

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)

IN THE MATTER OF THE CONVEYANCING ACT 1881
AND

IN THE MATTER OF A LEGAL MORTGAGE BETWEEN ROKEL COMMERCIAL BANK (SL)
LIMITED AND OSMAN ALLIE KABIA (ALSO KNOWN PARAMOUNT CHIEF BAI KOBLO
QUEEN)

AND

IN THE MATTER OF AN APPLICATION TO SECURE THE REPAYMENT OF MONIES DUE
AND OWING TO ROKEL COMMERCIAL BANK (SL) LIMITED

BETWEEN

ROKEL COMMERCIAL BANK (SIERRA LEONE) LIMITED - PLAINTIFF
25/27 SIAKA STEVENS STREET
FREETOWN

AND

OSMAN ALLIE KABIA - DEFENDANT
(ALSO KNOWN AS PC BAI KOBLO QUEEN)
T/A MUNKU CONSTRUCTION & GENERAL SERVICE SUPPLY
30 ECOWAS STREET
FREETOWN

JUDGMENT

This is an application by Originating Summons dated on the 30th of January 2015 filed on behalf of the Plaintiff asking for the following Orders to wit:

1. That the Mortgagor/Defendant/Borrower do immediately pay all monies due and owing the Mortgagee/Plaintiff under mortgage deeds dated the 11th day of May 2010 and 4th day of October 2012 and duly registered respectively as No. 58/2010 in volume 82 at page 86 and No. 215/2012 in volume 87 at page 107 of the Record Book of Mortgages kept in the Office of the Registrar-General in Freetown respectively for the payment of the sum of Le 4,276,342,775.75 (Four Billion Two Hundred and Seventy Six Million Three Hundred and Forty Two Thousand Seven Hundred and Seventy Five Leones and Seventy Five Cents)

Le 2, 700,000,000 of the same comprising the principal debt and the remainder being interest accrued thereon which said interest continues to accrue at the rate of 15% per annum from 30th November 2014 and remains payable until complete discharge of the sum due and owing the Plaintiff.

2. That in the alternative an Order be granted for the mortgages to be enforced by the sale of the mortgaged properties situate at No. 12 Kissy Street (now Sani Abacha Street) and at Pipe Line Road Wilberforce Loop Freetown as shown on survey plans L.S. 906/74 and L.S. 3853/2000 and the same if insufficient to liquidate the sum due and owing the Plaintiff that the Defendant personally pays the outstanding sum to the Plaintiff.
3. That in the event Order 2 be granted delivery up of possession to the Plaintiff of the mortgaged properties.
4. Any further Order(s)/relief(s) that this Honourable Court may deem fit and just.
5. That the costs of and incidental to the application herein be provided for, the same to be borne by the Defendant.

The application is supported by the Affidavit of Lemuel Cole sworn to on the 30th of January 2015 together with the exhibits attached thereto and filed herewith.

The Defendant filed an affidavit in opposition and a supplemental affidavit in opposition; and the Plaintiff filed an affidavit in reply.

SUBMISSIONS BY O. JALLOH ESQ COUNSEL FOR THE PLAINTIFF

Mr. Jalloh submitted to the Court that exhibit A of the Affidavit sworn to by Lemuel Cole on the 30th of January 2015 confirm unequivocally the facilities granted to the Defendant and the terms on which the facilities were granted. He drew the Court's attention to the rubric "memorandum of acceptance" in Exhibit A where the facilities granted and the terms thereof were fully acknowledged by the Defendant on the 28th of September 2012. He made reference to Exhibits B and C of the said affidavit showing the collateral security forwarded by the Defendant to the Plaintiff.


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He highlighted the fact that under cross-examination, the Defendant unequivocally confirmed the credits and debits he made to his accounts as reflected in exhibits BQ 1-4 of the Defendant's bundle and which are exhibits H and J of the said affidavit. He maintained that with these exhibits, there was no doubt about the state of indebtedness before the Court.

Mr. Jalloh referred the court to exhibits K 1 and K 2 respectively, attached to the affidavit of Lemuel Cole sworn to on the 30th of June 2015; which are comprehensive break downs of the interest accrued in the Defendant's account between the period of 2012 to December 2014. The said exhibits show the rate of interest claimed on the Defendant's current and loan accounts as Le 1,588,155, 343.06; and when you deduct this figure from the sum claimed by the Plaintiff, that is, Le 4,276,342,775.75 the court will note that the principle sum is Le 2,688,187,429.75. He pointed out that a clear picture of what is due and owing has emerged.

He further referred the Court to exhibit B of the Plaintiff's bundle which is a mortgage deed dated 11th May 2010 with a survey plan attached thereto, with the signature page, signed, sealed and delivered by Paramount Chief Bai Koblo Queen II.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANT – E. KARGBO ESQ

Mr. Kargbo relied on the affidavit sworn to by the Defendant, Osman Allie Kabia (also known as Paramount Chief Bai Koblo Queen II) sworn to on the 30th of January 2015 together with its exhibits attached. These exhibits include: exhibits BQ 1 and 2 which are copies of the mortgage deeds and the facilities granted; and exhibit BQ3 is a bank statement showing the huge sums of money taken from the Defendant's account and which is contrary to the agreement with the Plaintiff bank.

