

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN:

SKYE BANK (SL) LTD – PLAINTIFF/RESPONDENT
AND
CHUNG GANG FISING CO. – 1ST DEFENDANT/RESPONDENT
(SL) LTD
PRIMERA COMPANY (SL) LTD – 2ND DEFENDANT/RESPONDENT
ALFRED BADARA TURAY – INTERESTED PARTY/APPLICANT

Counsel:

A. C. Thompson Esq. for the Plaintiff/Respondent

E. Kargbo (Ms). for the Interested Party /Applicant

**RULING DELIVERED THIS 8th DAY OF DECEMBER 2022 BY HONOURABLE MRS.
JUSTICE JAMESINA E. L. KING J. A.**

Introduction

1. The Plaintiff instituted an action by way of an Originating Summons against the 1st & 2nd Defendants for payment of Le13,330,041 636.33 by the 1st Defendant being the outstanding debt and interest being accrued and which said interest continues to accrue and remains payable to the Plaintiff as part of various facilities granted to the 1st Defendant by the Plaintiff. Further or in the alternative orders are sought for the Legal Mortgage dated 12th day of August 2021 and registered as No. 118/2021 in Volume 102 at page 59 of the Books of Mortgages to be enforced by the sale of the mortgage property situate lying and being on 2.0119 acres of land at Emmanuel Pond Kent Freetown, enforcement of a lease for property at No.13 Damba Road Bundu Bush Murray Town Freetown against the 2nd Defendant Assignor to the Plaintiff, delivery of possession

of the said properties and further and or in the alternative for an order crystallizing/enforcing the Charges of Debentures by way of sale of the assets of the 1st Defendant forming the subject matter of the charges or by the Appointment of a Receiver to manage the assets under the Charges until realization for the full sum due and owing to it by the 1st Defendant herein.

2. This is an application by Notice of Motion dated 21st February 2022 on behalf of the Interested Party/Applicant for leave for the said Applicant Alfred Badara Turay, be added as a party to the proceedings as a Defendant on the grounds that his legal interest will be materially affected in the matter herein and that his presence is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon.

3. In support of the application is the affidavit of the Interested party/applicant Alfred Badara Turay and selected paragraphs read as follows:

"4. That the 1st Defendant /Respondent was incorporated on the 18th may 2011 and that since the incorporation of the 1st Defendant/Respondent I have been a Director and shareholder of the 1st Defendant/Respondent. Photostat copies of the certified Certificate of Registration and the Memorandum and Articles of Association of the 1st Defendant/Respondent are now shown to me exhibited and marked Exhibits ABT 3 and AB4 respectively.

5. That since the demise of Kim Sung Nyeon my co-Director on 2nd July 2021, I am the only Director and the Majority Shareholder of the 1st Defendant/Respondent herein. A Photostat copy of the Company Status Report of the 1st Defendant/Respondent issued by the Corporate Affairs Commission confirming this is hereby shown to me exhibited and marked as Exhibit ABT5/

6. That by letter dated 12th November 2020 I requested from the Plaintiff/Respondent in which the 1st Defendant/Respondent holds an account for the statement of account of the 1st Defendant/Respondent. A Photostat copy of the said letter is hereby shown to me exhibited and marked as Exhibit ABT6.

7. That on 21st January 2021 I received a reply from the Plaintiff/Respondent. A Photostat copy of the said reply is hereby shown to me exhibited and marked as Exhibit ABT7.

8. That sometime in July 2021, I was informed by one Musa Sesay that the Plaintiff/Respondent herein was paying frequent visits to the business premises of the 1st Defendant/Respondent in a bid to evaluate the assets of the 1st Defendant/Respondent.

9. That by letter dated 13th July 2021, solicitors acting for and on my behalf addressed a letter to the Plaintiff/Respondent appraising it of the fact that the 1st Defendant/Respondent and its assets are the subject of ongoing litigation. A Photostat copy of the said letter is hereby shown to me exhibited and marked as Exhibit ABT8.

10. That I am informed by my solicitors and verily believe that the Plaintiff/Respondent did not reply to the letter of 13th July 2021.

