IN THE DISTRICT COURT '2'

PREMPEH ASSEMBLY HALL, KUMASI ON TUESDAY THE 29TH DAY OF AUGUST, 2023 BEFORE HER HONOUR ALIATA SAEED (MRS.) SITTING AS ADDITIONAL MAGISTRATE.

SUIT NO. C11/06/22

MUSTAPHA HAKIM …… PLAINTIFF

V

SHARIF MOHAMMED …… DEFENDANT

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JUDGMENT

The gist of the instant matter are that, the Plaintiff alleged that somewhere in June, 2021, he purchased a Man Diesel Truck with registration number WR-761-Y from the Defendant at the cost of ninety two thousand Ghana Cedis (Gh₵92,000.00). That he inspected the said vehicle and was assured by the Defendant that the truck was in good working condition before he made payment of the purchased price to the Defendant. Plaintiff said he subsequently realised there were some minor faults and he brought Defendant's attention to and he fixed them. According to the Plaintiff, he later noticed that the engine of the truck was faulty and for it to function, needed to be replaced. He avers that despite his appeals to the Defendant to either put the truck in good condition or refund the purchased price of Gh₵92,000.00 to him yielded no positive response. As a result, Plaintiff brought the instant action against the Defendant seeking for:

a. An order for the recovery of the sum of ninety two thousand Ghana Cedis (Gh₵92,000.00) being the purchase price of Man Diesel Truck with registration number WR-761-Y as well as interest on the said amount at the prevailing Commercial bank rate from June, 2021 till date of final payment.

Or in the alternative;

a compelling order against the Defendant to fix the said truck to good working condition.

b. Damages for breach of contract.
c. Cost including legal fees.
d. Any other relief deemed just and fit by the court.

Defendant on the other hand denied the reliefs sought by Plaintiff and counterclaimed for:

a. A compelling order against the Plaintiff to remove the vehicle in issue from the garage of the Defendant.
b. An order for recovery of Gh₵8,700.00 as total expenses Defendant incurred in overhauling the engine of the vehicle in issue, and replacing one of its axle beams.
c. Cost on full indemnity basis.

However, on the 10th of September, 2021, Flavin Gai holding the brief of Mujeeb Rahman Ahmed for the Plaintiff informed the court that, he was approached by an interceder who said he is known to the parties and wanted to have the matter settled amicably between them. The parties were obliged by the court to try out of court settlement as prayed. Then, on the 28th day of October, 2021 Counsel for the Plaintiff again announced to the court that settlement broke down, as a result, the case took its normal course.

It is the case of the Plaintiff that somewhere in June 2021, he purchased from the Defendant a Man Diesel truck with registration number WR-761-Y at ninety two thousand Ghana Cedis

(Gh₵92,000.00) after he negotiated with the Defendant. It is also his case that the Defendant during their negotiations at all times represented to him that, the vehicle was in good condition. Defendant however, denied this assertion and explained that, he sold the truck to the Plaintiff "as is", "where is" and "with all faults" basis because, Plaintiff knew that it was a used vehicle. Plaintiff avers he paid (Gh₵2,000.00) cash to the Defendant through one Garfaru Moomin and paid the balance of ninety thousand Ghana Cedis (Gh₵90,000.00) into the Defendant's ABSA account number 011071592 at the Adum branch, Kumasi. In support of his assertion, he tendered in evidence a statement of deposit from Cal Bank, it was admitted in evidence and marked as exhibit 'A'. In response, Defendant admitted to have received a total amount of Gh₵92,000.00 from the Plaintiff, but explained that, the agreed purchase price of the truck was Gh₵90,000.00 and commitment fee of Gh₵2,000.00 per the industry practice. This has been admitted by the Plaintiff under cross-examination. It is important to state that there is no evidence on record that, Plaintiff would have paid the said Gh₵2,000.00 to the Defendant if he had decided not to purchase the vehicle. Commitment fee in transactions like the instant case is an amount of money paid by a person/buyer who is interested in purchasing particular goods but, does not have the purchase price money on him/her at the time. This person/buyer may be asked to pay an amount of money to protect his interest against any person who may later want to buy the same goods. Such amount of money usually forms part of the purchase price of the goods. So the person/buyer when paying the purchase price of the goods, pays minus this commitment fee. It is to the effect that, the seller is not supposed to sell the item to another person after he has received the commitment fee from the prospective buyer. So the court is not inclined to agree with defence counsel when he argued in his written address that the commitment fee would have been refunded to the Plaintiff if he had not asked that same be used to repair the interior of the car as well as its windscreen. In the instant case what is vital is the total amount of money paid by Plaintiff to the Defendant during the transaction,

and it is not in dispute that the Plaintiff paid a total amount of Gh₵92,000.00 to the Defendant comprising of purchase price of Gh₵90,000.00 and the commitment fee Gh₵2,000.00. It is further the case of the Plaintiff that he inspected the vehicle, noticed some patent defects, he drew the attention of the Defendant to these defects, and Defendant agreed to fix them before he paid the purchase price to him. According to the Plaintiff, he also brought to the attention of the Defendant when he noticed that one of the axle beams of the vehicle was faulty, and the Defendant told him he has a new axle beam to fix on the car but pleaded with him to engage a blacksmith-mechanic to fix it. Plaintiff said he agreed and did same. It is also the case of the Plaintiff that, it was agreed between him and the Defendant that he pays the purchase price to enable Defendant use some of the money to refurbish the interior defects of the truck that he drew his (defendant) attention to. Plaintiff explained he later bought new batteries, put them in the truck and started it, but noticed smoke emission from the engine though Defendant assured him that the vehicle was in good condition.

