

**IN THE SUPERIOR COURT OF JUDICATURE  
IN THE HIGH COURT OF JUSTICE SITTING AT KOFORIDUA  
ON TUESDAY 30<sup>TH</sup> DAY OF APRIL, 2024 BEFORE  
HER LADYSHIP JUSTICE GIFTY DEKYEM (MRS.)**

**SUIT NO. C2/75/2015**

**STEPHEN TREBARH**

**1<sup>ST</sup> PLAINTIFF**

**DIVINE K. TREBARH**

**2<sup>ND</sup> PLAINTIFF**

**VS**

**HFC BANK GHANA LTD**

**DEFENDANT**

---

**PARTIES:**

**COUNSEL: Frank G Donkor ESQ for Plaintiffs; Hans Awude ESQ. for Defendant**

---

**JUDGMENT**

Plaintiffs per their writ of summons and statement of claim filed 10<sup>th</sup> April 2015, sought the following reliefs:

- (a) recovery of property,
- (b) Declaration of unreasonable interest and other charges on a loan facility of GHS1,900 by the Defendant,

- (c) Declaration that the GHS9,231.11 paid by the plaintiffs to the defendant constitutes full payment of the loan facility.
- (d) Perpetual injunction to restrain the Defendant from sale of the property.
- (e) Costs.

The statement of claim indicates that per a mortgage agreement dated 18<sup>TH</sup> January 1999 under the 'Uncompleted Houses Scheme', between the Plaintiffs as mortgagors and Defendant as mortgagee for the completion of the Plaintiffs' four-bedroom house, the Plaintiffs obtained a loan amount of GHS1,890. The mortgage period was 15 years with an initial monthly installment of GHS11.29. It is the case of the Plaintiffs that the loan agreement did not specify any interest but subsequently noticed that the Defendant was applying between 4.5% to 5.5% per month and imposed unlawful compound interest. Plaintiffs contend that as a result of Defendant's conduct, the outstanding loan balance became GHS88,000.00 which became impossible for Plaintiffs to pay. Consequently, Defendants attached Plaintiff's house for sale to defray the unlawful debt wherefore, Plaintiffs sought the above reliefs.

#### COUNTERCLAIM

Defendant denied Plaintiffs' claim and averred that a mortgage facility was granted the Plaintiffs dated 18<sup>th</sup> January 1999 in the sum of GHS1,520.00 and a subsequent loan of GHS370 making a total of GHS1,936 which was secured with a four-bedroom uncompleted house at Adweso, Koforidua. As a pre-disbursement condition under the facility, Plaintiffs signed a mortgage deed dated 17<sup>th</sup> February 1999 to enable Defendant to register the mortgage over the property thus the 1<sup>st</sup> Plaintiff deposited the title deed of the property with Defendant. It is the case of the Defendant that a facility letter dated 2<sup>nd</sup> September stated that the repayment arrears shall attract a penalty charge equivalent to 10% of the amount in arrears. It is the case of the Defendant that several demand notices

were sent to the Plaintiffs informing them of the arrears with accrued interest and outstanding balance but they failed and refused to settle same. Defendant contended that it was entitled under the mortgage deed to enter possession upon default after giving Plaintiffs 30 days' notice.

It is the case of Defendant that upon the request of the 2<sup>nd</sup> Plaintiff, it restructured the loan facility with a new loan amount and interest rate by letter dated 12 January 2011 however Plaintiffs defaulted in fulfilling their obligations under the facility. Defendant averred that it served the Plaintiffs with a demand notice and recovery of the property. The Defendant therefore sought the following reliefs under its counterclaim.

- i. The sum of GHS71,225.87 (Seventy-one thousand, two hundred and twenty-five Ghana Cedis, Eighty Pesewas) being the outstanding loan balance under the facility.
- ii. Interest on the afore-mentioned sum at the variable interest rate from 1<sup>st</sup> October 2014 to the date of final payment.
- iii. Further or in the alternative an order for the judicial sale of the Property – 4 9four) bedroom building situate at Mile 50, Adweso, Koforidua.
- iv. Costs

At the close of pleadings, the following issues were adopted as issues settled for trial:

- a. Whether or not the loan facility which the Defendant granted the Plaintiffs is GHS1,934.57
- b. Whether or not the loan facility under the mortgaged agreement disclosed the interest rate on the loan facility.
- c. Whether or not the interest on the loan facility was calculated per annum.
- d. Whether or not the loan facility under the mortgage agreement disclosed the total amount payable by the Plaintiffs for the entire period of the loan facility.

