

CC165/10

2010

A.

NO.21

In the High Court of Sierra Leone
(Commercial and Admiralty Division)

Between:

Access Bank (SL) Limited	-	Plaintiff
And		
Frontpage Services Limited	-	1 st Defendant
Mr. Melvin Daniel Lisk	-	2 nd Defendant
Mrs. Lilian Lisk	-	3 rd Defendant

Counsels:

F. B. Kaifala Esq for the Plaintiff
C. F. Edwards Esq for the Defendant

RULING DELIVERED THIS 20th DAY OF January 2012 BY
HONOURABLE MRS. JUSTICE V. M. SOLOMON J. A.

RULING

The action herein is commenced by Writ of Summons dated 4th August 2010 in which the Plaintiff is seeking the following reliefs to wit:

1. Recovery of the sum of Le824,335,074.61 (Eight Hundred and Twenty Four Million Three Hundred and Thirty Six Thousand Seventy Four Leones and Sixty One Cents) being money due and owing to the Plaintiff under a time loan facility granted by the Plaintiff to the 1st Defendant.
2. Interest on the above-mentioned sum at the rate of 24% per annum from the 28th day of October 2009 till date of judgement.
3. Sale of property situate, lying and being at Summerset Street, Murray Town, Freetown in the Western Area of the Republic of Sierra Leone

which was mortgaged to the Plaintiff by the 1st Defendant by a deed of mortgage dated the 27th day of March 2009 and registered as No27/3/09 in Volume 80 at page 109 of the Record Book of Mortgages kept at the office of the Administrator and Registrar-General in Freetown.

4. Recovery of the sum of Le824,336,074.61 (Eight Hundred and Twenty Four Million Three Hundred and Thirty Six Thousand Seventy Four Leones and Sixty One Cents) by the Plaintiff from the proceeds of sale of the property referred to in 4 above.
5. Interest on the above-mentioned sum of Le824,336,074.61 (Eight Hundred and Twenty Four Million Three Hundred and Thirty Six Thousand Seventy Four Leones and Sixty One Cents) at the rate of 24% per annum from the 28th day of October 2009 till date of judgment.
6. Any further or other reliefs that the Honourable Court may deem fit and just.
7. Costs.

The Defendants entered an appearance to said action on the 19th November 2010. On the 1st December 2010 Judgment in Default of Defence was obtained against the Defendants. The said Judgment was in respect of the 1st, 5th and 7th claims on the Writ of Summons. On the 7th December 2010 the Plaintiff issued a Writ of Fieri Facias to levy executions in respect of the judgement obtained marked 'SVMT2A'. On the 1st December 2010 the Defendant's Solicitor filed a Motion Paper in which he is seeking inter alia, to set aside the Writ of Summons dated 4th August 2010 on the grounds of irregularity in that the said Writ of Summons offends Order 6 Rule 6 (b) of the High Court Rules

2007 (hereinafter called "The Rules"), further and any other relief and costs. In support are two Affidavits both sworn to by Kweku Lisk for the Defendants. There is an affidavit in opposition deposed to by Stephan V. M. Thomas a pupil Barrister of Solicitors for the Plaintiff. Counsel for the Defendants did appear on the 6th December 2010 and submitted that he is seeking an adjournment to file an affidavit of service of the Motion Paper on Solicitors for the Plaintiff. He relied on the entire affidavit in support and exhibits thereto, and submitted that the irregularity is irreparable and the said Writ of Summons dated 4th August 2010 and all subsequent proceedings are to be set aside. Mr. Lisk relied on the affidavit in reply deposed to on 11th February 2011. He submitted that the Motion Paper dated 1st December 2010 filed on the same day and so a search could not have been conducted on the 2nd December 2010. The said receipt for search conducted marked 'SVMT2B'. The receipt was dated 1st December 2010. He submitted if such search had been conducted it could have revealed that there is a Motion dated 1st December 2010. He submitted further, that the Plaintiff having knowledge of the Motion Paper to set aside the said default judgment it ought not to have gone ahead to pay stamp duty marked 'SVT3'. He submitted to seek the order on the Motion Paper to set aside the Writ of Summons is not a fresh step. He referred to the proposed Defence marked 'KML1' which he submitted raised triable issues. Mr Lisk submitted it was the Plaintiff's Managing Director who instigated the 2nd Defendant to take the loan as he stated 'it was very good business'. The said business of sale of transformers was to be jointly operated by parties to the action herein.

He submitted that it was agreed by the parties that they are to have control of the transformers and how it is to be sold. He submitted all these issues are raised in the defence.

Mr. Lisk submitted that the transformers are housed in the building of the Defendant but it is locked and manned by the Plaintiff's securities. Counsel submitted in reply that this application is made within reasonable time and referred to Order 2 Rule 2 of the Rules. He submitted the proceedings are a nullity.

The question of what is reasonable time is for the court to determine. During the course of the proceeding there was a change in Solicitors for the Defendant and C. F. Edwards now appear as Solicitor for the Defendants.