11. That I do not know of any loan obtained by the 1st Defendant/respondent save for one granted to the 1st Defendant/Respondent by the Guaranty Trust Bank Limited in 2012 in the amount of Le4,000,000,000/ (Four Hundred Million Leones) for which collateral was my personal property situated at 12 Adonkia Freetown and this has since been paid off.

12. That this alleged loan obtained from the Plaintiff/Respondent by Kim Sung Nyeon (deceased) was neither discussed and or approved in any Director's meeting and nor was it obtained with my consent and or knowledge.

13. That this alleged loan is conspired to commit a financial fraud and to defraud me.

14. That the said Kim Sung Nyeon acted unilaterally and without any Board of Director's resolution from the 1st Defendant/Respondent in obtaining the alleged loan from the Plaintiff/Respondent.

15. That prior to the death of the said Kim Sung Nyeon, I had been booted out of the 1st Defendant/Respondent both physically and operation wise and for which I am currently seeking redress in the Court of Appeal.

16. That I had no notice of the matter herein until I visited one of my personal properties close to that of the 1st Defendant/Respondent and I saw security men on the premises who informed me that they were there based on a court order in favour of the Plaintiff/Respondent.

17. That from the content of the Originating Summons it is clear that my pecuniary interest in the 1st Defendant/Respondent will be affected adversely if I am not given an opportunity to be heard in this matter."

4. The application is made pursuant to Order 18 Rule 6 (2) (b)(1) of the High Court Rules which gives the Court the discretion at any stage of the proceedings as it thinks just and either of its own motion or on application to order a person to be added as a party whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. This Rule is similar to Order 15 R 6 of the Supreme Court Practice 1999. This principle is buttressed in Halsbury's Laws of England 3rd Edition Vol. 30 at paragraph 735 of page 394.
5. Counsel for the Applicant also relied on *Gurtner v Circuit* 1968 1 All E.R. at 332 to the effect that when two parties in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit.
6. Other authorities Counsel relied on were Halsbury Laws of England, 3rd Edition Volume 30 p. 718 on the rules of natural justice, Hollington on Shareholders Rights 8th Edition under the heading personal rights at p.323, *Amon v. Raphael Tuck & Sons Ltd* 1956 Law Reports QBD Vol 1 p.357, Civ. App 51/2016 *Toufic Huballah v Clarice Davies & others* dated 28th March 2017, *Miguel Sanchez Y Compania S.L v The "Result" (Owners) (Nello Simoni, Ltd., Third Parties)*. 1958 Lloyd's List Law Reports
7. Counsel for the Plaintiff/Respondent referred to the affidavit in opposition to the application sworn to by Ikubolaje Nicol the General Manager of the Plaintiff/Respondent Bank on 16th March 2022. Paragraphs 4 – 13 of the said affidavit read as follows:
 4. That as to paragraphs 9 and 10 of the Affidavit in Support, it is averred that the 1st Defendant/Respondent assets are the subject of a charge and mortgage to the Plaintiff/Respondent bank.
 5. That contrary to paragraphs 12 of the Affidavit in Support, it is averred that the loan obtained by the 1st Defendant/Respondent was legitimately obtained and the monies were duly disbursed accordingly and utilized by the 1st Defendant/Respondent Company. Therefore, the loan is not a fraud on any person or corporation but a simple debt transaction which had become due and payable and remains outstanding.
 6. That contrary to paragraph 13 of the Affidavit in Support, it is averred that same is scandalous and oppressive against the Plaintiff/Respondent

especially as same has not been supported in any respect whatsoever and that the transaction was a legitimate contractual transaction between a corporate institution and a Bank.

7. That contrary to paragraph 14 of the Affidavit in Support, it is averred that the 1st Defendant/Respondent contracted with the Plaintiff/Respondent for facilities through personnel that have full authority to do so and I have been reliably informed by my solicitors and verily believe that Kim Sung Nyeon had full authority to act for and on behalf of the 1st Defendant/Respondent in his capacity as a member of the board of directors, as well as his position as a managing director, which said facts were represented to the Plaintiff/Respondent Bank in view of the fact that Mr. Kim was running all the operational, financial and administrative affairs of the 1st Defendant/Respondent and same was relied upon by the Plaintiff/Respondent Bank thereby necessitating the transactions and loan disbursements to the 1st Defendant/Respondent Company.