It is further the testimony of the Plaintiff that he relied on Defendant's assurance that the truck was in good condition, and requested for a complete overhauling of the engine yet, the problem persisted though Defendant told him he has fixed it. He also indicated that, he told the Defendant to fix the vehicle with new engine or refund the purchase price to him but he (defendant) refused. As a result, one Master Charles (he testified as PW1) intervened to resolve the matter between him and the Defendant. Plaintiff further adduced evidence that Defendant opted to refund the purchase price of Gh₵92,000.00 subject to some deductions within three days though he refused to disclose the amount to be deducted. It is also Plaintiff's case that due to the conduct of the Defendant, Mr. Paul Asamoah (to be referred to as Mr. Paul) on whose behalf he was buying the truck for, to be used for his construction works, has lost the contract. It is important to state that apart from bare assertion in paragraph 16 and 24 of Plaintiff's evidence in chief, he has not provided any

evidence that Mr. Paul has actually bided for the alleged contract, and lost same due to the unavailability of the subject matter herein. The duty rest on the Plaintiff to support his assertion with some corroborative evidence such as documentary evidence considering the nature of his assertion which involves paper work like, bidding/tendering or contract award documents. The law as I know it is that, a party mounting the witness box and repeating his averment does not constitute proof no matter how credible the witness might be. The Apex Court of our land speaking through *Dr. Date-Bah JSC* reiterated in the case of ***T.K. Serbeh & Co. Ltd v Mensah [2005-2006] SCGLR 341*** *at 360* when he said that, it is trite law that for however credible a witness may be, his bare affirmation on oath or the repetition of his averment in the witness box cannot constitute proof. Therefore, the court cannot rely on Plaintiff's mere assertion not supported by any other corroborative evidence in view of the Defendant's denial. Hence, the court holds that Plaintiff failed to lead supporting evidence in proof of his assertion regarding Mr. Paul alleged loss of a contract he bided for, due to the failure by the Defendant to fix the engine of the truck. It is again the case of the Plaintiff that, when Defendant failed to refund the purchase price money, his lawyers wrote to him demanding for the payment of the money. Plaintiff tendered a Demand Notice in evidence without objection, it was admitted and marked as exhibit 'B', but, Defendant denied being served with exhibit 'B'. Plaintiff further contended that the Defendant voluntarily agreed to some terms of settlement but failed to sign same. He tendered in evidence a copy of terms of settlement which was admitted and marked as exhibit 'C'. The court will soon be commenting on exhibit 'C' in this judgment. Plaintiff in support of his case called Charles Amoako as his only witness.

The Defendant on the other hand introduced himself as a car dealer and the Plaintiff an auto mechanic in Man Diesel Trucks. He denied having knowledge of exhibit 'C' and it contents. It is worthy to state that, Defendant on the face of this exhibit, has not put his mark or signed it, therefore, he cannot be bound by the contents of exhibit 'C'. On this note, the court holds

that exhibit 'C' has no binding effect on the Defendant. Defendant also asserted that Plaintiff expressed interest in purchasing a Man Diesel vehicle through one Garfaru. He alleged to have informed the Plaintiff and Garfaru that he has the vehicle in issue for sale, and requested they come to his garage at Dichemso in Kumasi and inspect the truck. He said they obliged, and followed up to the said garage on the 15th day of June, 2021, and they thoroughly inspected it. According to him, as part of the inspection, the engine of the truck was started for the Plaintiff who is an auto mechanic in man diesel vehicles to examine and ascertained that its engine was in good condition. He further contended that Plaintiff was satisfied after the inspection before they negotiated on the purchase price. It is again his case that, they agreed at a purchase price of Gh₵90,000.00 and a commitment fee of Gh₵2,000.00 per the industry practice to be paid by the Plaintiff. Defendant also asserted that, the Plaintiff requested him to use this Gh₵2,000.00 to refurbish some minor repairs detected in the vehicle, he agreed and did same. According to him, he delivered the truck together with its documents to the Plaintiff and Plaintiff engaged some mechanics to fix one of the axle beams of the truck and they ended up destroying it. It is further the case of the Defendant that, as a result of the destruction, he had to buy a new axle beam at a cost of Gh₵4,000.00 and replaced it. Defendant denied any damage caused to the axle beam in his evidence in chief, he however explained that, it was the Defendant that pleaded with him to get a blacksmith and that he never caused damage to the axle beam. Defendant again contended that when Plaintiff later brought his driver to pick the truck from the garage, he handed over the vehicle keys to him, and after the engine was started that Plaintiff complaint of vapour emission from the engine of the vehicle. Defendant alleged it was as a result of the complaint that, Plaintiff requested him to overhaul the engine, he agreed and engaged the services of a mechanic by name Osman Nasiru and he (the Defendant) replaced the faulty parts of the engine with new ones at a cost of Gh₵4,700.00. Defendant also avers that, Plaintiff bought engine oil for the vehicle, the engine was started and left to run to adopt to the new parts

fixed. Defendant alleged it was two days later that the Plaintiff visited his garage with Master Charles who disclosed to him that Plaintiff purchased the vehicle for a third party and that the said person is not satisfied with the truck because it is not fit for the kind of work he needed it to be used for. So, according to the Defendant, because Charles is his Master, he agreed to sell the vehicle and refund to the Plaintiff the amount it is resold, less the cost he incurred on the repair works on the vehicle. Defendant called Garfaru Moomin as DW1 as a witness in support of his case.

From the facts and evidence before the court, the undisputed facts are that; the Plaintiff is an auto mechanic with specialty in man diesel trucks and the Defendant is a car dealer. It was in June, 2021 that Garfaru called the Defendant and expressed Plaintiff's interest in purchasing a man diesel truck. That Defendant told the Plaintiff and Garfaru that they could visit his garage at Dichemso in Kumasi to inspect a man diesel truck he has for sale. It is also not in issue that Garfaru and Plaintiff visited the Defendant's garage and inspected a second hand man diesel truck with registration number WR-761-Y. It is not disputed that Plaintiff after the inspection of the truck, noticed some interior problems including the windscreen and brought same to the attention of the Defendant which he (defendant) agreed to repair. It is also undisputed that Plaintiff has paid an amount of Gh₵2,000.00 to the Defendant through Garfaru after he negotiated the purchased price with the Defendant, and transferred an additional amount of Gh₵90,000.00 into the Defendant's account at ABSA and evidencing the transfer is exhibit 'A'. It is undisputed that Plaintiff paid a total amount of Gh₵92,000.00 to the Defendant during the transaction. It is again, not in dispute that further inspection of the vehicle by the Plaintiff revealed that one of the axle beams of the truck was faulty and same was brought to the attention of the Defendant and same was replaced by the Defendant. It is also unchallenged that, further inspection revealed vapour emission from the engine of the vehicle. Again, it is not in dispute that Defendant agreed

and replaced the following parts of the engine of the vehicle; engine bearings, lining, rings, head gasket, cylinder head and lining roter rubbers.

