

MISC. APP. 319 /13

2013 E. NO. 11

**IN THE HIGH COURT OF SIERRA LEONE**  
**(COMMERCIAL AND ADMIRALTY DIVISION)**

**IN THE MATTER OF THE CONVEYANCING ACT 1881**

**AND**

**IN THE MATTER OF A LEGAL MORTGAGE BETWEEN  
FULLADU EAST CONSTRUCTION, MINING AND  
AGRICULTURE, PRODUCE MARKETING COMPANY LIMITED  
AND ECOBANK SIERRA LEONE LIMITED**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF A PERSONAL  
GUARANTEE MADE BY BAJOKO KABBA**

**AND**

**IN THE MATTER OF ASSIGNMENT/DOMICILIATION OF SALES  
PROCEED AGREEMENT**

**BETWEEN: -**

**ECOBANK SIERRA LEONE LIMITED  
7 LIGHTFOOT BOSTON STREET  
FREETOWN**

**- PLAINTIFF/RESPONDENT**

**AND**

**FULLADU EAST CONSTRUCTION, MINING AND  
AGRICULTURE, PRODUCE MARKETING  
COMPANY LIMITED**

**-1<sup>ST</sup> DEFENDANT/APPLICANT**

**BAJOKO KABBA  
JOHN SAMBO  
ALL OF NO. 29 REGENT STREET  
FREETOWN**

**-2<sup>ND</sup> DEFENDANT/APPLICANT**

**-3<sup>RD</sup> DEFENDANT/APPLICANT**

**O. Jalloh Esq. for the Plaintiff/Respondent**

**S. S. Thomas Esq. for the Defendants/Applicants**

RULING DELIVERED THE 1<sup>st</sup>/<sub>2</sub> DAY OF July, 2016

This is an application by Notice of Motion dated 4<sup>th</sup> November 2015 filed on behalf of the Defendants/Applicants herein seeking a stay of execution of the judgment of this court dated 13<sup>th</sup> October 2015 and all subsequent proceedings pending the hearing and determination of the appeal to the Court of Appeal.

In support of the application is the affidavit of **BAJOKO KABBA**, the 2<sup>nd</sup> Defendant/Applicant herein sworn to on 4<sup>th</sup> November 2015. He deposed therein that the action herein commenced by Originating Summons dated 5<sup>th</sup> July 2013 wherein the Plaintiff Bank sought payment by the Defendants of monies due the Bank under a deed of mortgage dated 22<sup>nd</sup> September 2008 and in the alternative the enforcement of the mortgaged by sale of the mortgage properties belonging to the 2<sup>nd</sup> Defendant.

The deponent further deposed that the 1<sup>st</sup> Defendant's account with the Plaintiff Bank had been debited on several occasions in fulfillment of the principal debt and interest therein by the Plaintiff but that very serious discrepancies in the accounts were later noticed by the Defendants and the same brought to the attention of the Plaintiff and explanation sought but no such explanation has been proffered by the said Plaintiff. That the Defendants noticed that several withdrawals were made from the 1<sup>st</sup> Defendant's account with the said Bank without the Defendant's consent. That several letters were written to the said Bank by the 2<sup>nd</sup> Defendant seeking clarification and requesting statements of accounts of the 1<sup>st</sup> Defendant's account covering the period 1<sup>st</sup> January 2009 to date of the action herein all to no avail.

That it was only during the course of the action herein that the said Bank made the 1<sup>st</sup> Defendant's statement of account available and forwarded a copy of the said statement covering the period January 2008 to 31<sup>st</sup> July 2013. A copy of the said statement of account is exhibited to the said affidavit and marked Exh 4<sup>1-31</sup>.

The deponent further deposed that the Defendants have fully paid up in excess of the principal loan which was Le1, 200,000,000 and interest thereon and that he had suggested a settlement of the outstanding loan because the bank statement he had requested was not made available by the Plaintiff and for fear of the sale of his house on the wrong facts.

The discrepancies relating to withdrawals from the 1<sup>st</sup> Defendant's account for which the Plaintiff failed to proffer explanation are listed in the said affidavit as follows:

- a) The withdrawal of the sum of Le15, 728, 653.58 from the 1<sup>st</sup> Defendant's account on the 17<sup>th</sup> November 2009 for professional fees after professional fees had been withdrawn 3 times on the 24<sup>th</sup> March 2008 and 25<sup>th</sup> March 2008.
- b) The withdrawal of the sum of Le150, 000,000 plus Le15, 000,000 on the 11<sup>th</sup> February 2008 and the 15<sup>th</sup> February 2008 separately.
- c) The withdrawal of the sum of Le22, 093, 150.68 on the 29<sup>th</sup> February, 2008.



- d) The withdrawal of the sum of Le40, 331, 491.57 on the 11<sup>th</sup> March 2008 when the cheque issued was for Le9, 000,000.
- e) The withdrawal of the sum of Le59, 000,000 on 6<sup>th</sup> January 2010 which the Defendants insist they were quite unaware of
- f) The debiting of the sum of US\$ 27, 690.67 from the 1<sup>st</sup> Defendant's Dollars account which the Defendants are quite unaware of

The 2<sup>nd</sup> Defendant went on to depose that the court proceeded to deliver judgment amidst these discrepancies which he still wanted clarified. That he has instructed his solicitor to appeal against the said judgment. That the properties the subject matter of the judgment are his only possession where his entire family live. That he surrendered the title deeds of his properties in order to obtain the loan for his business, a loan which he believed has been fully settled. He therefore prayed that the Order sought be granted.

