IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - AD 2021

CORAM: YEBOAH, CJ (PRESIDING)

OWUSU (MS.), JSC

HONYENUGA, JSC

AMADU, JSC

KULENDI, JSC

CIVIL MOTION

NO. J8/37/2021

31ST MARCH, 2021

OGYEEDOM OBRANU KWESI ATTA VI ……. APPLICANT/RESPONDENT

RESPONDENT/APPLICANT

VRS

1. **GHANA TELECOMMUNICATION CO. LTD. .. 1ST RESPONDENT/APPELLANT**

APPELLANT/RESPONDENT

2. **LANDS COMMISSION ……. 2ND RESPONDENT**

RULING

DECISION OF THE COURT BY MAJORITY

KULENDI, JSC:-

This Court on 30th July, 2020, by a unanimous decision, granted the 1st Respondent leave to adduce fresh evidence on Appeal.

The brief facts of this case are that the 1st Respondent is the grantee of the 2nd Respondent. The Applicant issued a writ of summons against the Respondents for, among other reliefs, a declaration of title to land, an order for recovery of possession and special damages for trespass and unlawful possession. The 2nd Respondent in its Defence admitted that it had granted a lease to the 1st Respondent in good faith in the belief that the land, the subject matter of the dispute, formed a part of the larger area vested in the Government of Ghana by reason of Stool Lands (Efutu and Gomoa Ajumako Instrument, 1961 (E.1 206). The 2nd Respondent further stated that upon critical examination of available records, it had come to the realization that the land in dispute is not state-vested land as same falls outside the subject-matter of the area covered by E.1 206. Consequently, the Applicant obtained a judgment against the 1st and 2nd Respondents on these admissions of the 2nd Respondent. The 1st Respondent being dissatisfied with the judgment of the High Court appealed to the Court of Appeal. The Appeal was dismissed on the 11th of June, 2019. The 1st Respondent, still dissatisfied with the affirmation of the judgment of the High Court by the Court of Appeal and the dismissal of his Appeal filed a further Appeal to this Court. The 1st Respondent sought and obtained the leave of this Court on the 30th July, 2020 to adduce fresh evidence in the Appeal to demonstrate that the land, the subject matter of dispute, was acquired by the Government of Ghana by Executive Instrument 86 of 7th June, 1969 under the State Lands Act, 1962, (Act 125) and further, that Government, as far back as 6th October 1969 paid compensation for the acquisition to the predecessor of the Applicant, one Nana Obranu Gura II.

Following the grant of leave to the 1st Respondent by this Court and the indication of the documentary evidence that the 1st Respondent proposes to adduce to prove the payment of compensation to the Applicant's predecessor, the Applicant, in reaction,

took out the present application seeking leave of this Court to, in turn, lead fresh evidence to contradict the proposed fresh evidence of the 1st Respondent by demonstrating whether the signatures as appears on the receipts presented as those of Nana Obranu Gura II were authentic.

This is a novel application because, in our rich line of judicial decisions on the abduction of fresh evidence on appeal, it is difficult to find precedents where a successful party to a judgment on appeal seeks leave to adduce fresh evidence to support the judgment in his favour. There is therefore a paucity of judicial precedent or none at all wherein a successful party to a judgment on appeal, applies to adduce fresh evidence. This however does not preclude this Court from considering such an application on its merits. In the case of **MERCHANT BANK LTD. Vrs. GHANA PRIME WOOD LTD. [1989-99] 2 GLR 551 at page 568** Adade JSC cautioned our Courts on over reliance on judicial precedents as follows:

> ***"precedents are merely to help us think about cases before us. We are in danger of substituting our thinking to be done for us and this is because the impression is being created that every case must have a precedent by which it should be decided. So rather than do some original thinking about the case, we first try to look for a deciding precedent and then proceed to push our case into the straight jacket of the precedent."***

It is obvious from the circumstances of this case the Applicant herein, who is the successful party to the judgment on appeal, is apprehensive that unless he is given an opportunity to proffer further evidence to rebut the fresh evidence proposed to be introduced by his opponent, the sufficient, cogent and credible evidence on which his favourable judgement stands may be dislodged, the judgment impaired and reversed to his loss. It is this prejudice which will be occasioned the Applicant by the fresh evidence the 1st Respondent has been given leave to adduce that has provoked the present application.

The application is made pursuant to Rule 76 of the Supreme Court Rules, 1996 (C.I 16) (As amended by C.I 24, 1999).