Lawyers for the parties were given opportunity to file their addresses not later than 5th July, 2023. However, counsel for the Plaintiff filed a written address on behalf of his client on 31st July, 2023, whilst defence counsel filed on 8th August, 2023. Though both were filed out of time, same are adopted and regularised as if they were filed within time because parties could not procure the proceedings early. Defence counsel during cross-examination challenged Plaintiff's capacity to mount the instant action against the defendant on grounds that Plaintiff said he was purchasing the truck for another person and not for himself. Plaintiff disagreed with him (Defence Counsel) in the negative and insisted that Plaintiff is the proper person to sue. This laid the foundation for counsel for the parties to address the court on the issue of capacity as a preliminary legal matter in their respective addresses. Kamil Mohammed Iddrisu on behalf of the Defendant holds the view that, Plaintiff is not clothed with the capacity to bring the instant action against the defendant. I am in ad idem with defence counsel when he stated the correct principle that, capacity is a very critical component in civil action and without which, an action by a Plaintiff cannot be maintained. He cited authorities such as ***National Investment Bank Ltd (No.1) v. Standard Bank Offshore Trust Comp. Ltd (No. 1) [2017-2020] 2 GLR 28 at 47 & holding 2*** and ***Board of Governors of Achimota School v. Nii Ako Nortey II & Others (Civil Appeal No J4/9/2019).*** He holds the view that Plaintiff has no interest in the contract therefore lacked capacity to institute this action because Plaintiff adduced evidence that, he was purchasing the subject matter for and behalf of one Mr. Paul Asamoah. Assuming without admitting that Plaintiff did not disclose his principal to the Defendant but, had taken the vehicle away without paying the purchase, would the Defendant take an action to recover the unpaid money from the Plaintiff? Or even where the Principal is disclosed but cannot be traced to recover the money. Your guess is as good as mine. It is trite law that when parties contract face to face,

they are presumed to intend to contract with each other physically. This position of the law was aptly stated in ***Lewis v Averay [1972] 1 QB 193*** where it was held that, the claimant was presumed to intend to contract with the person in front of him no matter who that turned out to be. There is evidence that an amount of Gh₵90,000.00 was transferred by the Plaintiff from his personal account with Cal Bank into the Defendant's ABSA account for payment of the truck. In any case, Plaintiff per paragraph 16 of his evidence in chief as well as in cross-examination, insisted that at all material times he made it known to the Defendant that he was buying the car for another person. Hence, the court is of the opinion that the Plaintiff has disclosed his principal to the Defendant, and he is properly clothed with capacity to bring the instant action.

Flivin Gai for the Plaintiff in his written address, set out two main issues after he briefly discussed the issue of capacity was borne out of defence Counsel's cross-examination of the Plaintiff which has already been dealt with by the court. These two issues are:

1. Whether or not Plaintiff is entitled to recover an amount of Gh₵92,000.00 he paid to the Defendant in respect of the vehicle in issue?
2. Whether or not Defendant is entitled to the recovery of Gh₵8,700.00 as total expenses he incurred in the repairs of the truck?

Defence counsel after the preliminary issue, also set out five (5) issues as follows:

a. Whether or not plaintiff inspected the vehicle before agreeing with the defendant to purchase it?
b. Whether or not the purchase price of the vehicle was Gh₵92,000.00?
c. Whether or not the engine of the vehicle is defective and the defect could not have been detected by the Plaintiff (sic) upon his inspection of the vehicle?
d. Whether or not the Plaintiff is entitled to reject the vehicle and recover the purchase price from the Defendant?

e. Whether or not the Defendant is liable for breach of contract.

Issues (a) & (b) of the defence have already been determined above by the court. However, the court adopts the two issues set out by the counsel for the Plaintiff and the last three (3) issues of defence counsel are fused in as follows:

1. Whether the defects complaint of by the Plaintiff are latent?
2. Whether or not Plaintiff is entitled reject the vehicle?
3. Whether or not Plaintiff is entitled to refund of the Gh₵92,000.00 he paid to the Defendant?
4. Whether or not Defendant is entitled to an order compelling the Plaintiff to remove the vehicle with registration number WR-761-Y from his (Defendant) garage?
5. Whether or not Defendant is entitled to the recovery of Gh₵8,700.00 as total expenses he incurred in repairs of the truck?
6. Whether or not Plaintiff is entitled to general damages?

From the nature of the first three (3) issues, the court will discuss them together, and in doing so, will first make reference to the ***Sales of Goods Act of 1962*** which regulates commercial contracts like the instant case. *Section 13(1) the Sale of Goods Acts, 1962 (Act 137)*, provides as follows:

"13 (1) Subject to the provisions of this Act and any other enactment there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follow;

(a) There is an implied condition that the goods are free from defects which are not declared or known to the buyer before or at the time when the contract is made:

Provided that there is no such implied condition

(i) where the buyer has examined the goods, in respect of defects which should have been revealed by the examination;

(ii) in the case of a sale by sample, in respect of defects which could have been discovered by a reasonable examination of the sample;

(iii) where the goods are not sold by the seller in the ordinary course of his business, in respect of defects of which the seller was not, and could not reasonably have been aware.

(b) Where the goods are of a description which are supplied by the seller in the course of his business and the buyer expressly or by implication makes known the purpose for which the goods are required there is an implied condition that the goods are reasonably fit for that purpose."

