



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

Case No: MISC.APP 023/15

**THE MATTER BETWEEN:**

SIERRA LEONE COMMERCIAL BANK LTD

-PLAINTIFF

AND

SAHID KOROMA

T/A MARIKA ENTERPRISE

-DEFENDANT

LAMBERT & PARTNERS

-COUNSEL FOR THE PLAINTIFF

JENKINS-JOHNSTON & CO

-COUNSEL FOR THE DEFENDANT

**BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA JA**

**RULING DELIVERED ON THE 7TH SEPTEMBER, 2016**

1) This is an Application by way of Notice of Motion dated the 23<sup>rd</sup> August, 2016 for the following Orders pursuant to Order 43 Rule 8 subrule 1 of the High Court Rules, 2007.

1. That leave be granted by this Honourable Court for this Notice of Motion to be heard through 2 clear days notice has not been given in accordance with the High Court Rules, 2007.
2. That an interim stay of execution of the Judgment of the Hon. Justice Sengu Koroma JA dated 8<sup>th</sup> July, 2016 be granted pending the hearing and determination of this Application.
3. That Order 3 of the Judgment of the Hon. Justice Sengu Koroma JA dated 8<sup>th</sup> July, 2016 which reads “that the said sum of Le 5,528,814,755/22 be paid in six (6) monthly instalments commencing on the 1<sup>st</sup> August, 2016 be varied so that the Defendant/Applicant can commence payment of the monthly instalments on the 1<sup>st</sup> December, 2016.”
4. That in the alternative, that this Honourable Court sets the reserve price at which the mortgaged property situate, lying and being at 18 Garrison Street, Freetown in the Western Area of the Republic of Sierra Leone should be foreclosed based on an open market valuation report dated October, 2015 prepared by Messrs Eben Elliot Associates.
5. Any further and/Order or others as this Honourable Court may deem just.
6. That the costs of this Application be costs in the cause.

### **BACKGROUND**

- 2) By an Originating Summons dated the 13<sup>th</sup> November, 2015, the Plaintiff (herein referred to as the “RESPONDENT” instituted proceedings against the Defendant (herein referred to the “APPLICANT” for the recovery of the sum of Le 5,528,814,785/22 with interest at the rate of 25 percent.
- 3) An appearance was entered on behalf of the Applicant on the 25<sup>th</sup> November, 2016.
- 4) In accordance with the Commercial and Admiralty Court Rules, 2010, the matter proceeded to the Pre-trial settlement stage (PTSC). The PTSC failed and the Originating Summons was heard on the 24<sup>th</sup> May, 2016. Judgment was delivered in favour of the Respondent on the 8<sup>th</sup> July, 2016.
- 5) On the 2<sup>nd</sup> day of August, 2016, the Applicant filed an Application for an interim stay of execution of the Judgment of this Court dated 8<sup>th</sup> July, 2016 and a variation of same. This Notice of Motion was withdrawn on the 30<sup>th</sup> August, 2016 in favour of the present Application.

### **THE PRESENT APPLICATION**

- 6) The present Application was moved by Leon Jenkins-Johnston on the 30<sup>th</sup> August, 2016.

### **AFFIDAVIT IN SUPPORT**

- 7) The Application was supported by the Affidavit of Sahid Koroma sworn to on the 22<sup>nd</sup> August, 2016.
- 8) In the said Affidavit, the Deponent averred as follows amongst others:
  1. That the Applicant was unable to obey the Court Order dated 8<sup>th</sup> July, 2016 because the enterprise was facing difficulties. The oil mill



which produced oil out of palm kernel had broken down and that the soap it produced for the local market did not sell well in the rainy season.

2. That by a contract dated the 15<sup>th</sup> August, 2016, the Applicant had entered into an agreement with Central Gottesman Europe GMBH for the export of 6,400 metric tons of palm kernel shells for which he expected payment by the end of November, 2016. This was exhibited and marked as “B1-15”.
3. That the 1<sup>st</sup> Instalment of the said shipment was ready and the Applicant expected 80 percent payment on presentation of the Bill of Lading and other documents evidencing shipment.
4. That in the alternative, this Court sets a reserve price at which the mortgaged property should be foreclosed based on a valuation report which was exhibited and marked “C 1-8”.
5. That irreparable damage and loss would be caused the Applicant if the stay was not granted or reserve price not fixed.

#### **AFFIDAVIT IN OPPOSITION**

- 9) The Respondent opposed the Application in an Affidavit sworn to by Editayo Pabs-Garnon on the 30<sup>th</sup> day of August, 2016.
- 10) In the said Affidavit, Mr. Pabs-Garnon averred as follows, amongst others:
  1. That the Application was frivolous and vexatious and an abuse of process meant solely to waste the Court’s time.
  2. That the Application had not shown special circumstances meriting a stay.

