IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE, HOHOE, HELD ON THURSDAY THE 1ST DAY OF MARCH 2023 BEFORE HIS LORDSHIP
AYITEY ARMAH-TETTEH J.

SUIT NO.: E12/2/2023

SAMUEL NAPARI --- PLAINTIFF/APPELLANT

V

JIPIEH GMAGNAN ---- DEFENDANT/RESPONDENT

PARTIES: PLAINTIFF /RESPONDENT - PRESENT

DEFENDANT/APPELLANT - PRESENT

COUNSEL : MR OSCAR VULOR FOR PLAINTIFF/APPELLANT

MR. GODWIN KPORBLE FOR DEFENDANT/RESPONDENT

JUDGMENT

This is an appeal from the Judgment of the District Court, Kpassa presided over by His Worship Salifu Bugri Ayagiba dated 15 August 2022. Being dissatisfied with the judgment, the Plaintiff/Appellant, has appealed to this court per a notice of appeal filed on 20 October 2022. For convenience, the Plaintiff/Appellant will be referred to as Plaintiff and the Defendant/Respondent as Defendant.

By his writ of summons dated 12 May 2022 the Plaintiff claims against the defendant the following reliefs:

a. Plaintiff claim against the defendant is for a declaration of title to all that piece of land situated and lying at a place called Nakpando-Tido in Kpassa and bounded by the properties of Mr. Ojabon's house to the North, the Plaintiff's family land to the South, the Roman Catholic Church to the east and Mr. Kawame Losso's house to the west.
b. Refund of Gh2,900 being the cost of an uncompleted 5-bedroom house which the Defendant and his agents demolished on the land on the 24th day of January, 2022.
c. An order for recovery of possession.
d. General damages for trespass.
e. Perpetual injunction restraining the Defendant, his workmen, agents, assigns, family members and anyone who claims from him having anything to do with the land.
f. Costs

THE PLAINTIFF'S CASE

The Plaintiff's case is that his late father in 1963 was led by one Dakoja to Ubor Konja I the Chief of Kpassa for a land to settle on. According to plaintiff after acquiring the land his father reared cattle on part of the land, planted tress which served as resting spot for the cattle and also built a house on a portion of the land where he lived with his family. It is the case of the plaintiff that when his father died he succeeded him and the land in dispute was handed over to him. That in January 2022 he engaged masons to construct a building but defendant and his agents demolished the land.

CASE FOR DEFENDANT

The case of the defendant is that the subject matter was acquired by his late father from NANA Konja a long time ago before plaintiff's father set foot at Kpassa. According to defendnat Nana Konja later made his a sub-chief and he was detailed in demarcating lnd for all those who later came to Kpassa as starngers.

After the trail, judgment was entered in favour of the defendant. The defendant being dissatisfied with the decision of the trial Court has appealed to this court per Notice of filed on 20 August 2022. By this appeal Defendant is urging this Court to reverse the judgment delivered on 15 August 2022 by the District Court, Kpassa and enter judgment in her favour.

The sole ground of appeal is that the judgment is against the weight of evidence

From the Roa the plaintiff testified and called two witnesses to close his case. This appears at pages 14-21 of the record. The defendant equally testified and called and called two witnesses to close his case. This can be found at pages 22 to 30.

On 21st June 2022, the court suo moto called s witness in the name of Baddal Ninai. This appears at page 31 of the Record of Appeal. The court cross examined the witness and the defendant was also allowed to call the witness. From the records the plaintiff did not cross examine this witness and there is no reason on record why the plaintiff was not allowed to cross examine this witness. The law is that each and very party should be given the opportunity to cross examine every witness that is called to testify for the opposing party or the court. This is the enshrined in the rules of natural justice that each parson should be given a fair hearing. The Plaintiff was not allowed to cross examine this witness.

On the 1st day of August 2022 another witness was brought by the court to testify. Again, the defendant was given the opportunity to cross examine this witness but the plaintiff was not.

In his judgment the trial magistrate referred to the evidence of these witnesses that the plaintiff was not given the opportunity to cross examine.