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He argued that the mortgages which the bank was relying on as security had nothing to do with the subsequent facilities granted by the bank. He said that overdraft facilities were converted into a loan and that all the money the Defendant had paid into his account were used to satisfy the interest payments. He informed the Court that the Ebola disease epidemic affected the Defendant's business adversely; and that most of the mining companies his business relied on folded up.

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DECISION OF THE COURT

In order to arrive at a decision, a number of issues in dispute need to be addressed.


Firstly, did the Defendant, Osman Allie Kabia (also known as Paramount Chief Bai Koblo II) enter into an agreement with the Plaintiff, Rokel Commercial Bank (SL) Limited to borrow money? Exhibit A attached to the affidavit of Lemuel Cole, a Banker of the Plaintiff bank sworn to on the 30th of January 2015, is a letter dated 27th September 2012 documenting the facilities availed the Defendant as requested. It states that the Defendant's current account is re-structured to include the following facilities: an outstanding overdraft converted to an ordinary loan of Le 2,350,000,000; an overdraft of Le 150,000,000 and a bank guarantee of Le 200,000,000; bringing the facility lent to the Defendant to a total of Le 2,700,000,000. At the bottom of the said letter is a memorandum of acceptance which was signed by the Defendant on the 28th of September 2012. This arrangement thereby crystallized into an agreement to borrow the sum of Le 2,700,000,000.

Furthermore, the said agreement expressly states the terms including the right to repayment upon demand, the expiry date of the facilities and the cost of borrowing described as 'pricing'. The 'pricing' spelt out that the interest on the overdraft and the loan will be charged at 20% per annum and that changes to the prime lending rate would be advertised in the electronic and/or print media. It was also stated that the bank will rely on a legal mortgage over property at Sani Abacha Street (formerly known as Kissy Street) to cover borrowing of Le 1.1 Billion; and on a legal mortgage over property at Off Pipe Line, Wilberforce Loop to cover borrowing of Le 2 Billion.

I however observe that no written request for the aforementioned facilities was exhibited by any of the parties.

My deduction from exhibit A aforesaid, is that an agreement to borrow the sum of Le 2,700,000,000 (Two Billion Seven Hundred Million Leones) was executed by the Defendant, Mr Osman Kabia and the Plaintiff Bank, Rokel Commercial Bank to lent the said sum to the Defendant.

The second question that arises is, did the Defendant comply with the agreement? I have stated the terms of the agreement above and I need not restate them here; suffice to say that from exhibits "F" and "G" of the Plaintiff's bundle and attached to the affidavit of Lemuel Cole sworn to on the 30th of January 2015 aforesaid and exhibits "BQ 4 (1)" and "BQ 4 (2)" of the Defendant's bundle, which are the bank statements supplied to the


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defendant, the repayments were irregular. From March 2014 to the end of that year, it is clear that no repayments were made. Also, even though the Defendant was very much overdrawn he was still issuing cheques and withdrawing huge sums of cash. This behaviour was reckless and irresponsible and certainly in breach of the loan agreement entered into with the Plaintiff bank. The Defendant was therefore not in compliance with the loan agreement.

Thirdly, did the Defendant understand the legal nature of an overdraft? An overdraft in law is a loan granted by a bank to a customer, so that the bank is the creditor and the customer is the debtor. Ellinger (supra) at p 756. Furthermore, did the Plaintiff bank have a right to demand a repayment of the loan? In law, where an account is overdrawn, or where the bank lends money to a customer, the relationship is that of debtor and creditor and the bank is entitled to be repaid the debt in full on demand (subject to contrary provision); Williams and Glyn's Bank v Barnes [1981] Com LR 205.

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E.P. Ellinger
et al, 'Ellinger
Modern Bank
Law' 5th
edition [2004]
OUP.

A particular problem may arise in relation to overdrafts and loans which are expressed to be payable on a fixed future date but in respect of which the bank reserves the right to demand repayment in full before that date. In: Lloyds Bank plc v Lampert [1999] 1 All ER (Comm) 161 and in: Bank of Ireland v AMCD (Property Holdings) Limited [2001] 2 All ER (Comm) 894, it was held that the agreements in question meant what they said: that the debt should be repayable on a certain future date subject to a right in the bank to demand repayment prior to that date. Thus, while there may be circumstances in which a bank may be precluded from relying upon an express right to call for immediate repayment of a fixed-term overdraft or loan, in the absence of such exceptional circumstances the bank will be entitled to rely upon the express provision of the agreement to call for immediate repayment.

Also, in order to be entitled to repayment, the bank must make a valid demand; Joachimson v Swiss Bank Corp [1921] 3 KB 110; Thomas Cook (New Zealand) Limited v Commissioner of Inland Revenue [2005] STC 297.

