CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON WEDNESDAY, 21ST DECEMBER, 2022

SUIT NO. C11/195/21

JOHN ANANE KYEREMEH - PLAINTIFF

VRS

PETER KWASI PEPRAH - DEFENDANT

JUDGMENT

The claim of the plaintiff as endorsed on his writ of summons and statement of claim are for the;

I) Recovery of the amount of twenty one thousand four hundred and ninety nine Ghana cedis (Ghs 21,499) being the outstanding amount of the total debt owed by the defendant to the plaintiff

II) Interest on the amount of twenty one thousand four hundred and ninety nine Ghana cedis (Ghs 21,499) from March, 2015 till the date of final payment at the prevailing interest rate

III) Costs.

In his statement of claim, the plaintiff contended that the defendant is his cousin. That sometime in 2011, upon the request of the defendant, he procured a loan of twenty thousand Ghana cedis (Ghs 20,000) from Eazy Capital Investment for the defendant. That the defendant paid eight thousand Ghana cedis (Ghs 8,000) of the loan amount with an outstanding amount of twelve thousand Ghana cedis (Ghs 12,000).

That his creditors sued him at the High Court and the court on the 30th day of March, 2015, the Court entered judgment with interest. The total judgment debt stood at twenty eight thousand, nine hundred and ninety nine Ghana cedis, ninety nine pesewas (Ghs 28,999.99).

That subsequently, the defendant paid four thousand Ghana cedis (Ghs 4,000) and he plaintiff had to use his meagre resources to pay off the remaining debt. Thereafter, the defendant has made further payments of one thousand, five hundred Ghana cedis (Ghs 1,500) and two thousand Ghana cedis (Ghs 2,000) in 2019 and November, 2020.

According to plaintiff, he would not have incurred this judgment debt had the defendant made full payment of the loan he procured for him within the time stipulated in the loan agreement. That the defendant has paid seven thousand five hundred Ghana cedis (Ghs 7,500) out of the total judgment debt and the outstanding amount is twenty one thousand four hundred and ninety nine Ghana cedis (Ghs 21,499). That the defendant has remained adamant in paying off the said amount despite several calls on him.

Although the defendant entered appearance and filed his statement of defence, he failed to file his witness statement and pre trial checklist. Consequently, his statement of defence was struck out and the case proceeded to trial.

THE CASE OF THE DEFENDANT

The defendant denied the claims of the plaintiff. According to his statement of defence, he imported three vehicles into the country and the agreement was that the plaintiff would clear the vehicles from the port and sell the vehicles. This was based on a prior

agreement which they had. That although he is aware that the plaintiff contracted a loan to clear the said vehicles, same was done in plaintiff's name and not on his behalf.

He continued that the plaintiff has since sold two of the vehicles but failed to render accounts to him. That each of the vehicles cost twenty five thousand Ghana cedis (Ghs 25,000), thus putting the total at fifty thousand Ghana cedis (Ghs 50,000). That he has also assisted the plaintiff with various sums totaling fifteen thousand, five hundred Ghana cedis (Ghs 15,500).

He counterclaimed for

a) A declaration that plaintiff has sold two of defendant's two Opel Astra vehicles at an agreed sale price of twenty five thousand Ghana cedis (Ghs 25,000) each totaling fifty thousand Ghana cedis (Ghs 50,000) but plaintiff refused or failed or neglected to account to defendant till date.
b) An order directed at plaintiff to account for proceeds of the sales of the said defendant's two Opel Astra vehicles and pay the proceeds of the sale to the defendant
c) An order for payment of interest on the sale of defendant's two Opel Astra vehicles sold by plaintiff under reference in relief (a) herein at the current Bank rate from sometime in 2012 till the date of final payment
d) General damages for breach of oral contract.

THE CASE OF THE PLAINTIFF

Plaintiff repeated the averments in his statement of claim as his evidence in chief. He continued that the purpose of the loan was to enable the defendant pay import duty at

the Port in order to take possession of his goods. That the defendant represented to him that he would pay off the loan immediately he sold off the said goods.