- e. Whether or not the total amount of GHS71,225.85 demanded by the Defendant constitutes interest and penal interest charges on the loan facility under the mortgage agreement.
- f. Whether or not the Defendant deliberately allowed the loan facility to amortize.
- g. Whether or not the Plaintiffs have challenged the Defendants in respect of the interest rate and penal charges on the loan facility.
- h. Any other issues raised by the pleadings.

Additional issue:

- 1. Whether or not the Defendant is entitled to its counterclaim?

The following sections of the Evidence Act, 1975 (NRCD 323) provide for the burden of proof in civil cases as follows:

#### SECTION 10 – BURDEN OF PERSUASION DEFINED

- (1) 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.
- (2) The burden of persuasion may require a party
  - (a) to raise a 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

#### SECTION 11 – BURDEN OF PRODUCING EVIDENCE DEFINED

- (1) For the purposes 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.

- (4) In other circumstances the 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.

## SECTION 12 – PROOF BY A PREPONDERANCE OF THE PROBABILITIES

- (1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.
- (2) “Preponderance of the probabilities” means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of fact is more probable than its non-existence.

## SECTION 14 ALLOCATION OF BURDEN OF PERSUASION

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.

It was held in *Madam Akosua Dufie & Or vs. Madam Amma Fosua & Or* [2009] DLSC2502 that:

Section 11(4) of the Decree put the obligation in civil proceedings like the present, of producing evidence on a party to produce sufficient evidence so that on all the evidence, a reasonable mind could conclude that the existence of the fact was more probable than its non-existence. It was all a question of which of the parties was better able to prove its case than the other on all the evidence led at the trial.

The onus is thus on both parties to adduce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the facts was more probable than if non-existence. A Plaintiff and a defendant counter-claimant have the same burden of persuasion in proving their respective claims.

Issues a, b, c, and d will be considered together. It is not in dispute that the Plaintiffs obtained two loan facilities from the defendant evidenced by exhibits 'B' and '2'. Exhibit 'B' is a letter from the defendant dated 18 January 1999 detailing the terms of the mortgage loan facility. The loan amount is GHS1,5200 for fifteen years. Interest was to be charged at an adjustable half-yearly rate of 4.5% per annum. Repayment was to be determined by the defendant based on the projected amount required to amortize the loan over the specified period to be determined on the 1<sup>st</sup> January and 1<sup>st</sup> July each year for a period of six months. The initial minimum monthly installment payable was GHS11.29. Exhibit '2' defendant's letter dated 2 September 1999 offering an additional loan to the existing loan the terms of which are as follows. The existing loan balance is shown as GHS1,564.57 and an additional loan of GHS370.00 making a total of GHS 1,934.57. The terms were identical to exhibit 'B' except that the adjustable interest rate was 5.5% and 10% penal charge on the amount in arrears. The initial monthly instalment payable in exhibit '2' was GHS15.00. From exhibits 'B' and '2' there is no controversy that the loan facility which the defendant granted the plaintiff was a total of one thousand, nine hundred and thirty-four Ghana Cedis, fifty-seven Pesewas (GHS 1,934.57) expressed in old Cedis. The interest rate was 4.5% adjustable from exhibit 'B' and 5.5% adjustable rate per exhibit '2'. The loan facility did not disclose the total amount payable by the plaintiffs for the entire period of the loan facility as DW1 explained at paragraph 13 of his witness statement that repayment was adjusted periodically so it was not feasible to estimate the total loan payable.

Issues 'e', 'f' and 'g'

Whether or not the total amount of GHS71,225.85 demanded by the Defendant constitutes interest and penal interest charges on the loan facility under the mortgage agreement? Defendant counterclaimed for GHS71,225.87 (Seventy-one thousand, two hundred and twenty-five Ghana Cedis, Eighty Pesewas) being the outstanding loan balance under the facility. It is the Defendant's case that it wrote to Plaintiffs per exhibits '7', '8', '9', '10', '11', '12', '13', and '14' letters dated 6<sup>th</sup> October 1999, 4<sup>th</sup> July 2000, 11<sup>th</sup> August 2003, 24<sup>th</sup> February 2005, 5<sup>th</sup> March 2009, 3<sup>rd</sup> April 2012, 26<sup>th</sup> June 2013 and 5<sup>th</sup> September 2014 reminding them of their outstanding arrears under the loan. In all these letters the Defendant reminded the Plaintiffs of their arrears without indicating any components making the arrears. However, the facility letters, exhibits 'B' (same as exhibit '1') and '2' indicate clearly that the facility is subject to chargeable adjustable interest rates and penal interest on repayment arrears. DW1 was cross-examined thus:

Q58 As his relationship manager and a staff of the defendant you know what rate was applied to facilities granted to the plaintiffs.