From the documentary evidence of exhibit "E" of the Plaintiff's bundle and exhibit "BQ 3 (2)" of the Defendant's bundle, it is quite clear that this was a demand letter from the Plaintiff bank, demanding the outstanding debt of Le 3, 587,950,957 as at 24th February 2014. This was the bank exercising its right to demand repayment of the loan borrowed by the Defendant, since he consistently exceeded the banking facilities availed him.

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Additionally, the Defendant's breach of the agreement, triggered the default lending rate; and as a result, the Defendant accumulated even more debt. This was highlighted in the bank's Demand Letter where it made reference to the issue that "inspite of the restructuring of your account, you did not keep to the agreed re-payments which led to a significant deterioration of your accounts...."

An examination of exhibits F and G for instance, shows that despite the deduction of interest on overdraft in the Defendant's account on a monthly basis, he did not question their accuracy; instead he was still issuing cheques and withdrawing cash from his account. This conduct as pointed out earlier amounted to recklessness in the operation of his account and a clear lack of compliance with the loan agreement.

I note how the Ebola Disease Epidemic adversely affected the Defendant's operations. However, no evidence was adduced to show that it was drawn to the attention of the Plaintiff. I sympathise with the Defendant and I know that so many people and businesses were affected and suffered; as well as the economy. It would have been useful on the other hand and been of assistance, to prove that the Plaintiff was being updated about events. Unfortunately, accrued rights under a contract which has been frustrated (for instance, for a liquidated sum of money already due) are not destroyed; Arab Bank Limited v Barclays Bank [1954] A C 495; though the right of suing in respect of such rights may be suspended for the duration of the "epidemic" [emphasis mine] or outside event or extraneous change of situation. In other words, the Ebola Disease Epidemic has ended and the right of the Plaintiff to demand a debt it is owed can be restored.

This then leads to the question of whether there was security for the loan? The answer is in the affirmative. The Defendant mortgaged two properties to the Plaintiff bank: one dated 11th May 2010 situate at 12 Kissy Street (now known as Sani Abacha Street) and it was to cover borrowing of Le 2,000,000,000 (Two Billion Leones). The survey plan attached thereof was in the name of Allie Osman Kabia. The second mortgage deed was dated 4th October 2012 situate at Pipe Line Road, Wilberforce Loop; and it was in the name of Osman Allie Kabia. It stated that the borrower was allowed to overdraw up to the sum of Le 2,000,000,000 (Two Billion Leones), ~~although the agreement~~

The terms of the mortgage were clearly documented in the deed and I have no doubt that the Defendant knew what he entered into; since he is, as a matter of fact, a literate man. In other words, he clearly mortgaged his properties to the bank.

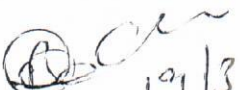

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I also note that the interest charged by the Plaintiff bank was considered to be too high by the Defendant and it was a significant issue raised in the matter. I have already dealt with my findings on cheques being issued by the Defendant, withdrawals of cash and penalty rates, despite notices being sent by the Plaintiff, warning of unauthorised overdrawn balances; all of which I need not reiterate. The right to charge interest by banks cannot be overemphasised. Where an overdraft facility document stipulates interest to be payable, this is usually based upon variable market rates. The validity of banks rights to charge variable interest rates was affirmed in Yourell v Hibernian Bank Limited [1918] AC 372 (HL) where the House of Lords recognized that this method of charging interest was legitimate as between banker and customer despite the compounding involved. The House regarded the debt accrued on the basis of the interest charge as accrued on the day it was debited to the account.

In National Bank of Greece S-A v. Pinios Shipping Co. (No. 1) [1990] 1 AC 637 (HL) Lord Goff of Chieveley held that the usage in question prevailed generally as 'between bankers and customers who borrow from them and do not pay the interest as it accrues.' He said that a bank could continue to compound interest, even after a bank had demanded repayment. His Lordship also pronounced that '..... if it is equitable that a banker should be entitled to capitalize interest at, for example, yearly or half yearly because its customer has failed to pay interest on the due date, there appears to be no basis in justice or logic for terminating that right simply because the bank has demanded payment of the sum outstanding in the customer's account.'

In the premises therefore, after due consideration of the evidence herein and the law, judgment is entered for the Plaintiff bank in the following terms to wit:-

1. The Defendant is liable to the Plaintiff for the repayment of the sum of Le 4,276,342,775.75
2. The Defendant is hereby given one month statutory notice from today 19th March 2018 to 18th April 2018 being notice of intention to sell the mortgaged properties.
3. The said Le 4,276,342,775.75 is to be paid in 36 monthly instalments commencing 31st March 2018.
4. In the event of a default in any one instalment payment the entire sum becomes immediately due and owing.


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5. In the event of a default in repayment as stipulated in Orders 3 or 5 supra then the Deed of Mortgages referred to above in this Judgment are to be foreclosed by sale.
6. In the event of compliance with Orders 3 or 5 herein then the properties mortgaged herein are to be re-conveyed to the Defendant.
7. Liberty to apply.
8. Solicitors costs assessed at Le 30,000,000 (Thirty Million Leones) to be borne by the Defendant.



19th March 2018

Honourable Justice F. Bintu Alhadi J.