8. That as to paragraph 15 of the Affidavit in Support, it is averred that I am reliably informed by my solicitors and verily believe that the Interested Party/Applicant has other remedies in law against the 1st Defendant/Respondent Company if he was booted out of the operation of the referred company.

9. That contrary to paragraph 17 of the Affidavit in Support, it is averred that the Originating Summons filed for the recovery of monies owed to the Plaintiff/Respondent by the 1st Defendant/Respondent does not affect the pecuniary interest of the Interested Party/Applicant as he is not the person with whom the Plaintiff/Respondent contacted, neither is he the owner of any of the assets. Furthermore, if which is denied, there is any interest of the Interested Party/Applicant to be affected, that is an internal matter between him and the 1st Defendant/Respondent Company as he is not privy to any contract between the Plaintiff/Respondent and the 1st Defendant/Respondent.

10. That I am reliably informed by solicitors and verily believe the Interested Party/Applicant does not have any legal rights or standing to be added as a party as he is not a proper Defendant in the specific claim made in the Originating Summons.

11. That the Interested Party/Applicant is not a necessary party to a debt recovery action filed by the Plaintiff/Respondent as he does not owe any

money to the Plaintiff/Respondent bank and neither is he privy to any contract in that regard.

12. That the Interested Party/Applicant has no interest in the matter now before the court and neither is his presence necessary to effectually and completely determine the issues now before the court. Furthermore, there are no orders or declarations sought to affect the rights or interest of the Applicant whether positively or negatively.

13. That the Interested Party/Applicant does not have an interest to protect and neither is it in the interest of justice for him to be made a party as the action is not instituted against his person as a director or on his shares held in the 1st Defendant/Respondent, if at all."

8. There is a supplemental affidavit of Anrite Columbus Thompson on behalf of the Plaintiff, sworn to on 17th May 2022 exhibiting the Corporate Account Opening document showing that the Interested Party/Applicant was not at any point in time a signatory to the 1st Defendant/Respondent's Company Account held with the Plaintiff.
9. There is an affidavit in Reply by Alfred Badara Turay sworn to on 2nd June 2022 in which he states that he is the majority and only other shareholder as well as the only director of the 1st Defendant/Respondent. He stated that having read the Affidavit in opposition of Ikubolaje Nicol and Anrite Columbus Thompson, the assets of the 1st Defendant/Respondent cannot be the subject of a charge and mortgage to a purported non-existent loan, which was obtained without his knowledge as the majority and only other shareholder as well as one of the only two directors of the 1st Defendant/Respondent and or any authorization from the 1st Defendant/Respondent company. He made reference to the Articles of Association and that the conduct complained of is an abuse of his individual rights as a shareholder.
10. Paragraphs 7 – 9 & 13 of the Affidavit in Reply read as follows:
 - "7. That in answer to paragraph 7 of the Affidavit in Opposition, irrespective of the fact that Kim Sung Nyeon was a director and shareholder, he neither acted by resolution of the board of directors nor did he comply with the Articles of Association of the 1st Defendant.
 8. In further answer to paragraph 7 of the Affidavit in Opposition, I will aver that whatever loan was purportedly obtained from the Plaintiff/Respondent by the said Kim Sung Nyeon was obtained for his

personal use and or benefit as he did not act with my knowledge or consent.

9. That in answer to paragraph 8 of the Affidavit in Opposition, I will aver that I have been reliably informed by my solicitors and verily believe that to be added as a party to this action is an avenue available to me in law. Furthermore, any other remedies available to me in seeking redress would be acts done in futility as the assets of the 1st Defendant/Respondent would have been dissipated and I would be left with a paper judgment if I am successful in my claim.

13. That in answer to paragraph 2 of the Supplemental Affidavit, I will aver that I have no knowledge of the referenced account purported to have been opened on behalf of the 1st Defendant/Respondent and that the only accounts I know for a fact that the 1st Defendant/Respondent operated with the Plaintiff/Respondent are those with accounts numbered 3084011114 and 3084013212 respectively. Photostat copies of statements of accounts issued by the Plaintiff/Respondent to the 1st Defendant/Respondent are hereby shown to me exhibited and marked as Exhibits ABT1 and ABT2 respectively."

