Neutral Citation Number Misc. App. 032/20 U6 Fast Track Commercial Court

Case No: cc 032/2020

IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN
COMMERCIAL AND ADMIRALTY DIVISION

Law Court Building
Siaka Stevens Street
Freetown

Date:15 February 2021

Before:

THE HONOURABLE MR JUSTICE FISHER J

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Between:

Union Trust Bank Limited **Plaintiffs**

-and-

Sierra Construction Systems Ltd **Defendant**

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Miss M K Conteh of Counsel for the Plaintiffs

Mr CF Margai and Miss E N Margai of Counsel for the Defendant

Hearing dates: 27January, 4th ,5th, 9th February 2021

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APPROVED JUDGEMENT

I direct that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FISHER J

The Honourable Mr Justice Fisher J:

1. The Defendants challenge the jurisdiction of this court by way of a preliminary objection to the form and manner in which the application by the Plaintiffs, to recover the repayment of monies by foreclosure was instituted. The Defendants allege that the manner in which the application was brought is contrary to Order 5 rule 4 of the High Court rules 2007. I consider it expedient to set out the background facts pertinent to this ruling.

Background facts

2. By way of an originating summons, dated 14th day of July 2020, the Plaintiff prayed for several orders contained on the face of the originating summons, which includes an order that the Defendants/Mortgagors, borrowers/debtors jointly and severally immediately pay the total sum of **Le 17,117,915,918.80**,(now reduced to thirteen billion, nine hundred and fifty million, eight hundred and forty five thousand four hundred and ninety five thousand and fifteen Leones **(13,950,845,495.15),** including interest), under covenants contained in the mortgages, an order of foreclosure, vacant possession and an interlocutory injunction, restraining the Defendants from disposing of properties situate, lying and being at Smart Farm, off Wilkinson Road, Freetown, and costs. The application was supported by an affidavit sworn to by Millicent Macauley James, on the 14th day of July 2020.

3. The Defendants entered an appearance on the 16th of July 2020 and rely upon an affidavit in opposition, sworn to by Kamal Nassar on the 30th day of July 2020, and the exhibits attached thereto. Further, the defendants also rely upon a supplemental affidavit, sworn to by ELUMA NORA MARGAI, a

partner in the firm of CF Margai and Associates, on the 5th day of February 2021.

4. The Defendants are customers of the Plaintiff bank and conduct banking transactions with them. Between March 2010 and September 2010, the Defendants obtained credit facilities with the Plaintiff and executed two mortgage deeds as collateral. Further supplemental mortgages were also entered into by the defendants. Both facilities were to have been repaid by 31st July 2017. In summary, the Defendants defaulted in making repayments to the Plaintiff of the sums due and owing.

The ADR process.

5. Following the filing of the originating summons, the court in accordance with rule 21(2) of the Commercial and Admiralty Court Rules 2020, hereinafter referred to as the "Fast Track Commercial Court Rules", conducted an ADR process. The notes of the ADR process are contained in the record of proceedings. The findings at the ADR process can be summarised as follows:

    1. The parties have reached a settlement, in accordance with rule 31(a) of the "Fast Track Commercial Court Rules", which shall now be adopted as a judgement of the court.

    2. The parties have agreed that the monies owing to the Plaintiff amount to thirteen billion, nine hundred ad fifty million, eight hundred and forty-five thousand four hundred and ninety-five thousand and fifteen Leones **(Le13,950,845,495.15),** including interest.

    3. The parties have agreed to sell the first mortgaged property (the 6 storey building) at a price of at least eleven billion Leones (Le11,

000,000,000/00, (forced sale value) in part fulfilment of the judgement debt.

4. The defendant has agreed to pay the remining balance of two billion nine hundred and forty-five million, four hundred and ninety-five leones and fifteen cents, (**Le2,950,845,495.15),** including interest, by instalments over a period of twelve months, from the date of sale of the first mortgaged property.

5. The Plaintiff has offered, and the defendant has agreed that the plaintiff would not seek foreclosure of the second mortgaged property for at least twelve months, from the sale of the first mortgaged property, should the defendant fail to make payments of the outstanding amounts due, following the sale of the mortgaged property.