The said Rule 76 of C.I 16 provides as follows:-

Rule 76—New Evidence.

> ***(1) A party to an appeal before the Court shall not be entitled to adduce new evidence in support of his original action unless the Court, in the interest of justice, allows or requires new evidence relevant to the issue before the Court to be adduced.***
>
> ***(2) No such evidence shall be allowed unless the Court is satisfied that with due diligence or enquiry the evidence could not have been and was not available to the party at the hearing of the original action to which it relates.***
>
> ***(3) Any such evidence may be by oral examination in Court, by an affidavit or by deposition taken before an examiner as the Court may direct."***

From the language of Sub-Rule (1) of Rule 76 as set out above, the person clothed with the capacity to invoke our jurisdiction for abduction of fresh evidence on appeal is **"a party**" to the appeal. The logical inference from the plain and ordinary language of the rule and meaning of the words **"a party"** is that in the contemplation of the Rules of Court Committee, any party, whether an Appellant or Respondent in an appeal, is eligible and/or clothed with the capacity to mount an application for leave to adduce fresh evidence on appeal. The only caveat being that such an application may succeed only if it is in "**the interest of justice"**. This means that applications for the abduction of fresh evidence on appeal are not the sole preserve of an Appellant in the appeal. Consequently, in appropriate circumstances, a Respondent may have a justifiable need to apply and be granted leave to adduce fresh evidence on appeal. However, to

our minds, an Applicant who is Respondent in the substantive appeal should not ordinarily be allowed to adduce fresh evidence unless the application discloses that it is in the interest of justice that such a Respondent be given an opportunity to adduce fresh evidence in rebuttal of new evidence that has been proffered and/or is about to be proffered by the Appellant. Therefore, the fresh evidence that a Respondent may seek leave to adduce must have been made necessary, relevant and compelling by the fresh evidence that the Appellant who is seeking to overturn the Respondent's favourable judgment has and/or is about to adduce.

My learned and esteemed brother Bennin JSC in the consolidated case of: **Rev. Rocher De-Graft Sefa & Anor v. Bank of Ghana & Anor [Civil Motion No. J8/75/2014]; Samuel Gyamfi v. Bank of Ghana & Anor [Civil Motion No. J8/76/2014] [Judgment delivered on 29th July 2014]** gave consideration to the scope of Rule 76 of C.I 16 and enunciated the following criteria in order to succeed on an application to adduce fresh evidence before this Court:

1. The evidence was not available to the applicant at the trial;
2. The evidence could not have been obtained by the applicant upon reasonable diligence for use at the trial;
3. Had the evidence been adduced at the trial it would have had an important influence on the result of the case, although it need not be decisive;
4. Such as is presumably to be believed, in other words evidence of a sort which is inherently not improbable.

This Court in the case of ***Poku v Poku [2007-2008] SCGLR 996 at page 998***, *where it considered the requirements that an applicant must meet in order to be granted leave to adduce fresh evidence under Rule 26 (1) and (2) of the Court of Appeal Rules, 1997, C.I 19, reasoned as follows:*

> **"in an application to lead fresh or new evidence before the Court of Appeal, the first criterion, which an applicant ought to establish, was whether the**

> **evidence sought to be adduced, was neither in the possession of the applicant nor obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was given by the lower court.** ***It was only when that first hurdle had been surmounted, that the court should proceed to determine the other pertinent question of whether or not the intended evidence would have a positive effect on the outcome. If the first criterion was not met, no useful purpose would be served by examining the other factors"***

Significantly, the essential requirements in the criteria set out by this Court in the Rev. DeGraff Sefa and Poku v. Poku cases (supra) are essentially the same.

We are however of the view that in addition to the said criteria, if the Applicant, in an application to adduce fresh evidence on Appeal is the Respondent to the Appeal as in the instant case, then such an Applicant must demonstrate, as a pre-condition, that the Respondent to the application, has been granted leave to adduce fresh evidence and that unless the Applicant is also given an opportunity to adduce fresh evidence in rebuttal, the new evidence of the Respondent is likely to occasion new findings by this Court which may result in an overturning of a the judgement appealed.