The 11th Edition of Black's Law Dictionary defines a latent defect as a hidden defect not discoverable upon reasonable inspection. A latent defect in commercial settings to my understanding is a hidden or concealed fault in property that could not have been seen by a reasonable inspection by a buyer before it is sold to the buyer. As already indicated it is not in issue that the vehicle was inspected by the Plaintiff and Garfaru (DW1). Plaintiff from the evidence before this court insisted that he relied on the assurance by the Defendant that, the vehicle was in good condition and fit for purpose, however, Defendant denied making any assurance and put up a defence that the vehicle was in good condition, and that he sold it to the Plaintiff "AS IS", "WHERE IS" and "WITH ALL FAULT" basis. He also alleged the vehicle was inspected by the Plaintiff and DW1, and that Plaintiff was satisfied before he started negotiation with him (Plaintiff) on the purchase price. Plaintiff admitted that he inspected the vehicle, and this is evident in paragraphs 3 and 7 of his reply and defence to the counterclaim of the Defendant as well as paragraph 7 of his evidence in chief.

The onus of proof in matters like the instant case is on the plaintiff particularly that his reliefs sought are denied by the Defendant, to lead credible and admissible evidence to establish his case and the standard of this proof, is by a preponderance of probabilities to avoid ruling against him. This rule of evidence regarding the onus of proof, was appropriately stated by ***Kpegah J A**, as he then was, in **Zabrama v Segbedzi [1991] 2 GLR 221** at 246 as follows:*

> *"... a person who makes an averment or assertion which is denied by his opponent has a burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred ..."*

Also, the standard of proof in civil matters has been codified in ***sections 11(4) and 12*** of the ***Evidence Act 1975, [NRCD] 323,*** as proof by preponderance of probabilities. This position of the law was aptly stated in ***Adwubeng v. Domfeh [1996-97] SCGLR 660,*** *holding (3) at 662.* Also see cases where the same principles on the onus and standard of proof in civil matters were stated; *head note (5) of **Takoradi Flour Mills v. Samir Farris [2005-2006] SCGLR 882** at 884,* ***African Mining Services v. Larbi [2010-2012] GLR 579*** *at 586*, and ***Sarkodie v. FKA Co-Ltd. [2009] SCGLR 65*** *at page 69.* Plaintiff however explained that, his inspection of the vehicle revealed some patent defects such as the windscreen and some interior defects and that he brought these to the attention of the Defendant, and he (Defendant) agreed and worked on them. Counsel for the Plaintiff disagreed with the Defendant's assertion that, the vehicle was sold *"as is", "where is" and "with all faults"* basis. He argued in his written address that, it was an afterthought because if the parties had agreed on the alleged *"as is", "where is" and "with all faults"* basis, then, the Defendant would not have agreed to use the commitment fee of Gh₵2000.00 to undertake minor repairs detected by the Plaintiff and brought to his (defendant) attention without any statement to the effect that, same would

be reimbursed by the Defendant to the Plaintiff. In support of his argument, he stated excerpts of his cross-examination of the Defendant as below:

"Q. It was also part of your agreement that you would undertake minor repairs and refurbishment like changing the windscreen and the interior lining?

A. Plaintiff paid commitment fee of GhȻ2,000.00 to work on the interior of the vehicle.

Q. And you agreed to do the minor refurbishment. Not so?

A. Plaintiff told me to work on only the windscreen and the interior and that was all."

It is also on record that, it was when the Plaintiff brought batteries, put in the truck and the engine was put on that he detected smoke or vapour emission which according to the Plaintiff, is a sign that the engine was not in good condition. The question I pose is that, was the Defendant aware of the smoke or vapour emission when the engine of the vehicle was put on? That is so, and the answer is provided by the Defendant in paragraph 17 of his evidence chief when he said that after the vehicle was started, Plaintiff complained of vapour emission from the engine, as a result, Plaintiff then requested him to overhaul engine of the vehicle. Again, Defendant under cross-examination admitted that the engine of the vehicle was faulty and that called for it to be overhauled. For emphasis I reproduce this portion of cross-examination of Defendant by Counsel for Plaintiff as follows:

"Q. You admitted before this court that you overhauled the engine of the vehicle in dispute?

A. That is correct.

Q. With your experience as a car dealer, you are aware that an engine of a vehicle is overhauled only when same is faulty?

A. There was a problem with the engine that was why I did the overhauling.

Q. You also agree with me that before you supposedly overhauled the engine, vapor was emitting from the engine?

A. That is true but with a reason. There can be vapor emission if the engine oil is not good or if the vehicle is parked for a long time."

From the above interaction, it is obvious that it was within the knowledge of the Defendant that, the engine of the truck was faulty yet, he failed to disclose that to the Plaintiff. In fact, if the vapour emission was due to the long parking of the vehicle or it was that the oil was not good as alleged in the immediate interaction, then, those components in the engine of the truck would not have been replaced by the Defendant, rather only the oil would have been changed. However, defendant adduced evidence that, apart from changing of the oil bought by the Plaintiff, he (Defendant) replaced parts of the engine. It is equally evident from the above interaction that Defendant that the engine of the car was faulty. Particularly that, he agreed to overhaul the engine at his own cost, because from the evidence on record it was when the Plaintiff declined to accept the vehicle that Defendant said he will re-sell the car and deduct expenses he incurred on it. Again, defence counsel in his cross-examination of the Plaintiff on the 22nd of August, 2022, admitted that the Defendant changed the bearings, lining, rings, head gasket, cylinder head and lining roter rubbers of the engine of the vehicle. Here is an excerpt of his cross-examination of the Plaintiff:

"Q. You are aware that the parts of the engine which the defendant changed are:

- Engine Bearings

- Lining, Rings

- Head gasket

- Cylinder head

- Lining roter rubbers (sic)

You are aware these parts were changed by the Defendant.

A. I can't tell because I was not the one who did the work."

Where an engine of a vehicle is in good condition, there would not be the necessity for the above mentioned components to be replaced. The court holds that the engine of the truck was faulty and that was within the knowledge of the Defendant which he failed to disclose to the Plaintiff before he sold the truck to the Plaintiff. This none disclosure by the Defendant infringes on *section 13(1) of the Act*. Defence counsel in his written submissions, raised and discussed the issue as to whether the purchase price of the truck was Gh₵92,000.00. From the record before this court, the parties described the said Gh₵2,000.00 as commitment fee, and according to the Defendant, it was used to repair minor defects upon Plaintiff's request. As already indicated above, what is crucial is that, Plaintiff paid a total amount of Gh₵92,000.00 to the defendant in the course of the transaction in respect of the subject matter herein.

