



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

Case No: MISC.APP.296/15

THE MATTER BETWEEN:

HFC MORTGAGE & SAVINGS (SL) LTD -PLAINTIFF

AND

AMINATA DARAMY -DEFENDANT

YADA WILLIAMS & ASSOCIATES -COUNSEL FOR THE PLAINTIFF

TEJAN-COLE, YILLAH
& BANGURA -COUNSEL FOR THE DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA JA

JUDGMENT DELIVERED ON THE 18th OCTOBER, 2016

This is an Application by Originating Summons dated the 10th July, 2015 for the following Orders:-

- 1) That the Plaintiff be granted possession of the mortgaged property under the Deed of Mortgage dated 20th day of September, 2010 and duly registered as No 201/2010 in Volume 83 at Page 49 and a Supplemental Deed of Mortgage dated 22nd day of December, 2011 registered as No. 318/2011 in Volume 86 page 40 of the Record Book of Mortgages kept in the office of the Administrator and Registrar-General in Freetown.
- 2) Any further Order(s)/reliefs(s) that this Honourable Court may deem fit and just.
- 3).That the costs of and incidental to this Application herein be provided for, the same to be borne by the Defendants.

1. The Application was supported by the Affidavit of Ishmaila Sheriff sworn to on the 10th day of July, 2015 together with the exhibits attached thereto.

FACTS

2. The Defendant applied to the Plaintiff for a mortgage facility loan and that in consideration of the grant of the said facility, the Defendant executed a Deed of Mortgage dated the 20th September 2010.
3. The Mortgage Deed provided inter-alia “that the mortgagor shall duly and punctually repay the mortgagee the said principal sum comprised of the total aggregate monies advanced together with interest thereon at the rate of nineteen (19%) per annum or such rate as the mortgagee may from time to time substitute thereof as may be necessitated by changes in the mortgagee’s cost of funds in monthly instalments at such amounts as the mortgagee shall from the mortgagor.”

4. By this Deed of Mortgage, the mortgagees agreed to advance a loan of Le 190,000,000/00 to the mortgagor, Aminata K. Daramy being monies in respect of completing the construction of property lying, situate and being at 5 Wilberforce Drive, Congo Valley, Freetown.
5. By a Supplemental Deed dated 22nd December, 2011, the mortgagor advanced an additional sum of Le 170,000,000/00 to the mortgagor at an interest rate of twenty-three percent per annum or such other rates as may be determined by the mortgagee at an annual percentage rate (APR) of 24.32%.
6. On the 23 August, 2011, the Plaintiff wrote to the Defendant informing her that her mortgage account was in arrears of Le 4, 4441, 577.35-first letter.
7. On the 10th April, 2013, the Plaintiff again wrote requesting her to repay the arrears of Le 93, 693, 880, 95 representing non-payment for a period of ten months.
8. On the 30th April, 2013, the Plaintiff issued a Mortgage Demand Note in accordance with Section 9 (2) of the Mortgage Finance Act, 2009 and Clause 5.2 of the Mortgage Agreement requesting the payment of the said sum within 14 days of the date of the letter dated 30th April, 2013.
9. The loan as at 1st October, 2016 stood at Le 276,398,164.70.

THE PRESENT APPLICATION

10. On the 10th July, 2015, the Plaintiff filed the present Application praying that the Plaintiff be granted possession under the Mortgage Deed dated 20th September, 2010 and a Supplemental Mortgage Deed dated 22nd December, 2011.
11. The firm of Tejan-Cole, Yillah and Bangura entered appearance on behalf of the Defendant on the 22nd January, 2016.

