



Sierra Leone

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

Case No: MISC APP 493/14

UNION TRUST BANK LIMITED

- PLAINTIFF

AND

MOHAMED BAH

- FIRST DEFENDANT

HAWA BAH

- SECOND DEFENDANT

REPRESENTATION

YADA WILLIAMS & ASSOCIATES - COUNSEL FOR THE PLAINTIFF

G.K. THOLLEY & CO. - COUNSEL FOR THE DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA JSC
JUDGMENT DELIVERED ON THE 15TH JULY, 2019

Background

1. The Plaintiff/Respondent herein filed an Originating Summons dated the 21st day of November, 2014 praying for the payment of the sum of Le1, 903,183.826.29 due and owing the Plaintiffs herein by the 1st Defendant herein or in the alternative, an Order that the said Mortgage be enforced by sale of property situate at off Main Motor Road, Juba Hill, Freetown.
2. The 1st Defendant (then the sole Defendant) did not enter appearance though service was effected on him by advertisement in the local newspapers.
3. As the 1st had not entered appearance, the Plaintiff was allowed to prove his case and Judgment was delivered against the said 1st Defendant on the 15th January, 2016.
4. I shall return to the Orders given in this Judgment in due course.
5. The 2nd Defendant/Applicant herein filed a Notice of Motion dated 27th February, 2017 praying for, amongst others that the Applicant therein be added as a party.
6. By a Ruling delivered by this Court dated the 17th May, 2017, the said application was granted for the reasons given therein.

THE PRESENT APPLICATION

7. Augustine S Marah Esq. Counsel for the Plaintiff/Respondent herein (hereinafter referred to as the "Respondent") cross-examined the 2nd Defendant/Applicant herein (hereinafter referred to as the "Applicant") on her affidavit in support dated 31st May, 2017.
8. In the course of the said cross-examination, the Applicant testified as follows:-
 - i. That she was the first of two wives of the 1st Defendant, Mohamed Bah and she knew that he had an account with the Respondent Bank
 - ii. That she knew that the 1st Defendant had business in Freetown and Kono but did not know of any in Magburaka.
 - iii. That she was never involved in the 1st Defendant's banking transactions including his applying for and been granted a loan
 - iv. That she did not know why the 1st Defendant surrendered the title deeds to the property which is the subject matter of this action
 - v. That apart from the subject-matter of this action, the Applicant also had another property at Kabba Drive which is in the name of

vi. That she had receipts for all the materials she bought for the construction of the subject-matter of this action.

9. In the affidavit in support, the Applicant averred that the Respondent knew at the time of the action that the 1st Defendant was not ordinarily resident in Sierra Leone and that she has an equitable interest in the property –the subject-matter of this action since 2011.
10. The Applicant further averred that she had been told by the 1st Defendant and verily believe that he did not create any equitable Mortgage in favour of the Plaintiff rather, he deposited the title-deeds for safe keeping with one Wusu, a senior officer at the Respondent Bank as the latter is his friend and in whose hands the first Defendant left the day to day Management of his fuel station situate in Kono.
11. The Applicant denied that the 1st Defendant owed any money to the Respondent and did not receive any letters on his behalf from the said Respondent.
12. Paragraph 3 (J) and 4 of the said affidavit are particularly important to this application.
13. Paragraph 3 (J) states`` that the 1st Defendant and I are still in possession of the property situate at Off Main Motor Road (otherwise known as No. 1 Cheryl Drive) Juba Hill Freetown because it is our freehold property to which I am the undisputed legal and equitable owner, free from encumbrances”.
14. Paragraph 4 states “that in addition to the above, apart from our household, I am occupying the property with my lawful tenants”. A tenancy agreement was exhibited and marked “HN1”
15. In his oral submission, Sahr Bernard Mondeh Esq. for the Applicant contended that the Respondent in their affidavit have not challenged the claims of the Applicant in her affidavit meaning that they have no answer to the application. Mr. Mondeh assumed without conceding that if the 1st Defendant had deposited the said title deeds as security for loan, this would not destroy the equitable interest of the Applicant in the property. For this, he cited the case of WILLIAMS & GLY’S BANK – V- BOLAND AND ANOTHER (1991). Mr. Mondeh further submitted that the Applicant was and is still in occupation of the property in dispute.
16. Mr. Mondeh finally submitted that the Applicant was not a party to the agreement between the 1st Defendant and the

Respondent nor was she aware of any loan or overdraft facility extended to the 1st Defendant.

