



The duration of the loan was for four (4) months and the interest rate was 5% per month compounded with a penal interest rate of 7%. That the defendant paid cash of two thousand, four hundred and ninety five Ghana cedis (Ghs 2,495) which was to be applied towards the payment of the last instalment.

That the defendant failed to make any payments for the loan and after deducting her cash deposit and credit balance, her total indebtedness as at 9<sup>th</sup> October, 2018 was nine thousand, two hundred and forty seven Ghana cedis, six pesewas (Ghs 9,247.06). That the monthly penal rate of 7% kicked in and as at 9<sup>th</sup> May, 2021, the outstanding due loan balance was seventy five thousand, three hundred and eighteen Ghana cedis, thirty five pesewas (Ghs 75,318.35).

The defendant filed a statement of defence which was struck out for non compliance with the filing of her witness statement and pre trial check list.

### **THE CASE OF THE PLAINTIFF**

Plaintiff testified through its credit officer. His evidence is that the defendant applied for a loan facility of ten thousand Ghana cedis (Ghs 10,000) in May, 2018 and same was approved. He tendered into evidence the defendant's loan application form as EXHIBIT A, a guarantor's form as EXHIBIT B and loan approval form as EXHIBIT C. That the defendant also secured the loan with a piece of land with uncompleted house thereon at community 25, Tema. He also tendered in evidence as EXHIBIT D series, documents covering the said property.

He continued that the plaintiff was issued with two royal bank cheques dated 29<sup>th</sup> May, 2018 with a face value of five thousand Ghana cedis (Ghs 5,000) each by plaintiff. He tendered in evidence EXHIBIT E series as copies of the said cheques. That the loan was

repayable over a four (4) month period commencing from 9<sup>th</sup> July, 2018 and ending on 9<sup>th</sup> October, 2018. The amount repayable each month was three thousand Ghana cedis (Ghs 3,000). He tendered in evidence EXHIBIT F as a copy of the offer letter.

That the defendant made a cash lien payment of two thousand, four hundred and ninety five Ghana cedis (Ghs 2,495) which was to be applied to the her last instalmental payment but she failed to make any payment of the loan amount as at the due dates.

That at the time of the expiry of her loan, the defendant had a credit balance of two hundred and fifty seven Ghana cedis, ninety four pesewas (Ghs 257.94) with the plaintiff. That this together with the cash lien were applied to the outstanding loan balance and the remaining amount to be paid was nine thousand, two hundred and forty seven Ghana cedis six pesewas (Ghs 9,247.06) He tendered in evidence EXHIBIT G as a summary of loan balance as at the date of expiry.

That the monthly penal interest rate charge of 7% on the unpaid and due loan kicked in on 9<sup>th</sup> October, 2018 and as at 9<sup>th</sup> May, 2021, the outstanding and due loan balance was seventy five thousand, three hundred and eighteen Ghana cedis, thirty five pesewas (Ghs 75,318.35).

### **CONSIDERATION BY COURT**

The defendant entered appearance and filed a statement of defence to this action. Thereafter, she failed to file her witness statement and pre trial check list as ordered by the court. Her counsel with leave of the court withdrew his services for her. Although the defendant was almost always represented in court by her daughter, she did not engage the services of another counsel or seek further leave of the court to reinstate her statement of the defence and also file her witness statement.

As it is the duty of a court to give a party to a case before it a hearing, the failure of the defendant to file her processes in court is taken to mean that she did not wish for the court to hear her 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. The defendant appeared in court on the trial date and was given the opportunity to cross examine the plaintiff representative.

Plaintiff bore the onus of producing evidence that would convince the court on a balance of probabilities that it is entitled to the reliefs which it 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]." See also the case of ***Re B* [2008] UKHL 3** where Lord Hoffman aptly stated the requirement of proof mathematically.*

Plaintiff relied on both oral and documentary evidence to prove its 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.

