



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

CASE NO: MISC.APP 153/15

ROKEL COMMERCIAL BANK (S/L) LTD

-PLAINTIFFS

AND

AHMED KHADI & ANOR

-DEFENDANTS

REPRESENTATION

YADA WILLIAMS & ASSOCIATES

-COUNSEL FOR THE PLAINTIFF

C. F. EDWARDS ESQ.

-COUNSEL FOR THE 1ST DEFENDANT

R. NYLANDER ESQ.

-COUNSEL FOR THE 2ND DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA J.A
JUDGMENT DELIVERED ON THE 1ST DECEMBER, 2016

1. The Plaintiff applied to this Court by Originating Summons dated the 31st day of March, 2015 for the following orders:
 - a) That the Mortgagor/Trustee do immediately pay all monies due and owing the Mortgagee/Lender/Plaintiff under the respective covenants in the Mortgage Deed dated the 28th August, 2009 duly registered as No.152/2009 in volume 81 at page 63 of the Record Book of Mortgages kept in the office of the Administrator and Registrar-General in Freetown respectively for the payment of the sum of Le 1,836,872,847.83; Le 1,317,380,474.00 being principal debt and the remainder being interest accrued thereon which said interest continues to accrue at the rate of 18 percent per annum from the 29th April, 2011 and remains payable until complete discharge of the sum due and owing the Plaintiff.
 - b) That in the alternative, an Order be granted for the Mortgage to be enforced by sale of the mortgaged property situate at off Barracks Road, Murray Town, Freetown as shown on Survey plans L.S. 1937/87 the same if insufficient to liquidate the sum due and owing the Plaintiff that the Defendants personally pay the outstanding sum to the Plaintiff.
 - c) That in the event that Order 2 be granted delivery up of possession to the Plaintiff of the mortgaged properties.
 - d) Any further Order (s) relief (s) that this Honourable Court may deem fit and just.
 - e) That the costs of and incidental to the Application herein be provided for, the same to be borne by the Defendants.
2. The application was supported by the Affidavit of Lemuel Cole sworn to on the 31st March, 2016 together with the exhibits attached thereto.
3. The relevant parts of this Affidavit for our present purposes were paragraphs 3 dealing with the 2nd Defendant putting up his property hereinbefore described as collateral for the said loan and executed a legal mortgage in favour of the Plaintiff. This was exhibited and marked "B"; and paragraph 4 dealing with the terms of the Mortgage Deed.

4. The deponent in paragraph 6 also swore that by a letter dated 8th February, 2013, the Plaintiff restructured the banking facility of the 1st Defendant at his request so that the sum due and owing the Plaintiff by the Defendant would be repaid within a period of 36 months. A copy of the said letter was exhibited as "C".
5. That by another letter dated 2nd August, 2013, the Plaintiff made a proposal to the 1st Defendant based on the latter's offer to liquidate his indebtedness by instalment. The first payment by instalment was expected by end of August, 2013. The said letter was exhibited and marked "D". This was not honored.
6. The deponent finally swore that the 2nd Defendant was in possession of the mortgaged property and the 1st Defendant was in default of the sum of Le 1,836,872,847.83.00, the same comprising of principal and interest. The 1st Defendant's statement of Accounts was exhibited as "E".
7. On the 16th April, 2015, C. F. Edwards Esq. entered appearance for the 1st Defendant herein and on the same date, S. K. Koroma Esq. entered appearance for the 2nd Defendant herein.
8. On the 18th June, 2015, C. F. Edwards Esq. acting for the 1st Defendant swore to an Affidavit expressing the willingness of his client to settle the indebtedness. He referred to a letter to the Plaintiff's solicitors dated 20th April, 2015 proposing terms of repayment but was rejected by the Plaintiff by letter dated 15th June, 2015.
9. The matter proceeded to the Pre-trial settlement conference at which several promises made by the 1st Defendant to liquidate his indebtedness were not honoured.
10. On the 16th September 2015, on the application of the Plaintiff with no objection from the Defendants, this Court made the following Orders:
 1. That the 1st Defendant pays the sum of Le 400m on or before Monday, 30th November, 2015.
 2. That the 2nd Defendant pays the sum of Le 600m on or before the 30th November, 2015.
11. On the 30th November, 2015, Counsel for the Plaintiff, Mr. Osman Jalloh reported to the Court that the Defendant's had not complied with the Orders of the 16th September 2015.

Mr. Jalloh however informed the Court that the 1st Defendant and others had sold an estate for \$ 1.3m. Based on this information, this Court on the application of Mr. Osman Jalloh, again without any objection by the Defendants on the said date made certain Orders to the effect that any sale of property lying situate and being at 14 A, 14 B and 14 C Highbroad street, Murray Town Freetown comprising of the Estate of Alhaji Mohamed Ahmed recently sold for the sum of USD 1, 300,000/00 by the Administrator-General due Ahmed Khadi T/A Amtech Agencies be paid into the judicial sub-treasury pending the hearing and determination of the matter. This Order was to also apply to all payments received or to be received by the Attorney of Mr. Ahmed Khadi.

