IN THE HIGH COURT OF SIERRA LEONE

COMMERCIAL AND ADMIRALTY DIVISION

FAST TRACK COMMERCIAL COURT

OFF WALLACE JOHNSON STREET-GOVERNMENT WHARF

MISC. APP 007/15

ROKEL COMMERCIAL BANK (SL) LTD — PLAINTIFF

AND

ALIEU THORLU BANGURA & ORS. — DEFENDANT

REPRESENTATION:

A. SHOWERS ESQ. — COUNSEL FOR THE PLAINTIFF

MOHAMED P. FOFANAH ESQ. . — COUNSEL FOR THE DEFENDANTS

BEFORE THE HON. MR. JUSTICE SENGU KOROMA JA.

RULING DELIVERED ON THE 28TH JUNE, 2017.

1. The Defendants/Applicants applied to this Court by a Notice of Motion dated the 30th day of September, 2016 for the following Orders:-

   1) That this Honourable Court stays the execution of its Orders dated 14th July, 2016 and 3rd August, 2016 respectively and all other Orders, pending the hearing and determination of this Application and Action

   2) That this Honourable Court sets aside the said Orders obtained against the Defendants on the following grounds:-

      a) That they failed to serve the Defendants any notice of intention to proceed with this matter as 12 months had elapsed since the last step in the Action herein pursuant to Order 41 Rule 9 of the High Court Rules, 2007,

      b) That at the time the Originating Summons dated 30th January, 2015 was heard by this Honourable Court, the Plaintiff had already sold the 2nd Defendant's property situate at No. 25 Percival Street, Freetown making the application dated 30th January, 2016 functus.

      c) That the Defendant did not receive any statutory notice as outlined in the Order dated 14th July, 2016 nor were they served with the said Order of Court.

      d) That the Defendants contend the quantum of the judgment sum claimed by the Plaintiff considering them more than half of the said sums are interest computed as compound interests or interest upon interest which the Defendants contend is contrary to law.

   3) That in view of the above, this Honourable Court grants leave to the Defendants to defend this action.

   4) That the costs of this application be costs in the cause.

   5) Any further or further Order (s) that this Honourable Court may deem fit and just.

2. The Applicant used the affidavit of Mr. Allieu Thorlu-Bangura, the 1st Applicant herein sworn to on the 30th day of September, 2016 together with the exhibits attached thereto.

3. The Plaintiff opposed the application by two affidavits to wit: Affidavit of Assiatu Mansaray sworn to on the 20th day of October, 2016 and a Supplemental Affidavit sworn to by Adewale Showers on the 20th day of October, 2016.

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BACKGROUND

4. The Plaintiff took out an Originating Summons against the Defendants for the payment of the sum Le 8,902,888,271.22 being principal and interest at the rate of 24 percent per annum until payment due to the Plaintiff under the respective covenants in the Mortgages dated the 27th day of September, 2013 and 27th day of September, 2013 respectively.

5. The mortgages were in respect of the following properties:-

   i. All that piece or parcel of land and hereditaments situate, lying and being at 25 Percival Street, Freetown in the Western Area of the Republic of Sierra Leone demarcated in Survey Plan No. LS 4320/09 dated the 5th February, 2010; and

   ii. All that piece or parcel of land and hereditaments situate, lying and being at Fabaina Road, Kono-Town near Songo, demarcated in Survey Plan No. LS 3884/83 dated the 1st March, 1984.

6. Service of the said Originating Summons was effected on the Defendants substituted service pursuant to an Order of this Court dated 16th day of March, 2015. The Defendants were also ordered therein to enter appearance to the said Summons within 14 days of the second publication of the said notice.

