



IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT

Case No: MISC.APP 485/14

THE MATTER BETWEEN:

ROKEL COMMERCIAL BANK (SL) LTD - PLAINTIFF

AND

BMC COYANDA-PARKES
APA GROUP
AFRICANUS PARKES - DEFENDANTS

YADA WILLIAMS & ASSOCIATES - COUNSEL FOR THE PLAINTIFF

JENKINS-JOHNSTON & CO - COUNSEL FOR THE DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA JA
JUDGEMENT DELIVERED ON THE 17TH OCTOBER, 2016

1) The Plaintiff filed an Originating Summons against the 1st, 2nd and 3rd Defendants herein praying for the following Orders:-

1. That the Mortgagor/Defendants/Borrowers do immediately pay all monies due and owing the Mortgagee/Plaintiff under a Mortgage Deed dated 22nd August, 2014 and duly registered as No. 149/2014 in Volume 91 at Page 5 of the Record Book of Mortgages kept in the office of the Registrar-General in Freetown for the payment of the sum of Le 469,600,941.09 (four hundred and sixty nine million six hundred thousand nine hundred and forty-one Leones nine cents) the same comprising the principal debt and the interest accrued thereon which said interest continue to accrue at the rate of 30% per annum and remains payable from 1st June, 2014 until payment of the sum due and owing the Plaintiff.
2. That in the alternative, an Order be granted for the Mortgage to be enforced by the sale of the mortgaged property situate at **143A** Wilkinson Road, Freetown, Lumley as shown on survey plan L.S. 1102/72 and the same if insufficient to liquidate the sum due and owing the Plaintiff that the Defendants personally pay 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 property.
4. Any further Order(s)/reliefs(s) that this Honorable 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 Defendants.

- 2) The Summons was supported by the Affidavit of Lemuel B. Cole sworn to on the 19th day of November, 2015 together with the exhibits attached thereto.
- 3) An appearance was entered for and on behalf of the 3rd Defendant, Africanus Parkes on the 3rd day of February, 2015, an Order for substituted service was granted for service on the 1st and 2nd Defendants.
- 4) By an Affidavit sworn to by Bernard Jones Esq. of Yada Williams & Associates, the 1st and 2nd Defendants were served the Originating Summons by publication of same in the Awoko Newspaper on Tuesday 10th and Wednesday, 11th March, 2016 respectively.
- 5) By an Affidavit sworn to by one Hamid Bangura, Solicitors' clerk in the Firm of Yada Williams & Associates, a search of the Cause Book in the High Court Registry on the 30th day of March, 2016 revealed that no appearance had been entered by or on behalf of the 'Defendant' herein. This Affidavit, I must say is tardy. It does not state which of the Defendants as he referred to them in the singular. However, for the sake of progress, I will assume that the Deponent meant the 2nd and 3rd Defendants.
- 6) A certificate of non-appearance was filed by the Plaintiff on the 30th March, 2015.
- 7) A thorough perusal of the file however revealed that an appearance had been entered into on behalf of the 1st Defendant by the Firm of Jenkins-Johnston & Co on the 16th December, 2014.
- 8) An Affidavit in Opposition sworn to by Festus Robin-Taylor, an Attorney for the 1st Defendant had been filed.

AFFIDAVITS

- 9) Affidavit in Support

- 1) That on the application of the 2nd Defendant, APA Group, the Plaintiff granted it banking facilities and in consideration of the said grants, the 1st Defendant deposited the title deeds to his property at 143A Wilkinson Road, Freetown thereby creating an equitable mortgage thereon. A copy of the said equitable mortgage deed was exhibited and marked "A".
- 2) That the 2nd Defendant utilized the facilities granted but has defaulted in making repayment.
- 3) That the 1st Defendant had since conveyed the mortgaged property to the 3rd Defendant by virtue of a Deed of Gift dated 20th day of February, 2013. A copy of the said Deed of Gift was exhibited and marked "B".
- 4) That the Defendants were in possession of the mortgaged property and the 2nd Defendant was in default of repayment of the sum of Le 469,600,941.09 comprising of principal and interest accrued thereon which said interest continue to accrue at the rate of 30 percent per annum.