11. Counsel for the Plaintiff/Respondent submitted that the Applicant has not fulfilled any of the statutory requirement in Order 18 Rule 6 to enable him to be added as a party to this matter because he has failed to show any interest that he has in the matter in his affidavit or why he deems himself a necessary party to the action or why he should be added as a party.

12. He submitted that the reasons proffered by the Applicant are not the issues that make it necessary for his addition as none of the reliefs sought are directly or indirectly against him. He submitted that it must be shown that the Applicant should not only have an interest but that his presence is necessary to determine the issues, thereby making him bound by the result of the action being that he will be liable to satisfy the judgment and that the matter cannot be completely settled unless he is a party. He relied on *Tamba Brima and the President of the Special Court v. the Registrar of the Special Court and the Attorney General and Minister of Justice SC. Misc. App 3/2005*. He submitted that the Applicant is not a debtor/guarantor/mortgagor/assignee as such claims, reliefs cannot be made/sought against him in respect of any of the contracts before the court.

13. He submitted that what the Applicant has stated in his affidavit appears to be issues that he may have with the 1st Defendant company as a shareholder or director and that must be channelled against the 1st Defendant. Relying on *Voyotovich Rostilav v Momoh Ansmama & Ors. Civ App 1/17* he submitted that the Applicant must not only show a nexus, but must show that he has a direct business relationship with the Plaintiff and he must be directly affected by the matter. He submitted that the Applicant does not have any direct business relationship with the Plaintiff and neither directly affected by the matter. He concluded that the Applicant is a separate person in law from the company and whether or not he is a shareholder and director is immaterial when a suit is instituted against the company because the law prescribes that a company can be sued in its own right, relying on *Eric James v Seaboard West Africa Civ. App 1/2001*.
14. He further submitted that the Applicant is not privy to the loan contract between the Plaintiff/Respondent and the 1st Defendant and therefore cannot acquire rights and obligations under that contract. He concluded that on these two grounds that it will be wrong and illegal for the Applicant to be sued as a party in the action thus what the Applicant is asking the Court to do is to go against settled principles of law by adding him as a party to a matter that he has no business being a party to, and that the application should be dismissed with costs.

Analysis and Decision

15. The main issue for this Court's determination is whether to grant the Interested Party/Applicant's application to be added as a party and be allowed to defend this action as Defendant on account of the reasons proffered in his affidavits so that this matter in dispute can be effectually and completely determined and adjudicated upon. This application is vigorously opposed by the Plaintiff for the various reasons set out in the affidavits and submissions set out above. The Plaintiff does not believe that the Interested Party is necessary as a party in this action.
16. The court has a discretion under Order 18 Rule 6 (2) (b)(1) whether to add as a party to the action if that person ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the course or matter may be effectually and completely determined and adjudicated upon.

17. It is not in dispute that at the material time this action was instituted, the Plaintiff had no reason to believe that the Interested Party Mr. Turay should be joined as a party. This is because as argued by their Counsel, Mr. Turay was not privy to the contract or transaction as the cause of action which is for the recovery of a debt in respect of a loan was granted solely to the 1st Defendant and not Mr. Turay. Furthermore, it has been argued that Mr. Turay is not the owner of the assets which are the subject matter of the loan or action.
18. The second limb of this Rule is what is in issue as far as this court is concerned, which is whether the Applicant's presence is necessary to ensure that all matters in dispute in the course or matter may be effectually and completely determined and adjudicated upon. The Plaintiff does not have a cause of action against the Interested party as it is seeking to enforce collateral given to it by the 1st Defendant for loan facilities utilized. At the material time of the transaction the Plaintiff dealt with the other Co-Director and minority shareholder who was also Managing Director who is now deceased.
19. The interested party Mr. Turay is claiming that as a majority and other shareholder and as well as the only director of the 1st Defendant his pecuniary interests and proprietary rights will be adversely affected more so when according to him the loan was not authorised by a resolution of the board of directors, was without his knowledge and consent and in his words is a fictitious or non-existing loan. He claims that as much as he might have other remedies available to him in seeking redress which he is in fact doing in the Court of Appeal, but it will be in futility as the assets of the 1st Defendant/Respondent would have dissipated as a result of this action and he would be left with a paper judgment if successful in his claim.
20. Counsel for the Plaintiff submits that the Applicant or interested party is in no way going to be bound by the reliefs prayed for in the Originating Summons and if he will not be bound he must not be added and having a nexus with the Company does not make him a necessary party to the action. He further stated that there is nothing in his affidavit suggesting that he has a direct relationship with the Plaintiff. He relied on the *Voytovich Rostislav & Others v Momoh Ansumana* a decision of the Court of Appeal dated 31st October 2019.
21. I have reviewed that case and think it can be distinguished from the current case. In that case the applicant seeking to be a party only had a

