MISC APP 028/19 2019 G. NO.4

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

BETWEEN:

GUARANTY TRUST BANK (SL) LIMITED -PLAINTIFF

AND

WHIKKER TRADING CO. LTD & ANOTHER -DEFENDANTS

JUDGMENT

The Plaintiff approached this court by Originating Summons dated 10th October 2019 praying for the following;

1. That the Defendants jointly and or severally do immediately pay the outstanding sum of Le 2,524,884.72 being the outstanding debt and the interest being accrued thereon which said interest continues to accrue and remains payable to the plaintiff as part of a Le 4,100,000,000 term loan (restructured facility) granted by way of an offer letter dated 18th May 2018 which was as a result of restructure of an original overdraft facility which said facility was secured under a deed of mortgage dated 27th December 2017 duly registered as No. 211/2017 in volume 97 at page 114 of the Record books of Mortgages kept in the office of the Administrator and Registrar-General in Freetown and a guarantee and indemnity dated the 18th day of May 2018 due and owing to the Plaintiff.
2. That further and or in the alternative, an order be granted in favour of the Plaintiff for the mortgage to be foreclosed and enforced by sale of the mortgaged property which is a 7 storey commercial residential apartments building situate, lying and being on a 0.576 acre of land at Regent Road, Hill Station, Freetown as shown to survey plan numbered

LS 3590/14 and dated 24th June 2014 by way of private treaty so that the Plaintiff Bank can realise the outstanding sum of Le 2,524,884,149.722 which is due and owing them.

3. That in the event order 2 is granted, delivery up of possession to the Plaintiff of the Mortgaged property which is a 7 storey commercial residential apartments building situate, lying and being on a 0.576 acre of land at Regent Road, Hill Station, Freetown as shown to survey plan numbered LS 3590/14 and dated 24th June 2014.
4. Any further order(s) that this Honourable court may deem fit and just.
5. That the costs of this application be borne by the defendants

The Summons is supported by the affidavit of Maria Munje Sowa a Relationship Officer working with the Plaintiff which said affidavit contained 10 exhibits deposed to on the same date as the application to which it is attached. The Defendant opposed the application and filed an affidavit in opposition deposed to by Hilal Toufic Kange on the 25th February 2020. This affidavit contained 2 exhibits. Subsequent to same, the Plaintiff filed and affidavit in Reply deposed to by Anrite Columbus Thompson on the 10th of March 2020 containing 2 exhibits and the supplemental affidavit in reply deposed to on the 16th March 2020 containing 1 exhibit.

The facts before this court are that by letter dated 19th May 2017, the Plaintiff offered an overdraft facility to the 1st Defendant for the amount of Le 2,000,000,000 for a term of 12 months. The purpose of the facility was to augment the working capital of the defendant. The letter offering the said facility is before this court as Exhibit MMS1. An overdraft facility agreement dated 24th May 2017 is before this court and marked Exhibit MMS1b but I note that same is unsigned. By letter dated 27th July 2017 which is before this court as Exhibit MMS2a, further facilities were granted to the 1st defendant. The first was considered to be the existing overdraft facility as aforesaid and the second was a further term loan facility in the amount of Le 3,000,000,000 for a period of 24 months to finance the completion of a seven storey commercial-residential apartment building located at Hill Station in Freetown. There is also before this court a Term Loan Agreement dated 27th July 2017 for the amount of Le 3 Billion which this court notes is also unsigned. With respect to both facilities, interest was agreed to be at the rate of 18% per annum. According to Exhibit MMS2a, both facilities were to be secured by a tripartite legal mortgage on 7 storey commercial residential apartments building situated on a 0.5762 acre of land at Regent Road, Hill Station, Freetown belonging to Mr. Helal Toufic Kange with an open market value of Le

