the Defendant claimed ownership of the house. She contacted her grantor who informed her that the Defendant had told her, the grantor, that the Plaintiff and her daughter in France had directed that the Defendant's name be used in the preparation of the documents including the Allocation Note and that the Defendant had come for the documents on the land.

Case of the Defendant

Defendant's case is that the disputed property was his self-acquired property. He claims that he made part payment for the plot and paid the remaining amount by instalment. He put up the building on the plot in dispute from his own resources without any input from the Plaintiff. Defendant claims that at a point in time when the Plaintiff needed a place to stay he gave her a key to a room in the house in dispute following pleas from his wife and other people. He also allowed two grandchildren and a daughter of the Plaintiff to stay in

the disputed house but the Plaintiff never went to live in the house and he took the key back.

The Defendant went on to deny the claims of the Plaintiff and counterclaimed for a declaration that the disputed house was his self-acquired property.

At the close of pleadings the following issues were adopted for trial.

1. Whether or not the Plaintiff is the bonafide owner of house No Plot 9A Block F Asuoyeboa-Kumasi.
2. Whether or not the Defendant is the owner of the disputed property.
3. Any other issues raised in the pleadings.

Judgment

The Learned Trial Judge entered judgment for the Plaintiff and granted her all the reliefs sought.

The Learned Judge concluded that on the balance of probabilities it was more probable than not that the disputed house was the property of the Plaintiff even though the documents in respect of the plot were in the name of the Defendant. She therefore made a finding that the Plaintiff was the owner of the disputed property.

Grounds of Appeal

Aggrieved and dissatisfied with the judgment the Defendant filed an appeal with the following as the grounds of appeal:

1. The Learned Trial Judge erred when she held that the Plaintiff/Respondent has rebutted the presumption of ownership which operated against her in the judgment.
2. The Trial Judge erred when she failed to pronounce on the Plaintiff's failure to call vital witness evidence but only pronounced on the failure on the part of the Defendant to call some witness(sic)
3. The Trial Judge failed to give adequate consideration to the case of the Defendant.
4. The Judgment is against the weight of the evidence.
5. Additional grounds of appeal will be filed upon the receipt of the Record of Appeal.

Standard of Proof

This being a civil case and a land matter also we will first of all like to deal with the issue of the Standard of Proof and the Burden of Proof.

Adwubeng Vrs Domfeh (1996-97) SCGLR 660 at 662

Holding 3 states as follows:

> ***"Sections 11(4) and 12 of the Evidence Decree 1975 (NRCD 323) have clearly provided that the standard of proof in all civil actions was proof by a preponderance of probabilities. No exceptions were made. In the light of the provisions of the Evidence Decree, 1975, cases which had held that proof in titles to land required proof beyond reasonable doubt no longer represented the present state***

of the law. In the instant case, the plaintiff on the balance of probabilities had succeeded in proving that his claim to title was more probable than that of the defendant's."

In the earlier case of ***Adzraku vrs Dzatagbo High Court Ho, 11th February 1993 (unreported)*** Acquah J, as he then was, delivered himself as follows on the issue of Standard of Proof:

"Let me indeed point out that cases like Kodilinye Vrs Odu (1935) 2 WACA 336 and Kponuglo Vrs Kodadja (1933) 2 WACA 24 which had a different and indeed higher standard of proof in land suits no longer represents the present state of our law.

Our Evidence Decree 1975 (NRCD 323) postulates a single standard of proof in all civil trials. That is proof by a preponderance of probabilities which is defined in Section 12(1) of the Decree".

Section 12 provides as follows:

1. "Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.
2. "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence."

The apex court in the case of ***GIHOC Refrigeration & Household Vrs Jean Hanna Assi (2005-2006) SCGLR 458 at 485*** explained that the standard of proof by a preponderance of probabilities is based on a party's ability to satisfy the judge of the probable existence of the relevant facts in issue.