10) Affidavit in Opposition

- 1) That he had been informed and verily believe that the 1st Defendant never deposited his Title Deeds with the Plaintiff as collateral for any banking facilities granted to the 2nd Defendant.
- 2) That the 1st Defendant was and had never been a part of the 2nd Defendant and that the purported mortgage dated the 22nd August, 2014 was entered into whilst the 1st Defendant was out of the jurisdiction since 2012 on grounds of ailing health.
- 3) That the 1st Defendant never executed a Deed of Gift in favour of the 3rd Defendant and the purported document is the subject of ongoing action in the High Court.

11) Affidavit in Reply

- 1) That following an application in the High Court of Sierra Leone, an Order was granted on the 21st of January, 2014 giving leave to the Plaintiff to register out of time the equitable mortgage between the Plaintiff and the Defendants deemed to take effect on the 24th January, 2011. A copy of the said Order was exhibited and marked "C".
 - 2) That in error, Exhibit "A" was photocopied and exhibited by the Clerks of the Plaintiff's Solicitors without attaching all the documents registered. A certified true copy of Exhibit "B" obtained from the Office of the Administrator and Registrar-General was exhibited and marked "D".
 - 3) That the Statement of Accounts of the 2nd Defendant was exhibited and marked "F".
- 12) I must comment at this stage that there is an overlap in the markings on the Affidavit in Support and that in reply.
- 13) I shall, for further clarification of the issues in this matter refer to the following affidavit

Affidavit sworn to on the 28/12/2015.

- 1) That this Affidavit was in answer to the Affidavit of Mohamed Adam Timbo sworn to on the 6th October, 2015.
- 2) That Exhibit "D" attached to the Affidavit of Mohamed Adam Timbo purportedly signed by the 1st Defendant described the property to be mortgaged as 220 Wilkinson Road and not 143A Wilkinson Road.

- 3) That the agreement to loan dated 8th May, 2008 also attached to Exhibit "D" was addressed and signed by Conrad Coyanda-Parkes and not the 1st Defendant.
- 4) That the Memorandum of deposit of deeds was drawn up by the Plaintiff and purportedly executed between the 1st Defendant and the Plaintiff was neither signed nor dated by any of the parties. The schedule attached to the Memorandum aforesaid is also unsigned and undated.
- 5) That in light of the premises, an equitable mortgage was not executed between the Plaintiff and the 1st Defendant.

ISSUES IN DISPUTE

- 14) All the parties herein filed their respective issues in dispute. From those lists, I have considered the following issues to be in dispute.
 - a) Whether there is a valid equitable mortgage between the Plaintiff and the 1st Defendant; and
 - b) whether by the Deed of Gift dated 20th February, 2013 the 3rd Defendant herein became the fee simple owner of subject matter of this.

ADMISSIONS

1. It is agreed between the Plaintiff and the 3rd Defendant that the 2nd Defendant owed the Plaintiff the sum of Le 460,600,914.09 under a Deed of Mortgage dated 22nd August, 2014.

2. The 3rd Defendant admitted that he was aware that the 1st Defendant deposited his property as security for the loan given to the 2nd Defendant.

I will note here that of all these admissions were contained in the affidavit of Len Gordon-Harris Jnr, a Solicitor sworn to on the 8th January, 2015. To my mind, a Solicitor should not swear to issues of this nature on behalf of his client. I shall return to this matter later in the Judgment.