Mr. Kaifala of Counsel for the Plaintiff submitted the Motion Paper is focused on the Writ of summons only. To set aside a Judgment there ought to be a distinction between a regular and an irregular Judgment. He relied on Order 2 Rule 1 of the Rules. He submitted this is a mere irregularity which should not nullify the proceedings. He further submitted that the present application is not made within reasonable time and relied on Order 2 Rule 2(1) of the Rules.

I have considered the present application and submissions thereto. The first issue for my consideration is whether the Writ of Summons marked 'KML1' is irregular on the ground that the claim is in respect of a liquidated demand. I shall at this stage refer both Counsels to a similar submission in the case of CC. 161/10 2010

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I adopt my previous argument in that case and will state that the claims on the Writ of Summons are not for a liquidated demand only. The claim includes in the 4th claim a claim for the sale of property at Summerset Street, Murray Town, Freetown. I am again at a loss as to how Counsel for the Plaintiff did not realize that his client's case is not one that is for a liquidated demand only. A question I pose, is if the claims in Paragraphs 1 and 2 of the Particulars of Claim are not met by the Defendants, then the reliefs in paragraphs 3, 4 and 5 arise. The said Writ of Summons is badly drafted and does not refer the claims in paragraphs 3, 4 and 5 in the alternative. Claims 2 and 5 of the Plaintiff's claim are a replica. Counsel for the defendants did orally submit in his lengthy submissions that the Defendants have a good defence to the action herein. He submitted that he had not filed a defence within time stipulated as (in the considered opinion) the Writ of Summons was irregular and should be struck out. I refer to the affidavit in reply sworn on the 11th February 2011. In said affidavit is a proposed defence marked 'KML1'. In as much as Counsel has not specifically prayed for an Order to file a defence of time, I see it fit to consider the defence in the light of the 2nd order prayed for on the Motion Paper which reads thus:

"2. Any other relief this Honourable Court may deem just in the circumstances"

The proposed defence in my view has raised several triable issues which ought to go to trial. It is trite law that when a triable issue is raised then the Defendant ought to be given the opportunity to have the matter proceed to trial and be determined on its merits. There are several authorities within our Jurisdiction as seen in

the case of S/C app 4/2004 Aminata conteh Vs APC -a decision of the Supreme Court. There are several authorities relating to this which judgments have been delivered in this Court to wit: CC397/10 - Ahmed Wurie Vs. Ecobank - Ruling delivered on 26th January 2011; CC384/10 Daphne Olu-Williams Vs Akal Security - Ruling delivered on 15th March 2011; CC150/10 Jeffrey Myers Vs National Project delivered on 6th May 2011 to name a few. Reasons have been proffered in each case. The proposed defence 'KML1' as submitted raises several triable issues which ought to be tested by a full trial with the opportunity to verify the veracity thereof. I refer to the Annual Practice 1999 pages 159-160 under rubric 'discretionary powers of the court'. The Learned Authors did state that a default judgment ought to be set aside if not as a matter of law but of common sense.

In the instant case paragraphs 5 to 18 of the proposed defence have raised issues which ought to be tried and cannot be summarily determined in a default judgment. Counsel for the Plaintiff in its affidavit has referred this court to an affidavit of search marked 'SVTM2B' and 'SVMT3'. The search was conducted on 1st December 2010 and Motion Paper filed on the same date. The said Motion paper was served on the 2nd December 2010 as deposed to by Ishaka Suma a process server for the Defendants solicitor. On the same date, stamp duty was paid for the judgment obtained on 1st December 2010. Again, I refer to Order 43 Rule 7(1) (2) of the Rules which provides that after due payment of stamp duty, then judgement can be entered. In instant case, judgment was entered before the stamp duty was paid, and solicitors even proceeded and issued a Writ of Fieri Facias dated 7th December 2010 after

they had knowledge of the present proceedings. in
the premises therefore, I will set aside the Judgment in
Default and I hereby order as follows to wit:

1. The Judgment in Default of Defence dated 1st December 2010 and all subsequent proceedings are hereby set aside.
2. The Defendants are at liberty to file a defence (if any) within 5 days of the date of this order.
3. The Plaintiff is to file a reply and close all pleadings 5 days thereafter.
4. Each party is to serve on the other a list and copies of all documents intended for use at the trial within 21 days from the date of this order.
5. The Plaintiff is to lodge in the High Court Registry two court bundles which shall comprise the following documents:
 - a. Copies of all pleadings (and any amendments thereto);
 - b. Any admissions of facts including any agreed evidence;
 - c. List of issues in dispute;
 - d. Evidence to be relied upon both oral and documentary;
 - e. List of witnesses and their statements
6. There is liberty to restore these directions for further directions.

7. Costs in the cause.

Ums. 8. Matter referred for further
directions to 17th February 201

V. M. Solomon

Hon. Justice V. M. Solomon J. A.