6. The parties having reached agreement, the matter was adjourned for a consent judgement to be entered in accordance with the provisions of rule 33 of the "Fast Track Commercial Court Rules". Following that adjournment, Mr CF Margai, counsel for the defendant appeared and indicated to the court that he had a jurisdictional objection to the case proceeding.

<u>The defence's jurisdictional objection.</u>

7. Mr CF Margai of counsel indicated to the court that he wanted to raise a jurisdictional objection. He claimed the parties had not reached agreement to which I pointed out to him that that the parties did reach agreement with the assistance of competent counsel, Miss Conteh and Miss Margai. Counsel for the Plaintiffs objected to the jurisdictional objection on the basis that Mr Margai did not raise any jurisdictional issue as the law is settled on

originating processes in the fast-track commercial court and there is nothing in his indication that raised a jurisdictional issue.

8. Having heard both counsels, I ruled that where a jurisdictional objection is raised at any stage of the proceedings, the court needs to hear the application, on the basis that where such an objection is not heard and the matter proceeds on appeal, and the appeal succeeds, the proceedings in the lower court are ultimately declared a nullity. The parties would have been put through unnecessary costs and resources in conducting proceedings that eventually declared a nullity. I then made consequential orders.

9. Defence counsel's objection was predicated on one main ground which can be summarised as follows:

    1. That the application by the plaintiff is contrary to Order 5, in particular rule (4) (1) of the High Court Rules, CI No 8 of 2007, in that the court is not competent to entertain the matter, as the application should have been made by writ of summons and not by originating summons as there are contentious issues to be determined by the court, in particular, the defendant disputes the amount of Le17,117, 915,981.80 that the Plaintiffs claims it is owed, which is inclusive of interest and the principal amount.

    2. The defendant did refer in paragraph 6 of his affidavit to the dispute about the amount of interest charged and whether that amount includes the principal sum and further whether the said amount include compound interest, which they claim is illegal at law.

    3. The defendant takes an exception to him being joined as a defendant to this action; and

4. That the defendant disputes the value placed on the property sought to be sold, on the grounds that the said property is grossly undervalued.

10. I did ask Mr Margai if the matters referred to at paragraphs 9 (2-4) amount to a jurisdictional objection to which he replied that those paragraphs flowed from paragraph 9 (1). I did not share those views. I am satisfied that the matters raised at para 9(2-4) do not flow from paragraph 9 (1) and even if they did, they do not amount to a jurisdictional objection or points of law, such that will deprive this court of the legal powers (jurisdiction) to consider the matters in dispute.

The Law.

11. A jurisdictional objection is one in which a party raises an objection to the court proceeding to hear a case. This can take many forms. Where a party succeeds in the objection it raises, the court can either refuse to hear the case or where the court has powers to hear the case, it can dismiss the application where the wrong originating process is used to institute proceedings.

12. In **The Peoples Movement for Democratic Change (P.M.D.C.) and the Secretary General for the Peoples Movement for Democratic Change (PMDC) v The Sierra Leone Peoples Party, June 2007, unreported,** Renner-Thomas CJ held:

"*The issue of jurisdiction is fundamental and its being raised in the course of proceedings cannot be too early, nor premature nor too late. This is because if there is want of jurisdiction, the proceedings of the court will be affected by a fundamental vice and would be a nullity, no matter how well conducted the proceedings might otherwise be*."

13. In **Mohamed M'bakui and another v The State (Misc.App.5/2016, SLCA 1150,** Fynn JA relying on the P.M.D.C case, quoted the dictum of Renner Thomas CJ in these terms:

"*Where a court has no jurisdiction to entertain a matter any proceedings and decision given thereon is a nullity no matter how well conducted the proceedings were. Judicial power is inextricably tied up with jurisdiction and justiciability. A court can only exercise powers to entertain a matter where it has jurisdiction.*"

14. It is therefore necessary to review the concept of jurisdiction and how the court is conferred with such jurisdiction to hear cases before it.

Jurisdiction

15. The concept of jurisdiction is a basic judicial requirement which facilitates the process of the interpretation of the law, which is the court's primary function. It can further be explained that jurisdiction is the authority of a court to hear and decide a specific action, such jurisdiction being invariably conferred upon a court by legislation. These invariably occur in four different types, which can be summarised as follows:

    1. Personal Jurisdiction which is the authority of a court to hear and decide a dispute involving the particular parties before it.