In his judgment the trail magistrate referred to an Exhibit B but from the proceedings there is record that the plaintiff tendered any document.

At page 5 of the Record of Appeal, the trial judge referred to a locus report. There is no evidence who tendered this locus report. There is also no record that the parties were made to cross examine on the locus report

I wish to deal with an issue before proceeding further, i.e. introduction of new evidence on appeal. The defendant in his written address alluded to certain matters which are not found in the record of proceeding. He referred to evidence in respect to the credibility of the plaintiff's witness. These are fresh evidence that the defendant is introducing on appeal. He has done so without leave of the court. The law is that fresh evidence cannot be introduce on appeal without leave of the court. The evidence must not be available to the party and the party with due diligence was not able to lay hands on it. The evidence should also be relevant to the resolution of the issues before the court. I will therefore strike out all these pieces f evidence.

Order 51 Rule 13 of the High Court (Civil Procedure) Rules, 2004, C.I. 47 provides as follows:

> *'It is not open as of right to any party to an appeal to adduce new evidence in support of a party's original case, but for the furtherance of justice, the Court justice, the Court may allow or require new evidence to be adduced, and the evidence shall be either by oral*

examination in court or by affidavit or by deposition taken before an examining commissioner as the Court may direct; but the new evidence shall be evidence which was not within the knowledge of the party or could not have been produced after the exercise of due diligence by the party at the time when the judgment was given or that order made."

From this provision, the evidence should in three forms, (i) by oral examination,(ii) by an affidavit or (iii) by deposition taken before an examining commissioner.

The new evidence Defendant is introducing is in the written address filed by her Lawyer on 22 February 2022. Is not in the form as required by the rule. If even it was in the form as required by the rules, he need to seek leave of the court and the evidence should not have been available or within the knowledge of the Defendant or could not have been produced after exercise of due diligence.

See the case of **Poku v Poku** [2007-2008] SCGLR 996 the court held 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. Furthermore, on a grant of the application, the court of appeal had a duty to set out, explicit terms the evidence to be introduced. The matter must not be left at large, but explicitly detailed to forestall some other evidence outside of the express terms being smuggled into the record under the guise of new evidence."

Having failed to satisfy the requirements of Order 51 Rule 13 of C.I.47 before introducing fresh evidence on appeal in the form introduced by the Defendant in his written address the will close its eyes those evidence in dealing with the appeal.

From the Record of Appeal, no further or other grounds of appeal were filed by the defendant. However in his written address filed on 22 February 2022 Counsel for the Defendant and argued a new ground of Appeal to wit: 'The ***Presiding Magistrate erred when he refused/failed to stay proceedings for the Police to investigate the alleged fraud when the Respondent alleged that her signature has been forged."***.

The law is that an appellant shall not, without the leave of the court, urge or be heard in support of any ground of appeal not mentioned in the notice of appeal as doing so will certainly sin against the rules of court and will spring a surprise on the Respondent.

Order 51 rule 2(5) provides as follows:

> "The appellant shall not without leave of the Court rely on any ground of appeal not stated in the notice of appeal."

I will there disregard any reference to this ground of appeal made by the lawyer of Defendant in his written address. The rules of court are not made for fun, they are to be complied with by those who practice before our courts.

I will therefore deal with the two grounds of appeal found in the notice of appeal filed by the defendant and in dealing with them and for convenience I will deal with the two under the omnibous ground that ***'The judgment is against the weight of evidence"*** and in the end all the issues in this appeal will be covered.

It is trite law, that an appeal constitutes a re-hearing especially when the Appellant comes under the omnibus ground of appeal that the judgment is against the weight of evidence and what the re-hearing means is that the appellate court is to evaluate the evidence and

assess all documentary evidence and case law and come to its own conclusion. This court being an appellate one in this matter, is therefore entitled to look at the entire evidence and come to its own conclusion on both the facts and law.