3. That the Applicant was merely repeating the same set of circumstances or excuses that have left him owing the debt since 2009. In support of this averment, the Respondent exhibited “EPG 1”, “EPG 2” and “EPG 3”.
4. That the Applicant had failed to comply with Order 3 of the Court’s Judgment.
5. That his clerk was almost physically assaulted when he attempted to serve and paste the Judgment on the affected premises.
6. That this Court grants leave to the Plaintiff to issue a Writ of Possession in respect of the mortgaged property.

#### **AFFIDAVIT IN REPLY**

- 11) i) Mr. Sahid Koroma in his Affidavit in Reply sworn to on the 1<sup>st</sup> September 2016 denied the averments in paragraph 7-9 of the Affidavit in Opposition.
- ii) That the Respondent had failed to comment or respond to a tabled offer to buy the mortgaged property from a respected Law Firm.

#### **SUBMISSIONS OF COUNSEL**

- 12) Mr. Leon Jenkins-Johnston, Counsel, for the Applicant relied on the entirety of the affidavit in support and also on Order 43 Rule 8 (1) of the High Court Rules, 2007. He referred to Order 45 Rule 6 of the English Annual Practice, 1999 which was in the same terms as Order 43 Rule 8(1) of the High Court Rules, 2007.



- 13) Mr. Jenkins-Johnston cited the case of V-V-A & Co. (1900) 1 ch. 484 where it was held that Order 43 would apply where there was a positive undertaking to do the act within the specified time. In his view, this Order gave the Court wide latitude of discretion.
- 14) Counsel further submitted that though the alternative to Order 3, it was a remarkable progress in the light of what was been prayed for in Order 3. Invoking Order 43 would amplify and bring fairness in the Judgment of this Court dated 8<sup>th</sup> July, 2016.
- 15) Mr. Jenkins-Johnston referred the Court to the letter from Tanner Legal Advisory on behalf of their clients offering to buy the Mortgaged property. He prayed that this Court should not allow the Mortgaged property to be sold at an undervalue.
- 16) Counsel finally referred to the case of VERNON – V BETTEL (1762) 28 ER 838.
- 17) Mr. Editayo Pabs-Garnon Counsel for the Respondent relied on his affidavit in Opposition sworn to on the 30<sup>th</sup> August, 2016. He submitted that contrary to the allegation of Counsel for the Applicant, the Judgment of this Court dated the 8<sup>th</sup> July, 2016 was clear, fair and all issues were dealt with. What Counsel for the Applicant was canvassing was almost in the nature of an appeal.
- 18) Counsel for the Respondent submitted that the fresh set of circumstances the Applicant was referring to were really not new. He referred this Court to Exhibits EPG 2 and EPG 3 attached to his Affidavit in Opposition. The Applicant could not therefore avail himself of the advantages of Order 43 of the HCR, 2007.

- 19) Counsel further submitted that his colleague could not rely on Exhibit "B" of the Affidavit of Sahid Koroma. This was entered into on the 18<sup>th</sup> August, 2016 after the Judgment of this Court. These information had been used to extend the time of repayment by the Applicant as far back as 2009.
- 20) Finally, on the issue of the Reserved Price, Counsel for the Respondent referred to Exhibit "EPG 4" attached to his Affidavit in Opposition. He argued that property value fluctuates and considering the current economic landscape, it would be difficult to sell the mortgaged property at the said "Reserved Price".
- 21) In his reply, Counsel for Applicant referred to the implication of the Order of this Court dated 8<sup>th</sup> July, 2016. If the Mortgaged Property is sold below the value of the loan, the Applicant would have to pay the balance. It would therefore be fair for the property to be sold at a Reserved Price or the time of repayment be extended to 1<sup>st</sup> December, 2016.
- 22) In conclusion, Counsel for the Applicant submitted that the Respondent had not in the entirety of his Affidavit opposed the 3<sup>rd</sup> and 4<sup>th</sup> Orders prayed for. They had also not opposed paragraphs 5-14 of the Affidavit in Support.

### **ISSUES FOR DETERMINATION**

23) The main issues for determination in this Application are as follows:-

1. Whether this Court can vary its own Judgment in the manner canvassed by the Applicant.
2. Do the circumstances of this case warrant such variation.

### **THE LAW**



- 24) Counsel for the Applicant has submitted that he was making this Application pursuant to Order 43 Rule 8 (1) of the HCR, 2007. Counsel for the Respondent on the other hand argued that the Applicant could not avail himself of that provision.

Order 43 Rule 8 sub-Rule 1 provides as follows:

“Where any Judgment or order directs the payment of money, the Court may, for sufficient reason, order that the amount be paid by instalments with interest; and any other order may be made at the time afterwards by the same Judge or any other Judge and may be rescinded upon specific cause shown at any time.” (Emphasis mine)

A similar provision could be found in Order 45 Rule 6 sub-Rule 1.