This court will proceed on some decisions by our Superior Courts regarding the progression in relation to *section 13(1) of Act 137 of 1962*. In ***Yirenkyi v. Tormekpey [1987-88]1GLR 533***, the Plaintiff bought a second-hand Toyota truck from the Defendant who deals in vehicles. Plaintiff made part payment of the purchase price, took delivery of the truck and did substantial repairs to rehabilitate the vehicle. As a result, he took an action against the Defendant to recover both sums and for damages for loss of use on grounds that after he took delivery of the truck, he found that it was not roadworthy contrary to the warranty given to him by the Defendant. The Defendant denied having given any warranty to the Plaintiff and that Plaintiff brought his own mechanic to examine the truck before he made part payment of the purchase price. The Plaintiff obtained summary judgment from the trial High Court, but on appeal, the Court of Appeal set aside the decision of the High Court. The appellate court held that, the Plaintiff in buying a second-hand car should know that

defects might appear sooner or later and that the absence of an express warranty, the buyer has no redress. This is to the effect that, the seller of second-hand goods is under no obligation as to the quality and fitness of the goods to the buyer. This puts the burden on the buyer to ensure that the goods he has contracted to buy are fit and of the highest quality for the purpose for which he desires them. Also see ***Rockson v. Armah [1975] 2 GLR 116***. The facts in the case of *Yirenkyi (supra)* are different from the facts in the case before this court. In *Yirenkyi's case (Supra)*, the buyer had taken the car, used it for some time and had done substantial repairs on it. In the instant case, after payment of the purchase price to the Defendant, all repairs were done by him (Defendant) and the car has not been taken away by the Plaintiff. This notwithstanding, these two cases cited are under caveat emptor which means let the buyer beware. But over the years our Ghanaian Courts seem to have drifted to caveat venditor. I say so because, in a related matter in the case of ***Continental Plastics Engineering Co Ltd v. IMC Industries-Technik GMBH [2009] SCGLR 298***, *Georgina Wood, CJ*, as she then was, summed up the legal position in respect of *section 13(1)* of the Act in the following terms:

> *"The legal position can therefore be summed up as follows; a seller of either first or second hand goods is by an implied condition, liable for all defects in them. Based on what we believe is pure common sense, the seller is however not liable for defects which he fully discloses or declares to the buyer at the time of the contract of sale. When the buyer has examined the goods the seller cannot be held liable for defects which ought to have been discovered on examination as for example patent defects. It does follow that if there were defects particularly latent defects which are not discoverable on examination and which are not disclosed to the buyer before the conclusion of the contract the seller cannot escape liability for the breach of an essential condition of the contract."*

In furtherance, the Supreme Court speaking through *Ansah JSC* in ***G.A. Sarpong & Co v. Silver Star Auto Ltd [3013-2014]2 SCGLR,*** re-echoed the above position of the law by *Georgina Wood, CJ* as she then was in the *Continental Plastics case (supra).* Based on the authority of *Continental Plastics Engineering Co Ltd [supra] and Silver Star Auto Ltd [supra],* the defects from which the vehicle suffered were latent defects, and could not have been easily detected just by inspection with human eyes. Under *section 13 of the Sale of Goods Act of 1962*, the seller has the duty to deliver goods of the right quality and fitness. It can be seen from the foregoing summary that the rules to be applied under our Ghana law is that, where a buyer complains of latent defects in goods are completely different from those existing under English law. It is also worth observing that in Ghana, provisions dealing with defects in goods the duty imposed by the law is the same for sellers of both new goods and second-hand goods. In short, I am not afraid to say that, our Ghana law approaches the topic on Sale of Goods with the Caveat Venditor approach instead of, the Caveat Emptor approach of the English common law. Though buyers are given the opportunity to examine goods before they buy. And if the goods are examined before the buyer pays for them, the seller will not be liable for any defect. But if the seller fails to disclose defects which cannot be seen by examination by the buyer, the seller will be liable. Therefore, it is the Plaintiff who alleged that the he detected defects in the vehicle and that they could not be detected when he initially inspected the car before he paid the purchase price to the Defendant. Per the evidence before this court, the attention of the Defendant was drawn by the Plaintiff to the vapour emission from the engine of the vehicle. Plaintiff on record, insisted that the defects discovered after payment of the purchased price could not have been discovered at his first inspection of the vehicle. His assertion was however denied by the Defendant placing the burden of proof on the Plaintiff. I do acknowledge that, Defence rightly cited the case of ***Zabrama v. Segbezdi [supra]*** where *Kpegah J A, as he then was* explained that the burden rests on a party who makes an averment or assertion particularly on a material fact, which is

denied by his opponent has a legal obligation to proof the fact alleged. It is not in contention that Plaintiff before payment of the purchase price examined the vehicle with the DW1. It is also unchallenged from the record that Plaintiff had paid the purchase price, he brought batteries, put them on the truck, and the engine was put on to run. It was when the engine was running that he detected vapour or smoke emission from the engine of the truck. An engine of a car is what moves it and any prudent reasonable buyer would have checked it. The court is of the view that Plaintiff as a mechanic with specialty on man diesel trucks has failed to exercise due diligence before making payment of the purchase price. However, the question is whether or not by mere inspection of the engine with human eyes without moving the truck to a considerable distance could have reasonably exposed the defects in the engine? In fact, under cross-examination, Plaintiff explained that the defects he discovered in the engine of the truck could not have be discovered when he first inspected the car. Paragraphs 18, 19 and 20 of the statement of defence and counterclaim of the Defendant provide:

"18. Defendant …. It was after the key was handed to Plaintiff when he brought his driver to take away the vehicle that, after starting the vehicle, the Plaintiff complained that there was vapour emitting from the engine and requested the Defendant to overhaul the engine.