12. The Pre-trial settlement conference failed and the matter was assigned to this Court for trial.
13. At the hearing of the Application, the issue arose as to whether the said Application ought to be made ex-parte or inter-partes.
14. Section 12 (1) gives the Mortgagee the right upon the failure of performance of an act or acts secured by the mortgage as against the Mortgagor and any person deriving an interest in the Mortgaged Property through him whose interest is subsequent to that of the Mortgagee, to take possession of the Mortgaged Property.
15. Section 12 (2) provides that in the exercise of his right of possession under this Section, the Mortgagee under a Mortgage to which this Act applies shall make an ex-parte application to the High Court for an Order to take possession of the Mortgage property.
16. Section 12 (3)-An Order made by the High Court under sub-section (2) shall be enforceable by a Writ of Possession.
17. It is not disputed that the Defendant received a loan from the Plaintiff. This is evidenced by the Facility Letter dated 9th July, 2010-Exhibit "F" attached to the Affidavit in Support sworn to on the 10th day of July, 2015 and the Deed of Mortgage dated 20th day of September , 2010 and a Supplemental Mortgage dated the 22nd day of December,2011.
18. The Defendant received a total advance of Le 360,000,000/00 from the Plaintiff for a specific reason viz completion of property lying, situate and being at 5 Wilberforce Valley Road, Wilberforce, Freetown.
19. It is not denied that the Mortgagor has failed to repay the Mortgage loan as covenanted.
20. There is however a dispute between both parties as whether the application should be made inter-partes or ex-parte. In support of their respective positions,

both Counsel submitted oral and written submissions. The oral submissions were made on the 20th January, 2016. However, for convenience, I shall deal with both the oral and written submissions together.

THE DEFENDANT'S SUBMISSIONS

20. Mr. Ibrahim Yillah submits that the question for determination here is whether an application for possession under Section 12 of the Mortgage Finance Act, 2009 can be made ex-parte. In his opinion, such an application cannot be made ex-parte for the following reasons:-

- i. An ex-parte application for possession would violate Section 23 (2) of the Constitution of Sierra Leone, No 6 of 1991.

Mr. Yillah submits that the elements of impartiality and fair hearing within the context of Section 23 (2) require both parties to be afforded opportunity to be heard in Court before reaching its conclusion. Any other interpretation would be inconsistent with Section 23 (2) of the Constitution and the natural law principle of Audi Alteram Patem.

- ii. Sustaining an ex-parte application would be inconsistent with the Constitution as a whole.
- iii. Sustaining an ex-parte application without the Court entering final Judgment would be inconsistent with the High Court Rules, 2007. No trial has been held and final Judgment given and so the Plaintiff cannot rely on the High Court Rules, 2007 to support its contention that such an application can be made ex-parte.
- iv. Before sustaining an ex-parte application for possession which should be the final end of the trial process should be carefully considered for particular two reasons

-In an ex-parte proceedings, an Applicant is required to make full and frank disclosure

-Before an application is sustained under Section 12 (2) of the Home Mortgage Act, the provisions of Section 12 (1) have to be carefully considered and the Court must be satisfied that the mortgagor has failed to meet her obligations under the Mortgage Deed. There were also the procedural requirements under Section 9 of the Act in the event of a default.

21. In support of his submission with respect of the requirement of full and frank disclosure in an ex-parte application, Mr. Yillah referred this Court to the case of EX-PARTE MUCTARU OLA TAJU DEEN –V-COMMISSIONER OF THE ANTI-CORRUPTION COMMISSSION & OTHERS (SC Misc.App 8/2000) (Unreported) and the English Civil case of THE ANDRIA (1984) 1 ALL ER 1126.

- v. If the Originating process contains or seeks mixed reliefs of recovery and possession, the Court should not treat the application as ex-parte because it would be outside the ambit of Section 12 (1) of the Home Mortgage Finance Act, 2009.
- vi. Entertaining the application ex-parte would deprive or deny the Defendant her effective right to appeal.

In his submission, Mr. Yillah waged this Court err on the side of caution and hear the application inter-partes.

PLAINTIFFS SUBMISSIONS

22. Mr. Bernard E. Jones, Counsel for the Plaintiff prefaced his submissions by citing Section 12 (2) of the Home Mortgage Finance, Act, 2009 and Section 23 (2) of the Constitution of Sierra Leone, 1991 and

stated that there are various exceptions to the 'Audi Alteram Partem' Rule which may have informed the drafters of Section 12. These were:

- a) Statutory provisions
- b) Absence of legitimate expectation
- c) Nature of the case.