service contract with a third party and not the 1st Appellant. Furthermore, in that case the application was made after a full trial in the High Court wherein the issues between the parties had been determined and at no stage of the proceedings did it make any order or declaration that in any way affected the rights or interests of the Applicants, whether positively or negatively.

22. The Applicant in this matter as a majority shareholder and only other Director has come to this Court raising issues why he ought to be joined and has shown that his legal and pecuniary rights could be affected by the outcome of the action as the assets of the Company in which he is a majority shareholder and director could be dissipated. This matter has not gone to trial and even before he knew about the proceedings the affidavit evidence is that as soon as he was aware of the Plaintiff's claim he wrote to them asking questions but he received no reply. Had the Plaintiff replied we probably will not have had to deal with this application.
23. His financial rights will be certainly negatively affected should the Plaintiff succeed in enforcing its rights under the mortgage, assignment or charge and has sought to come to be added to be heard. Can this Court legitimately shut the doors on the Applicant /Interested party and refuse to hear him, the answer is no. I am of the view that the Applicant does have an interest in this matter and his challenge to the transaction between the Plaintiff and the Defendant can only be appropriately raised in this action and before the Plaintiff obtains judgment which it will be entitled to. Certainly the Applicant will be affected by a decision of this Court and by any judgment obtained.
24. Can this court or any other court effectually and fully determine the matters in this action in the light of the issues raised in the affidavits of the Applicant more so when as a majority shareholder and director he is saying that the other director now deceased had no authority to enter into the transaction which he has described as fictitious which will occasion substantial financial damage to him. I am of the view that he does have his financial interest to protect which will be affected if he fails to do so. The objections that the Plaintiff has to the issues raised by the Applicant can only be heard and determined at a trial.
25. It matters not that the Plaintiff does not have a cause of action against the Applicant but if his presence is necessary for the matter to be effectually and completely adjudicated upon, it behoves the Court to add such a party

as Defendant as the court may direct. This will enable the disputes to be determined in so far as the transaction between the Plaintiff and 1st Defendant is concerned without the delay and inconvenience and expense of separate actions and trials.

26. The Applicant's presence is therefore necessary to ensure that the matters in dispute are effectually and completely determined and adjudicated upon. Furthermore, the interest of justice warrants that in the circumstances of this case the Applicant should be heard. I am persuaded in this view by "*The Estate of Khalilu Jabbie Case*" referenced in the Voytovich case cited above, at paragraph 19 thereof, where the Court in the Jabbie case held that a party can be added when such a party has an interest to protect and it is in the interest of justice.
27. Having considered the affidavits, both Counsel submissions, written addresses and authorities. It is my view that the Applicant is entitled and should be added as a Defendant and should do an undertaking to pay damages or costs that may be awarded.
28. I therefore make the following orders:
1. Leave is granted for Alfred Badara Turay the Applicant to be added as a party to the proceedings as a Defendant.
 2. The Plaintiff shall add the Applicant's name as a Defendant by amending the Originating Summons within 14 days of this Order and serve same on his Solicitors in this matter.
 3. The Defendant shall file an affidavit in opposition within 7 days of receipt of the amended Originating Summons and the Plaintiff shall file an affidavit in Reply if any to the Affidavit in Opposition within 7 days of receipt of the affidavit in opposition.
 4. The Applicant shall give an undertaking to pay damages or costs that may be awarded against him.
 5. The matter shall proceed thereafter in accordance with the Commercial and Admiralty Court Rules 2020.


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HON. MRS. JUSTICE JAMESINA E. L. KING J.A.