

IN THE CIRCUIT COURT 3 HELD AT ACCRA ON TUESDAY THE 28<sup>TH</sup> DAY OF  
FEBRUARY, 2023 A. D. BEFORE HER HONOUR SUSANA EDUFUL (MRS.),  
CIRCUIT COURT JUDGE

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SUIT NO. C5/28/2017

**PAN AFRICAN SAVINGS AND LOANS LTD**

**PLAINTIFF**

**VRS**

**1. ELORM KOKOU**

**DEFENDANTS**

**2. MORIS KOTEI NEEQUAYE**

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THE PLAINTIFF PRESENT AND REPRESENTED; DEFENDANTS ABSENT

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### **JUDGMENT**

The Plaintiff filed this writ of summons and statement of claim on May 5, 2021 claiming the following;

1. Repayment of the amount GHC61, 145.70 being monies outstanding as at April 2021.
2. Interest of 3.5% and a default interest of 5% on the sum of GHC61,145.70 from April 2021 till date of final payment.
3. Legal fees being 10% of the total outstanding.
4. Cost.

The 1st Defendant was served by Substituted Service, the 2nd Defendant was however served personally with the writ of summon and statement of defence. The 2nd Defendant was duly served but he was absent. The court entered Judgement in Default of Appearance on May 5, 2022 against the 2nd Defendant. The 1st Defendant filed his defence as well as his Witness Statement. But at the time of trial he was notified and given the opportunity to defend the matter but he did not cease the opportunity. After the close of Plaintiff's case on January 13, 2023 the 1st Defendant was absent and therefore the s Statement of Defence and Witness Statement filed was struck out under order 36 of CI 47 and then it was adjourned for Judgement.

Under order **36 rule 2(a) and (b) of the High Court (Civil Procedure rules), 2004 (C.I. 47)**, "Where an action is called for trial and a party fails to attend, the trial Judge may (a) where the Plaintiff attends and the Defendant fails to attend, dismiss the counterclaim, if any, and allow the Plaintiff to prove the claim; (b) where the Defendant attends and the Plaintiff fails to attend, dismiss the action and allow the defendant to prove the counterclaim, if any;

In the case of **Ankumah V City Investment Co Ltd. [2007-2008] SCGLR 1064** it was held that: "The Defendant after several attempts was finally served but failed to appear in court. The trial court therefore rightly adjourned the case for judgment. A court is entitled to give a default judgment, as in the instant case, if the party fails to appear after notice of the proceedings has been given to him. For

then, it would be justifiable to assume that he does not wish to be heard.”

That party is deemed to have deliberately failed to take advantage of the opportunity to be heard.

In such a situation, the *audi alteram partem* rule cannot be said to have been breached.

At the close of the trial, the legal issue that fell for determination by the Court was;

1. Whether or not the 2nd Defendant gave a personal guarantee for the credit facility of GHC100,000.00 to the 1st Defendant.
2. Whether or not the Defendants agreed to pay an additional interest of 5% for the delay and or default payment
3. Whether or not the Defendants are in breach of the repayment terms.
4. Whether or not the Defendants outstanding debt to the Plaintiff as at April 2021 stood at GHC61,145.70
5. Whether the Plaintiff is entitled to the Reliefs claimed

### **BURDEN OF PROOF**

The general position of the law is that the party who assert must prove. Sections 11, 12 and 14 of the Evidence Act, NRCD 323 is clear on the respective burdens assumed by the parties in a civil suit. In this regard Dr. S. Twum, JSC noted in the case of **BAKER-WOODE v NANA FITZ** [2007-2008] SCGLR 879 that:

*'the common law has always followed the common sense approach that the burden of persuasion on proving all facts essential to any claim lies on whoever is making the claim'*

The Supreme Court had earlier reiterated this principle in the case of **ABABIO v AKWASI III** [1994-95] GBR 774 where the court noted as follows:

*"a party whose pleadings raised an issue essential to the success of his case assumed the burden of proving such issue. The burden only shifted to the defendant when the plaintiff has adduced evidence to establish the claim"*

In this regard per the claim of Plaintiff he has a burden to discharge as he has to adduce sufficient evidence on any of the issues raised to avoid a ruling against him. The standard of the burden is one of preponderance of probability.

The Plaintiffs evidence given by Charles Kwasi Bani who is the Credit officer of the Plaintiff's company stated that the company is registered under the laws of Ghana and carries on its business as a Savings and Loans Company. The attached exhibit A and B which are Certificate of Incorporation and a license to operate a Savings and Loans Company. The Plaintiff's evidence is that, the 1st Defendant was a customer of their company and operates under the name and

style Liner in Leadex. The 1st Defendant opened an account with the Plaintiff's Company at the Madina Branch.

The 1st Defendant applied for a loan facility in August 20, 2019 and the loan facility agreement was exhibited in evidence as exhibit C which depicts that the 1st Defendant was given an amount of GH¢100,000.00 as loan from the facility for a period of 12 months at an interest rate of 3.5% per month. It was further agreed between the parties that a further 5% interest per month will be paid by 1st Defendant to Plaintiff as Compensation for defaulting in the repayment. The Defendant used his business assets valued at GH¢132,720.00 and household assets valued at GH¢4,000.00 to secure the loan facility. It was the 2nd Defendant who provided a personal guarantee as further security for the loan. Exhibit E was attached in evidence. On January 3, 2020 the Plaintiff notified the Defendants of Plaintiff's intention to recall the credit facility due to the Defendants breach of the payment terms. Exhibit F was attached evidence. The Plaintiff stated that as at November 22 2021 the amount outstanding was GH¢73,082.93 per exhibit G which the 1st Defendant has refused to redeem. The Plaintiff accordingly prayed that the Defendants are ordered by the court to pay the amount as stated to the Plaintiff.

Guided by the principle in the case of **QUAGRAINE v ADAMAS** [1966]

GLR 599 that:

*“where a party has given evidence of a material fact and he was not cross examined on the issue he need not call further evidence of that fact”*

And also in the case of **MARTEY v BOTWE** [1989-90] 1 GLR 479 that:

*‘where a party’s testimony of a material fact was not challenged under cross examination the rule of implied admission for failure to deny by cross examination would be applicable and the party need not call further evidence on that fact’*

The court has taken into consideration the Plaintiff’s evidence as a whole. As the case stands the 1st Defendant has no defence or evidence on record. The court accordingly presumes the 1st Defendant is not opposed to the Plaintiffs claim. The court on the authority of the cases cited supra that is **QUAGRAINE v ADAMAS** [1966] GLR 599 and **MARTEY v BOTWE** [1989-90] 1 GLR 479 hereby grant the Plaintiffs claim.

Judgment in favour of the Plaintiff and on the Plaintiffs reliefs.

The 1st Defendant is ordered to pay the following.

1. The amount GHC61,145.70 being monies outstanding as at April 2021
2. Interest of 3.5% and a default interest of 5% on the sum of GHC61,145.70 from April 2021 till date of final payment.
3. Cost of GHC1,000.00 is ordered against the Defendants.

Having already given judgment in default of appearance against 2nd Defendant the court accordingly orders that the 1st and 2nd Defendants are held to be jointly and severally liable for the Plaintiff's claim.

**LEGAL REPRESENTATION**

**MCKWEON AMENANU HOLDING KWAME NYAMPONGS BRIEF FOR THE PLAINTIFF**

**H/H SUSANA EDUFUL (MRS)  
(CIRCUIT JUDGE)**