As this is a loan agreement between the parties, it is governed by the ***Borrowers and Lenders Act, 2008 (Act 773)***. The said Act as at 2018 when the parties entered into this agreement, was the relevant law that governed credit facilities or agreements. For every

credit facility including loans of this nature, except where the loan amount is less than one hundred Ghana cedis (Ghs 100) or the Bank of Ghana has made an exemption, parties are to comply with the provisions of *Act 773*. See *Section 1 of Act 773*.

Plaintiff in proof of its case tendered in evidence EXHIBIT A as the personal loan application form of the defendant. On the face of the said document, particularly at the facility details, the answer to the first question is “how much do you wish to borrow?” The answer to that question has clearly been altered to read ten thousand Ghana cedis (Ghs 10,000).

The number “2” appears to have been interpolated and the number 1 written in its stead. The second number also has an interpolation. The security undertaking which forms part of EXHIBIT A also has the same interpolations in the writing of the amount. It appears per the plaintiff’s own documents that the amount the defendant applied for was not the ten thousand Ghana cedis (Ghs 10,000) that it claimed.

Indeed the defendant (in cross examining the witness asked this question) **had in cross examining the witness for the plaintiff at page.....of the record of proceedings asked this question**

Q: I put it to you that the initial loan amount I applied for was GH¢25,000 and so I paid a deposit of GH¢6,000. My guarantor paid it.

A: No my lord.

Q: I suggest to you that I paid GH¢6,000 as a deposit and I was only given GH¢10,000 instead of the amount of GH¢25,000 which I applied for.

A: No my lord. The application forms that you used to apply for the GH¢10,000 are in the office with your signature.

Contrary to the answers of plaintiff, the said application forms which is EXHIBIT A does not bear out his claim that the defendant applied for a loan of ten thousand Ghana cedis (Ghs 10,000). The interpolations in the form means that it cannot be relied on by this court.

The plaintiff tendered in evidence other EXHIBITS particularly C and EXHIBIT E series which are the loan recommendation form and two cheques issued by itself to the defendant in May, 2018. EXHIBIT C is a recommendation by the plaintiff for defendant to be given ten thousand Ghana cedis (Ghs 10,000) as a loan and the approval of the said amount. EXHIBIT E series are royal bank cheques of a face value of five thousand Ghana cedis (Ghs 5,000) each issued by the plaintiff to the defendant. Per defendant's own cross examination, she received the loan of ten thousand Ghana cedis (Ghs 10,000) from the plaintiff. I thus find that the plaintiff advanced a loan of (Ghs 10,000) to the defendant on 29<sup>th</sup> May, 2018.

EXHIBIT F is an offer letter which shows that the loan was for a period of three (3) months at an interest rate of 5% per month payable monthly until 8<sup>th</sup> October, 2018. The commitment fee for the loan was 3% and the penal rate was 7% with an insurance rate of 1%. Although the plaintiff signed the document per its manager, the defendant did not sign same indicating her acceptance of same. The lower part of EXHIBIT F is for acceptance and the defendant's name is printed together with a date but she does not sign the document. That means that the defendant did not accept the offer.

Indeed, the plaintiff appears not to have complied with some other legal provisions in its contract with the defendant. *Act 773* provides in section 18 that the plaintiff provides the defendant with a pre agreement statement.

*Disclosure of information* **Pre-agreement disclosure**

18. (1) A lender shall not conclude a credit agreement with a prospective borrower unless the lender provides the prospective borrower with a preagreement statement and quotation in the form specified in the Schedule.

(2) A pre-agreement statement shall specify

- (a) the principal amount;
- (b) the proposed disbursement schedule of the principal debt;
- (c) the interest rate;
- (d) other credit costs;
- (e) the total amount involved in the proposed agreement,
- (f) the proposed repayment schedule; and
- (g) the basis of any cost that may be assessed if the borrower breaches the contract.

None of the documents the plaintiff tendered in evidence indicates this pre agreement statement. As the offer letter was not signed by the defendant and there was no pre agreement statement, it stands to say that the defendant was not put on notice as to the exact details of the loan agreement she had with the plaintiff.