19. Despite initial protests against the Plaintiff's unreasonable request for overhauling of the engine, the Defendant reluctantly resolved to do as requested by the Plaintiff. Consequently, Defendant engaged a mechanic to take out parts of the engine which accounted for the vapour emissions and these were the engine bearings, lining, rings, head gasket, cylinder head and lining rubber. Defendant then purchased new parts at a total cost of GH₵4,700.00 to replace the faulty ones in the engine aforesaid. In the presence of the Plaintiff, the said new parts were installed on the engine by mechanics engaged by the Defendant at his expense. The Plaintiff actually assisted these mechanics to replace the parts as he was also a mechanic.

20. After the engine had been overhauled in the manner explained above, the Plaintiff accepted the vehicle and proceeded to buy engine oil for the vehicle. In view of the engine overhauling, the vehicle was started and the engine left to run for some time in order for it to adjust and adopt to the new parts installed on it."

From the immediate paragraphs, there is an admission on the part of the Defendant that the vehicle needed overhauling. In response, Plaintiff in paragraphs 11 and 12 of his Rely and Defence to the Counterclaim of the Defendant reads:

"11. The Plaintiff … avers that when the vehicle was started, he noticed that vapour were emitting from the engine of the vehicle despite the Defendant's earlier representation that the engine was in good working condition and so the Plaintiff requested a complete overhauling of the engine because without a good engine, the vehicle would not be able to undertake the intended activities it would be put to.

12. The Plaintiff partly admits paragraphs 19 and 20 and avers that despite the alleged refurbishment of the engine, the problem persisted so he entreated the Defendant to rather get a new engine and fix same in the vehicle to put it in good working condition but the Defendant flatly refused to replace the engine."

If the defendant had disclosed to the Plaintiff that the engine of the vehicle is faulty, it would be least probable for the Defendant to have agreed and replaced those engine parts. Again, Plaintiff would have been aware of the faulty engine before it was put on and would not have had the right to complain of the faults he detected later in the engine. It would appear from the explanation given by Wood CJ as she then was regarding section *13(1) of the Act* in the *Continental Plastic case* that, where the defects complained of were not declared or made known to the buyer before the contract and could not have been revealed by the buyer's examination, if any, the seller is liable. From the facts and evidence before this court, though Plaintiff examined the vehicle before he paid the purchase price, it would be least probable

that mere inspection of a truck be it new or old with the eyes without driving it to a considerable distance or allowing the engine to run for a considerable time, would be in a position to detect defects in the engine of the vehicle. In any case the Plaintiff knew that he was purchasing a vehicle from the Defendant that was free from latent defects within reasonable time, and believing in all honesty that the vehicle would be fit for the purpose of which he bought it. The faults in the engine of the car discovered by the Plaintiff in the opinion of the court are latent defects. The law as I know it is that a complaint of a latent defect(s) should be made within a reasonable time as stated in the case of *Rockson (supra) and Continental case (supra).* It has been establish on the facts and evidence that, the defects discovered in the engine of the car, could not have been discovered by mere inspection before the sale of the vehicle. Plaintiff has been able to discharge the burden of proof that the defects discovered in the engine are latent defects, and that the vapour or smoke from the engine still continued after the overhauling of the engine. Particularly, when there is sufficient evidence on record that, some major parts of the engine of the subject matter herein have been replaced by the Defendant after a Plaintiff made the complaint. Plaintiff also insisted that the vapour emission did not stop after the engine was overhauled though denied by the Defendant. Plaintiff was purchasing the car for use, so, it would be surprising if he would reject the car if the vapour he complaint of had stopped. Per the evidence on record, Plaintiff was trained by PW1 as mechanics in man diesel trucks which implies that PW1 is a master mechanic in such vehicles with some in-depth knowledge than the parties herein. I say so because, each of the parties described PW1 as their master. This witness (PW1) under cross-examination on 31st October, 2022 told the court that he inspected the vehicle, switched on the engine, and found that, it was not in good condition. This add up to the fact that the car was not in good condition, because PW1 went and inspected the car after Plaintiff had told the Defendant that he repudiates the contract on grounds that, the vapour he complaint of had not stopped after it was overhauled.

Now, with regards to the movement of the car, Defendant asserted that the truck was moved on test drive within his garage. His only witness (DW1) contradicted this piece of evidence when Counsel for the Plaintiff had the following interaction with DW1 in the following terms:

"Q. When you said you inspection, do you mean that the vehicle was moved out from the garage for test drive?

A. That is so.

Q. And to your knowledge where was the vehicle driven to on test drive?

A. Plaintiff brought a driver who drove the vehicle away.

Q. So do you know where they drove the vehicle to?

A. No please."

Counsel for Plaintiff on the authority of ***Attadi v. Ladzakpo [1981] GLR 281***, argued in his written address that the contradiction is on a material fact and should inure to the benefit of the Plaintiff. On the 22nd August 2022, Plaintiff when cross-examined by defence counsel disagreed with him that the truck was driven around by his driver. In response, he explained that, the driver put on the engine of the vehicle but could not move the vehicle because the clutch was faulty. He also explained that his driver left when he was told that he does not know how to drive. Though the Defendant alleged that the vehicle was moved within his garage, his only witness (DW1) contradicted his evidence when cross-examined by Counsel for the Plaintiff when he said that the truck was driven out from the garage to a distance. The law as I understand it is that, the court will not lean towards the evidence of a party whose evidence is in conflict with his own witness. On this note, the court will accept the evidence of the Plaintiff that, the vehicle was not driven out of the defendant's garage though its engine was put on for some time. That notwithstanding, a machine is said to be

fit for purpose if it is able to perform the task for which it was acquired safely and for a reasonably period before major defects may appear. However, these latent defects were discovered when the truck was still at the garage of the Defendant.