23. He proceeded to explain the exceptions as follows

- a) Where a Statute e.g. Section 12 (2) of the HMF, Act, Rules of Court such as Order 47 Rule 4, Order 50 Rule 2, Order 35 Rule 1 (8) of the High Court Rules, 2007, makes provision for the carrying out of an act in a particular manner, there is nothing unconstitutional about them unless so declared by the Supreme Court. The principles of natural justice are meant to supplement the law and not to supplant them. The Court is not permitted to ignore the mandate of the legislature.

On this point, Mr. Jones urged this Court to resolve the question by use of longstanding interpretative Maxims such as "Expressio unis est exclusion alterius (express mention of one thing excludes another) and expressum facit cessare tacitum (express mention of certain things excludes anything not mentioning)".

- b) The absence of a legitimate expectation to be heard.

24. Mr. Jones submitted that in the case of a default under Section 12 (2) of the Act, the mortgagor is said to lack any legitimate expectation. In support of this proposition, Mr. Jones cites the Belize case of British Caribbean Bank International Limited -v- Central Bank of Belize 516 2011 which referenced the West Indian case of Kent Garment Factory Limited -v- Attorney-General and Another (1991) 46 WLR 176 at Page 187.

25. In support of this exception to the Audi Alteram Partem rule, Counsel referred to the test Laid down by Lord Denning in the English case of Cinnamond –v- British Airports Authority (1980) 2 ALL ER 36 . In that case, Lord Denning held that taxi-cabs drivers who were prohibited by an order from entering Heathrow Airport other than as legitimate passengers had no legitimate expectation of being heard. In his view, `in cases where there is no legitimate expectation, there is no call for hearing`. Applying the principle herein, Mr. Jones proceeded to give reasons for arriving at this conclusion: which include the indebtedness, the Mortgage Agreement, the utilization of the funds, failure to repay after due notice.

26. In his submissions under “The facts of the case” Mr. Jones said “....the facts in support of the motions for granting of possession clearly show that the principle of fair hearing is helpless and completely dead in relation to such application.” This submission sounds ominous. I shall refer to it later on in the Judgment.

27. Mr. Jones submitted that the Plaintiff had complied with Section 9 of the HMF Act. Coupled with this is the fact that the mortgage would have three (3) defaults affecting any exiting right, such as:

- 1) Failure to pay monthly sum 14 days after due date
- 2) Failure to remedy the 14 days default within one month
- 3) Failure to settle the entire arrears within three succeeding months.

28. He submitted that the Defendant had defaulted on various terms of the Mortgage Agreement despite several notifications and/or reminders as is required in all ex-parte applications. In support of this submission, Counsel cited the case of T. M Orugbo & Another –v- Bulara Uria & Others (SC 112/98.

29. Counsel concluded by making the following submissions:

- a) Counsel for the Respondent has not cited any provision of the HCR, 2007 that would be offended if this Court acknowledges that indeed Section 12 (2) gives right to an ex-parte application.
- b) The issue of frank disclosure raised by Counsel for the Defendant is the bedrock of an ex-parte application and this has been done by the Plaintiff.
- c) All applications before the Court under the HMF Act, 2007 seek only one relief and that is the right to possession.

30. Mr. Jones finally urged the Court to dismiss the objection of the Defendant's Solicitor and grant the Applicant the ex-parte hearing provided for under Section 12.

DECISION

31. From the date of these submissions, the Defendant has not been represented in Court nor filed an Affidavit in Opposition. The only information received by this court is that the Defendant was trying to make repayments which were not done.

32. I shall therefore first rule on the issue in dispute and afterwards pronounce judgment.

33. On the issue in dispute, the Defendant has raised two major points, amongst others:-

- i. Whether Section 12 of the HMF Act, 2009 would violate Section 23 (2) of the Constitution of Sierra Leone.