Again, *Act 773* also sets out the procedure by which a lender may enforce the obligations of a borrower upon default.



*Enforcement of borrower's obligations*

***Default in payment***

32. (1) *Where a borrower fails to make payment on the due date for a payment, the lender shall give notice of default to the borrower in writing and request the borrower to pay the amount due within thirty days.*

(2) *The lender may send the notice by (a) hand,*

*(b) courier service,*

*(c) registered mail, or*

*(d) other means determined by the lender in consultation with the borrower.*

(3) *Where the notice is delivered*

*(a) by hand, it shall take effect on the date it is received by or on behalf of the borrower;  
and*

*(b) by courier service or registered mail, it shall take effect on the day it is officially  
recorded as delivered by return receipt*

*or its equivalent.*

(3) *If a borrower fails to pay or make satisfactory arrangements to pay the amount outstanding to the lender within thirty days after the date of receipt of the notice, the lender may enforce the rights provided for under this Act.*

Thus per **Act 773**, the plaintiff herein was under an obligation to write to the defendant and notify her of her default in payment on the due date as well as call upon her to

make payment within thirty (30) days of the receipt of the notice. The plaintiff tendered in evidence various documentary exhibits none of which included a notice of default and request to make payment which was written to the defendant. Indeed, nowhere in the plaintiff's evidence does it aver that it notified the defendant of her default and called upon her to make good her payment.

It appears that the plaintiff itself had qualms about the ability of the defendant to pay off the loan as its loan officer "Helen Obeng" per EXHIBIT C noted in recommending that a loan of ten thousand Ghana cedis (Ghs 10,000) be granted to the defendant that the defendant "must be closely watched to follow the schedule to minimize exposure".

As evidenced by the exhibits, this is a written loan agreement which was for a period of four (4) months and was to expire in October, 2018. As at the date of expiration of the loan, the defendant had not paid any of the four (4) monthly instalments as scheduled. The plaintiff was thus under an obligation to write to the defendant and notify her of her default in payment and call upon her to make payment within thirty (30) days.

*Section 32 of Act 773 (1) uses the word "shall" i.e Where a borrower fails to make payment on the due date for a payment, the lender shall give notice of default to the borrower in writing and request the borrower to pay the amount due within thirty days.*

*Per section 42 of the Interpretation Act 2009 Act 792 "In an enactment the expression "may" shall be construed as permissive and empowering, and the expression "shall" as imperative and mandatory'.*

As the plaintiff has failed to comply with the requirements of the law in its dealings with the defendant, it cannot in good faith call upon this court to compel the defendant

to pay off the loan amount with penal interest almost three (3) years after the default in payment.

However, it is a legal known that the courts frown upon unjust enrichment. See the case *Umar & Anor v. National Health Insurance Authority [2021] GHASC 13* where the supreme Court held that “*quantum meruit, literally meaning “as much as he has deserved” (Black Law Dictionary, 8<sup>th</sup> edition) is used as an equitable remedy where unjust enrichment has occurred to enable the plaintiff to recover even if a contract is unenforceable for one reason or the other*”.

The defendant has by exhibit E series clearly received the amount of ten thousand Ghana cedis (Ghs 10,000) from the plaintiff as a loan. She is under obligation to pay that money back to the plaintiff. As it was a loan, the reasonable expectations of both parties was that she pays back with interest.

The non compliance of the legal requirements by the plaintiff means the default bank of Ghana commercial lending rates would be applied in the circumstances of this case. Accordingly, I hereby order the defendant to pay to the plaintiff the sum of ten thousand Ghana cedis (GHS 10,000) with interest calculated at the commercial bank interest rate from the 8<sup>th</sup> of October, 2018 till the date of final payment less the sums of two thousand four hundred and ninety five Ghana cedis (Ghs 2,495) and two hundred and fifty seven Ghana Cedis, ninety four pesewas (Ghs 257.94).

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

**H/H BERTHA ANIAGYEI (MS)**

**(CIRCUIT COURT JUDGE)**

FRANCIS KUMAH FOR THE PLAINTIFF