It is worthy to determine whether property in the goods passed as soon as the keys and documents of the vehicle were handed over to the Plaintiff by the Defendant. Title could passed as soon as the documents together with the truck were to be handed over to the Plaintiff. It is uncontested that the documents of the subject matter were handed over to the Plaintiff by the Defendant. Plaintiff explained that as soon as he noticed that, the fault in the engine persisted after the overhauling, he told the Defendant that he has rejected the vehicle. It could not be correct when defence counsel submitted in his address that Plaintiff failed to adduce evidence that the engine is faulty when there was vapour emission before and after the engine was overhauled. According to the Plaintiff, he made efforts by given the documents to the Defendant, but he refused to collect them and that caused the documents to remain the custody of his counsel. *Section 26* of the Act provides for when property passes as below;

> *"(1) Subject to section 25 of this Act, the property in goods passes under a contract of sale when the parties intend it to pass.*
>
> *(2) Unless a different intention appears the property in the goods passes under a contract of sale when they are delivered to the buyer."*

From the facts and evidence, the parties herein did not intend that property in the goods passes after delivery. If parties intended that property in goods passes, the Defendant will not assume the responsibility to change those internal components of the car engine. Especially, if he was of the mind that property in the goods had passed as soon as he delivered the car key and documents of the car to Plaintiff. Though the car documents were given to the Plaintiff, the vehicle remained at the garage of the Defendant, and the

Defendant was working on the engine after Plaintiff detected vapour emission and drew the Defendant's attention to it to enable him fix it. The court from the analysis hold that property in the goods did not pass to the Plaintiff.

Our Ghanaian Courts have held that, time is an essential ingredient for consideration where repudiation of a contract of sale is sought, and long period of retention must be equated with acceptance, the transfer of the property in the goods and the assumption of all risks. See ***Rockson v. Armah (supra)*** and ***Yirenkyi v. Tormekpey (supra)***. Though the intention of the parties is pivotal in this determination, any undue delay in rejection of the goods amounts to a positive assumption that the property in the goods has passed. Again, what is a reasonable time is a question of fact, and may vary depending on the circumstance of each case. From the facts and circumstances of the case before this court, the commencement of the contract between the parties and the rejection time took place within a span of three weeks. In relation to the sale of a second-hand car, where a buyer kept the car for almost eleven months, the Court of Appeal, speaking through *Dennis Adjei J.A* in the case of ***Pyne & Associates v African Motors [2016-2017] 1GLR 500*** was of a considered opinion that keeping the vehicle for almost eleven months was a long enough period of retention which could be equated with acceptance, the transfer of the property in the goods and the assumption of all risk. As a result, held that the buyer was not allowed to repudiate the contract. S*ection 50(1)* of the Act provides that where goods are delivered to the buyer and he rejects them, having the right so to do, he is not bound to return the goods to the seller, but it is sufficient if he intimates to the seller that he rejects them. Then, s*ection 50(2 &3)* of the Act further provides that after the buyer has intimated to the seller that he rejects the goods, the seller is entitled to have the goods placed at the buyer's disposal provided that the buyer has paid the price or part thereof, he may retain the possession of the goods until the seller repays or tenders the amounts he has received from the buyer. A buyer by virtue of *section 51 of the Sale of Goods Act, 1962 (Act 137)* may not reject goods which he has accepted. Then,

per *section 52(a & b)* a buyer is deemed to have accepted the goods if he informs the seller he accepts the goods, or "he does not", within a reasonable time after delivery of the goods, inform the seller that he rejects the goods. Driving from *section 52(b)*, the buyer has the right to reject the goods within a reasonable time upon delivery of the goods but, in the instant matter, the goods were not delivered to the buyer (Plaintiff). It is not far-fetched to say that, the key element here is the communication by the buyer to the seller his intention to reject the goods. Therefore, since Plaintiff communicated to the Defendant within a reasonable time that he has rejected the truck, reserves the right to repudiate the contract. Again, by virtue of *section 50(3)*, Plaintiff has the right to keep the documents of the vehicle till the Defendant tenders the money Plaintiff paid to him in the transaction.

Gleaning the evidence before the court, apart from exhibit 'A' that provided 16th June, 2021 as the date Plaintiff transferred the purchase price money to the Defendant, the parties failed to provide the court with specific dates. Example, when the car documents were handed over to the Plaintiff, when engine of the truck was repaired and when Plaintiff informed the Defendant of his intention to reject the vehicle. However, it is inferable from paragraphs 16 and 17 of the statement of defence and counterclaim of the Defendant as well as paragraphs 15, 16 and 20 of his evidence in chief that Plaintiff intimated his intention to reject the truck as soon after the engine was overhauled. From these stated paragraphs, and the contract between the parties from the time Plaintiff paid the purchase price, when the engine of the car was overhauled and the time he rejected the goods, was less than to a month. Considering the sequence of events, I am of the opinion that Plaintiff acted timeously and he has not waive his right under the *Sale of Goods Act* to repudiate the contract. The reason is that, from the evidence Plaintiff immediately rejected the vehicle when he was the vapour or smoke he complaint of was still emitting from the engine after it was overhauled. Perhaps, the Plaintiff would not have rejected the vehicle if the vapour emission had stopped after the overhauling of the engine, and was in good working condition. Defendant

in paragraph 22 of his evidence in chief described PW1 as his former mater. From the record, PW1 is a master mechanic specialised in man diesel trucks, he has inspected the car, switched on the engine of the car and confirmed under cross-examination that, it was not in good condition. In fact, all these happened after Plaintiff informed the Defendant that he was no longer interest in buying the car. It is not in issue that, the vehicle has since been at the garage of the Defendant located at Dichemso in Kumasi. The car has never been in the custody of the Plaintiff and he rejected the car within three weeks which in the opinion of the court is within a reasonable. For the reasons stated in the analysis above, the Plaintiff is entitled to recover from the Defendant a total amount of Gh₵92,000.00 Defendant received from him in respect of the contract. On the face exhibit 'A', the final payment was deposited in to the Defendant's account at ABSA Bank on the 16th June, 2021. The Court having held that Plaintiff is entitled to recover the sum of Gh₵92,000.00 from the Defendant, will allow his relief of interest on the money and same is granted at Commercial Bank Rate. The interest shall be calculated from 16th June, 2021 till final payment of the judgment debt.