“Notwithstanding that a Judgment or Order requiring a person to do an act specifies a time within which the act is to be done, the Court shall without prejudice to Order 3 Rule 5, have power to make an Order requiring the act to be done within another time, being such time after service of that Order, or such other time, as may be specified therein”.

- 25) This provision is explained in paragraph 45/6/1 of the White Book, 1999 as stating that where a Judgment or Order under which an act is required to be done may, by supplemental Order of the Court made subsequently, fix another time for the required act to be done. This practice extends to an Order containing a positive undertaking to do a certain act within a specified time (D-V-A & Co (1900) 1 ch. B 12-also cited by Counsel for the Applicant.



- 26) It is my view that what these provisions aim to establish are that where special circumstances have arisen after Judgment but before execution that suggest that a Defendant would be in a position to liquidate its indebtedness, the Court may extend the time repayment was to commence. The only caveat here is that the Court needed to satisfy itself that the Defendant had it in its power to pay the sum due within that or some other time. Where the Defendant was literally hoping for "manna from heaven," it would not be in the interest of fairness to grant the Application.
- 27) This takes me to the second issue which is the application of the above principles to the facts of this case.
- 28) The Applicant argued that there had been developments since the Judgment that would warrant this Court to either extend the date of payment to 1<sup>st</sup> December, 2016 or fix a reserved price. For the first part, the Applicant relied on a contract with an Austria Company dated 18<sup>th</sup> August, 2016. In respect of the second, a valuation Report prepared at the instance of the Respondent dated 8<sup>th</sup> October, 2015. Counsel also referred to a letter from Tanner Legal Advisory dated 29<sup>th</sup> August, 2016 on behalf of their clients manifesting interest in the mortgaged property.
- 29) I have studied the exhibits referred to by the Applicant and hold that the Agreement dated 18<sup>th</sup> August, 2016 do not carry any weight. As pointed out by Counsel for the Respondent by exhibits "EPG 1", "EPG 2" and "EPG 3" attached to the Affidavit in Opposition, this was not a new position. I am not satisfied that it would take the Applicant anywhere close to repaying the Judgment debt. The fixing of a reserved price would not be the appropriate step at this stage and it would fundamentally alter the

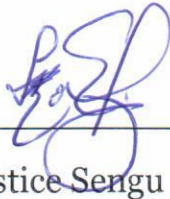
reasoning behind the Judgment dated 8<sup>th</sup> July, 2016 especially when it was never canvassed nor used by the Applicant in the entire course of the matter.

- 30) I am however persuaded by the argument of Counsel for the Applicant regarding paragraph 5 of the Judgment dated 8<sup>th</sup> July, 2016 that in the event that the sale of the mortgaged property was not sufficient to liquidate the indebtedness, the Applicant would be personally liable for the balance remaining due and owing. To my mind, it would be fair, just and equitable that since there was an offer to buy the mortgaged property, the Applicant be given the opportunity to try one last time to repay the loan. This is what has been referred to as the equitable right to redeem which only arises when the contractual date of redemption had passed. In other words, the equitable right to redeem was distinguishable from the equity of redemption.
- 31) I must state that though I am inclined to, in part, grant Order 3 prayed for, it would be on such terms as justice to the Respondent would require.
- 32) For the reasons given above, I hereby Order follows:-
1. That Order 3 of the Judgment of this Court be varied to read “that the said sum of Le 5,528,814,755/55 with interest thereon at the rate of 5 percent per annum from 5<sup>th</sup> November, 2015 to date of Judgment be paid in full on or before 31<sup>st</sup> October, 2016.
  2. That Order 4 of the Judgment of this Court dated the 8<sup>th</sup> July, 2016 be deleted there from.
  3. That Order 5 of the Judgment of the of this Court dated 8<sup>th</sup> July, 2016 be varied to read “in the event of default in repaying the sum of



Le 5,528,814,785/22 and interest thereon at the rate of 5 percent per annum from the 5<sup>th</sup> November, 2015 to date of Judgment on or before the 31<sup>st</sup> October, 2016, the Defendant/Applicant herein yields up possession of the mortgaged property to the Plaintiff and the Mortgage Deeds dated 24<sup>th</sup> May, 2004, 28<sup>th</sup> December, 2004 and 7<sup>th</sup> November, 2016 respectively be foreclosed for sale.

4. That paragraph 4 of the Judgment dated 8<sup>th</sup> July, 2016 be deleted there from.
5. That all other Orders contained in the Judgment of this Court dated 8<sup>th</sup> July, 2016, shall remain in force.
6. Costs of Le 1, 500, 00/00 to be borne by the Applicant to the Respondent.



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Hon. Justice Sengu Koroma JA.