In **Agyeiwaa v. P & T Corporation** [2007-2008] 2 SCGLR 985, Wood C J said at 989 as thus:

> *"The well-established rule of law is that an appeal is by rehearing, and an appellate court is therefore entitled to look at the entire evidence and come to the conclusion on both the facts and the law."*

See also the case of **Owusu Domena v. Amoah** [2015-2016] 1 SCGLR 790 where the Court held as follows:

> *'Where the appeal was based on the omnibus ground that the judgment was against the weight of evidence, both factual and legal arguments would help advance or facilitate determination of factual matters.''*

Again, when the appellant comes under the omnibus ground, he should be able to point out the evidence if applied to his case he would have been successful or evidence that were attributed to him that made him lose the case or made him fail to win.

In **Akufu -Addo v. Catheline** (1992) 1 GLR 377, the Apex Court of the land had this to say on the allegation that a judgment is against the weight of evidence.

> *"That whenever an appeal is based on the omnibus ground that the judgment is against the weight of evidence, the appellate court has jurisdiction to examine the totality of evidence before it and come to its own decision on the admitted and undisputed facts. Thus, when an appellant complains that the judgment is against the weight of evidence, he is implying that there are pieces of evidence on record which, if applied properly or correctly,*

could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him. The onus in such an instance is on the appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."

The issues that in my view arise in this appeal are as follows:

1. Whether or not the Plaintiff gave financial assistance of Gh¢40,000.00 to the defendant.
2. Whether or not the Defendant executed the Promissory note and if so whether she is bound by it.

The Plaintiff in proof of his case testified and called one witness Revered Kwarteng Amaning (PW1). The defendant testified and called two witnesses (DW1 and DW2).

In respect of the first issue Plaintiff testified on the purpose for the amount as follows:

> "Defendant's vehicle was with the National Security in Accra. Defendant sent the one who was in charge of the vehicle to me. He is called John Mpamoa, for assistance. I offered to assist but I decided to enquire if John had come out of his own volition or he was actually sent by defendant. John called defendant and I spoke to defendant on phone. Defendant admitted that she is the one who sent John to come for the money from me. I asked if John was going to pay me back or she was the one responsible for the repayment. I therefore agreed to assist. On the day in question, I paid Ghs5,000.00 to John."

On the purpose of the payment of the Gh¢40,000.00 to defendant the Plaintiff's only witness (PW1) initially testified in his evidence in chief as follows:

> "I asked her how much plaintiff has given to her in the name of the vehicle in the custody of BNI. She (defendant) told me in all, Plaintiff has given her about Gh¢40,000.00"

By this evidence, PW1 is saying that Defendant told him that Plaintiff has given her Gh¢40,000.00 towards the vehicle in the custody of BNI.

However, further in his evidence in chief to the court, PW1 testified as follows:

> "The third day, plaintiff alone came to me with a complaint that Madam Philomina (defendant) had defrauded him under the pretext of buying a KIA truck and that he had paid over Gh¢50,000.00 to her…..I invited defendant to my house as well as plaintiff on an agreed date. When they both met in my house under my invitation, defendant said money advanced to her by plaintiff was Gh¢40,000.00, whilst plaintiff disagreed saying he had advanced over Gh¢50,000.00 to defendant. After a lengthy argument by the two (2), I intervened. I pleaded with plaintiff to agree and accept Defendant's argument. The plaintiff and defendant finally agreed of defendant's Gh¢40,000.00. on that day, both plaintiff and defendant agreed that plaintiff signs a promissory note which I was charged with the responsibility to contract. I then prepared both the power of attorney and promissory note. I asked them to return to my residence on 20th April 2016. I signed as a witness for both parties on 20th April, 2016."

From the above pieces of evidence whiles the Plaintiff says the money he gave Gh¢40,000.00 in the form of financial assistance to the plaintiff in bits towards retrieval of the KIA Rhino truck seized by the BNI , PWI said the plaintiff complained to him that the defendant had defrauded her under the pretext of buying a KIA truck and he had paid Gh¢50,000.00 .