SUBMISSIONS OF COUNSEL

PLAINTIFF

- 15) Mr. Osman Jalloh, Counsel for the Plaintiff relied on three affidavits the contents of which I have listed earlier on in this Judgment. Mr. Jalloh in particular contended that there existed an equitable mortgage between the Plaintiff and the 1st Defendant-Exhibit "A" attached to the Affidavit of Lemuel Cole sworn to on the 9th November, 2014. By the Exhibit "B" attached to Lemuel Cole's Affidavit is a Deed of Gift by which the 1st Defendant's interest in the mortgaged property passed on to the 3rd Defendant. In sum, the case of the Plaintiff is that it granted banking facilities to the 2nd Defendant and the 1st Defendant put up his property at 143 Wilkinson Road, Freetown as collateral security. He submitted that by Exhibit "A" attached to the affidavit sworn to on the 19th January, 2016, the 1st Defendant was a shareholder of the 2nd Defendant thereby making him an integral part of the arrangements with the Plaintiff.

NOTICE OF INTENTION TO CROSS-EXAMINE FESTUS ROBIN-TAYLOR ON HIS AFFIDAVIT SWORN TO ON THE 24TH FEBRUARY, 2016

16) The Plaintiff filed a notice of intention to cross-examine the Deponent . This application was granted and the said Deponent was examined on the 8th December, 2015. In the cross-examination, the Deponent denied living at No. 143 Wilkinson Road, Freetown (the mortgaged property) and had never resided there. He further testified that he had known the 1st Defendant since “he became a human being” (his own words) and was fully aufait with his business affairs. The Deponent in response to a question about the whereabouts of the 1st Defendant during the period relevant to this transaction replied that the 1st Defendant was in the country during 2010-2011. He claimed lack of knowledge of the Deed of Gift allegedly made by the 1st Defendant to the 3rd Defendant though it was notarized and signed. Mr. Taylor finally insisted that the property at 143 Wilkinson Road belonged to the 1st Defendant.

17) In his subsequent submissions, Counsel for the Plaintiff referred to the equitable mortgaged deed and a letter from the 1st Defendant therein. He stated that based on the testimony of Festus Robin-Coker under cross-examination, the 1st Defendant was within the jurisdiction of Sierra Leone during the relevant period of 2010-2011. Mr. Jalloh noted that the conveyance in respect of 143 Wilkinson Road had been deposited with the bank.

18) Mr. Osman Jalloh finally at this stage referred the Court to Order 37 of the High Court Rules 2007 and to Section 25 (2) of the

Conveyance Act, 1881. He also cited the case of Union Trust Bank-v-Mohamed Bah delivered on the 15th January, 2016.

19) Mr. Leon Jenkins-Johnston in reply referred to the affidavit of Mr. Festus Robin-Taylor sworn to on the 28th December, 2014. He also referred to a second affidavit sworn to by the said Festus Robin-Taylor on the 24th February, 2015. Mr. Jenkins-Johnston said that by virtue of the said affidavit, the 1st Defendant was out of the jurisdiction of Sierra Leone during the relevant period. He referred to the affidavit of Festus Robin-Taylor sworn to on the 24th February, 2015 and exhibits "FR1" and "FR2"-medical reports of the 1st Defendant in the USA attached thereto.

Mr. Jenkins-Johnston argued the following points:-

- a) That the signature on the letter dated 17th December, 2010 which was part of the documents filed for the registration of the equitable mortgage herein was not that of the 1st Defendant.
- b) That the letter dated 17/12/2010 referred to property at 220 Wilkinson Road, Freetown and not 143 Wilkinson Road (the subject matter of this action). The Deed of Conveyance for the property which the Plaintiff is seeking to sell states the address as 43A Wilkinson Road, Freetown.
- c) That the agreement to loan contained in the document dated 8th May, 2008 was not addressed to the 1st Defendant and the signature thereon purporting to be that of the 1st Defendant was blurred. Interestingly, the agreement to loan was dated the 8th May, 2008 but the request for the loan was dated 17th December, 2010.

- d) As regards the Memorandum of Deposit, the Plaintiff stated the address of the mortgaged property as 220 Wilkinson Road, Freetown and the said Memorandum was signed by both parties. There had therefore not been any equitable mortgage as the foundation for same had not been laid. Counsel referred the Court to Atkins Encyclopedia on Forms Volume 28 at page 45 under the rubric "Description of Equitable Mortgages."
- e) That there was an action in the High Court between the 1st Defendant and the 3rd Defendant in which the former is seeking amongst other things cancellation of any document of ownership in respect of property at 143 Wilkinson Road, Freetown in the name of the latter.