Generally, in applications of this kind, the Applicant, whether an Appellant or a Respondent must sufficiently state or demonstrate the nature of the fresh or new evidence sought to be adduced at the hearing of the appeal. Also the Applicant must give reasons why the evidence was not produced at the trial, namely that it was **not necessary, relevant or compelling** and that it was not obtainable despite best efforts and/or reasonable diligence. See: **Boasiako V Panin Ii [J6/1/2012), (Judgment delivered on 22 January 2013,), His Lordship, Date-Baah Jsc; Republic Vs. Thompson And Others (J8/92/2011) (15 February 2012) Dotse JSC, R V Gbadamosi [1940] 6 Waca 83, Rex V Oton [1946-1949] 12 Waca 212-214,** *Nash V Rochford Rural District Council [1917] 1 Kb 384* **At 393**

Accordingly, we are of the view that in order to motivate the exercise of our discretion in favour of an Applicant who is the Respondent to the substantive appeal, such an Applicant must satisfy the following conditions:

1. **That the Appellant in the substantive appeal has been permitted to adduce fresh evidence;**
2. **That the fresh evidence the Appellant has adduced or proposes to adduce, unless rebutted, is likely to occasion a reversal of the findings of the Trial Court.**
3. **That the reversal of the findings of the Trial Court that will be occasioned by the fresh evidence abducted or about to be introduced by Applicant's adversary is likely to result in a reversal of the judgement of the Trial Court in favour of Applicant's opponent;**
4. **That the new evidence the Applicant proposes to adduce has been made necessary, relevant and compellable by the fresh evidence that the Respondent has adduced or is about to adduce.**
5. **That prior to the grant of leave to the Respondent to adduce fresh evidence, the Applicant could not reasonably have foreseen the necessity and relevance of the fresh evidence sought to be adduced;**
6. **That it is in the interest of justice for such new evidence to be allowed.**

In contrast, if the party who applies for leave to adduce fresh evidence under Rule 76 of C.I 16, is the Appellant in the substantive appeal, the applicable criteria would be as set out in the Rev. Rocher De-Graft Sefa and Poku vrs. Poku cases (supra). These criteria which are less onerous follows that which were enunciated by Denning LJ in **Ladd v Marshall [1954] 3 All ER 745 at page 748** as follows:

> ***"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: Second, the***

evidence must be such that, if given, it would probably have an important influence on the result of the case, although it needs not be decisive: Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

It must therefore be noted that the criteria that an Applicant who is the Respondent to an appeal must satisfy in order to succeed on an application for the leave of this Court to adduce fresh evidence is of a higher threshold than that imposed on an Applicant who is simply the Appellant in the substantive appeal.

There is the need to ensure that Applicants who seek leave to adduce fresh evidence on appeal comply with the above principles of judicial guidance laid by the rules of court and case law so that litigation is not unduly prolonged, with needless attempts to lead fresh evidence on appeal.

Application

The ultimate question that arises from the substantive appeal is whether or not the land, the subject matter of dispute between the parties, was compulsorily acquired by the State and compensation paid. As has been stated earlier, this Court has already granted leave to the 1st Respondent to lead fresh evidence to prove that the Land in dispute is State Land, same having been acquired by the Government of Ghana in 1969 and compensation duly paid to the predecessor of the Applicant. These two legs of evidence which the 1st Respondent herein has been granted leave to introduce will become a material part of the evidence on record that this Court will consider in determining the pending appeal. The Applicant, in this application, contends that he has contrasting evidence which shows that his predecessor never received any compensation and that the signatures on the receipts which 1st Respondent has been granted leave to tender as fresh evidence are not authentic signatures of his predecessor. The evidence which the Applicant seeks leave to adduce is to demonstrate to this Court that his predecessor, received no compensation for the

acquisition of the land and is not the signatory to those receipts which the 1st Respondent has been given leave to introduce. In the affidavit in support, the Applicant deposed in paragraphs 8, 11 and 12 as follows:

> ***"8.That the burden of the new evidence that the Respondent seeks to lead is to demonstrate that the Government of Ghana by Executive Instrument 86 of 7th June, 1969, acquired the property in dispute under the State Lands Act, 1962 (Act 125) and further that the Government, as far back as 6th October, 1969, had paid my predecessor, Nana Obranu Gura II, the sum of Eight Hundred and Fifty New Cedis (NC 850.00) being compensation for the acquired land and yet, further that my predecessor in title had, through several receipts and letters that he had appended his signature to, negotiated the compensation to be paid him and acknowledged being paid the Compensation for the acquisition of the disputed property for a microwave transmission station at Gomoa Afransi.***
>
> ***11. That I was taken by surprise by the new evidence that Respondent has been given leave to adduce, as this evidence was available and could have been procured by Respondent, had it exercised due diligence, especially given that it failed to Appeal against the decision of the trial court refusing its application to subpoena the lands commission to produce relevant records.***
>
> ***12. that my lawyer advised that it was necessary to determine whether indeed government had paid any money to Nana Obranu Gura II, my predecessor and whether the signatures represented as those of Nana Obranu Gura II in Exhibit OOAK 2 series were authentic.***
>
> ***18. That until Respondent was given leave to adduce new evidence, there was no need for me to lead such evidence on the matter."***