Also in ***Takoradi Flour Mills Vrs Samir Faris (2005-2006) SCGLR 882 at 900*** the apex court stated as follows:

> ***"To sum up on this point, it is sufficient to state that being a civil suit the rules of evidence required that the Plaintiff produces sufficient evidence to make out his case on the balance of probabilities as defined in Section 12 (2) of the Evidence Decree, 1975 (NRCD 323).***
>
> ***Our understanding of the rules in the Evidence Decree 1975 on the burden of proof is that in assessing the balance of probabilities all the evidence be it that of the Plaintiff or Defendant must be considered, and the party in whose favour the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favourable verdict".***

In the instant case both parties had the burden of producing evidence to satisfy the court on the balance of probabilities with the Plaintiff starting first. This is because the Defendant had counterclaimed for the same reliefs the Plaintiff was claiming.

We will in dealing with the grounds of appeal in this opinion make a determination as to which of the parties has proved his claim on the balance of the probabilities.

Although the Defendant evinced an intention to file additional grounds of appeal he did not do so. Thus there are the four grounds of appeal filed in the Notice of Appeal which are to be dealt with.

Ground One

"The Learned Trial Judge erred when she held that the Plaintiff has rebutted the presumption of ownership which operated against her in the judgment."

The Plaintiff's evidence was to the effect that the disputed property was her own property which she acquired with funds remitted to her by her daughter in France, Cecilia (PW4). Cecilia first remitted five hundred thousand cedis (¢500,000.00) old currency to her. The Defendant and his wife (Plaintiff's daughter) came for the said amount to lend to people at interest. The daughter first came for ¢200,000 and later on the Defendant came for ¢300,000. This yielded some returns. Defendant and his friend Ollabodey therefore informed her about the sale of land in Asuoyeboa. She together with Defendant and the friend Ollabodey went to purchase the plot of land from one Agyeman PW1 and her mother PW3 for ¢400,000.00. She made an initial payment of ¢200,000.00 and subsequently paid the balance of ¢200,000.00 through PW1 and the Defendant.

Owing to the fact that she trusted the Defendant and was also unwell at the time she directed the Defendant to keep the documents on the land for her together with her other documents covering plots already in the custody of the Defendant and his wife.

When Plaintiff wanted to move into her house the Defendant then claimed ownership of same. This made her contact her grantor and the grantor's son who revealed to her that the Defendant had prevailed on them to prepare the documents on the house in his Defendant's name.

PW3 the grantor by name Nana Abena Amoku in her evidence stated that after the full payment of the ¢400,000 Plaintiff together with PW1 and the Defendant came to her and she got the relevant documents prepared for her. Later on Defendant came back to her to say that the original documents were sent to someone abroad and the person claimed that the documents were missing so he the Defendant had come back to PW3 for new documents to be prepared and so came with a new site plan.

PW3 said she first doubted what the Defendant was saying but gave in when Defendant swore to the truth of what he was saying.

According to PW3 Defendant alleged further that the person overseas had asked that the Defendant's name be used in the preparation of the new documents.

PW3 testified that she prepared the new documents. The Defendants asked her to thumbprint them for him to send the documents abroad for the woman to execute same, and upon the return of the documents he the Defendant would also execute same.

PW3 testified that she did as requested by the Defendant. For a period of ten years she PW3 never saw the Defendant again.

Plaintiff later on came to complain to her PW3 that she had been driven out of the house by Defendant and his wife (DW1) with Defendant insisting that she PW3 had sold the plot to him.

The Plaintiff's account was also corroborated by PW1 Kofi Agyemang the caretaker of lands for PW3, the common grantor for the parties. Both PW1 and PW3 gave evidence to corroborate Plaintiff's story that Plaintiff was the bonafide owner of the plot of land which she bought at ¢400,000.00.

Again, PW5 the friend of Defendant who initially led them to the landowner/grantor also testified in favour of the Plaintiff as the owner of the piece of land.

In respect of the construction of the building PW4 the Plaintiff's daughter in France who sent the funds to Plaintiff through regular remittances corroborated Plaintiff's story that she built the house through funds from her, the daughter, and Plaintiff's own meagre resources. Plaintiff was not able to tender or produce any document bearing her name in respect of the property.