On how the payment of the alleged Gh¢40,000.00 was made, the testimony of the plaintiff is that the money was paid in bits of Ghs5,000.00 on two occasions, Ghs8,000.00 on two occasions, Gh¢2,000.00 on two occasions and Gh¢10,000.00 on two occasions. And on the payment of the last Gh¢10,000 this what the Plaintiff said :

> "Later, the lawyer said he had retrieved the vehicle. Defendant said battery, road worthiness, insurance, etc. had expired and other items pilfered on the vehicle ***and thus needed Gh¢10,000.00 which I gave to her along the Circle-Abosokai road***."(EMPHASIS MINE0

And this is what Plaintiff's only witness PW1 said on the alleged last Gh¢10,000.00 under cross examination.

> Q. What did I use the GH¢40,000.00 for?
>
> A. You told me it was the accumulated amount on the vehicle since you had engaged two (2) lawyers and they could not assist you. On the day the vehicle was released, you made me speak to Plaintiff to release Gh¢10,000.00 to maintain the vehicle. The following day, plaintiff arrived with Gh¢10,000.00 which we used part to acquire batteries at Gh¢2,500.00 each. We used the rest for fuel and mechanic.
>
> Q. When and where did plaintiff give me the Gh¢10,000.00 ?
>
> A. Because Plaintiff had lost trust in you, ***he made the expenses himself and I accompanied him to purchase the batteries. (emphasis mine)***

Whiles the Plaintiff told the Court that the money he gave to Defendant was financial assistance given to defendant towards the release of Defendant's KIA truck seized by the BNI, he told PW1 that the Defendant had defrauded him in the sum of Gh¢50,000.00 under the pretext of defendant buying him a KIA truck. And whiles the Plaintiff said he

gave the last Gh¢10,000.00 to the Defendant along the Circle -Abosokai road to purchase the items, PW1 said because the Plaintiff had lost trust in Defendant the money was used by the Plaintiff himself and purchased the items by himself. He even accompanied the Plaintiff to purchase the batteries.

> On her part the Defendant denied receiving any Gh¢40,000.00 from the plaintiff as financial assistance towards the vehicle. Defendant testified that she only received Gh¢3,500.00. The money was paid in three instalments of Ghs500.00, Gh¢2,000.00 and Gh¢1,000.00. The money was for maintenance and acquisition of battery. The defendant promised to add Gh¢500.00 to the money plaintiff gave him because he could have earned interest on it if he had worked with it.
>
> DW1, the driver of the Defendant testified and corroborated in all material respect the evidence of the defendant on the amount of money Plaintiff gave to the Defendant towards the maintenance of the truck.

This is what he said in his evidence in chief:

> "John and plaintiff arrived and plaintiff was introduced to defendant. On that day, the money I saw plaintiff giving (sic) to defendant was Ghs500.00. We towed the vehicle to the house and a mechanic inspected the vehicle and estimated the cost of repairs. On the second occasion, plaintiff brought Gh¢2000.00. The mechanic said Gh¢2,000.00 was not enough and asked for additional Gh¢1,000.00."

DW2, John Mpoama who introduced the Plaintiff to the defendant for the financial assistance also testified as follows:

> "On the first occasion, plaintiff gave defendant Gh¢500.00 . On the second occasion, I took Gh¢2,000.00 from plaintiff. It was defendant who sent us to take

the money. On the third occasion, I took Gh¢1,000.00 from plaintiff and handed same to the defendant. "

BURDEN AND STANDARD OF PROOF

Section 10(1) of the Evidence Act 1975, (NRCD 323) provides as follows:

'For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.'

Section 10(2) also provides as follows:

"The burden of persuasion may require a party (a) to raise reasonable doubt concerning the existence or non-existence of a fact, or (b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Section 11(1) of the Act also provides as follows :

"For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party."

Section 11(4) also provides as follows:

"In other circumstances burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence."

In the case of **Ackah v Pergah Transport Ltd & Others** [2010] SCGLR 728 at 736 the court per Adinyira JSC opined as follows:

'It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it

includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of law of evidence under sections 10(1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD323).'

In **Gihoc Refrigeration & Household Products Ltd v. Hanna Assi** [2005-2006] SCGLR 458 the Supreme Court held thus:

> "Since the enactment of NRCD 323, therefore, except otherwise specified by statute, the standard of proof (the burden of persuasion) in all civil matters s by preponderance of probabilities based on a determination of whether or not the party with the burden of producing evidence on the issue has, on all the evidence, satisfied the judge of the probable existence of the fact in issue.."