The court has made finding that the Plaintiff is entitled to recover the amount of money he paid to the Defendant in respect of the truck (subject matter), has automatically resolved the counterclaim of the Defendant regarding his claim for a compelling order against the Plaintiff to remove the vehicle from Defendant's garage. In the circumstance, the court is obliged to dismiss Defendant's counterclaim for a compelling order and same is accordingly dismissed.

Whether or not Defendant is entitled to recover Gh₵8700.00 from the Plaintiff being total expenses he incurred in the repairs of the vehicle in issue; Defendant alleged in paragraph 14 of his evidence in chief that he purchased an axle beam for the car at a cost of Gh₵4,000.00 but a mechanic Plaintiff engaged ended up destroying it. Plaintiff disagreed with him. Defendant further alleged to have purchased and replaced some vital parts of the car engine

to the tune of Gh₵4,700.00. One would have expected the Defendant to support his assertion at least with some receipts particularly that of the axle beam and the engine components, but he failed to do so. The law as it is, is that, though proof in civil actions place the burden of proof on the plaintiff, the same duty is placed on a defendant who counterclaimed. Hence, the same standard that would be applied to evaluate the case of the Plaintiff, would be used to evaluate the counter claim of the Defendant. Our courts have held that a counterclaim is an independent and a separate action. There are plethora of cases that held that a counterclaim is in law, a separate and independent action. Such are ***Fosuhene v Atta Wusu [2011] 1 SCGLR 273,*** *and* ***Appeah v Asamoah [2003-2004] SCGLR 226.*** In ***Fosuhene v Atta Wusu*** [supra], *Anin-Yeboah JSC as he then was* stated at *page 287* in respect of a counterclaim that:

> *"From the line of authorities therefore, it is settled that a counterclaim is in law a separate and independent action which is tried together with the original claim of the plaintiff."*

Counsel for the Plaintiff also correctly cited ***Aryee & Akakpo v. Ayaa Iddrisu (2010) SCGLR 891*** where the Apex Court of our land has stated that a party who counterclaims bears the burden of proving his counterclaim on the preponderance of probabilities and must win on the strength of his own case. Respondent in this case has counterclaimed, therefore, is equally required to prove his counterclaim on the preponderance of probabilities having regard to the above authorities cited and *sections 10 and 14 of the Evidence Act, 1975 (NRCD 323).* Defence counsel in his written address submitted that, the Defendant has sufficiently discharged the burden of proof of his counterclaim for the recovery of Gh₵8,700.00. His reasons are that Plaintiff admitted in paragraph 8 of his Reply and Defence to Counterclaim that, it was upon his request that Defendant fixed the engine of the vehicle. He again, indicated that Plaintiff said he was present and witnessed the engine being overhauled by the Defendant. According to defence counsel, that goes with cost and that, once Plaintiff

failed to deny or cross-examined the Defendant when he contended to have purchased an axle beam at a cost of Gh₵4000.00 and Gh₵4,700.00 being the cost of the replaced engine parts. Defence counsel having relied on these reasons, urged the court to grant the counterclaim of Gh₵8,700.00 in favour of his client against the Plaintiff. Counsel for the Plaintiff in response called on the court to dismiss this counterclaim of the Defendant. He argued that Defendant failed to provide documentary evidence in proof of the Gh₵8,700.00 he sought for. I do agree with defence counsel when he argued the Plaintiff was present when some parts of the engine, and axle beam of the vehicle were replaced and that goes with cost. Notwithstanding these arguments by counsel for the parties, the court has already made finding that the Plaintiff is entitled to repudiate the contract and recover the total amount of money the Defendant received from him during the transaction in respect of the subject matter in issue. Furthermore, it is unchallenged that all the parts bought were used and fixed on the truck in issue which is still at the garage of the Defendant. From the totality of the evidence on record, the court found that, Defendant failed to adduce credible and sufficient evidence that he is entitled to recover an amount of Gh₵8,700.00 from the Plaintiff. Hence, the counterclaim of the Defendant for the recovery of Gh₵8,700.00 from the Plaintiff is rejected by the court.

The principles in the award of general damages are stated in the case of ***Attorney-General v. Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271*** at page 290 that general damages are presume to be natural or probable consequence of the defendant's act. General damages are said to be at large, which means that the court will award a reasonable amount having regard to the circumstances of the case. A court may award nominal damages under General Damages where no real loss has been occasioned by the infringement of a right, or award substantial damages where actual loss has been caused to the plaintiff. From the facts and evidence Plaintiff was buying the vehicle for a purpose, and the fact that the property in the goods did not pass to the Plaintiff to be used for the purpose will be entitled to nominal

damages instead of general damages. Hence, Gh₵3,000.00 nominal damages is granted in favour of the Plaintiff against the Defendant.

From the analysis above, the court made the following findings that; the Defendant did not sell the vehicle to the Plaintiff on "as is", "where is" and "with all faults" basis. The defects discovered by the Plaintiff in the engine are latent defects, and these defects persisted after the engine was overhauled. Defendant failed to comply with *section 13(1) of the Act.* Property in the goods did not pass, and Plaintiff rejected the vehicle within a reasonable time of less than a month. The vehicle in issue is still at the Defendant's garage.

In summary, the court grant an order in favour of the Plaintiff against the Defendant for the recovery of an amount of Gh₵92,000.00 being the total amount of money Defendant received from Plaintiff during the contract. Interest on the Gh₵92,000.00 at Commercial Bank Rate from 16th June, 2021 till final date of payment of the judgment debt. An amount of Gh₵3,000.00 nominal damages is granted in favour of the Plaintiff against the Defendant. The counterclaim of the Defendant is dismissed in its entirety. The before awarding cost has taken into consideration that both parties have engaged the services of lawyers. Again, the case is concluded within two years. Hence, I award a minimal cost of Gh₵5,000.00.

HER HONOUR ALIATA SAEED (MRS.)

CIRCUIT COURT JUDGE

(DONYINA)

Flavin Gai holding Mujeeb Rahman Ahmed's Brief for the Plaintiff.

Kamil Mohammed Iddrisu for the Defendant.