At the hearing of the application, counsel for the Plaintiff sought leave to cross-examine the deponent, **BAJOKO KABBA**, the 2<sup>nd</sup> Defendant on his affidavit in support of the application. Leave was duly granted and the deponent was exhaustively cross-examined on his affidavit. The substance of the cross-examination related to the discrepancies the 2<sup>nd</sup> Defendant alleged he discovered in his statement of accounts prepared by the Plaintiff Bank.

He was cross-examined lengthily on these figures and he insisted that the amounts he is disputing are entries for Le150, 000,000, Le59, 000,000 and Le40, 331, 491.57 totalling Le249,331, 491.57.

The deponent acknowledged that the total amount for which judgment was obtained against him is for Le 2, 302, 166, 999.94 comprising the principal debt plus interest thereon at the rate of 35% per annum from 1st October 2012 until full discharge of the principal debt and interest accrued thereon. The deponent further stressed that the statement of accounts were furnished him after the Bank had instituted these proceedings against him.

The application herein is for a stay of execution of the judgment herein against the Defendants pending the hearing and determination of the appeal against the said judgment.

It seems to me that the special circumstances relied upon by the Applicant which in his view warrant the stay prayed for are that the properties subject matter herein are currently occupied by himself and his family and they are the only properties which he has after years of doing business. He states that if these properties are sold he and his family would have no other place to go as they are the only properties they refer to as home.

Counsel for the Applicant stressed that since the Applicant stands a chance of losing the properties which represent his life's work it is necessary that all chances at legal redress are exhausted especially when the Applicant is challenging the



amount claimed and alleging that the Plaintiff Bank did not exercise due diligence in handling his accounts.

He further contended that the Court of Appeal would be acting in vain if a stay is not granted and emphasized that the whole situation would have been mitigated if the Plaintiff Bank had responded more promptly to the Applicant's request for his statement of accounts. He urged the court to grant the application.

Counsel for the Plaintiff Bank in his response to the submissions made by counsel for the Applicant referred the court to the testimony of the deponent under cross-examination and submitted that the Applicant had admitted that the queries he raised relating to the discrepancies had now been resolved with the exception of one payment of the sum of Le 150,000,000. He therefore submitted that the Applicant cannot rely on these discrepancies as amounting to special circumstances. He argued that if even if there are discrepancies in the account, the total sum disputed is Le 249, 331,491.57 out of a judgment sum of Le 2, 302,166,999.94. He stated that if the sum in dispute is taken out it would leave a debt of over Le 2 billion. He submitted that the Applicant should not be allowed to continue to deprive the successful litigant of the fruit of his judgment and permit the Applicant to enjoy the properties mortgaged to the Bank to the detriment of the Bank.

With regards the grounds of appeal counsel for the Plaintiff referred the court to the first ground and submitted that this ground which raised the provisions of Order 5 rule 4 of the High Court Rules 2007 relating to the suitability of actions instituted by Originating Summons was not canvassed before the High Court and

was only raised after the contentions had been resolved so there was no need for the said rule to apply.

Counsel for the Plaintiff further argued that the Applicant has failed to show special circumstances warranting the grant of a stay. He relied on the case of **Wahid vs. Floode** 2003 unreported decision of the Court of Appeal which held that a stay of over 40 years in a family house did not constitute special circumstances. He urged the court to refuse the application.

The question now is have special circumstances been shown here to warrant the court exercising its discretion in the Applicant's favour? What is clear is that the Applicant has complained that the Bank has not shown due diligence in handling the Applicant's accounts resulting in discrepancies in his accounts. Counsel for the Plaintiff has laid great emphasis on the fact that the amount still owed by the Applicant is much higher than the amount disputed. That may well be the case. I believe the fact still remains that should the discrepancy be found in the Applicant's favour, judgment would have been executed against him based on an inaccurate figure. This in my view would be an exceptional circumstance warranting a stay of execution of the said judgment pending the appeal. In fact one of the grounds of appeal is that full clarification of the issues raised by the Defendant relating to withdrawals from his account was not done.

The Applicant has maintained that he stands the risk of losing his properties should the execution of the judgment proceed which is most likely and thereby render his appeal if successful nugatory.

In my judgment Applicant has raised exceptional circumstances warranting a stay of execution of the judgment given against him until the appeal is heard and determined.

The application is hereby granted and the stay of execution of the judgment herein is granted on terms that the Defendants/Applicants pay the costs of the action which have been ordered to be taxed if not agreed upon. The costs to be paid to the Plaintiff/Respondent's solicitor on his written undertaking to refund same if the appeal succeeds. Costs of the application to be borne by the Defendants/Applicants assessed Le 5 million.

**SIGNED: - A. SHOWERS**

**JUSTICE OF THE SUPREME COURT**



In my judgment Applicant has raised exceptional circumstances warranting a stay of execution of the judgment given against him until the appeal is heard and determined.

The application is hereby granted and the stay of execution of the judgment herein is granted on terms that the Defendants/Applicants pay the costs of the action which have been ordered to be taxed if not agreed upon. The costs to be paid to the Plaintiff/Respondent's solicitor on his written undertaking to refund same if the appeal succeeds.

*A. Showers*

**SIGNED: - A. SHOWERS**

*1/7/2016*

**JUSTICE OF THE SUPREME COURT**