The depositions above, sets out the grounds on which the Applicant urges that it is in the interest of justice that he be given leave to adduce new evidence in rebuttal of the fresh evidence that the 1st Respondent has been given leave to adduce. This inference

is borne by paragraphs 20 and 21 of the Affidavit in support wherein the Applicant stated as follows:

> ***"2o. That I am adviced by Counsel and verily believe same to be true that the new evidence I seek to adduce is material and, if accepted, is highly likely to affect the outcome of the instant case and that, in the interest of doing substantial justice, it is just, and proper for this Honourable Court to grant leave for me to adduce fresh evidence as set our above especially after this Honourable Court has granted Respondent leave to adduce fresh evidence.***
>
> ***21. That I am further advised and verily believe same to be true that a refusal of the instant application will constitute a violation of my right to a fair hearing, this Honouable Court having already granted the Respondent leave to adduce the very evidence which I seek to challenge by the instant application."***

Our duty is to hold the balance evenly between the parties. It will therefore be unfair and likely to occasion the Applicant a miscarriage of justice if after granting the 1st Respondent leave to adduce fresh evidence, we turn around to deny the Applicant an equal opportunity to introduce new evidence in direct rebuttal of the fresh evidence the 1st Respondent will introduce. The ends of justice and our duty to be fair will be better served by affording both parties an equal opportunity to adduce fresh evidence to ensure a fair hearing of the appeal.

As the Applicant has stated in his affidavit in support of this application, the evidence he seeks to adduce is a direct reaction to the fresh evidence that the 1st Respondent has been granted leave to adduce. Consequently, we are satisfied that the new evidence the Applicant proposes to introduce is made necessary, relevant and compelling by the fresh evidence that we have already given the 1st Respondent leave to adduce. In our view the Applicant has satisfied all the conditions set out above to warrant a grant of this application.

Until this Court granted the 1st Respondent leave to adduce the receipts of payment of compensation to the predecessor of the Applicant as fresh evidence, the forensic evidence on signatures of the Applicant's predecessor did not became necessary and relevant, let alone compelling. Therefore, the question of whether or not the Applicant could not have produced evidence of these signatures if he had exercised reasonable diligence does not arise in these circumstances and that is why this test is not applicable to an Applicant who is the Respondent to the substantive appeal. This is because, in the face of admissions by the 2nd Respondent of their supposed error in leasing the land to the 1st Respondent, Applicant was not enjoined to lead evidence on admitted facts. Therefore, no matter the level of diligence by the Applicant, the nature of the evidence that the Applicant now seeks to adduce in rebuttal of the evidence of the 1st Respondent on payment, receipts and signatures, even if they were available to the Applicant at the time of the trial in the High Court, would most likely have been deemed irrelevant and for that matter, inadmissible.

It is commendable that, even though the 1st Respondent has formally filed an affidavit in opposition to this application, its Counsel has indicated in open court that he will not oppose the application. He conceded that given that the 1st Respondent has benefitted from a similar application, it was only fair that the Applicant should also be allowed to introduce his proposed new evidence in rebuttal.

After all, under our Civil procedure Rules, the Evidence Act, 1975 (NRCD 323), and the settled practice of our Courts, the Applicant will be entitled under section 62 of Act 323 to cross-examine the 1st Respondent on the fresh evidence that it proposes to lead at the hearing of the Appeal. During such cross-examination, the Applicant will, among others be entitled to suggest and/or put oral and documentary evidence to the 1st Respondent and/or its witnesses. Therefore, the implication of a denial of leave to the Applicant to equally adduce fresh evidence, which meets the test or threshold we have set out above, will mean that this Court would have precluded, foreclosed and/or practically restricted the Applicant's rights during cross-examination. This is because

a refusal of leave to the Applicant to adduce fresh evidence will disentitle the Applicant to suggest and/or put any such fresh or new evidence to the 1st Respondent and/or its witnesses even under cross-examination. In consequence, the Applicant's right to cross-examine the 1st Respondent and/or it's witnesses on the new evidence will be effectively limited. Needless to say, a refusal to grant the instant application, notwithstanding the circumstances of this case, will undermine a fair hearing of the appeal.