Further that at all material times, the defendant knew that the money he advanced to him was a loan facility.

He tendered in evidence EXHIBIT A as a copy of the entry of judgment in the case his creditors instituted against him at the High Court. Also that after the institution of this case, the defendant paid five thousand Ghana cedis (Ghs 5,000) to him leaving a balance of sixteen thousand, four hundred and ninety nine Ghana cedis (Ghs 16,499) outstanding.

CONSIDERATION BY COURT

From the records, the defendant only appeared once in this Court even though he was aware of all adjourned dates either because his lawyer was present on the days that he was absent, or his counsel was served with a hearing notice for days that they were both absent. Defendant was represented by counsel who informed the court on the 25th day of May, 2022 at page 7 of the record of proceedings that he was having challenges communicating with his his client. Thereafter, even though he was still counsel in this matter, counsel for the defendant never appeared in court again.

As it is the duty of a court to give a party to a case before it hearing, the failure of the defendant to appear in court to be heard is taken to mean that he did not wish for the court to hear him before deciding on the matter. Dotse JSC speaking for the Supreme Court in the case of ***Julius Sylvester Bortey Alabi v. Paresh & 2 Others [2018] 120 GMJ 1 at p. 11*** held: *"We are therefore of the view that, if a party voluntarily and deliberately fails and or refuses to attend a court of competent jurisdiction, (such as the High Court which*

determined this case) to prosecute a claim against him, he cannot complain that he was not given a fair hearing or that there was a breach of natural justice. The Defendants must be respected for making such a choice, but they must not be allowed to get away with it".

The Court of Appeal also in the case of ***Ghana Consolidated Diamonds Ltd. v. Tantuo [2001-2002] 2 GLR 150*** held at holding 4: *"A party who was aware of the hearing of a case but chose to stay away out of his own decision could not, if the judgment went against him complain that he was not given a hearing***".** See also the case of ***Accra Hearts of Oak Sporting Club v. Ghana Football Association [1982-83] GLR 111 at page 117***.

Order 36 rule 2 (a) of the High Court Civil Procedure Rules, 2004 (C.I.47) provides in unambiguous terms that the proceedings at a trial where the defendant fails to attend is for the court to strike out the counterclaim if any and allow the plaintiff to prove his claim. Accordingly, the plaintiff mounted the box to testify.

He still bears the onus of producing evidence that would convince the court on a balance of probabilities that he is entitled to the reliefs which he seeks. In the case of ***Gifty Avadzinu v. Theresa Nioone [2010] 26 MLRG 105 @ 108***, their lordships held *"It is trite that the standard of proof in all civil actions without exception is proof by preponderance of probabilities, having regard to section 11 (4) and 12 of the Evidence Act. This means that a successful party must show that his claim is more probable than the other."*

It is also elementary that a party who bears the burden of proof must produce the required evidence of facts in issue that is credible in order for his claim to succeed. Adinyira JSC in reading the judgment of the Supreme Court in the case of ***Ackah v. Pergah Transport Ltd [2010] SCGLR 728*** held that:

> **"**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… It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that upon all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law of evidence under section 10 (1) and (2) and 11 (1) and (4) of the evidence Act 1975 [NRCD 323]."

In the case of ***Re B [2008] UKHL 3*** **Lord Hoffman** aptly stated the requirement of proof mathematically as follows;

> "If a legal rule requires a fact to be proved [a fact in issue] a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not if the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carried the burden of proof. If the party who bears the burden of proof fails to discharge it a value of 0 is returned and the fact is treated as not having happened. If he does discharge it a value of 1 is returned and the fact is treated as having happened."