34. Counsel for the Defendant argues that the elements of impartiality and fair hearing within the context of Section 23 (2) of Act No 6 of 1991 require both parties to civil proceedings to be afforded opportunity to be heard in

Court before reaching its conclusion. Any contrary interpretation would also be inconsistent with the natural law principle of Audi Alteram Partem.

35. Counsel for the Plaintiff argues that there is nothing unconstitutional with Section 12 of the HMF Act, 2009 unless so declared by the Supreme Court.

36. I note that highly competent arguments were put forward by both Counsel on this point but I am inclined to agree with Counsel for the Plaintiff. Chapter 6, part 1 Section 73 thereof of the Constitution of Sierra Leone, Act No 6 of 1991 vests legislative authority in Parliament. It has the right to legislate on all aspect of life in Sierra Leone as long as the necessary conditions had been met. This takes me to the long title to the HMF Act, 2009 “Being an Act to regulate home mortgage financing and institutions which carry on home mortgage finance and provide for related matters.” There is also the legend “enacted by the President and members of Parliament in the present Parliament assembled.” Under and by virtue of the provision of Section 105.....of Act No 6 of 1991 Part V which gives supreme legislative authority to Parliament, the HMF Act, 2009 was validly passed into law. As such, the Act is binding on each and every Sierra Leonean engaged in or benefiting from mortgage financing. It constitutes part of the laws of Sierra Leone. The only remedy available to any person challenging its legitimacy is an application to the Supreme Court for it to be declared unconstitutional. There is no such Order before me and therefore the HMF Act, 2009; Section 12 shall remain in force on this issue. The other authorities cited by the Defendant on this point would not in any way change the current position of the law.

b) Whether the Plaintiff had made full and frank disclosure in line with Section 9 of the HMF Act, 2009.

37. To my mind, this is the most relevant aspect of this case for if the Act has been deemed valid, then the question is whether the Plaintiff complied with the provisions of the said HMF Act, 2009.

Section 9 sets the following criteria:-

- a) Where the mortgagor fails to make an instalment payment within fourteen days after due date for such payment, the mortgagee shall inform the mortgagor in writing of this fact and demand urgent steps be taken to remedy such default by the mortgagor.
- b) If no payment is made and the immediately following month's instalments also falls into arrears, the mortgagee shall send to the mortgagor a Demand Note for the immediate payment of the total amount that had fallen into arrears. Section 9(2).

The other subsections of Section 9 dealt with service of the various processes.

38. In his submission on this point, Counsel for the Defendant argued that the Plaintiff had not confirmed that if it had complied with Section 9.

39. In response to this allegation, Counsel for the Defendant presented the steps it had taken in compliance with Section 9. These are:

- a) Notified the mortgagor in writing of the default and demanding that urgent steps be taken to remedy the default (Section 9(1))
- b) By delivering to the mortgagor a Demand Note for immediate payment of the total amount that had fallen due.
- c) Had given the Mortgagor by Section 9(5) of the Act the opportunity to settle the total amount outstanding for well over an indeterminate period unless three successive months go by without settlement.

40. I have perused the Affidavit filed by the Plaintiff and note that the Plaintiff has complied with the requirements of Section 9. The Defendant has not submitted any evidence to the contrary.

41 In the circumstances, I hold that the Plaintiff has complied with the provisions of HMF Act, 2009 and Judgment ought to be given in his favour.

In the circumstances, I Order as follows:-

- 1) Judgment is hereby given in favour of the Plaintiff against the Defendant.
- 2) That the Plaintiff is granted possession of the Mortgage property under the Deed of Mortgage dated the 20th day of September, 2010 and duly registered as No 201/2010 in Volume 83 at page 49 and a Supplemental Deed of Mortgage dated 22nd day of December, 2011 registered as No. 318/2011 in Volume 86 page 40 of the Record Book of Mortgages kept in the office of the Administrator and Registrar-General in Freetown.
- 3) That the Defendant pays cost to the Plaintiff in the sum to be agreed by the parties. Failing which, such costs to be taxed.



Hon. Mr. Justice Sengu M. Koroma JA