7. By another Notice of Motion, the Plaintiff applied to this Court that its Order dated 16th March, 2015 be varied by Ordering that substituted service of the Originating Summons in this action be effected on the 1st Defendant by pasting same at a conspicuous location on the wall of the said Defendant's residence. The reason for this was that the 1st Applicant's residence had been located but was evading service and on one occasion instructed his wife to receive the said Originating Summons on his behalf which would not amount to personal service. These facts were sworn to by James Momodu Fornah-Sesay in his affidavit dated 5th day of June, 2015. This was granted by an affidavit of service sworn to by Akieola Taylor, clerk and Process Server attached to the Plaintiff's solicitors, the Applicant was served by pasting the Originating Summons dated 30th January, 2015 and the Court Order dated 25th day of June, 2015 on the wall of his residence at No. 8F Thompson Bay Road, Off Collegiate School Road, Freetown. Photostat copies of the pictures of the pasting were exhibited as AT 1A-B.

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8. A certificate of NO APPEARANCE was filed for and on behalf of the Plaintiff dated 26th May, 2016.

9. Writ of Possession and subsequent actions were taken out by the Plaintiff.

10. On the 30th September, 2016, the Defendants filed the present Application.

THE PRESENT APPLICATION DATED 30TH SEPTEMBER, 2016

11. I shall deal with the Orders prayed for herein sequentially.

The first Order prayed for shall be dealt with after all the others because a determination of the issues here may determine its relevance either way.

12. The second Order relate to the following issues being reasons given by the Defendants for setting aside the Orders of this Court dated 14th July, 2016 and 3rd August, 2016 respectively.

a. Failure of the Plaintiff to serve the Defendants with Notice of Intention to proceed with this matter as 12 months had elapsed since the last step taken in the action herein pursuant to Order 41 Rule 9 of the IIigh Court Rules, 2007.

13. On this point, Mr. M.P Fofanah, Counsel for the Defendant submitted that since the Originating Summons was issued on 30th January, 2015, no other step was taken until the filing of the affidavit in opposition sworn to the 16th June, 2016 with the certificate of NO APPEARANCE attached. That amounted to a period of one year, six months which violates the Rules as hereinbefore stated.

14. Mr. Showers in reply submitted that the requirement of 12 month notice of Intention to proceed was not applicable in the instant case. There was no delay for 12 months. In support of this, he referred the Court to paragraph 3 of the affidavit in support dated 25th June, 2015; Exhibit AM1 attached to the affidavit in opposition dated 16th June, 2016. In essence, Mr. Showers submitted a fresh step was taken before the 12 months elapsed. So there was no need to give notice of Intention to proceed.

15. Order 41 Rule 9 of the High Court Rules, 2007 provides as follows:-

"Where 12 months have elapsed since the last steps taken in any cause or matter, the party who wishes to proceed shall give every other party not less than 28 days Notice of Intention to proceed."

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16. It could be seen that Mr. M. P. Fofanah on this point cited the correct legal provision. The question here is whether the Plaintiff violated the said Rule. In deciding this, I will look at Order 41 Rule 10 (1) of the High Court Rules, 2007 which must be read together with Order 41 Rule 9.

Order 41 Rule 10(1) provides as follows:-

"Where in any cause or matter no step has been taken for 12 months from the date of the last proceedings and no notice has been given under Rule 9, the master or any party to the cause or matter may apply to the Court for an Order that the cause or matter be struck out for want of prosecution"

Rule 10 (2):-

"Notice of the application shall be served on all parties concerned, at least 14 days before the day stated in the notice for hearing of the application."

17. Rules 10 (3)-10(4) of the Order states the procedural steps in pursuance of the objective in Order 10.

18. From the foregoing provision, it could be discerned that both parties had obligations to fulfill: the Plaintiff to give Notice of Intention to proceed; the Defendant to make an application to strike out the action for delay. Both parties have failed to fulfill their respective obligations and as such, this application cannot justly be determined on this point.

19. In any event, the steps taken by the Plaintiff in applying for substituted service, filing of affidavits of service, search and notice of NO APPEARANCE to my mind proves that the Plaintiff may not be held liable for the delay envisaged by Order 41 Rule 9.