Again, in the case of **Takoradi Flour Mills v Samir Faris** [2005-2006] SCGLR 882 at 900, the Supreme Court on burden of proof, stated as follows:

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

In the instant case since the Plaintiff says he gave Gh¢40,000.00 to the Defendant towards the release of the defendant's KIA truck from the BNI ,the a claim the defendant denied, it behoved on the Plaintiff to lead evidence that would tilt in his favour the existence of the facts asserted by him. Differently put, Plaintiff has the burden of persuasion and producing evidence on the issues to the satisfaction of the court of the probable existence of the facts in issue for the court to make a determination on the issues in his favour, failing which he risks having his claim failing.

On the evidence on record, whiles the Plaintiff's evidence and that of his only witness Rev. Kwarteng Amaning on the issue and purpose of payment of the alleged Gh¢40,000.00 to defendant is inconsistent and contradictory, the evidence of the defendants on the payment of Ghs3,500 was corroborated by the evidence of his witnesses. I find the contradictions and inconsistencies not to be pedestrian but are to the core of the issues before the court. I find the evidence of the Plaintiff and his witness on the amount owed by the defendant not credible and unreliable.

Again, according to the Plaintiff, defendant told him that if she (defendant) is unable to pay the Gh¢40,000.00, she will give the vehicle to him to work with it to defray the debt. On the evidence, there is no doubt that the Defendant gave the Plaintiff the vehicle to use to defray the any monies given by the Plaintiff to the defendant towards the maintenance of the defendant's vehicle. The defendant used the vehicle and paid Gh¢9,000.00 to Defendant.

This is what the Plaintiff said I his evidence in chief:

> "The document was prepared, and we all appended our signatures and I thumb printed in addition. I worked with the vehicle for six (6) when Defendant invited

me to the lawyer that I was supposed to pay her Gh¢9,000.00 for the six(6) weeks that I had worked. I told the lawyer that defendant had instructed me to send Gh¢3,000.00 to GN Bank on two (2) occasions. Defendant then took the balance of Gh¢3,000.00 in presence the of the lawyer."

The Plaintiff said the defendant told him if defendant is unable to pay the Gh¢40,000.00 she will give the vehicle to him to work with to defray the debt. The vehicle was indeed given to the plaintiff to work and after working for 6 weeks he had Ghs9,000.00 and the defendant asked for the money and he gave the money to him when his own debt of Gh¢40,000.00 was outstanding. No prudent creditor will do that. the Plaintiff's case does not add up. I am satisfied that never gave Gh¢40,000.00 to the Defendant towards the maintenance of the defendant's KIA Rhino truck and I so find.

The finding by the trial magistrate that the Plaintiff paid Gh¢40,000.00 to the defendant is not supported by the evidence on record. I will therefore set aside that finding. In terms of section 12(2) of NRCD 323 on prove by preponderance of the probabilities I am satisfied that the balance tilts in favour of the defendant. I find the case of the Defendant more probable than that of the plaintiff and resolve this issue in favour of the defendant. The Plaintiff did not pay any Gh¢40,000.00 to the defendant.

The second issue: ***"Whether or not the Defendant executed the Promissory note and if so whether she is bound by it."***

Since the Plaintiff claim that the defendant signed exhibit 1, the power of attorney, a claim the defendant denies it behoves on Plaintiff to adduce credible evidence in support of this claim filing which his claim must fail.

On this issue the plaintiff testified as follows:

> "I asked about my money and the lawyer asked how much. I told him it had all come up to Gh¢40,000.00. The lawyer asked how I got to know defendant and assisted her with money. I told him it was through John. The lawyer again asked about my arrangement with defendant before I expended my money on the vehicle. I told him defendant promised to give me the vehicle to work with even if she is unable to pay me fully. The lawyer said he will contract a document making me a caretaker of the vehicle and another as evidence that defendant owes me Gh¢40,000.00. Defendant agreed to the amount in the presence of the lawyer. Thus the document was prepared and we all appended our signatures and I thumb printed in addition."