Further, in recent practice, parties may put in discovery, such material or documentary evidence that they intend or propose to put in evidence at the trial. In the peculiar circumstances of this case, the Applicant will be confronted with the fresh or new documentary evidence in proof of the allegation that his predecessor has negotiated and received compensation for the acquisition of the land in dispute. How would the Applicant, in turn, be able to put in, his proposed documentary evidence to impugn the authenticity of the 1st Respondent's new documentary evidence to avoid a reversal of the factual findings in his favour in the judgment appealed, if leave to adduce his version of the new evidence has already been refused by this Court.

In the circumstances, having examined the Application together with the affidavits and all processes filed thereto, as well as the submissions by counsel, we are of the considered opinion that this is a proper instance where we ought to exercise our discretion in favour of the Applicant in the interest of justice. For the reasons aforesaid, the application for leave to adduce fresh evidence is granted as prayed.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

AMADU, JSC:-

(1) I have had the opportunity of reading the opinion delivered by my esteemed learned brother and I agree entirely with the reasoning and conclusion reached. I however wish to make a contribution to the lead opinion by way of concurrence with a view to espousing on the jurisprudence relative to the issue arising out of the application whether or not the Respondent in the substantive appeal is entitled to a favourable exercise of our judicial discretion for leave to adduce fresh evidence on appeal.

(2) My Lords, the instant application as my brother has rightly pointed out, though conceivable, is quite novel in our procedural jurisprudence. It presents an extraordinary situation different from all available decided authorities. The peculiar circumstances of the instant application are strikingly different from

the ordinary situation as borne out by the contents of the Applicant's affidavit in support.

(3) The plethora of case law under rule 76 of C.I 16 on adduction of new evidence tend to relate to Appellants and not Respondents to the appeal. The major requirement is that the new evidence sought to be adduced should not have been available upon due diligence to produce same at the trial of the original action. The main policy behind the rule is to ensure that as a matter of public policy, litigation ought to be brought to an end.

(4) In **Foli & Others Vs. Agya Atta & Others (Consolidated) [1976]1 GLR 194, CA** it was held that: ***"the court would not admit fresh evidence in a case where the evidence was available and known to the party seeking to adduce it to be so, at the time of the trial. However, the court was unable to say that no circumstances would ever occur which would persuade it to think that a departure from the rule in a particular case should be permitted in the oversiding interest of justice***". Then in **Karikari Vs. Wiafe [1982-83] GLR 864 CA**, the court set out the conditions for grant of leave to adduce new or fresh evidence having regard to the general rule that each party in an action before the court must produce all the relevant and material evidence in support of his cause of action. Thus, the court would ordinarily not permit a party to produce his evidence piecemeal in a series of actions.

(5) However there are exceptions to the general rule one of which is where material evidence that might have altered the conduct of the trial was discovered after the trial and could not have been made available upon due diligence to procure same by the party seeking to introduce the new evidence. In any such case, the

court may grant leave to adduce fresh evidence provided there was satisfactory proof that there was no such lack of diligence.

(6) In the case of **Poku Vs. Poku [2007-2008] SCGLR 996**, this court upon a through review of both local and foreign case law and in determining whether or not the Court of Appeal was right in granting leave for fresh evidence to be adduced held *inter alia* that, the critical issue for resolution was whether the evidence being sought to be adduced was in the possession of the party seeking leave during the original trial, or before judgment, or it is such as could have been procured by reasonable diligence. In answering the question, this court held that: ***"in applications of this kind, as indeed, is the position in all applications requiring the exercise of a court's discretionary jurisdiction, proof of an applicant's bonafides, or conversely, mala fides, is crucial to the success or failure of the application".*** Upon an exhaustive evaluation of the peculiar facts, this court set aside the judgment of the Court of Appeal which allowed the adduction of fresh evidence only because fraud had been alleged in the appellate proceedings.

(7) In the instant application before us, as aforesaid, the Applicant's step was provoked by an earlier order for leave granted to the 1st Respondent to adduce fresh evidence in this court on a particular issue in prosecuting their appeal.