17. The Applicant filed a supplemental affidavit sworn to on the In the said affidavit, the Applicant swore that her name did not appear on the conveyance because at the material time, 1st Defendant prevailed on her to agree to the property being in the name of their adopted son who is also known as Mohamed Bah. A true photocopy of the passport of the adopted son is exhibited as HB1

18. The Applicant also exhibited photocopy of receipts for building materials bought for the construction of the said house as well as a copy of her architectural plan and design as HB2 ^{(A)-(0)} and HB3 ^{(A) (0)} respectively.

19. The Respondent through an affidavit sworn to by Millicent Macauley-James, the credit Manager of the bank Respondent sworn to on the 21st June, 2017 together with the exhibits attached thereto replied to the affidavit in opposition.

20. In the said affidavit, the deponent swore that contrary to the affidavit of the Applicant, the 1st Defendant applied for and was granted an overdraft facility by the Respondent on two occasions. Copies of the application letters were exhibited and marked Exhibit A; Exhibit B 1-2 (copies of letters granting overdraft facilities)

21. Paragraphs 5 and 6 of the said affidavit are particularly germane herein:-

22. Paragraph 5: ``That in consideration of the said facilities, the 1st Defendant herein deposited two separate title deeds as security for the said facilities''. Copies of the said title deeds were exhibited and marked D and E respectively.

23. Paragraph 6:`` That based on advice by Plaintiff's Solicitors, Exhibit D which is in the sole name of the 1st Defendant was retained by the Plaintiff to create an equitable Mortgage in regard the property in order to secure the said overdraft facility granted the 1st Defendant.

24. The deponent further averred that the 1st Defendant utilised the said overdraft facility granted by the Respondent but has defaulted in the discharge or repayment of the sum due. A copy Defendant's statement of accounts from January, 2011 to 31st May, 2017 is now exhibited and marked Exhibit F

25. In his oral submission, Mr. Marah for the Respondent argued that there was a valid mortgage between the 1st Defendant and the Bank. He referred to Exhibits A, D and E

26. Mr. Marah further submitted that the affidavit in opposition of the Applicant did not disclose any contribution made by her.
27. He cited the case of LLOYD'S BANK PLC -V- ROSETT & ANOR. (1990) IAC 107 in which the case of GLN'S BANK (cited by Counsel for the Applicant) was considered.
28. In his submission on Exhibit HB1 – (copy of passport bearing the name of Mohamed Bah), Mr. Marah argued that at the time the subject-matter of this matter bought, the said Mohamed Bah lacked capacity to enter into a contract.
29. On Exhibit HB2-HB3, Mr. Marah submitted that the purpose for which the materials were bought has not been stated or who provided the funds.
30. As regards Exhibits D and E attached to the affidavit in reply, Mr. Marah submitted that these two separate prices of land purchased in 2006. The names of the Defendants were on Exhibit D but not on Exhibit E. He concluded that there was no intention for Exhibit E to be jointly owned.
31. In his respondent, Mr. Mondeh stated that the age of Mohamed Bah was of no movement.
32. As regards the purpose for which the materials were bought, Mr. Mondeh referred this Court to paragraph 5 of the supplemental affidavit.
33. Before proceeding further, I would want to refer to the Judgment of this Court dated the 15th January 2016.
34. In paragraph 6 of that Judgment, I ordered that "in the event of default of repayment as stipulated in paragraphs 3-5 supra, the Defendant immediately executes a legal mortgage in favour of the Plaintiff in respect of the mortgage property"; and in paragraph 7, I ordered that "After the execution of the legal mortgage, the Defendant delivers up possession of the mortgaged property to the Plaintiff for foreclosure for sale. In the event of the Defendant failing to execute legal mortgage as herein ordered, the Plaintiff shall seek leave of this Court for possession and sale of the said mortgaged property".
35. My reason for giving these orders ^{was} ~~is~~ that there was no legal mortgage created in this case but an equitable one; and also the creation of a future mortgage. The said mortgage would therefore confer no right to possession before the execution of the mortgage intended to be created.
36. I concluded by saying that, "to remedy this, I shall direct the Defendant to convey the mortgaged property unconditionally