On the execution of the promissory note PW1 testified as follows:

> "The third day plaintiff alone came to me with a complaint that Madam Philomina (defendant) had defrauded him under the pretext of buying a KIA truck and that he had paid over Gh¢50,000.00 to her. I invited defendant to my house as well as the plaintiff on an agreed date. When they both met in my house under my invitation, Defendant said money advance to her by plaintiff was Gh¢40,000.00 whilst plaintiff disagreed saying he had advanced Gh¢50,000.00 to defendant. After a lengthy argument by the two (2) I intervened. I pleaded with plaintiff to agree and accept defendant's argument. The plaintiff and defendant finally agreed on defendant's Gh¢40,000.00. On that day, plaintiff and defendant agreed that plaintiff signs promissory note which I was charged with the responsibility to contract. I then prepared both power of attorney and promissory note. I asked plaintiff and defendant to return to my residence on 20th April 2016 to sign the

documents. I prepared the documents for the two of them to sign in my presence dated 20th April 2016. I signed as a witness for both parties on 20th April 2016."

There are a lot of contradictions between the evidence of the Plaintiff and PW1 evidence on this issue as well and it makes the Plaintiff's evidence not credible and unreliable. Whiles the plaintiff says the promissory note was signed for the payment of the money advanced to the defendant in bits as financial assistance towards the repair of defendant's KIA Rhino vehicle, the plaintiff's only witness said it was a promissory note in respect of money Plaintiff told him defendant collected from Plaintiff and defrauded him under the pretext of buying a KIA Truck but defendant failed to produce.

Further the plaintiff tendered the promissory note (exhibit 1) and the Power of Attorney (exhibit 2) prepared by the PW1 and allegedly executed by the parties. The defendant denied executing the power of attorney and the promissory note. She further denied that the signature appearing under her name on the promissory note is her signature.

On the face of the promissory note and the power of attorney, the signatures seem to be the same but differs from the signature on the agreement (exhibit A) signed by the defendant for the plaintiff to use the vehicle. The signature on exhibit A which plaintiff admits she signed seem to be the same as the signature of the defendant on processes filed in this instant suit. The signature on the motion on notice for the release of the vehicle and the signature on the supporting affidavit are the same as the signature on exhibit A.

In these circumstances the burden of proof shifted to the plaintiff to prove that it was the Defendant who signed the promissory note. The plaintiff failed to discharge this burden.

Section 14 of the Act provides as follows:

> "Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting."

The plaintiff failed to discharge the evidential burden placed on him when the burden of persuasion shifted on him.

Again, the law is that whenever there was in existence a written agreement and conflicting oral evidence over a transaction, the practice in the Court was to lean favourable towards the documentary evidence, especially it was authentic and the oral evidence conflicting.

In **Fosua & Adu-Poku v. Dufie (Deceased) & Adu Poku-Mensah** [2009] SCGLR 310 at 345 Doste JSC opined thus:

> "In the case of *Yorkwa v Duah* [1992-93] GBLR 278, CA , it was held that whenever there was in existence a written agreement and conflicting oral evidence over a transaction, the practice in the Court was to lean favourable towards the documentary evidence, especially it was authentic and the oral evidence conflicting. See also *Nsia V Atuahene* [1992-93] GBR 897 CA.'

In the instant case, I do not find the documentary evidence credible and will not lean on it else I fall.

The plaintiff failed to discharge the evidential burden placed on him by sections 10 and 11 of NRCD 323 in respect of the claims that the Defendant owes his Gh¢40,000.00 and the defendant executed a promissory note to that effect.

From the evidence on record, I find that the Plaintiff gave Gh¢3,500.00 and not Gh¢40,000.00 to defendant towards the maintenance of the Defendant's KIA Rhino Truck

and the Defendant gave the vehicle to work with to defray the debt and the Plaintiff has recovered his money. I will therefore uphold the appeal and set aside the judgment of the trial Magistrate.

I award costs of Gh¢2,000.00 in favour of the Defendant.

(sgd)

AYITEY ARMAH-TETTEH J.

(JUSTICE OF THE HIGH COURT)