IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT

Case No: MISC.APP 139/15

BETWEEN:

UNION TRUST BANK LIMITED - PLAINTIFF
2 HOUSE STREET
FREETOWN

AND

MARIAMA DEEN SWARRAY - 1ST DEFENDANT
T/A SISY MARIAM ENTERPRISE
M'BALU BANGURA - 2ND DEFENDANT
NO. 38 GOODING DRIVE
OFF REGENT ROAD
LUMLEY
FREETOWN

REPRESENTATION

PLAINTIFF - YADA WILLIAMS & ASSOCIATES
DEFENDANT - UNREPRESENTED

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA J.
Judgement DELIVERED ON THE 15TH JANUARY, 2016

This is an action brought by the Plaintiff against the Defendant by way of Originating summons in which the Plaintiff is seeking the following orders:-

1. That the Borrower/Surety do immediately pay all monies due and owing the Plaintiff under the respective covenants in the Mortgage Deed dated the 31st day of December, 2010 and duly registered respectively as No. 3/2011 in volume 84 at page 26 of the Record Book of Mortgages kept in the office of the Registrar-General in Freetown for the payment of the sum of **Le 5,750,558,203.46; Le 4,000,000,000.00** comprising the principal debt and the remainder being interest accrued on the debt which interest continues to accrue at the rate of 34% per annum from the 1st March, 2015 which remains payable until complete discharge of the liability of the Plaintiff.
2. That in the alternative, an Order be granted for the mortgage to be enforced by the sale of the mortgaged property situate at Gooding Drive, off Regent Road, Lumley Freetown as shown on Survey Plan LS 137/95 dated 21st February, 1995 and should the same be insufficient to liquidate the sum due and owing the Plaintiff that the Defendants respectively personally pay the outstanding sum due the Plaintiff
3. Delivery of possession to the Plaintiff by the second Defendant of the said mortgage property.

4. Any further Order/Orders or other relief/reliefs that this Honourable Court may deem fit and just.

5. That the costs of and incidental to the application herein be provided for the same to be borne by the Defendants jointly and severally.

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2. AFFIDAVIT

The Plaintiff used the affidavit of Millicent Macauley-James (Mrs.) sworn to on the 1st of April, 2015 together with the exhibits attached thereto and filed herewith.

3. BACKGROUND

a) By a letter dated the 10th of October, 2012, the 1st Defendant by its agent, Mariama Deen Swarray applied to the Plaintiff for an extension of its overdraft facility-renewal of expired overdraft but at a reduced level of Le 3.5 billion, until the end of the year in order for them to satisfactorily complete outstanding construction works. This application was supported by a letter from Realini Bader Associates Ltd dated the 10th October, 2012.

b) By a letter dated the 3rd December, 2012, the Plaintiff approved the application in the sum of **Le 4,000,000,000.00.** This was subject to the following terms and conditions, amongst others:-

i. Interest rate: prime rate of 24% per annum plus 6% effective rate: 30% per annum to be charged monthly on all daily outstanding balances.

ii. Penal rate: prime rate 24% per annum plus 6 percent effective rate: 30% per annum to be charged monthly on all daily outstanding balances in case of default on agreed settlement date. Where interest payable on the outstanding balance remains unpaid, such interest shall become a debt due and owing the bank and the bank shall compute the interest on such debts on compound basis.

iii. Security: Legal Mortgage over property situate at Gooding Drive, off Regent Road, Lumley, Freetown with a valued of Le 800 million

iv. There will be no waiver or renegotiation of interest whatsoever on this facility.

The 1st Defendant accepted the above terms and conditions by signing and returning the attached copy of the said offer letter offer as required.

(C) By a letter of consent dated the 23rd day of July, 2010, one Mbalu Bangura, the 2nd Defendant herein, gave permission for the 1st Defendant and Mayakai International to use her property at 38 Gooding Drive, off Regent Road, Lumley,

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Freetown as collateral for Banking facilities from Union Trust Bank in respect of fulfilling contract requirements awarded the said first Plaintiff.

(d) By another letter of consent dated the 19th January, 2012, Mbalu Bangura, the 2nd Defendant herein granted her irrevocable consent for the Plaintiff to take supplemental mortgage in respect of her property lying and being at Old Regent Road, Lumley, registered as 648/95 volume 486 at page 79 to cover additional borrowing to Madam Mariam Deen Swarray T/A Sisy Mariam Enterprises and Mayakai International.

d) A Mortgage Deed was made between the Plaintiff and the Defendants on the 31st December, 2010. Clause 4 of this Deed provides that "the surety (the 2nd Defendant herein) as beneficial owner hereby conveys and grants unto the Bank all that piece or parcel of land, hereditaments and premises situate lying and being at off Regent Road Lumley... and all the estate right title interest claims and demands whatsoever of the borrower unto and upon the said Mortgaged premises and every part thereunto to hold the same unto and for the use of the bank as mortgage in fee simple subject to the provision for redemption hereinafter contained."

Clause 10 of the said Mortgage Deed also provides that "it is hereby agreed and declared that although as between the surety and the borrower the surety is only surety for that borrower, yet as between the surety and the Bank the surety shall be considered a principal debtor for all monies and interest intended to be hereby secured."