On his part, the Defendant testified and tendered in evidence an Allocation Note and Site Plan in respect of the disputed property as Exhibits '2' and '2A' respectively. Both documents bear the name Gabriel Apemasu Peprah as the allottee. The Defendant claimed that he acquired the plot from Nana Abena Amoku PW3 for ¢600,000 (old currency) and was issued with documents in respect of same by PW3. He said that he financed the construction of the property from his own resources. The wife of the Defendant corroborated his story that he bought the land from PW3 at the cost of ¢600,000.00. That documents for the house were executed in the husband, the Defendant's name in which she was a witness. That her husband financed the construction of the building and that they had lived in the disputed house for about 20 years. The Plaintiff has never lived in that house. They had rented parts of the house to tenants one of whom testified to that effect and had been paying property rates and other outgoings on the house.

In view of the nature of the evidence adduced the learned trial Judge rightly observed in her judgment from the outset that there was the rebuttable presumption of ownership of the house in the Defendant's favour due to the following factors:

i. *The documents covering the land are in the name of the Defendant.*
ii. *The Defendant and his wife are in physical possession of the house and have been exercising acts of ownership over the house including renting some rooms of the house to tenants.*

This is a presumption based on ***Section 48 of NRCD 323*** which provides as follows:

1. ***"The things which a person possesses are presumed to be owned by that person.***

2. ***A person who exercises acts of ownership over property is presumed to be the owner of it."***

The Learned Trial Judge rightly observed that the effect of the presumption required the court to assume that the Defendant was the owner of the property unless the Plaintiff was able to prove the contrary; that the non-ownership of the house by the Defendant was more probable than not.

This presumption imposed a burden on the Plaintiff to produce evidence and the burden of persuasion as to the non-existence of the presumed fact.

Section 20 of NRCD 323 provides as follows:

> ***"A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact."***

In the case ***Akyea Djamson v. Dvagbor & Others [1989-90] 1 GLR 223*** the Supreme Court at page 234 affirmed the oft-quoted statement by ***Greer L. J. in De La Rue v. Hernu, Peron and Stockwell Ltd. [1936] 2KB 164 at 170*** that:

> ***"A person in possession has nine tenths of the law in his favour in regard to ownership with the outstanding one tenth reposed in any person aspiring to oust him, to make out his claim as to his entitlement to be declared an owner."***

Also, in the case of ***Ababio & Others vs. Mensah & Others (No. 2) [1989-90] 1 GLR 573 at 594 Taylor, JSC*** stated as follows:

> ***"The applicable principle is that a person in possession is entitled to retain his possession as against the whole world except the true owner."***

In his written submissions counsel for Defendant referred to the case of ***Nartey v. Mechanical Lloyd Assembly Plant [1987-88] 2 GLR 598.***

> ***"a long peaceful undisturbed possession over a considerable period of time raises a presumption in favour of ownership."***

He also cited the case of ***Fosua & Adu Poku vs. Adu Poku Mensah [2009] SCGLR 311 holding 1*** which states as follows:

> ***"It is well settled law that documentary evidence should prevail over oral evidence."***

Defendant's counsel further outlined the following points as factors which should tilt the decision of this court in his client's favour, if given serious consideration. They are:

1. *The Plaintiff never lived in the house in dispute.*
2. *The Plaintiff could not produce any documents in her name in support of her case.*
3. *No building permit or plan in respect of the house in dispute was produced by the Plaintiff.*
4. *The Plaintiff never put any tenant in the property and did not tender any tenancy agreement in respect of same or any receipts for property rate or any outgoings.*

Counsel for Defendant further draws the court's attention to the following pieces of evidence which amount to ownership of the property by the Defendant:

1. *The Defendant has lived in the disputed house with his wife from the period before the completion of the house till date of judgment.*
2. *The Plaintiff had to plead through her daughter Cecilia to the Defendant for the Defendant to give her a key to the room in the disputed house.*
3. *The Defendant has allocation note, and site plan Exhibit '2' and '2A' respectively to support his case.*

4. *The Defendant has rented out parts of the disputed house to tenants and also tendered in evidence a tenancy agreement – Exhibit '3'.*

Counsel argued further that in addition to the above factors, the case of the Plaintiff and her witnesses, when critically considered, show several inconsistencies and a lack of credibility.