37. I have made this reference because it came out during the arguments that the Applicant came to know of the Judgment when an attempted execution on the property was made. This would have been wrong as there is no evidence in the file that Orders 6 and 7 of the said Judgment had been complied with. If they have not been complied with, no legal estate in the property has yet vested in the Plaintiff and therefore had no right to possession.

ISSUE FOR DETERMINATION

38. The main issue here for determination is whether the 2nd Defendant/Applicant has established an equitable interest in the property which would prevent the Plaintiff from exercising its power of sale, if at all

THE LAW

39. Counsel for the 2nd Defendant relied on the case of WILLIAMS & GLY'S BANK LTD -V-BOLAND & ANOR (ubi supra) whilst the Counsel for the Plaintiff relied on that of LLOYD'S BANK PLC V ROSETT and ANOR.(ubi supra)
40. Counsel for the 2nd Defendant argued that his client had contributed to the construction of the subject-matter of the action (which is their matrimonial home) and therefore had an equitable or beneficial interest therein.
41. In WILLIAMS V GLY'S BANK, the question was whether a husband or wife, who had a beneficial interest by virtue of having contributed to its purchase price, but whose spouse is the legal and registered owner, has an 'overriding interest" binding on a mortgagee who claims possession of the matrimonial home under a mortgage granted by that spouse alone.
42. The facts of this case were repeated by me in my Ruling on the Intervener application dated 17th May, 2017. They are that, Mr. Boland took a loan for the purpose of his business and it required him to mortgage his matrimonial home by way of security. The house was registered solely in his name so his wife did not have to sign anything. Mr. Boland defaulted and when the bank wanted to take possession and enforce the security, Mrs. Boland claimed that she had an interest in the house. She claimed that she had assisted substantially in buying and improving it so although it was registered in her husband's name, he actually held it in trust for both of them. The House of Lords upheld Mrs. Boland and would not give the Bank the possession order it wanted. The question in

takes effects against the matrimonial home, or whether the wife's beneficial interest has priority over it.

43. Lord Wilberforce was of the view that the question was whether the wife was in actual occupation. He stated that the practice of dispensing with enquiries as to occupation by the vendor and accepting the risk of doing so should be replaced by more careful enquiry as to the fact of occupation, and if necessary, as to the rights of the occupiers
44. Quoting the dictum of Lord Denning in the Court of Appeal, Lord Wilberforce said "As Lord Denning MR points out, to describe the interests of spouses in a house jointly bought to be lived in as a matrimonial home as merely an interest in proceeds of sale, or rents or profits until sale, is just a little unreal." In the Court of Appeal, Denning MR stated that the court "should not give moneyed might priority over social Justice" and the bank was not entitled to throw these families into the Street simply to get the last penny of the husband's debt.
45. Counsel for the Respondent bank on the other hand relied on the case of LLOYDS BANK PLC V ROSETT (1990) IAC. 107 a case decided after GLYN'S BANK.
46. The brief facts of this case were that in 1982, the husband and wife decided to buy a semi-derelict farm house for £57,000.00 using money given to the husband by Trustees of a family trust, who insisted that they buy the house in the husband's name. It was the common intention of the parties that the renovation of the house was to be a joint venture, after which it was to be the family home. The husband and wife entered the property before the renovation was completed with the consent of the vendor and the builders engaged by the husband and the wife started work on extensive repairs that were necessary to make the property habitable. The wife co-ordinated works and assisted in renovation and decoration. The husband, without the wife's knowledge obtained a bank overdraft for £15,000.00 towards the purchase price and cost of repairs of the property.
47. The husband defaulted on the loan and the question arose as to whether the wife had beneficial interest in the house prior to completion. The decision was on the facts; the monetary value of the wife's work expressed as contribution was de minimis and although discussions had taken place between the husband and wife, no decision had been made