Plaintiff relied on both oral and documentary evidence to prove his claim. The law is settled that where documentary evidence exists, the courts prefer same over inconsistent oral testimony. Pwamang JSC held in the case of ***Nana Asiamah Aboagye v. Abusuapanyin Kwaku Apau Asiam [2018] DLSC 2486*** *"… the settled principle of the law*

of evidence is that where oral evidence conflicts with documentary evidence which is authentic, then the documentary evidence ought to be preferred over and above the oral evidence." See also the cases ***Ofori Agyekum v. Madam Akua Bio [2016] DLSC 2858 per Benin JSC and Agnes Tuffour alias Serwaa v. Akwasi Adu & Yaa Konadu [2018] DLCA 4432 per Dzamefe JA***.

EXHIBIT A is an entry of judgment filed at the High Court on the 21st day of April, 2015. It is the case of ***Eazy Capital Investment suing per its lawful Attorney v. John Anana Kyeremeh and Anor (suit no AC 333/2015***). It indicates that on the 30th day of March, 2015 judgment based on admission was entered against the defendants therein. The admitted principal is twenty thousand Ghana cedis (Ghs 20,000) and the total judgment including interest and costs is twenty eight thousand, nine hundred and nine Ghana cedis, ninety nine pesewas (Ghs 28,999.99). The 1st defendant therein is the plaintiff herein.

EXHIBIT A bears out the evidence of the plaintiff with regard to the fact that he took out a loan from the said company, that he defaulted in payment and judgment was entered against him after his creditors took the matter to court. It also bears out his claim as to the principal amount that he borrowed and the final amount he was adjudged to pay.

What EXHIBIT A does not manifest is the claim that the plaintiff took out the loan for and on behalf of the defendant. However, I take notice that in this Court the defendant paid five thousand Ghana cedis (Ghs 5,000) to the plaintiff in the course of proceedings in an attempt to settle the matter. He was represented by counsel and so his decision to pay an amount in settlement is an indication that he admits if not all then a part of the plaintiff's claim.

It is elementary that a statement of defence does not constitute evidence. Thus the non appearance of defendant to appear in court to cross examine the plaintiff and also pursue his counterclaim means that his statement of defence is of no relevance in considering the evidence before the court. Counsel for the defendant was served with a hearing notice to appear in court for the trial to cross examine the plaintiff if he so desired. Neither the defendant nor his lawyer appeared in court on the trial date. That is an indication that they had no questions to ask of the plaintiff.

It is settled that the failure of a party to cross examine his opponent on a claim constitutes an admission of the claim on the part of the silent party. In the case of ***Fori v. Ayirebi [1966] GLR 627***, the Supreme Court held that "where a party had made an averment that averment was not denied, no issue joined and no evidence need to be led on that averment. Similarly, when a party has given evidence of a material fact and was not cross examined upon, he need not call further evidence of that fact.'' See also the cases *of* ***Wiafe v. Kom [1973] 1 GLR 240*** and ***In Re Presidential Election Petition: Akufo-Addo & 2 Ors. (No. 4) v. Mahama & 2 Ors. (No. 4) [2013] SCGLR (Special Edition) 73,*** Anin Yeboah JSC (as he then was).

The failure of the defendant to appear in court to cross examine the plaintiff is deemed as an admission of the plaintiff's claim and plaintiff need not call any further evidence in proof of his claim.

Consequently, I hereby find on a balance of probabilities that the plaintiff has established his claim in my mind. Judgment is hereby entered for the plaintiff against the defendant in the sum of sixteen thousand, four hundred and ninety nine Ghana cedis (Ghs 16,499). Interest is to be paid on the said amount from the 30th day of March, 2015 till the date of final payment at the prevailing interest rate. As the defendant failed

to lead any evidence in proof of his counterclaim, same is hereby dismissed in its entirety.

Cost of five thousand Ghana cedis (Ghs 5,000) is awarded to the plaintiff.

(SGD)

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

EMMANUEL K.B.EWUL FOR THE PLAINTIFF PRESENT

JEAN MAURRELLET FOR THE DEFENDANT