20) In reply to the submissions of Counsel for the 1st Defendant, Counsel for the Plaintiff submitted that an equitable mortgage could be created notwithstanding that no document was signed. He referred to the Affidavit of Len Gordon-Harris Jr sworn to on the 8th of January, 2015 and submitted that the mortgaged property had been gifted to the 3rd Defendant who had acknowledged the indebtedness of the 2nd Defendant to the Plaintiff. Mr. Gordon-Harris, Counsel for the 3rd Defendant relied on his affidavit sworn to on the 8th January, 2015. The Affidavit was in essence supporting the position of the Plaintiff regarding the existence of the loan and the gifting of the mortgaged property to the 3rd Defendant. More importantly, that the 3rd Defendant was desirous of repaying the loan or alternatively that if the present application succeeded, he be

granted reasonable amount of time to repay the debt and find another accommodation for the occupants of the property.

21) Before proceeding further, I have a serious objection to a Solicitor deposing to the contents of the affidavit in support filed by Mr Gordon-Harris Jr. Paragraphs 3, 4, 5 and 7 thereof should not have been deposed to by Mr. Gordon-Harris. These are specific facts which only the 3rd Defendant could swear to. They cannot be based merely on information or beliefs but on facts. In paragraph 4 of his affidavit, Solicitor for the 3rd Defendant averred "that the 1st Defendant has now bestowed the said property on the 3rd Defendant by way of Deed of Gift dated 20th February, 2013." How could he swear to that when the validity of the said Deed of Gift was now the subject of litigation in the High Court? Indeed, Mr. Gordon-Harris in his list of issues in dispute posed the question whether the said Deed of Gift dated the 20th February, 2013 confirmed that the 3rd Defendant was now the fee simple owner of the property in question despite same being adjudicated in the High Court of Sierra Leone. It is my advice that Counsel must in future allow the relevant party to swear to matters of fact.

THE LAW AND ITS APPLICATION

22) There are two main but related issues for determination in this matter.

1) Was an equitable mortgage created?

23) An equitable mortgage is a contract that operates as a security.

Whether a particular transaction gives rise to an equitable mortgage must depend on the intention of the parties ascertained from what they have done in the then existing circumstances. If the parties intended to create an equitable mortgage, the proprietary interest in the debtor's property is conferred or undertaken in a binding manner to be conferred on the creditor. Where, however, the subject matter is precarious, this may be taken to be an indication that a security was not intended.

24) In the instant case, the Plaintiff is claiming that there had been an equitable mortgage by the legal owner, the 1st Defendant herein of his property at 143 Wilkinson Road, Freetown to the Plaintiff herein in consideration for a loan to the 2nd Defendant herein. If this is the case, then clearly an equitable mortgage would have been created. But the 1st Defendant is contending that he did not deposit his title deeds with the Plaintiff nor signed an equitable Mortgage Deed.

25) The Plaintiff supports its position with a series of documents which I shall now review.

1) Equitable Mortgage Deed dated 22nd August, 2014.

The Firm of Yada Williams & Associates filed an Originating Summons dated the 16th December, 2013 seeking leave to register an Equitable Mortgage between the Plaintiff as Lender/Mortgagee, BMC Coyanda-Parkes as Surety/Mortgagor dated 24th January, 2011 out of time. Leave was granted by Margai J on the 21st January, 2014 and was deemed to take effect on the 24th January, 2011. Contained in the said Equitable Mortgage Deed were several correspondences.

a) Letter from Conrad Coyanda-Parkes Snr, Partner, APA Group dated Friday, December, 17th 2010. The address given was 220 Wilkinson Road, Freetown and part of the letter reads thus “I am writing to instruct Rokel Commercial Bank to execute a legal mortgage against my property at 220 Wilkinson Road as collateral to secure overdraft facility in the sum of Le 250,000,000 from the Rokel Commercial Bank for use by our company, THE APA GROUP (APA)...” The letter is purportedly signed by the 1st Defendant. I shall return to this issue of signature later on.