Counsel referred to the following excerpts in the cross-examination of PW4, Plaintiff's daughter in France, who testified that she sent Plaintiff funds to construct the disputed house.

Q: I am putting it to you that you never complained about title deeds to your house at Nyinahin.

A: Yes I did not.

Q: I am putting it to you that throughout your seventeen (17) years stay in France, you were unemployed.

A: I was working. I was relying on somebody else's stay permit to work and every month when I am paid, I pay that person.

Counsel in his written submissions argue that since the PW4 was working with someone's documents or work permit in France, she could not earn money to remit her mother the Plaintiff to build the house.

It is difficult to accept this contention since it is common knowledge that many Ghanaians in Europe and North America who are illegal immigrants and have no resident and work permits do manage to work. They use the work permits of others and manage to send monies home. It is common knowledge that such people have put up buildings in their hometowns and other places in Ghana from their remittances.

Whilst the factors raised by counsel in respect of the documents tendered and the long possession of the Defendant of the disputed house are relevant, and valid legal points it is our considered opinion that the trial Judge did not err when she found that the Plaintiff has rebutted the presumption of ownership which operated against her.

The Learned Trial, Judge in our view, carefully evaluated the evidence, made the right findings and came to the right decision on the balance of the probabilities in the matter before her. The learned trial Judge relied on the testimonies of PW1, PW3 and PW5 in her judgment.

PW3 is the common grantor of the disputed plot the two contesting parties are claiming. Her evidence is crucial in the determination of the matter. Thus we have stated in some detail already her evidence in the case which favours the Plaintiff. She testified that she sold the plot to Plaintiff or that it was the Plaintiff who bought the plot from her at the cost of ¢400,000.00. This was corroborated by her son PW1 Kofi Agyemang who was the caretaker of the grantor's lands.

We are of the opinion that the learned Judge was right in preferring this account rather than the Defendant's account that he bought the plot for ¢600,000.00 which her grantor denies.

Again, the evidence of PW5 Yaw Mensah alias Ollabodey is also critical in the matter. Ollabodey may be described as the *"connection man"* in the local Ghanaian parlance or the linkman. He described himself as a friend of the Defendant who informed the Defendant about the availability of plots for sale at Asuoyeboa. Defendant, he claims, said he had no money and that they should inform his Defendant's mother-in-law, i.e. Plaintiff about the land for sale. They met the Plaintiff and informed her and Plaintiff expressed interest in the property and went on to acquire same at the cost of ¢400,000.00

We will at this stage like to refer to portions of the judgment of the Learned Trial Judge in respect of the above points which we endorse as follows:

At page 131 of the Record of Appeal (ROA) and page 9 of the judgment the Trial Judge stated:

> ***"The Plaintiff's case that she bought the land for ¢400,000.00 from PW3 was well corroborated by her witnesses unlike the Defendant whose evidence in regards how he acquired the disputed land was uncorroborated. The person from whom he claim to have bought the land from even stated that the land was sold to the Plaintiff. Even though the Defendant claims to have bought the land for ¢600,000.00, there is overwhelming evidence on record that it is not so. PW1, PW3 and PW5 all claim the land to have been sold for GH¢400.00. DW1 claims to have been present at the payment of this money by the Defendant. I wonder how this is possible as the Defendant claimed to have paid this money in installments.***
>
> ***Moreover, PW1 and PW5 did not mention her name as being present when the money was paid. The Plaintiff has emphatically stated that she did not beg the Defendant to be given a room in the disputed house. Her children and grandchildren lived in the house as of right and not at the behest of the Defendant. Both the Defendant and DW1 have stated that Cecilia called DW1 to inform them of the Plaintiff's ejection from her house for which the Defendant should allow the Plaintiff to reside in the house. PW4, Cecilia was however not cross-examined on this issue regarding her plea to DW1 for the Plaintiff to live in the disputed house.***
>
> ***Again, the said Alex Twedie whom Plaintiff had pleaded to beg on her behalf was also not called to testify. I therefore find it hard to believe that the Plaintiff begged***

the Defendant to stay in the disputed house together with her children and grandchildren.

