MISC.APP.015/2020 2020 C. NO.12

IN THE HIGH COURT OF SIERRA LEONE

COMMERCIAL AND ADMIRALTY DIVISION

FAST TRACK COMMERCIAL COURT

BETWEEN:

COMMERCE & MORTGAGE BANK - PLAINTIFF

AND

UMARO KAMARA & ANOTHER - DEFENDANTS

JUDGMENT OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED ON THE 5TH NOVEMBER 2020

The Plaintiff comes before this court seeking the following orders;

1. That the Plaintiff be granted possession of the mortgaged property situate lying and being at Off Peninsular Road, Adonkia in Freetown in the Western Area of the Republic of Sierra Leone.
2. An order for the sale of the mortgaged property situate, lying and being at Off Peninsular Road, Adonkia, Freetown in the Western Area of the Republic of Sierra Leone.
3. An injunction restraining the defendant, his agents and or privy from selling leasing and or interfering in any way whatsoever with the mortgaged property situate lying and being at off Peninsular road Adonkia, Freetown in the Western area of the Republic of Sierra Leone.
4. Any further order or relief that this honourable court may deem fit and just.
5. That the costs of and incidental to this application herein be provided for and borne by the defendant.

The Plaintiff's complaint is that prior to the on the 27th September 2014 when a deed of mortgage was executed between the parties, the Plaintiff and the defendant in pursuance of an agreement to grant the defendant a home completion facility in the sum of the sum of Le 500,000,000. This approval is evidenced by letter dated 26th February 2014 addressed to the defendant and before this court as Exhibit AM2. In compliance with this undertaking, the

Plaintiffdeposited an advance of Le 250,000,000 which credited into the account of the defendant on the 22nd April 2014 as shown in the statement of account of the defendant which is before this court and marked Exhibit AM7 A-G in the supplemental affidavit deposed to on the 3rd July 2020. Subsequently, this relationship was formalised and the parties executed a Mortgage deed on the 27th September 2014 by which it was agreed that the facility of Le 500,000,000 awarded to the defendant was for a term of 10 years and was to be paid back with interest at the rate of 22% per annum together with such other rates as may be determined by the Plaintiff and an annual percentage rate of 22.93%. This mortgage deed is before this court and is marked Exhibit AM1 in the affidavit in support attached to the application filed herein.

Several withdrawals were made by the defendant and the account attracted interest as agreed between the parties. As at the 15th March 2016, the Defendant was lagging in his payment of the mortgage and the account went into arrears. As a result, the Plaintiff wrote to the defendant notifying him of the arrears due and owing and demanded that they be settled by the 28th March 2016. This letter is before this court marked Exhibit AM3 A-C. Subsequent to this letter, several other letters were written to the defendant reminding him of his obligation to service the account and pay up on the arrears but the defendant neglected to comply accordingly.

As at the 14th October 2019, the account stood overdrawn in the amount of Le 475,192,673.93 as shown on exhibit AM6 A-F comprising arrears of mortgage payments and interest accumulated thereon. The Plaintiff has come before this court basically because according to the facts cited by it, the defendant was in breach of the covenants of his agreement and has refused to pay the debt.

Based on the facts as presented by the Plaintiff, it seems quite clear that this is a case of a simple contract and a breach thereof. Trite law is that for a contract to be enforceable, there has to be an offer **(Carlill v Carbolic Smokeball Co. (1892))**based on an intention to create legal relations**(Darlymple v Darlymple (1811)),**and such offer must have been accepted **(Adams v Lindsell (1818)),**and consideration duly provided**(Smith v Jenkins (1970))**.

In the present case it is clear from the documents before the court that the defendant was offered the facility, he accepted same and on the terms of his promise to pay back the facility with the requisite interest and on this basis, the Plaintiff on its part provided the requisite consideration. The Plaintiff is providing the facility to the defendant is in full compliance with the rule in **Tweedle v Atkinson (1861) B&S pg 393** which is to the effect that

consideration must move from the promise. As was succinctly put in the case of **Dutton v Poole (1687) 2 Lev pg 210,** "…only he could sue on a promise, who had paid the price of it". This is made clear by clause 2.1 in the mortgage deed attached to the affidavit in support of the application and marked exhibit AM1. It states thus;

"Now therefore in consideration of the loan of Le 500,000,000, the principal sum initially advanced and any monies advanced or may be advanced to the Mortgagors by the Mortgagee (receipt of which the Mortgagor hereby acknowledge)…..the Mortgagor hereby covenants to repay the principal money, interest and all other monies that may be advanced or any further advance made by the Mortgagee in accordance with the covenants contained in this deed".

