BETWEEN:

KOKEI COMMERCIAL BANK LIMITED — PLAINTIFF

AND

WHITEPOLE FISHING COMPANY LIMITED — 1ST DEFENDANT

AND

MR. REGINALD HARLSTON — 2ND DEFENDANT

F. K. GERBER — **-COUNSEL FOR THE PLAINTIFF**

I. KANU — **-COUNSEL FOR THE DEFENDANT**

JUDGMENT OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED ON THE 14th OCTOBER 2024.

This is a matter between the Plaintiff and the defendant is which the Plaintiff prays for immediate recovery of the sum of NLe 16,407,291.52 (Sixteen Million, Four Hundred and Seven Thousand Two Hundred and Ninety-One Thousand Leones and Fifty-Two Cents) same being principal and interest due and owing to the Plaintiff by the defendant.

By letter dated 3rd September 2021, the defendant applied for a loan facility from the Plaintiff in the sum of NLe 14,950,000,000 (fourteen Million Nine

Hundred and Fifty Thousand Leones). By letter dated 20th December 2021 the Plaintiff granted the defendant a business loan in the sum of Le 14,462,500,000 (Fourteen Million Four Hundred and Sixty Two Thousand Five Hundred Leones). This facility was for eight months and interest was to be charged at the rate of 20% per annum. The facility was to be secured by a legal mortgage to be created over the building, plant and machinery situate at Off Peninsular Road Kissi Town. The mortgage deed was executed by the parties on the said property on the 17th March 2023. In that period the said funds were dispensed to the defendant and same was utilized accordingly by it. The facility remains unpaid as agreed between the parties and it continues to accumulate interest. It is for this facility that the Plaintiff have approached this court, by originating summons dated 21st March 2024 seeking orders to enforce payment of same by foreclosure of sale of the mortgaged property.

The defendant filed and relied on an affidavit in opposition deposed to by the 2nd Defendant on the 15th April 2024 and a supplemental affidavit deposed to on the 7th June 2024. In the said affidavits, the defendant did not deny the debt. Its case is that its business suffered a setback when as a result of another matter, an injunction was placed on its accounts and it could not access funds for its business resulting on damages to its operations. The bank statements of the defendants were attached and exhibited to the supplemental affidavit. The defendant also attached a repayment plan to the said supplemental affidavit in opposition in which he proposes to make regular payments from the 1st August 2024 to have been concluded by the 1st July 2027, spanning a period of 3 years.

The Plaintiff seeks to enforce payment of the sum owed to it by the defendant by foreclosure or sale of the property which was delivered by the defendant as collateral for the debt. It is trite law that it is entitled to do so and there are many authorities on this point. However, this right of the plaintiff is subject to the equitable right of the defendant to redeem the property. In the eyes of equity, even though the mortgage passes the legal title in the property to the lender, it is nonetheless a security device to assure the repayment of the debt and/or interest or the performance of some obligation for which it is given

and nothing more. It is for this reason that the courts have in their judgments over the centuries always leaned towards the giving the debtor and opportunity to redeem the property. It is also for this reason that it was held in the case of ***Noakes v Rice (1902) AC 24*** that unless the right to redeem is lost in the manner prescribed by law, the mortgagor must be allowed to redeem his property at any time even after the contractual date. Lord McNaughton had this to say of the nature of mortgages in page 30.

> *"Redemption is the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself".*

The 1st defendant in this matter is indebted to the plaintiff and has not denied this fact. The facility was for a period of 8 months and this period has elapsed. This in law entitles the Plaintiff to foreclose on mortgaged property but for the fact that equity says the defendant is entitled even after the date of default to redeem the mortgaged property.

Further, the defendant to this action by its affidavits have admitted the debt owed to the Plaintiff and have asked for time to pay off the debt. In this light, I must refer to ***Rule 17 of the Commercial and Admiralty Court Rules 2020***. ***Rules 1 and 2*** of same provides thus;

> *"(1) A defendant who makes an admission pursuant to Rule (1) of Order 34 of the High Court Rules 2007, may request for time to pay the amount admitted.*
>
> *(2) The defendant's request shall be*
>
> *(a) filed with his admission;*
>
> *(b) supported by a statement of his financial position including details of all his bank accounts".*

In other words, where a defendant admits that he owes money he can request for time to pay, if he files his admission with a statement supporting his financial position. The court will then take this into consideration in delivering judgment.

However, if the Plaintiff wishes to object to the proposal of the defendant as to time to pay the debt, then pursuant to sub-rule 5 of rule 16, he must state his reasons for rejecting the defendant's proposal as to the time of payment. I have taken the liberty to peruse and understand the affidavit in reply filed by the Plaintiff. The deponent made the point that the defendant has never shown any willingness to liquidate its indebtedness but have only repeatedly requested for debt restructuring.

The above having been highlighted, the role of this court at this stage is to enter judgment on the sum admitted against the defendant and make a determination on how much time could be considered reasonable for the defendant to liquidate its indebtedness. In doing so, this court will also take judicial notice of the substance of ***Rule 17 sub-rule 7 of the Commercial and Admiralty Court Rules 2020***. The provision reads thus;

> *"Where a defendant fails to make any of the instalments which are due, the defendant's right to pay by instalment shall be abrogated and the plaintiff shall be entitled to execute the order for the outstanding sum in full without further notice".*

In simple terms, where a defendant misses any payment that he was supposed to make in instalments, he forfeits the right to pay in instalments. The plaintiff is then at liberty to demand the full remaining amount immediately without giving any more warnings.

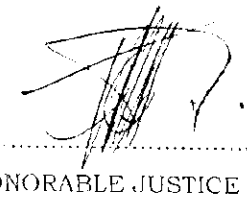
It is clear from this that even though the court (at the request of the defendant and based on the substance of the opposition by the plaintiff), can make orders for the defendant to satisfy the debt in instalments, where such an order is made and the defendant fails to comply with same by missing the instalment payment, the right to pay in instalment would be extinguished and it would be within the plaintiff's right to demand the sum remaining in full.

As such due consideration must be taken by the court in making a decision on the payment by instalment. It is a point from which the defendant cannot return. All that would be left for him if he defaults, is the equity of redemption which would only last as long as it takes for third party interests to be

established in the mortgaged property. I have taken the liberty to examine the payment plan as proposed by the defendant coupled with the reason for the plaintiff's rejection of same as pointed out in its affidavit in reply. It is my considered view that it would be just and equitable for this court to grant judgement for the debt owed by the defendant to the plaintiff to be paid in instalments as is proposed by the Defendant.

I therefore make the following orders;

1. The Defendant is indebted to the Plaintiff in the sum of Le 16,407,291.52 (Sixteen Million, Four Hundred and Seven Thousand Two Hundred and Ninety-One Thousand Leones and Fifty-Two Cents) same being principal and interest on loan facility granted to the defendant by the Plaintiff.
2. The said debt shall be paid in 24 equal monthly payments from the 1st December 2024 until full payment of same.
3. The defendant shall pay interest on the said sum at the rate of 4% per annum on the balance from the date of this judgment until satisfaction in full of the debt.
4. The cost of this action is assessed at Le 30,000 (Thirty Thousand Leones) to be paid by the 1st defendant to Solicitors for the Plaintiff.



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THE HONORABLE JUSTICE LORNARD TAYLOR

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