The Defendant admitted under cross-examination that the Plaintiff regarded him as a son. There is also evidence on record that the Plaintiff used to give documents to her daughter for safekeeping. According to the Defendant, his wife brought these documents to his room in his absence. It is thus probable that the Plaintiff who regarded the Defendant as a son and trusted him asked him to keep the documents in respect of the disputed land as she had been doing."

Again at page 132 of the ROA (page 10 of the judgment) the Judge observed:

"The documents covering the house are in the name of the Defendant. PW3 has explained the circumstances surrounding how she executed the documents in the name of the Defendant. It was the Defendant who constructed the house and hired the various artisans to work on it. The Plaintiff has explained that the Defendant constructed the house on her behalf. She was the one who had given the monies to the Defendant for the construction of the house. Even though there are facts on record that give rise to the presumption of ownership of the disputed house in favour of the Defendant, the facts led by the Plaintiff in evidence renders the non-existence of the ownership of the house by the Defendant more probable than not. The presumption has successfully been rebutted by the Plaintiff. It's more probable than not that the disputed house is the property of the Plaintiff even though documents covering the house is in the name of the Defendant. I therefore find that the Plaintiff is the owner of the disputed property."

The facts of the case clearly brings up the principle of a resulting trust.

The law on the circumstances under which a resulting trust will be presumed by the courts is trite learning. In **In re Sasu-Twum (decd.); Sasu-Twum vs. Twum [1976] 1 GLR 23**, it was held, among others, at page 32 of the report that:

> "It is the settled principle of law that where one purchases a property and causes the legal estate in that property to be conveyed in the name of another who provided none of the purchase price, there is a rebuttable presumption that the purchaser of the property intended that that other person should not enjoy the beneficial interest, but should hold the legal estate as a trustee for the purchaser. In the absence of evidence indicating an intention on the purchaser's part of not appropriating to himself the beneficial interest, the law will presume that the purchaser intended to keep the beneficial interest for himself and a resulting trust will be declared in his favour.

In the English case of **Dyer v. Dyer (1788) 2 Cox Eq. Cas. 92 at p. 93** which was affirmatively applied in **In re Wiredu (Decd.); Osei vs. Addai [1982-83] GLR 501**, it was pointed out that:

> "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly or successive, results to the man who advances the purchase money... and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor.
>
> In some circumstances where a person voluntarily transfers property into the name of another, or contributes to its purchase, the law presumes that a gift was intended and that the transferor/contributor did not intend to retain any interest in the

property concerned. This presumption, known as the 'presumption of advancement', displaces the presumption of resulting trust. The presumption of advancement arises as a result of pre-existing relationship between the parties to the transfer or acquisition, where the transferor/contributor is regarded as morally obliged to provide for the person benefiting."

In **In re Sasu-Twum (decd.); Sasu-Twum vs. Twum** (supra) the court held at page 33 of the report that:

> "However, the presumption is the other way round in the case where the person in whose name the legal estate was conveyed is the wife or the child of the purchaser or a person to whom the purchaser stands in loco parentis. A father is under an obligation to support or make provision for his child. So, where the father takes a conveyance of property in the name of his child, as in the present case, there will be a presumption of advancement in favour of the child. In other words, there will be a presumption that the father intended to part with both his legal and beneficial interest in the property to the child and that the property was intended to be a gift to the child"

In the case of **Ussher and Others vs. Darko [1977] 1 GLR 476** CA, the court pointed out that:

> "The equitable presumption of resulting trust was rebuttable by the equitable presumption of advancement and such cases were strictly circumscribed: it was applicable where the purchase was made in the name of a legitimate or illegitimate child, a grandchild whose father was dead or in the name of a wife of the purchaser.
>
> **The law in respect of advancement and resulting trust is very well settled. And it is that where a person buys property or conveys property in the name of another person who is not related to him either as a spouse or as a child, the law often**

presumed a resulting trust in favour of the purchaser or conveyancer. But if the grantee is the wife or child or stands in loco parentis to the grantor the law presumes an advancement in favour of the grantee … But it is to be noted that none of the authorities denies the important point that whether an advancement or a resulting trust is the subject of an act, it is still a rebuttable presumption only we are talking of. For that reason, both the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact lies on the party against whom the presumption operated."

We have taken note of the Supreme Court's decision in ***Re Taahyen & Asaago Stools; Kumanin II (substituted by) Oppon v Anin* [1998-99] SCGLR 399.**

In the said case the apex court in a majority decision held as follows on the issue of presumption of ownership:

"and the presumption of title raised by acts of possession and ownership appears now as section 48 of the Evidence Decree 1975 (NDCD 323). It follows from that provision that a party can succeed in his claim even if his traditional evidence is rejected. In the instant case the traditional evidence led by Respondent in respect of his claim was not authenticated by concrete acts and events in living memory unequivocally evidencing his claim."

We think the present case can be distinguished due to the cogent and compelling evidence given by Plaintiff's witnesses PW1, 3, & 5 and the principle of resulting trust.

We are also mindful of the decision in ***Fosua & Adu Poku Vrs Dufie Deceased & Adu Poku Mensah (2009) SCGLR 310 Holding 1*** where the Supreme Court held that

"It was settled law that documentary evidence shall prevail over oral evidence."

Again in ***Yorkwa vrs Duah 91992-93) GBR 278 C.A holding 4*** the court held as follows:

> *"Wherever there was in existence a written document and oral evidence over a transaction, the practice in the court was to lean favourably towards the documentary evidence, especially if it was authentic and the oral evidence conflicting. As between the conflicting and inconsistent oral evidence and the authentic exhibit 1 on the pledge, the court would lean favourably towards exhibit 1 that supports the case of the appellant that the transaction was a sale and not a pledge."*

It is our opinion that the documentary evidence i.e. the Allocation Note and Site Plan of the Defendant cannot be relied on to determine this case due to the evidence of PW1, PW3 & PW5 which we have alluded to supra.

On the other hand the oral evidence of Plaintiff and her witnesses were cogent and compelling and not at all conflicting.

On the basis of the above the principle in Adu Poku and Yorkwah cases cited supra are not applicable in this case.

We are of the opinion that the Learned Trial Judge's evaluation of the evidence adduced cannot be faulted.

On the basis of the above, we conclude that ground one of the appeal has not been made out and lacks merit.

Grounds '2', '3' & '4':

Counsel for the Appellant argued these grounds together and we will do same in dealing with the said grounds.

Indeed all the three grounds can be lumped together conveniently and discussed under the omnibus ground that the judgment is against the weight of evidence.

The oft-cited case of ***Djin v. Musah Baako [2007-2008] SCGLR 686*** provides the trite learning that when a Defendant puts forward this ground he is contending that there were certain pieces of evidence on the record which if applied in his favour would have changed the decision/verdict in his favour. He also implies that certain pieces of evidence have been wrongly applied against him in the judgment. The onus is on such a defendant to clearly demonstrate to the appellate court the lapses complained of. The duty of the appellate court, on the other hand, to thoroughly review the Record of Appeal and come to a decision on the matter is also explained in the case of ***Tuakwa v. Bosom [2001-2002] SCGLR 61 at 65.***

See also: ***Ampomah vs. VRA [1989-90] 2 GLR 28***

Brown v. Quashigah [2003-2004] 2 SCGLR 930 at 942 on this.