20. The third point relating to the fact that at the time of the Originating Summons dated 30th January, 2015 was heard, the Plaintiff had sold the 2nd Defendant's property situate at No. 25 Percival Street, Freetown making the said application functus. The point raised here is of fundamental importance in the law relating to Mortgages and sale of mortgaged property.

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21. Mr. M.P Fofanah for the Defendants submitted that by selling one of the mortgaged properties without a Court Order amounted to clogging of the Mortgagor's right to redeem. He referred the Court to Halsbury's Laws of England, 3rd Edition at pp 157-158 under the rubric "Right of Redemption".

22. In reply, Mr. Showers referred the Court to Sections 19-21 of the Law of Conveyancing and Law of Property Act, 1881 which give the Mortgagee power to sell the mortgaged property without seeking a Court Order. He also referred to Exhibit AS1 attached to his Supplemental Affidavit, particularly clauses 15, 18/18 of the Mortgage Deed. Mr. Showers argued the power of sale was invoked by the Plaintiff when the Defendants defaulted on the loan.

23. Matters relevant to the exercise of the Mortgagee's power of sale out of Court are, namely: (1) the basis for the Mortgagee's power of sale (as a legal incident of security, or under an express power, or under a statutory power); (2) when the power is exercisable; (3) the protection given to the purchaser; (4) the mode of sale and the Mortgagees rights and duties; (5) stopping or setting aside the sale (6) effect of the sale and conveyancing; (7) manner in which the proceeds are to be applied.

24. The essence of this exercise is to find out whether there was any aspect of the Plaintiff's dealing with the Mortgaged property at 25 Percival Street, Freetown to warrant this Court to set aside the sale.

25. As a general principle, there is no implied power of sale as the legal incident of the security in the case of mortgaged property. There is no right at Common Law or in equity for the Mortgagee to sell the mortgaged property free from the equity of redemption, unless he does so with the Mortgagors's concurrence. This appears to be the position of Mr. M. P. Fofanah on this respect.

26. Mr. A. Showers on the other hand submitted that in a mortgage containing an express power of sale, there is an implied term that the mortgagee could sell the mortgaged property without Court Order on default by the Mortgagor Deed. He also relied on the statutory power of sale contained in the Conveyancing and Law of Property Act, 1881 and 1882, Sections 19(1) and 21(1) thereof.

27. It should be noted at this point that the effect of the exercise of the power is the same as the effect of the exercise of the Statutory Power of Sale. Section 19(1) of

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the Conveyancing and Law of Property Act, 1881 and 1882 which is applicable in Sierra Leone pursuant to the Imperial Statutes (Law of Property) Adoption Act, Cap 18 of the Laws of Sierra Leone, 1960 provides as follows :-

"A mortgage where the mortgage is made by deed, shall, be virtue of this Act, have the following powers, to the extent as if they had been in the terms conferred by the Mortgage Deed

(1) a power when the mortgage money has become due, to sell, or concur with any other person in selling, the mortgaged property, or any part there..."

28. It can be seen at the point, that the Respondent exercised both its power under the Mortgaged Deed and that under statute in selling the mortgaged property.

29. However, before the Power of sale or the statutory power of sale could be exercised, the following conditions must be met

a) Where an express power is granted (in this case Clauses 18.1 and 18.3 of the Mortgage Deed dated 27th September, 2013, it will arise after due notice or on the happening of some specified event.

30. Section 15 of the Mortgage Deed dated 27th September, 2013 deals with two aspects: the exercise of the statutory power of sale as between the Plaintiff and the Purchaser and that between the Plaintiff and the Mortgagor (The Applicants). In the said provision, it is clearly spelt out that "as between the bank (Respondent herein) and the Mortgagor the bank shall not exercise the said power of sale until payment of the money hereby secured has been demanded and the Borrower has made one month default in paying the same".

31. Clause 25 of the Mortgage Deed specifies the manner of service of any notice on the Defendants. The notice may be served by sending it through the post in a pre-paid envelope addressed to the Borrower at this last known address and in the case of the company, its registered office. I must comment that his is an archaic type of service as our postal system is on its death bed.