(8) As has been earlier observed, the rules of this Court do not prohibit any such step by a Respondent in an appeal except that for the discretion to be exercised, it must be in the overriding interest of justice. Infact, there being no precedence for a Respondent to invoke the jurisdiction for such leave does not preclude us from charting the course. As the highest court of the land, the proper question to ask is what would be our attitude to novel situations such as what the instant

application appears to have provoked in the absence of judicial precedent? What should this court do in a situation where the application before it, is such that has never been dealt with previously? Definitely in my view, in any situation which calls for a judicial determination without the advantage of a previous precedent, the court ought to be guided by the overriding interest of justice in the matter and should not fold its hands merely because what is before it has never been done before. Indeed more than six decades ago, the celebrated common law jurist Lord Denning said in the case of **Parker Vs. Parker [1954]1 AII E.R 22.**

"What is the argument of the other side? Only that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand sill whilst the rest of the world goes on and this will be bad for both".

(9) In **R. Vs. Medical Appeal Tribunal (North Midland Region) Ex-parte Hubble [1959]3 AII E.B 40-47,** Morris C.J provided a definition of the expression fresh evidence as: ***"it seems to me, must have the quality of newness, or the feature of having become newly available and obtainable".*** The fresh or new evidence therefore must be that which was not available previously which is designed to be a reply to the evidence given by the other side on points material to the determination of the issues or any of them. It should not therefore be evidence which ought to have been led to establish the facts pleaded and meet the issues raised in the pleadings at the trial of the original action.

(10) From the peculiar facts of the instant application therefore, given that the need to adduce fresh evidence by the Applicant was provoked by the earlier leave granted the Respondent to introduce fresh evidence in the prosecution

of its appeal, we think the interest of justice demands that the Applicant be given the opportunity to introduce such new evidence that in his view will efficiently rebut the new matters and issues he is confronted with by reason of the leave granted to the Respondent. The absence of any precedent is no reason why the application ought to be refused. As the highest and final court of the land, it is not every legal issue that we can resolve on the basis of judicial precedent. Judicial decisions are made to resolve particular disputes. A decision derives it's quality of justice, soundness and profoundness from the peculiar surrounding circumstance of the dispute it is presumed to adjudicate within the context of the relevant applicable law. In my considered view, the rules and accepted principles of law established by this court cannot be considered in the abstract without proper attention to and consideration given to the facts of each case. The facts as in the instant application are peculiarly material and fundamental and must assume a crucial role in the process of our decision.

(11) That is why this application ought to succeed and I too will grant same.

I. O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

YEBOAH, CJ:-

This court differently constituted granted leave to allow the Defendant/Appellant/Appellant/Respondent (herein after called the Respondent) to

adduce fresh evidence on appeal before this court as a prelude to the hearing of a substantive appeal from the Court of Appeal, Cape Coast.

I have considered carefully and given serious thought to the majority opinion of my sister and brothers on this panel after receiving a draft ruling, but I cannot, with all due respect to them, agree with the decision to allow fresh evidence from the Plaintiff/Respondent/Respondent/Applicant (who shall hereinafter be referred to as the Applicant) in this ruling.

It is a fact that the Applicant herein was the one who initiated the suit culminating in this appeal at the High court, Swedru. The claim was for compensation; and my brother has adequately addressed same in the majority opinion. The Applicant was adjudged to recover compensation from the Respondent to a substantial amount of money. The Respondent lodged an appeal at the Court of Appeal, Cape Coast, but the judgment at the Swedru High Court was affirmed in its' entirety. Undaunted, the Respondent lodged a second appeal to this court; claiming that it had discovered that the Government of Ghana had acquired the land in dispute and paid compensation for same. The Appellant in this appeal, who is the Respondent in this application had applied to this court to be allowed to adduce fresh evidence, which application was granted.

The instant application before us is by the Plaintiff (the applicant) herein who had in his favour a judgment of the High Court, Swedru and the Court of Appeal at Cape Coast, affirming the High Court judgment in its entirety.
The application adduction of fresh evidence on appeal is statutorily backed by rule 76 of CI 16, Supreme Court Rules, 1996, which states thus:

> *"76(1) A Party to an appeal before the Court shall not be entitled to adduce new evidence in support of his original action unless the court, in*

the interest of justice, allows or requires new evidence relevant to the issue before the court to be adduced.