property. It follows that the wife was not entitled to a beneficial interest in the property.

48. It could be seen from the foregoing discussion of the two conflicting cases relied on by both Counsel that I have to make a decision as to which one to rely on.

49. As I stated in my decision in the Intervener action, the correct course here is to adopt the authority most germane to the matter before this Court. To my mind, the WILLIAMS-V- GLYN'S BANK case is more applicable here.

50. The LLOYDS BANK case, on the other hand was decided on the basis that the wife's activities in relation to the renovation of the property between the beginning of 1982 and the date of completion, on which the Trial Judge had, essentially, based his inference of a common intention that she should have a benefit interest in it, had been insufficient to justify the finding that the husband held the property as constructive Trustee for himself and his wife. Anything less than a direct contribution by the non-owning partner will be sufficient.

51. The decision in the WILLIAM -V- GLYN'S BANK case was based on "beneficial interest" and "overriding interest" to which the bank's charge was subject, so that possession should not have been ordered. The appropriateness of this case herein can be ascertained in the following ways:

52. In the instant case, Counsel for the Respondent and the affidavit in reply established that two separate title deeds were submitted by the 1st Defendant: one in his name alone and the other together with the name of the Applicant. This fact alone should have put the Plaintiff on enquiry as to the existence of a beneficial owner warranting a further investigation of the absoluteness of the 1st Defendant's title. This was not done but rather the plaintiff used the one with the 1st Defendant named as sole owner.

53. The second issue here is to establish, following on the foregoing, that the 2nd Defendant had beneficial interest in the property. In her supplemental affidavit, receipts for the purchase of building materials and other expenses – Exhibit HB2 A-0 and Exhibit HB3 A-0. These receipts were dated from August, 2006 to June, 2008. The validity of these receipts was not effectively controverted. They tend to establish that

the 2nd Defendant made contributions to the construction of the property.

54. The third matter concerns the occupation of the premises. It has not been controverted that the Applicant is in occupation of the premises and has tenants therein. The Plaintiff did not apparently make proper enquiries when they went to assess the premises to determine its suitability as a security.

55. It is my conclusion therefore that the Applicant has a beneficial interest in the property which is her matrimonial home. She enjoys by reason of her interest, a present right of occupation as well as a right to a share in the proceeds of sale, if and when the house is sold. She has the right to participate in any mortgage transaction regarding the property. In effect, the wife had an overriding interest in the property. Since Bank made no enquiry of the wife in either case before granting the husband a mortgage, its claim as mortgage to possession is, defeated by the wife's overriding interest.

56. As regards the liability of the 1st Defendant on the equitable mortgage. I shall leave the decision of this court dated the 15th day of January, 2016 on that point undisturbed: save that aspect regarding the sale of property at Off Main Motor Road, Juba Hill Freetown.

57. In the circumstance, I hold as follows:-

- 1) The aspect of the Judgment of this court dated the 15th day January, 2015 regarding the sale of property lying situate and being at Off Main Motor Road, Juba Hill Freetown registered as 12/2007 in volume 616 at page 26 of the Book of Conveyances otherwise known as No. 1 Cheryl Drive, Juba Hill Freetown) is hereby set aside.
- 2) That the other aspects of Judgment dated the 15th day of January, 2015 regarding the liability of the 1st Defendant to the Plaintiff shall remain in force.
- 3) Costs in the cause.



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Hon. Mr. Justice Sengu Koroma JSC.