

FTCC: 113/12

2012

S.

No: 23

IN THE HIGH COURT OF SIERRA LEONE

IN THE MATTER OF THE CONVEYANCING ACT 1881 AND IN THE MATTER  
OF A DEED OF MORTGAGE BETWEEN MOHAMED B. SOW AND SIERRA  
LEONE COMMERCIAL BANK LIMITED

Between:

Sierra Leone Commercial Bank limited - Plaintiff  
Siaka Stevens street, Freetown

And

Mohamed B. Sow - defendant  
T/A Pelly Enterprises  
66 Berwick Street,  
Freetown

Advocates:

Mr. W. Nicol for the plaintiff

Mr. C. F. Edwards for the defendant

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Justice V. M. Solomon J. A.

*3<sup>rd</sup> November*  
~~October~~ 2014

JUDGMENT

- 1) The plaintiff has commenced this action against the defendant in which it is seeking the following orders:
  1. That the defendant do immediately pay all monies due to the plaintiff under the respective covenants in a Deed of mortgage dated the 22<sup>nd</sup> day of September, 2006 and duly registered as 107/2006 at page 108 in volume 77 of the Record Books of mortgages kept in the office of the Registrar-General of mortgages kept at the Registrar-General's office in Freetown for the repayment of the principal sum totaling Le92,224,132/11 and payment in

/2

the mean time of interest at an annual rate to be determined by the plaintiff.

2. Or in the alternative an order that the said mortgage may be enforced by sale or foreclosure.
3. Delivery of possession of the mortgaged property situate at 66 Berwick Street, Freetown by the defendant to the plaintiff.
4. That the Honorable Judge grants any further or other relief that may be necessary in this action.
5. That the costs of this application be provided for.

In support of the application is the affidavit of Magnus Mansaray, a senior manager in charge of Risk Management in the plaintiff bank. An appearance was entered on behalf of the defendant. There is no affidavit in opposition. Several adjournments were granted to enable parties settle the matter in the form of a consent judgment. Mr. Edwards undertook to write a letter of proposal to Mr. Nicol, but never did; hence the file was withdrawn for judgment. On the 10<sup>th</sup> April, 2013 the court was informed that the defendant had made a payment of Le20,000,000/00.

- 2) Mr. Nicol relied on the entire affidavit in support of the summons. He made his application pursuant to Order 37 of the High Court Rules 2007 (hereinafter called "The Rules"). He referred the Court to the mortgage deed; letter of demand notice of intention to sell; and the valuation certificate. Mr. Edwards did not make any submissions on behalf of his client.
- 3) The plaintiff herein is a bank and the defendant its customer. This relationship is distinguished from other relationships. A banker is defined in Section 2 of the Bills of Exchange Act 1882 as including "body of persons, whether incorporated or not, who carry on the business of banking". Their relationship is special, based on confidentiality and secrecy in which the bank is ordinarily debtor and

the customer is creditor with a right, unless otherwise agreed, to payment on demand. The defendant herein as a customer operated an account numbered: 001-106743-11-00-01 with the bank and so the relationship of banker and customer exists. The basis of this claim is in respect of a debt in overdraft facilities granted to the defendant in the sum of Le250,000,000/00 as evidenced in "MM1". The sum claimed is for the sum of Le92,224,132/11. A letter of demand marked "MM2" was written to the defendant, but there is no evidence of a response. The court is however informed that he has made some payment in the sum of Le20,000,000/00. The defendant has not denied his indebtedness to the plaintiff but is asking for time to settle his indebtedness.

- 4) The plaintiff's claim is for the recovery of the sum of Le92,224,132/11, being sum owing and due under the respective covenants in the mortgage deed "MM1". Alternatively, the plaintiff is seeking an order of foreclosure of the said mortgage; possession; and costs. In the event the plaintiff repays the outstanding sum owing and due, then the alternative remedy will not be necessary. It is not disputed that the mortgage deed "MM1" was duly executed by the parties and it forms the basis of their relationship. The right to foreclosure exists in case of a legal mortgage and hence the remedy on such a charge, is foreclosure, whether the charge relates to land or to personal estate. The sum claimed includes the sum outstanding on the overdraft facility plus interest. This court may direct a sale of the mortgaged property on the request of the mortgagee, the plaintiff, without allowing any time for redemption or for payment of any mortgage money and it may be directed on such terms as the court thinks fit. To every mortgage there is the remedy in equity which is the right to redeem, that is, the equity of redemption. This right continues unless and until judgment for foreclosure by an order of court. By this right, the defendant can apply within a reasonable time and offer payment of the principal sum, interest and

all proper costs and it might redeem the estate forfeited at law. I refer to the case of Master, Etc, of Emmanuel College Cambridge v Evans (1625) 1 Rep. Ch. 18.