52.8 billion and a forced sale value of Le 37 billion. A copy of a tripartite legal Mortgage dated 27th December 2017 is before this court as Exhibit MMS3. On the 16th April 2018, the 1st Defendant wrote to the Plaintiff requesting that the facilities be restructured to the effect that they both be considered as one term loan facility of Le 4.1 billion. On the 18th May 2018, the Plaintiff in I would presume in response to the 1st Defendant's aforementioned request, offered the 1st Defendant a restructured term load Banking facility in the sum of Le 4.1 Billion. The document in this regard is before this court as Exhibit MMS5. This facility was for a period of 30 months. On the 18th May 2018 also, the 2nd Defendant executed a Guarantee and Indemnity for the 1st Defendant to the Plaintiff but this court cannot verify the amount for which the guarantee was executed for as same is not contained in the said document and it seems that the first page of the document for whatever reason not exhibited. This document is before this court and marked Exhibit MMS6. On the 1st August 2019, solicitors for the Plaintiff wrote to the 1st Defendant citing inter alia that the 1st Defendant had defaulted in servicing its Le 4.1 billion loan facility. They highlighted that the entire outstanding amount is Le 2,702,947,922.07 and demanded immediate payment of same. On the 9th August 2019, the 1st defendant sent a reply to the Plaintiff in which the debt was not disputed but rather requested time to service the loan citing the "sluggish state of the economy" as the reason for the default. These letters are before this court as Exhibits MMS 7 and MMS 8 respectively. Exhibit MMS 9 is a letter from the plaintiff to its solicitors confirming that the 1st defendant had indeed continued making payments subsequent to its plea for an extension of time to comply with the terms of the agreement and that the debt then stood at Le 2,524,884,149.72. These facts as stated above were not disputed by the defendants in the affidavit in opposition. Nonetheless, the deponent brought to the attention of the court the fact that since the demand by the solicitors for the Plaintiff, they have sought to make good on their default and have since October 2019 been paying the sum of Le 150 million monthly without fail. The affidavit in reply and the supplemental affidavit in reply filed by the Plaintiff both go to showing the comprehensive status of the 1st Defendant's current indebtedness to the plaintiff. Same currently stands in the amount Le 1,792,986,995.19.

In my effort to untangle the web that lay before this court, I will summarise as follows;

1. The Plaintiff granted the 1st Defendant 2 facilities totalling 5 Billion Leones.

2. The first facility of Le 2 billion was secured by a tripartite legal mortgage while with the second facility, it was agreed that the previously executed tripartite legal mortgage was to serve as security for same.
3. The 1st defendant requested a consolidation of both facilities which by then stood at the sum of Le 4.1 billion and his request was acquiesced to by the plaintiff and a new agreement between the parties was born.
4. According to the new agreement, the 1st defendant was to service its indebtedness in 30 equal monthly instalments.
5. The 1st defendant defaulted in servicing the said monthly instalment but communicated the reason for the default with a promise to make good on same.
6. Since the said promise, the 1st defendant has been making efforts to service the debt which now stands at the amount of Le 1,792,986,995.19.
7. Regardless of the above the Plaintiff seeks inter alia to foreclose on the mortgage should the debt not be paid.

Regardless of the fact that a number of key issues remain uncontentious, this court must nonetheless address certain facts before it so it becomes clear to the parties, the reasons for the court's conclusion on the subject-matter.

Firstly, there is the question of security of the facilities. It is without doubt that the 1st defendant was granted 2 facilities. The first was for the sum of Le 2 billion and the second was for the sum of Le 3 billion. There is no doubt that the first facility was secured by a tripartite legal mortgage. Same was duly executed and registered as No. 211/2017 at page 114 in volume 97 of the record book of mortgages kept in the office of the Administrator and Registrar-General in Freetown. The question this court faces is whether the second facility which was a loan for the sum of Le 3 billion was also secured by the aforesaid legal mortgage simply because there was a letter of offer stating that the facility would be thus secured. It is the Statute of Frauds 1677 that makes it a requirement that all interest in land can only be transferred by deed and such deeds, by the Registration of Instruments Act Cap 256 of the laws of Sierra Leone ought to be registered. It is in compliance with the provisions of these laws that the parties drew up, executed and registered the tripartite legal mortgage Exhibit MMS3. Indeed there is no law preventing the parties from agreeing to amend the terms of their transaction and amending same accordingly. However for the purpose of these proceedings, this court is compelled to rely on a letters dated 27th July 2017 and 18th May 2018 respectively as communicating that the new debt was to be secured by a

previously executed tripartite legal mortgage exhibited as Exhibit MMS3 the contents of which said document expressly states that the security was for an overdraft facility of Le 2 Billion Leones. I see no basis in law for this position and none was proffered by counsel for the parties. The second facility ought to have by the same token been secured by a legal mortgage of its own or where same is not feasible, the parties ought to have drawn up, executed and registered a supplemental deed that would have captured the current situation. However they did not. Maybe it was them being lazy or maybe they were trying to avoid the costs involved in going through the process. Whatever the reason, the state was clearly deprived of the much needed revenue yet it is to the state that the parties have turned to remedy their differences. I therefore do not have before me any document with authority enough to secure the loan of Le 3 billion and would confidently hold that that aspect of the facility is not secured by deed and therefore cannot be enforced under the Conveyancing and Law of Property Act 1881.