(2) No evidence shall be allowed unless the court is satisfied that with due diligence or enquiry the evidence could not have been and was available to the party at the hearing of the original action to which it relates.

(3) Any such evidence may be by oral examination in court, by an affidavit or by deposition taken before an examiner as the High Court may direct."

The above rule is similar to Rule 26 of the Court of Appeal Rules, 1997 (CI 19) and decided cases like **Poku** v **Poku** [2007-08] SCGLR996, **Azametsi** v **The Republic** [1974] IGLR 228 CA and **Sasu** v **Amua-Sackyi** [1987-88] IGLR 294 SC have discussed same in detail. With the coming into force of the CI 16 in 1996, this court has on rare occasions been invited, to discuss rule 76. My industry could only unearth the case of **Morkor** v **Kuma** [1999-2000] IGLR 69 SC. At page 72, Akuffo, JSC (as she then was) said:

"Thus, it is quite clear that the presentation of new evidence on appeal is not as of right but by the leave of the court and at the ourt's discretion. Since the court's discretion in such matters is a creature of statute, its exercise is governed by the conditions and parameters set by the statute and it is, therefore, a fettered one. Consequently, a person seeking to invoke the exercise of this discretion must necessarily surmount the hurdles imposed by rule 76 of CI 16 and, failing that, this court does not have the power to grant the leave prayed for. The first hurdle is that it must be shown that the reception of the new evidence will be in the interest of justice and such evidence is related to the issue before the court. However, rule 76(2) of CI 16 also makes it patently clear that, even where the interest of justice may be served by the reception of such new evidence, yet, it may not be received "unless the court is satisfied that

with due diligence or enquiry the evidence could not have been and was not available to the party at the hearing of the original action to which it relates."

As we see it, rule 76 of CI 16 is intended to function as a mechanism of ensuring that due justice is done to a diligent party to an appeal who comes across evidence which was not and could not have been known or available to her at the trial and which, had it been known or available to her during the trial, would have had a material effect on her case. However, the rule is also intended to ensure that the litigation comes to an end at some point in time, by preventing parties from dishing out piecemeal evidence as after thoughts, as and when they deem it advantageous. We believe that it is for these reasons that the restriction in 76(2) of CI 16 was created."

The Supreme Court, as the last appellate court, sparingly grants leave for adduction of fresh evidence on second appeal. I think we must do so when the evidence raises serious issues of facts which the appellant has discovered. In the opinion of the majority, my respected brother has referred to the leading cases on this subject and it would be sheer pedantry for me to repeat same. I agree with his analysis of the law which is not in doubt at all. My concern is that this court in allowing the Respondent in this appeal, who has repeatedly been adjudged victorious based on the evidence he provided is seeking to adduce fresh evidence on second appeal. I think the rule under which the application was brought is intended purposely to assist an appellant who was unable to unearth very crucial evidence which could have been worthy of believe and probably decisive of the matter.

To allow a Respondent to a second appeal to adduce fresh evidence on the basis that the prospective exhibits to be relied on by the Appellant seeking to adduce fresh evidence are not authentic should not be a ground for the application. Adduction of fresh evidence entails evidence-in-chief and cross-examination of the party by the other counsel in the appeal. Counsel for the other side will certainly be allowed to

also rebut the evidence as the normal trial court does. Justice demands parity of treatment and the Respondent in this appeal certainly will have the opportunity to challenge any evidence which may not be authentic. It would, however, be tantamount to reopening of the whole case on a second appeal to allow a party who on the strength of the evidence adduced at the trial court and affirmed at the Court of Appeal to call fresh evidence as if he was unable to prove his case.

An appeal is an application to an appellate court to ascertain whether the judgment of the lower court was in error. This explains why the Court of Appeal hear appeals by way or re-hearing and subject the whole evidence led to review to ascertain whether justice was done by the lower court in appropriate cases. The power conferred on appellate courts in adduction of fresh evidence is limited as appellate courts are bound by the record of proceedings from the lower court. If care is not taken, appellate courts will be opening the floodgates for such applications by Respondents to appeals pending for determination.

It is for the above reasons that I thought it prudent to dissent in this ruling.

ANIN YEBOAH

(CHIEF JUSTICE)

COUNSEL

AKOTO AMPAW FOR THE APPLICANT/RESPONDENT/RESPONDENT/ APPLICANT

ACE ANKOMAH FOR THE 1ST RESPONDENT/APPELLANTAPPELLANT/ RESPONDENT.