- 5) The defendant has not disputed the debt and he is aware of the sums granted as overdraft facilities, by the plaintiff, and that said facility is repayment of said sum loaned plus interest, and costs as evidenced in "MM1". Several judgments have been delivered in this court including Misc. app FTCC 006 SLCB v Mohamed Hijazie Ors; Misc. app ICB v Percy Waters Bright of February 2013; CC. 157/12 FIB v Primer Investment (SL) Ltd of 1<sup>st</sup> July 2013 all of which are of similar facts and circumstances. By Clause 7 of the mortgage deed, Section 20 of the Conveyancing Act 1881 was omitted and the requisite notice was one month. A 30 days notice dated 7<sup>th</sup> May 2012 was issued to the defendant requiring payment and of the intention to sell the mortgaged property. Since the notice was issued, the court is informed that the defendant has paid sum of Le20,000,000/00 thereby leaving a balance of Le72,224,132/11.
- 6) As stated in the cases referred to and after due consideration of the facts herein, I am not inclined to granting an immediate sale of the mortgaged property. I shall give the defendant an opportunity to redeem the mortgage and exercise his right to the equity of redemption. This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate. I refer to the case of Master v Evans referred to supra and Halsbury's Laws of England, 4<sup>th</sup> edition, volume 32, pages 188-190. The right to redeem is so inseparable an incident of mortgage, that is, it cannot be taken away by an express agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular description of persons. I refer to case of Esso Petroleum Co. Ltd v Harper's Garage (Stourport) Ltd (1967) 1 ALL ER 699. This right is not a mere right but an equitable estate or interest in the property mortgaged. I will allow the defendant

sometime, that is, 24 months within which he may redeem the mortgaged property though if he in default of anyone installment, the said mortgaged property will be foreclosed.

- 7) I shall now consider the issue of interest which is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to the other. I refer to case of *Dunn Trust Ltd v Feetham* (1935) ALL E.R 280. Interest may be recovered in equity where a particular relationship exists including mortgagors and mortgagees. Overdraft facilities were granted to the defendant at an interest to be determined. By Clause 2 of the mortgage deed interest rate is determined by the plaintiff and it reads thus:

"2. The mortgagor will in the meantime pay to the Bank so long as any money shall be owing on the security hereon, interest at the current Banker's rate or such rate as the Bank may determine as the appropriate prevailing rate of interest to be calculated on the balance owing from day to day."

(Emphasis mine)

By the aforesaid, the plaintiff has discretion in its determination of the rate of interest. It can be on the prevailing rate, or any rate it may determine. The charging of compound interest is allowed when it is expressly stated as in this case where the debtor has employed the money in trade and has presumably earned it. In considering the aforesaid, it is important to know the reason or purpose of the loan. Is it in respect of a business capital or investment of a property or to settle an outstanding loan? Interest charged should not be penal or put in the form of compensation for damage done. I refer to case of *Jefford and Another Gee* (1970) 1 ALL. E.R per Lord Denning in which he stated to wit:

“Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him.”

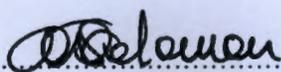
In a later case of *B. P. Exploration Co. (Libya) Ltd v Hunt (No. 2)* 1 ALL. E. R pg 925, Mr. Justice Robert Goff had this to say:

“The fundamental principle is not awarded as a punishment but simply because the plaintiff has been deprived of the use of the money which was due to him.”

The sum claimed includes interest. By the mortgage deed, the plaintiff determines the rate. I am not inclined to order an interest rate that is unconscionable and which will be deemed a punishment to the defendant. I however agree that the latter is still indebted to the plaintiff and have continued to settle his indebtedness to the plaintiff even after the commencement of these proceedings. It is the practice of this court to award interest after due consideration of all the facts before it, and there is no uniform interest rate. The usual practice, apart from special circumstance is to allow 5% as the statutory rate. It is also the practice that where the interest rate is not fixed; considering the circumstances and nature of the transaction; the rate of 5% is charged on commercial transactions. I refer to Halsbury's Laws of England 3<sup>rd</sup> edition, volume 27 pages 11 to 12. I will allow 2% interest from 13<sup>th</sup> November 2012 until judgment as this defendant has evinced an intention to settle his indebtedness by payment of some part of the sum owing even after the commencement of this matter. Let me remind litigants and their counsel that for as long as matters of this nature are outstanding interest continues to accrue and any quantum of interest granted will have to be paid up to the date of the judgment.

8) In the premises therefore, and after due consideration of the affidavit as filed and with no affidavit in opposition and no submissions for and on behalf of the defendant herein, judgment is hereby entered for the plaintiff on the following terms to wit:-

1. Judgment is entered for the plaintiff in the outstanding sum of Le72,224,132/11 with interest at a rate of 2% from 13<sup>th</sup> November 2012 until date of this judgment.
2. The defendant is to pay the said sum in 24 equal monthly installments commencing 1<sup>st</sup> December 2014.
3. In the event of default of any of the installment payments in paragraph 2 supra the entire sum immediately outstanding becomes due and payable.
4. Alternatively, in the event of default in paragraphs 2 and 3 supra, the deed of mortgage dated 22nd September 2006 registered as No.107/2006 at page 108 in volume 77 of the book of mortgages is hereby foreclosed.
5. In the event of default of paragraphs 2 and 3 supra, the defendant is to deliver to the plaintiff possession of the mortgaged property.
6. Liberty to apply.
7. Costs of this action to be borne by the defendant such costs to be taxed if not agreed upon.

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Hon Justice V. M. Solomon J. A.