A58 My Lady reference to point 5 on the facility letter, it is 4.5% per annum.

Q59 And you are telling the court that this rate was what was used throughout the term of the agreement to calculate the arrears owed by the plaintiff?

A59 My Lady this was the rate that was applicable from the start of the facility which is a variable rate, and it is reviewed based on the economic rate that pertains at any point in time.

DW1's testimony backed by the offer letters shows that the total amount of GHS71,225.85 demanded by the Defendant comprises the loan, interest, and penal interest which were terms under the facility granted the plaintiffs and there is no record of the Plaintiffs

challenging the interest or penal rates as embodied in the facility letter, the very agreement that bound the parties.

#### Additional Issue

Whether or not the Defendant is entitled to its counterclaim. The defendant is claiming the sum of GHS71,225.87 (Seventy-one thousand, two hundred and twenty-five Ghana Cedis, Eighty Pesewas) being the outstanding loan balance under the facility and interest from 1<sup>st</sup> October 2014 till the date of final payment or in the alternative an order for the judicial sale of the property subject matter of the mortgage agreement. The plaintiffs did not challenge the defendant on the outstanding balance by way of cross-examination when DW1 was in the witness box.

This court, differently constituted made an order for the appointment of a financial analyst to go through the books of the bank transactions between the parties and come up with a report on (i) whether the plaintiff owed the amount of GHS71,225.85 and (ii) whether or not the penal charges by the defendant and other charges were lawful according to the loan agreement. The financial analyst made the following concluding notes:

1. Interest rate of 4-5% was used as stated in the offer letter. No communication on interest change was available.
2. Interest was calculated based on 365 days per year.
3. Monthly interest was calculated based on number of days.
4. Interest calculated in one month is added to the principal in the following month before interest is calculated.
5. Calculation was done using the bank statement provided and payment schedule supplied.

6. No penal interest was charged in the calculation because there was no information on penal rate available.

Despite the specific order of the court to the financial analyst to determine whether or not the Plaintiffs owed the debt being claimed by the Defendant, the financial analyst did not come up with such a determination. Plaintiffs also declined to cross-examine the financial analyst on this issue. Exhibit '20' is the mortgage account statement of the Plaintiffs with the Defendant which concludes that the Plaintiffs are indebted to the Defendant in the sum of GHS71,233.08 as of 16 October 2014. Plaintiffs did not cross-examine DW1 on the closing balance in exhibit '20'. It was held in *Fori v. Ayirebi And Others* [1966] GLR 627-649 SC that:

When a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact. (emphasis added).

Also, it was held in *Duah v Yorkwa* [1993-94] GLR 217 that,

whenever there was in existence a written document and conflicting oral evidence, the practice of the court was to lean favourably towards the documentary evidence especially if it was authentic.

On the strength of exhibit '20' therefore, the court finds that the Plaintiffs owed the amount the Defendant is demanding from them as the balance on their mortgage account and will so hold.

The instant suit was filed on 10<sup>th</sup> April 2015. It has taken over nine years to resolve the issues between the parties. The record shows that often the parties have gone to sleep forgetting that they had invoked the jurisdiction of the honourable to determine issues between them. I am not impressed. Judgment is entered in favour of the Defendant in

respect of relief (i). The court will award interest on the sum of GHS71,233.08 (Seventy-one thousand, two hundred and twenty-five Ghana Cedis, Eighty Pesewas) being the outstanding loan balance under the facility claimed in relief (i) from the date of judgment till date of final payment. Interest is at prevailing commercial bank rate at simple interest. Costs of GHS10,000.00 awarded in favour of Defendant.

Parties to bear their costs.

Justice Gifty Dekyem (Mrs.)

Justice of the High Court

**Cases cited:**

*Madam Akosua Dufie & Or vs. Madam Amma Fosua & Or* [2009] DLSC2502

*Fori v. Ayirebi And Others* [1966] GLR 627-649 SC

*Duah v Yorkwa* [1993-94] GLR 217