12. The above Orders were made based on the special circumstances of the case as it had become clear that the 1st Defendant was not making any effort to liquidate its indebtedness to the Plaintiff as the loan was secured by the property of the 2nd Defendant and not his own.
13. On the application of Counsel for the Plaintiff on the 8th December, 2015, which was not opposed by Counsel for the Defendants, the Court ordered that in addition to its Orders dated 30th November, 2015, all payment accruing from the sale of properties lying situate and being at 32 Cline Street, Freetown, 3 Fisher Street, Freetown and 4 East Brook Street Freetown due the 1st Defendant be paid into the Judicial Sub-treasury pending the determination of this matter. The Court however refused the application made by the 1st Defendant for the substitution of the mortgaged property.
14. On the 26th January, 2016, this Court ordered the Defendants to comply with its Orders dated 16th September 2015 and if no repayment was made before the next adjourned date of Friday 26th February, 2016 the file would be withdrawn for Judgment as the 1st Defendant was not denying liability. The Defendants did not comply with the said Order. The file was finally withdrawn for Judgment on the 1st March, 2016.

FINDINGS

5. a) That the 1st Defendant was not denying liability to the Plaintiff.

- b) That the 2nd Defendant was not denying that he gave his property as collateral for a loan from the Plaintiff in favour of the 1st Defendant but that it was only in respect of the initial facility of Le 300m and not other monies given to the 1st Defendant without his consent.

CONCLUSION

16. While this Court had no doubt about the liability of the 1st Defendant, there were legal implications involved in the Plaintiff granting further facilities to the Borrower without the consent of the mortgagor. This was important in the light of Clauses 11 and 12 of the Mortgage Deed dated 28th August, 2009.
17. Clause 11.1 provides that "As between the customer on the one hand and the Mortgagor and the mortgaged premises on the other hand, the customer shall be primarily liable for the payment of the money hereby secured but this provision shall not affect the Bank or in anyway preclude the Bank from enforcing or having recourse to all or any remedies or means of recovering payment....."
18. Clause 11.2 "Although as between the customer and the Mortgagor the Mortgagor is only a surety for the customer yet as between the Mortgagor and the Bank the Mortgagor shall be deemed to be the Principal Debtor for monies hereby secured accordingly...(Emphasis mine)
19. By these clauses, the mortgagor was placed in a special relationship with the Bank which made it incumbent on the Bank to inform and seek the consent of the Mortgagor to any additional sums given to the Borrower. It could be argued by the Plaintiff that Clause 1 of the said Mortgage Deed covered all present and future moneys advanced to the 1st Defendant; I hold that this does not absolve the Plaintiff of the responsibility of keeping the 2nd Defendant informed about any increase in the 1st Defendant's indebtedness. If this were not so, the wheels of commerce would be clogged by Banks and Borrowers increasing the burdens on Guarantors without their knowledge and consent. The law must be an instrument of progress. It would not serve any economy well for Guarantors

- of loans to be over burdened with unexpected liabilities which would create the impression that as long as there was a security, the banks could proceed to make advances to the limit of the value of that security.
20. In the case of Union Trust Bank-v-Mariama Deen Swaray and Mballu Bangura delivered in January 2016, the guarantee was upheld because the Plaintiff bank ensured that the Guarantor consented to each and every further advance provided to the Borrower. This has not been done in this case. Equity will not allow a strict application of the law that would lead to injustice. The Guarantor should not be held liable for debts he had no knowledge of.
21. It should be further noted that Clause 11 of the Mortgage Deed created two different types of relationships, to wit:
- a) 11.1-The relationship between the Plaintiff and the 1st Defendant
 - b) 11.2-The relationship between the Bank & the 2nd Defendant.
22. There was therefore a tripartite agreement in which all the parties were entitled to information on any action on the part of the others regarding the loan. It could be argued that the 1st Defendant also had an obligation to inform the 2nd Defendant of any change in the loan status of the 1st Defendant. But by Clause 11.2, the Plaintiff also had that responsibility which was greater than that of the 1st Defendant.
23. The giving of notice is an equitable obligation on the part of the Bank. Banks must not be given uncontrolled rights to extend credit especially where such credit was covered by a mortgage. The Mortgagor needed to be informed at all times about the level of his exposure.
24. It is my view that the public interest will be best served by creating a system wherein Banks protect the interests of Guarantors who were not shareholders or partners in the business of the Borrower.

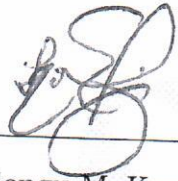
DECISION

1. The 1st Defendant is liable to the Plaintiff in the sum of the Le 1,836,872,847.83 being principal debt and interest thereon.

However before giving final Orders herein,

I hereby Order as follows:-

- a) That the Plaintiff provides the Court with the complete Statement of Accounts of the 1st Defendant clearly showing the facility made available to him at the time of the execution of the Mortgage Deed and interest thereon.
- b) Evidence of notice to the 2nd Defendant of all subsequent advances made to the 1st Defendant.
- c) Total sum advanced to the 1st Defendant after the execution of the Deed of Mortgage.
- d) Matter adjourned to the 15th December, 2016.



Hon. Mr. Justice Sengu M. Koroma JA