Defendant's counsel in his submissions on these grounds stated that in addition to the Defendant tendering documentary evidence in support of his case, he called artisans who constructed the disputed house as witnesses and the evidence shows that these artisans were paid by the Defendant.

He challenges the finding of fact by the trial Judge that the monies paid to the artisans by the Defendant were monies given him by PW4. It is the contention of counsel that there is no evidence to show that PW4 Cecilia did send any monies to the Defendant for construction of the house in dispute. He argued that the Plaintiff did not tender any evidence of money transfer e.g. receipts through agencies like the Western Union nor did she call the said Agya Owusu nor any person through whom PW4 claimed he sent the

money to be given to Defendant to testify. None of the Plaintiff's witnesses could also confirm that he saw the Plaintiff or PW4 give money to Defendant to pay the artisans.

Counsel describes this finding of the trial Judge as speculative which has occasioned substantial injustice to Defendant.

Counsel argues that on the other hand, there was evidence on record that the Defendant was a teacher, farmer, video operator, photographer and chairman of the GPRTU Nyinahin branch. With the proceeds from these endeavours the Defendant, he argues, acquired and constructed the house in dispute.

Also, the Plaintiff could not give an estimate of the money she claimed was sent her by PW4 describing it merely as a huge amount.

Whilst some of the above assertions may be true, it is also equally true that the Defendant who filed a counterclaim and had an equal duty to prove his claim on the balance of probabilities led no concrete evidence on his income or earnings he obtained from the various endeavours he claimed he was engaged in.

See the case of ***Jass Co. Ltd. v. Apau & Anor. [2009] SCGLR 265***

Osei Vrs Korang (2013-2014) 1 SCGLR 221 at 231.

The Trial Judge having made a finding on the solid evidence of PW1, PW3 and PW5 that it was Plaintiff who paid for and acquired the plot of land at the cost of ¢400,000.00 cannot be faulted for preferring the story of Plaintiff and PW4 that they gave money to Defendant to construct the building from which he paid the said artisans.

We are of the opinion that of the two conflicting stories, that of Plaintiff/Respondent's with whatever limitations appeared more probable than not and that the trial Judge's decision is not against the weight of evidence.

The basis for an appellate court's interference with the exercise of discretion of a court below is trite learning and there is a plethora of authorities on this.

See the cases of ***Nkrumah v. Serwah [1984-86] GLR 190*** and ***Ballmoos v. Mensah [1984-86] 1 GLR 725*** where in holding 1 the court held as follows:

> ***"The Court of Appeal would not interfere with the exercise of the trial court's discretion save in exceptional circumstances. An appeal against the exercise of the court's discretion might succeed on the ground that the discretion was exercised on wrong or inadequate materials or if it could be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account but the appeal was not from the discretion of the court to the discretion of the appellate tribunal."***

In Re Okine (Deceased); Dodoo & Another vrs Okine & Others (2003-2004) SCGLR 582 the Court held inter alia that:

> ***"An appellate court must not disturb the findings of fact made by a trial court, even if the appellate court would have come to a different conclusion, unless the findings of fact made by the trial judge were wholly unsupportable by the evidence. Therefore, where the evidence was conflicting, the decision of the trial court as to which version of the facts to accept was to be preferred, and the appellate court might substitute its own view only in the most glaring of cases."***

See also ***Crentsil v. Crentsil [1962] 2 GLR 171 at 175 SC***

Blunt v. Blunt [1943 AC 517 at 518 HL cited.

In conclusion, the grounds 2, 3 and 4 in our opinion have not been made out and are dismissed.

The appeal is therefore dismissed in its entirety and the judgment of the Trial Judge of 8/4/2016 is hereby affirmed.

SGD

ALEX B. POKU-ACHEAMPONG

(JUSTICE OF THE COURT OF APPEAL)

SGD

I agree, **ANGELINA M. DOMAKYAAREH (MRS)**

(JUSTICE OF THE COURT OF APPEAL)

SGD

I also agree, **SAMUEL K. A. ASIEDU**

(JUSTICE OF THE COURT OF APPEAL)

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