Clause 15 of the Mortgage Deed provides that "***Section 20 of the Conveyance Act, 1881 shall not apply to the security hereby created. However, the Plaintiff shall not exercise the statutory power of sale as regards the surety until demand for payment of all monies had been made on the borrower and there has been a default of one month in paying the same".*** It is important to note that this Mortgage Deed covers both the original overdraft and its extension in December, 2012.

e) As a result of the default of the 1st Defendant, the Plaintiff issued Originating Summons dated the 1st April 2015 claiming payment of the sums owing and due them by the Defendant. No appearance was entered on behalf of the Defendants

f) By a notice of motion dated the 2nd day of June, 2015, the plaintiff applied that service of the originating summons on the defendants be effected by publication of the same in two editions of a local newspaper. This application was moved on

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the 23rd June, 2015 and the Orders prayed for were granted. The defendant still did not enter appearance notwithstanding the order of this court. No affidavit in opposition was filed.

4. THE PRESENT APPLICATION

Augustine Marah Esq. made the present application on the 19th November, 2015 for the orders already listed at the beginning of this judgement. He relied on the affidavit of Mrs. Millicent Macauley- James and the following documents attached thereto:

i. **Exhibits "A"** and **"B"** are copies of documents granting banking facilities to the 1st Defendant
ii. **Exhibits "C"** and **"D"1-2 Mortgage Deed** and Consent of the 2nd Defendant.
iii. **Exhibit "E"** Statement of Accounts of the 1st Defendant.

In paragraph 4 of said application, the deponent stated the relevant provisions of the said Mortgage Deed. I shall refer to these in due course.

2. Mr. Marah urged this court to grant the orders prayed for even when the Defendants have not appeared in court nor filed any papers. This he attributed to the fact that the said defendants had no defence to the action.

5. THE PARTIES

1. The relationship between the plaintiff and the 1st defendant is one of banker and customer. The 2nd Defendant is the guarantor of the obligation owed to the plaintiff by the 1st defendant. The 1st defendant is the principal debtor. It should be noted however, that the principal debtor, though sometimes bound by the same instrument as his surety, is not a party to the latter's contract to be answerable to the creditor. There is no privity between the surety and the principal debtor, and they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts. Where, however, a party becomes a surety to another under an instrument which in terms creates only a joint liability, then in the absence of any proof to the contrary, the intention of the parties must be taken to be that the surety is only liable to the extent limited by the instrument, and does not become a surety out and out (**Per Kindersley VC** in the case of **OTHER-V-INVERSON (1855), 3 Drew 177 at page 182).**

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2. In the instant case there is only one instrument binding both parties that is the Mortgage Deed made on the 31st December, 2010. Also, the borrower has the primary responsibility to repay the loan. However, by the authority **JOHANNESBURG MEDICAL COUNCIL V-D- STEWART (& Co Ltd) (1902) 47 SC. L R 20**, House of Lords, the primary liability need not, however, be legally enforced before having recourse to surety unless the latter has so stipulated. In other words, notice of the borrower's default need not be given to the surety, and he is liable without been requested to pay, in the absence of a stipulation to the contrary, express or implied (see Halbury's Laws of England) 3rd edition, paragraph 824 at page 449.

3. Having dealt with the parties and how their respective liabilities arise, I shall now proceed to determine whether the borrower and the surety are liable for the claims brought by the plaintiff.

6. PRINCIPAL SUM

1. The plaintiff is claiming the sum of Le 4,000,000,000.00 being principal debt due and owing by the 1st defendant to the plaintiff. The defendants have not entered appearance nor in any way challenged the claim. This claim has been proved by Exhibit "B" attached to the affidavit of Millicent Macauley-James. Exhibit E of the said affidavit, the statement of Accounts of the 1st defendant reveals that as at 3rd December, 2013, the said defendant had a negative bank balance with the plaintiff in the sum of 4,014,394,330.20. As I have mentioned earlier, this loan is secured by the property of the 2nd defendant lying situate and at 38 Gooding Drive, off Regent Road, Lumley, Freetown. The property is valued at 800M. It appears the 1st defendant had an overdraft facility which she applied on the 10th October, 2012 to be extended. This extension was granted on the 3rd December, 2012. There is no evidence before this court that the principal sum has been repaid and the defendants have not challenged the action. It is therefore presumed that the said principal sum is due and owing.

7. INTEREST

1. The plaintiff is also claiming interest of Le 1, 750,558,203.45 on the principal sum of **Le 4,000,000,000.00** at 34% percent per annum. It is important to remember that a rate of interest is a price- the price of money now in exchange for money at some later date (Modern Banking by R.S. Sayers, 7th Edition at page 201).