b) Letter from Rokel Commercial Bank (Sierra Leone) Limited to President/CEO, Access Point Africa, 143A Wilkinson Road dated in 8th May, 2008. This letter granted an ordinary loan of Le 250,000,000.00 to the 2nd Defendant. As no evidence had been provided to the contrary, I will assume that it was a reply to the application for a loan made by the 1st Defendant on the 17th December, 2010. This is rather curious and has stirred my imagination. On the said letter, the Managing Director, minuted to another Official “please adopt”. What does this mean? Was he requesting the Official to adopt it as an application for a loan that was granted two years earlier? To my mind, this amounts to a reckless lending procedure.

c) The Memorandum of Deposit of Deeds

This document merely listed in its schedule the documents deposited with the bank. It was a requirement that the “schedule must be signed or witnessed.” Counsel for the Plaintiff argued that there was no requirement that the Memorandum must be signed. I

agree with him as a general principle. Where, however, it is expressly required, failure to sign and witness it would not be view favourably by any Court.

- d) Resolutions of the Board of APA Group at its meeting held on the 17th December, 2010.

Here again the property to the mortgaged was property of the 1st Defendant situate at 220 Wilkinson Road. I observe here that the signature of Conrad Coyanda-Parkes (the 1st Defendant) is different from the signature on the letter dated 17th December, 2010 for the execution of mortgage as collateral for overdraft facilities.

- e) The Deed of Gift dated 20th February, 2013

As issues surrounding this deed are subject of litigation in the Land and Property Division, I will not comment on it but would only observe that the signature on it purporting to be the signature of the 1st Defendant is again different from that on the letter dated 17th December, 2010 and the Resolution of even date.

CONCLUSION

26) Without delving into the other issues raised which I consider are subordinate to the issue of whether there was an equitable mortgage, I hold that the 1st Defendant did not create any equitable mortgage in favour of the Plaintiff in respect of his property at 143 Wilkinson Road. All the documents purportedly signed by the 1st Defendant were highly suspicious and different signatures were used without any evidence as to why this was so. The description of the property is

also inconsistent which depicts total incompetence on the part of the Plaintiff in taking security of properties mortgaged in consideration of loans.

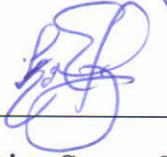
27). I note however that the 2nd Defendant has not contested the existence of the loan and its quantum. Indeed, the 3rd Defendant has admitted that the loan was contracted for the use of the 2nd Defendant. On this point, I hold the 2nd Defendant liable to the Plaintiff.

28) As regards the 3rd Defendant, who I hold responsible for creating this messy situation, I am inclined, particularly taking the contents of Mr. Len Gordon-Harris Jr into consideration, to hold him liable as a Guarantor for the loan to the Plaintiff. However, to do that, I need to pierce the veil of incorporation of the APA GROUP, the 2nd Defendant. I shall accordingly give orders to that effect.

DECISION

1. The second and third Defendants are liable to the Plaintiff for the sum of Le 469, 600, 941 .09 interest thereon at the rate of 5 percent per annum from the 1st June, 2014 to date of Judgment.
2. That the 3rd Defendant herein is ordered to produce to this Court the statement of accounts of the 2nd Defendant in respect of this loan, the accounts of the 2nd Defendant during the relevant period and list of signatories to the said loan accounts within 7 days of the date of this Order.
3. That the Plaintiff do pay costs of Le 10,000,000.00 to the first Defendant.

4. That the 2nd and 3rd Defendants do pay costs to the Plaintiff to be taxed if not agreed.
5. Matter adjourned to Tuesday, 25th October, 2016 at 1.00 pm for the 3rd Defendant to produce the required documents.



Hon. Mr. Justice Sengu M. Koroma JA

JUDGMENT