Secondly and regardless of the above, it is clear from the evidence before this court that the current status of the debt owed by the 1st Defendant to the plaintiff now stands at Le 1,792,986,995.19 for which the Plaintiff has now sued. In view of the fact that this sum is less than the Le 2 billion obtained by the 1st Defendant and which is secured, it is but fair and equitable that this court considers that all sums paid thus far were in satisfaction of the unsecured portions of the facility and I will therefore hold that the sum remaining and uncontested by the defendants continue to be that portion of the facility secured by the tripartite legal mortgage exhibited as Exhibit MMS3 herein.

Thirdly, this court is in law bound to interpret and enforce the agreement between the parties as they have agreed to be bound. It is not the court's business to make fresh agreements for the parties. This is the position of the law in the case of Jacobs v Batavia and General Plantations Trust Limited (1924) 1Ch 287. As long as the parties have elected to enshrine their contract in a written document, the courts have always held that as a general rule, they cannot vary or contradict the terms of the contract. The parties have agreed that the 1st defendant's debt be restructured to be the sum of Le 4.1 billion. This is without question. They also agreed that the 1st Defendant was to be given 30 months to make equal instalment payments. This being the case, it means that the 1st Defendant has until the 17th of October 2020 to discharge the burden in full had it been making regular payments as agreed. The 1st Defendant clearly has reneged on this. Even though the defendant has been

making payments subsequent to his default, the debt now stands at the sum Le 1,792,986,995.19 By the law, the hands of this court are tied and I must give judgment for the Plaintiff in this amount which I have no option but to grant and will so order.

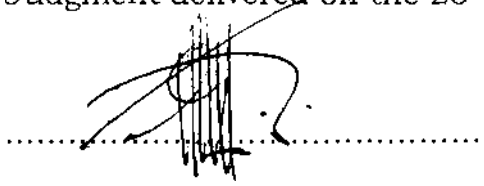
Fourthly, despite the Plaintiff is entitled to judgment in his favour for the sum due and owing to him and despite the fact that the Plaintiff is entitled by law to enforce same by foreclosure and sale of the property to satisfy the debt, this court is also authorised to give judgments and make orders based on fairness. That is its equitable jurisdiction. Over the years, the courts have in situations such as these developed and applied the principle of the equity of redemption. It is a right that is rooted on the fact that the transaction is and will always be considered as a mere loan of money secured by a pledge of an estate. The defendant has come before this court invoking the temperance of the court in its application of the law and asking that the court places above all and in every outcome, the principle of fairness which is itself the conscience of justice. There are a plethora of authorities on this issue both within our jurisdiction and the commonwealth. In the case of Kreglinger v New Patagonia Meat and Cold Storage Co. Limited (1914) AC 25 HL, the court in applying the principle made clear that incident to every mortgage is the right of the Mortgagor to redeem, a right which is called his equity of redemption and which continues notwithstanding that he fails to pay the debt in accordance with the proviso for redemption. I will refer to the maxims so extensively used in the said matter. "Once a mortgage, always a mortgage" and "A mortgage cannot be made irredeemable". I will also refer to the case of Sierra Leone Commercial Bank Limited v Mohamed B. Sowe FTCC 113/12 S. No. 23 and quote the learned Solomon J. She stated "I am not inclined to grant an immediate sale of the mortgaged property. I shall give the defendant an opportunity to redeem the mortgage and exercise his right to the equity of redemption. This right arises from the transaction being considered a mere loan of money secured by a pledge of the estate. In the present case, the Plaintiff itself brought forth evidence to show that the mortgaged property has a forced sale value of Le 37 billion. How can this court claim to be acting in with a good conscience and order that same be sold to service a facility worth a little over a billion leones. I dare not.

In the circumstances I hereby order as follows;

1. That judgment is entered for the plaintiff in the sum of Le 1,792,986,995.19 with interest assessed at the rate of 5% of the said sum.

2. The 1 defendant is to pay the said sum and interest in 7 equal monthly instalments commencing on the 1* of April 2022 until same is paid in full.
3. In the event of default of payment of aforesaid, the Plaintiff shall be at liberty to issue a writ of possession and the undersheriff shall take possession of the mortgaged property and shall manage same by renting out or leasing same and the proceeds thereof paid to the Plaintiff until the judgment sum is satisfied.
4. Liberty to apply.
5. Costs assessed at Le 10 million to be paid by the defendants to the Plaintiffs counsel.

Judgment delivered ~~on~~ the 23rd March 2020.



JUSTICE LORNARD TAYLOR