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2. The application made by the 1st Defendant, Exhibit "A" was for an extension of overdraft facility. In its response, Exhibit "B", the plaintiff gave the following conditions regarding interest rates:-

i. Interest Rate: Prime Rate: 24 percent plus 6 percent effective rate: 30 percent per annum to be charged monthly on all daily outstanding balances.

ii. Penal rate: Prime Rate: 24% per annum plus 10 percent percentage points. Effective Rate: 34% per annum to be charged monthly on all daily outstanding balances in case of default on agreed settlement date. Where interest payable on outstanding balance remains unpaid, such interest shall become a debt due and owing the bank and the bank shall compute the interest on such debt on compound basis. Exhibit "B" further provides under ***"GENERAL CONDITIONS"*** (d) as follows:- "In view of the fact that this facility is financed by other customers savings on which interest is paid by the bank, there will be no waivers or renegotiation of interest whatsoever on this facility". These conditions were accepted by the Borrower (1st Defendant).

3. The loan granted to the 1st defendant was a short term loan with duration of six (6) months. This probably explains why compound interest was charged. The practice whereby the bank charge customers compound interest has become recognised as a usage of bankers, and as such is implied into a contract between banker and customer; a bank's right to charge compound interest does not cease upon its demand for payment of such sums outstanding on the customer's accounts but continues until all sums are paid or until judgement is given on the bank's claim ***(NATIONAL BANK OF GREECE SA-V-PINIOS SHIPPING CO) (No.1) the Maria (1990) 1AC 538 (English Supreme Court Practice, 1999) paragraph 6/4/7 page 60.*** I shall return to this aspect when giving my Orders herein.

4. It is important to note that if a plaintiff is entitled to interest by statute or statutory instrument or by contract, the plaintiff is entitled to interest as of right. In the instant case, the payment of interest and percentage thereof was agreed by the parties. Though it is often said that award of interest is discretionary, here the parties are contractually bound by an agreed interest rate. I therefore hold that this court cannot interfere with a freely negotiated and agreed term of a contract, in the absence of a vitiating factor.

5. I am however constrained to grant interest a further interest of 34 percent on the accrued interest as it would be unconscionable. As interest should not

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be punitive, I will award interest on the said accrued interest at the rate of 5 percent per annum from the 1st April, 2015 until judgement.

6. Having held that the Plaintiff has proved the liability of the 1st defendant for both the principal sum owing and the interest thereon, I will however not order an immediate sale of the mortgaged property. The Defendants shall be given the opportunity to redeem the mortgage through the exercise of their equity of redemption. This is because their legal right to redeem had been lost by failing to repay the loan on the due date. If the defendants fail to exercise their equity of redemption, then the plaintiff will be entitled to foreclose. This will make the plaintiff both the owner in law and equity of the mortgaged property.

DECISION

In the circumstances therefore, after due consideration of the affidavit evidence and submission of Counsel and the fact that the defendants did not contest the action, judgement is entered on behalf of the plaintiff herein on the following terms:-

1. The Defendants are jointly and severally liable to the plaintiff for the repayment of the sum of **Le 5,750,558,203.46** ***(Five Billion, Seven Hundred and Fifty Million, Five Hundred And Fifty-Eight Thousand, Two Hundred and Three Leones and Forty Six Cents).***

2. The defendants are hereby given one month statutory notice from **1st February, 2016 to 29th February, 2016** being notice of intention to sell the mortgaged property, that is property situate at Gooding Drive off Regent Road, Lumley, Freetown as shown on survey plan L S 137/95 dated 21st February, 1995.

3. Interest on the said sum of **Le 5,750,558,203.46** ***(Five Billion, Seven Hundred and Fifty Million, Five Hundred And Fifty-Eight Thousand, Two Hundred and Three Leones and Forty Six Cents)*** at 5 percent per annum from the 1st day of April, 2015 to date of judgement.

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4. That the said sum of Le **5,750,558,203.46** ***(Five Billion, Seven Hundred and Fifty Million, Five Hundred And Fifty-Eight Thousand, Two Hundred and Three Leones and Forty Six Cents)*** be paid in Ten (10) monthly equal instalments commencing on the 1st day of March, 2016.

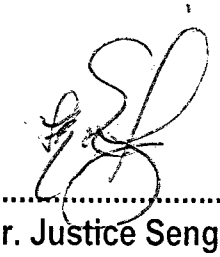
5. In the event of default of one instalment payment, the entire sum of **Le 5,750,558,203.46** ***(Five Billion, Seven Hundred and Fifty Million, Five Hundred And Fifty-Eight Thousand, Two Hundred and Three Leones and Forty Six Cents)*** with interest thereon as at (3) above immediately becomes due and owing.

6. In the event of default of repayment as stipulated in paragraphs 3 to 5 supra then the defendant yields up possession of the mortgaged property to the plaintiff and the Mortgage Deed dated the 31st day of December, 2010 duly registered as No. 3/11 in volume 84 at page 26 of the Record Book of Mortgages be foreclosed by sale. Should the proceeds thereof be insufficient to liquidate the sum due and owing the plaintiff herein, that the Defendants respectively personally pay the outstanding sum due to the Plaintiff.

7. Liberty to apply.

8. That the orders herein be published in two editions of two widely read local newspapers during the period granted herein for notice of intention to sell the mortgaged property.

9. Costs to be taxed if not agreed.



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Hon. Mr. Justice Sengu Koroma (J.)

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