32. The question now is, was the Defendants given notice? A perusal of the file will reveal that the only notice given to the Defendants was that dated 15th December, 2014 which is attached to the affidavit in support marked Ex LC 5. To my mind,

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no notice of the sale was served on the Defendants as required by terms of the Mortgage Deed and by statute. Exhibit LC gave 48 hours to the Applicants to repay the loan or face foreclosure which is less than the 1 (one) month statutory notice. I therefore agree with Counsel for the Defendants on this point. The matter does not however end on this point. The property at 25 Percival Street has been sold to a third party. This was clearly disclosed by the Applicant in making his application leading the Court to give its rulings on the 4th July, 2016 and 3rd August, 2017. The Applicant and the Defendant signed Exhibit AS 1 –the Mortgage Deed. They should have served the Defendant in the same manner as they did the summons as per Exh. A ST 1, 2.

33. On the position of the Purchaser, the respondent relied on Section 21 (2) of the Conveyancing and Law of Property Act, 1881 and 1882 which provides that:

> *"where a conveyance is made in professed exercise of the power of sale conferred under this Act, the title of the purchaser shall not be impeachable on the grounds that no case has arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorized, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power."*

34. Section 22 (1) states that the receipt in writing of a Mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his Mortgage, arising there under.

35. The principle is that equity will not intervene to set aside the conveyance if a Legal Estate pursuant to a Mortgagees' Statutory Power of Sale unless there was some impropriety or element of bad faith in the exercise of the power of sale which was known to or participate in, by the Purchaser. If such impropriety is discovered or exists at all, the Court may hold that the property is subject to the Mortgagor's equity of redemption". FISHER and LIGHTWOOD'S LAW OF MORTGAGE (13th Edu) page 669.

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36. In the instant case, the mortgaged property has been sold to a third party by a Deed of Conveyance dated 16th June, 2016 registered as No. 1225/2016 volume 769 page 125 in the Book of Conveyances kept in the Office of the Administrator and Registrar-General.

37. No evidence has been adduced that the Purchaser had notice of irregularity or impropriety in the exercise of the statutory power of sale. This Court however notes that notice was not served on the Applicants as required by statute and the Deed of Mortgage. The Applicant ought to be aware of the sale, the proceed thereof and the impact on his obligations. But consideration has to be given to the contents of Exhibit AM4 attached to the affidavit of Assiatu Mansaray dated 16th August, 2016. In the said letter, the first Defendant accepted his liability without any contention about the principal and interest. He also made reference to a Notice to Quit from 25 Percival Street, Freetown. So though no statutory notice of the sale was given to the Applicant, he had notice of an impending action by the Respondent.

38. It should be noted that this Court by its Order dated 3rd August, 2016 merely took cognizance of the sale of property at 25 Percival Street, Freetown for the sum of Le 522,000,000/00 but gave direct Orders in respect of the other mortgaged property at Fabaina Road, Kono Town near Songo demarcated on Survey Plan No. LS 3884/83 dated 1st March, 1984.

39. It is my view that sale of property without Court Order under the Conveyancing Law of Property Act 1881 and 1882 though not unlawful is to my mind, an undesirable practice, particularly when as in this case, the Plaintiff later deems it necessary to seek the Court Order.

I will conclude by saying that the scenario in this case is unique thereby necessitating unique Orders.

In the circumstances, I Order as follows:-

1) That the Plaintiff/Respondent gives an account of the sale of the Mortgaged property at 25 Percival Street, Freetown.
2) That the Plaintiff/Respondent provides the foregoing information in writing:

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3) That a Stay of Execution is hereby granted in respect of the Orders of this Court relating to the sale of the Mortgaged property at Fabaina Road, Kono Town near Songo demarcated in Survey Plan No. LS 3884/83 dated 1st March, 1984 until 1-2 herein have been fulfilled.

4) Costs of this application shall be costs in the cause.

5) Matter adjourned to Wednesday 28th June, 2017 at 9:30am.

HON. MR. JUSTICE SENGU KOROMA -JA

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