Based on the documents before this court, the Plaintiff has paid such price and is therefore entitled to sue on the defendant's promise to repay the facility sum and interest as agreed.

The Mortgagor having acknowledged receipt of the facility as per the said mortgage deed and as shown in Exhibit AM7 $^{A-G}$, is therefore under the duty to comply with the terms of repayment as stated above failing which clause 5 of the mortgage deeds would then be activated.

It is also trite law that the parties to any agreement are bound by the terms of same. Where the terms of the contract are expressed in clear and unambiguous language, the court's duty is to enforce the terms as agreed between the parties and not to make fresh agreements for them by going beyond their literal meanings.

Pursuant to clause 5.1 of the Mortgage deed, it was agreed between the parties that where the Mortgagor defaults in 3 monthly payments or fails to observe and perform any of the terms, conditions, obligations or covenants contained in the mortgage deed, the whole sum will become due and owing.

Once this state of affairs is activated, the Plaintiff is granted the liberty as agreed between the parties to exercise any one or more of the powers, rights and remedies as contained in **sections 10, 11, 12 and 13 of the Home Mortgage finance Act No. 4 of 2009.**Section 10 gives the Mortgagor the liberty to sue the Mortgagee for specific performance on any personal covenant and or to realise the security on the mortgaged property in any of the ways provided by the Act. Section 11 gives the Mortgagee the authority to appoint a receiver in the event of a default. Section 12 authorises the Mortgagee to take possession of the mortgaged property on failure by the Mortgagor to perform any act secured by the mortgage. Section 13 mandates

the Mortgagee to sell the property upon failure of an Act secured by the Mortgage.

In this instance, the Mortgagee has chosen to sue the Mortgagor for performance of his undertaking to make good on the facility and for which the Mortgagor clearly has failed. The Plaintiff has come before this court seeking to enforce the terms of the mortgage and have provided evidence to show that it is by law entitled to the remedies prayed for.

Several opportunities have been given to the defendant by this court to appear and defend this action but he has failed to do so. In this regard, **Order 13 rule 10 of the High Court Rules 2007** is quite instructive. It states;

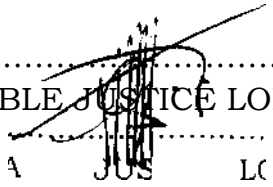
"Where a defendant or respondent to an originating summons to which an appearance is required to be entered fails to appear within the time limited, the plaintiff or applicant may apply to a Judge for an appointment for the hearing of such summons, and after the filing of a certificate that no appearance has been entered, the Master shall notify the plaintiff of a time for the hearing of such summons".

This matter was accordingly forwarded to this court for hearing and determination of same.

Regardless of the fact that the Defendant did not appear in court to defend the action, this court was not oblivious of the fact that the Plaintiff needed to prove its case nonetheless on a balance of probabilities which is the standard as required by law in the case of **Bringshaw v Bringshaw (1938) 60 CLR pg 336.**Applying this standard and based on the exhibits and argument of counsel before this court, I therefore hold as follows;

1. The defendant is indebted to the Plaintiff in the sum of Le 475,192,673.
2. The defendant shall also pay interest on the said sum at the rate of 20% per annum from the 15th October 2019 until the date of this judgment.
3. The Plaintiff is granted leave to foreclose on property of the defendant situate at off peninsular Road, Adonkia delineated on survey plan numbered LS54/11 dated 13th May 2011 to recover the said sum and any other sum ordered by this court.
4. The Plaintiff is at liberty to issue a writ of possession and recover possession of the said property from the defendant.
5. The Plaintiff shall thereafter cause a notice of intention to sell the aforementioned property to be published on 4 widely read newspapers in Sierra Leone.

6. Upon the expiration of one calendar month after the last publication, the Plaintiff shall cause the aforesaid property to be sold by public auction or by private treaty.
7. The reserved price for the said sale of the property shall not be less than 85% of the value of the property as at the 26th February 2014.
8. The cost of this action is assessed at Le 50 million to be paid from income received from the sale of the property to solicitors for the Plaintiff.



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HONORABLE JUSTICE LORNARD TAYLOR