    2. Subject Matter Jurisdiction, which is the authority of a court to hear and decide a particular dispute before it.
    3. Original Jurisdiction, which is the authority of a court to hear and decide a case in the first instance over the authority of other courts.

    4. Appellate Jurisdiction, which is the authority of a court to review a prior decision in the same case by another lower court.

16. Having regard to the M'bakui decision, it reinforces my conclusions that jurisdiction is invariably conferred upon a court by legislation and not simply by other principles of law. Fynn JA in the M'bakui decision whilst interpreting section 129 of the Constitution, Act no 6 of 1991 was clear that the phrase "*or any other law*" should not be read in isolation and that whilst other laws may confer jurisdiction on a court, it does not detract from the fact that invariably, such conferment of jurisdiction on a court is normally and invariably conferred by statute. Whilst the other sources of law as provided for in section 170 of the Constitution Act no 6 of 1991 are part of the Laws of Sierra Leone, where jurisdiction is conferred by any of these alternative forms of law, the overriding basis for such conferment would undoubtedly be the 1991 Constitution, Act no 6 of 1991, which is itself statutory.

<u>The jurisdictional objection</u>

17. Mr CF Margai counsel for Defendants has argued that the manner and form in which the application is brought is contrary to Order 5 rule 4(1) of the High Court rules 2007. He predicates his arguments on two grounds:

    1. That the court is not competent to entertain this action as it ought to have been made by writ of summons and not by an originating summons, as there are contentious issues to be determined by the court.
    2. That rule 18(2) of the Commercial and Admiralty Court Rules 2020 applies to interlocutory matters only and not to substantive matters.

18. Counsel also relied upon a number of authorities both local and international, which I shall address in due course.

The submissions of the Defendants

19. The primary submission of Mr CF Margai of counsel for the defendant is that the manner and form in which the application is brought contravenes Order 5 rule 4(1). The said rule provides as follows:

"4 (1) Except in the case of proceedings which by these rules or by or under any enactment are required to be begun by writ or originating summons or are required or authorized to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the Plaintiffs considers appropriate.

(2) Proceedings-

(a) in which the sole or principal question at issue is or is likely to be one of the construction of an enactment or of any deed, will, contract or other document or some other question of law; or

(b) in which there is unlikely to be any substantial dispute of fact,
are appropriate to be begun by originating summons unless the Plaintiffs intends in those proceedings to apply for judgment under Order 16 or in actions for specific performance or for any other reason considers the proceedings more appropriate to be begun by writ.

20. Mr Margai has alleged that there is a contravention of the above section and the basis of the alleged contravention is the fact that the originating process by which the matter came before the court ought to have been done by writ of summons and not originating summons. He has supported his arguments with authorities.

21. It is incumbent upon this court to interpret the statutory language in Order 5 rule 4(1) of the High Court Rules 2007, in a bid to discover whether Mr

Margai has an arguable legal basis to suggest a contravention of the said Order 5 rule 4 (1). I have emphasised the relevant phrases in order 5 that will guide the court's interpretation of the above rule.

The Originating process.

22. Notwithstanding the submissions of Mr Margai, I have to give consideration to the fact that it is not only the High Court rules that govern these proceedings. This matter is assigned to the fast-track commercial court which has its own specific rules for the conduct of proceedings.

The fast-track Commercial Court rules

23. By constitutional instrument, no 2 of 2020, Parliament adopted the Commercial and Admiralty Court Rules 2020. Rule 2 subrule (1) of the said rules provide that the 2020 rules shall apply to the fast-track commercial court of the Commercial and Admiralty Division of the High Court. Subrule 2 is of significance and it is necessary to set out its provisions:
"(2)
Unless otherwise provided for in these rules, the High Court Rules 2007 shall apply with the necessary modifications, adaptations and exceptions as are necessary to give effect to these rules".

24. In part 2 of the rules, provision is made for the jurisdiction of the Fast Track Commercial court in rule 3. Sub paragraph (d) of rule 3 provides the legal basis upon which the court adjudicates on this particular dispute.

25. Part 4 deals with the institution of proceedings. It is therefore necessary for me to set out rule 7 of the rules in clear terms:
"7
proceedings in the court shall be instituted by –
(a) Wit of summons

(b) Originating summons
(c) Originating notice of motion
(d) Petition.

26. Further, rule 8 of the rules prescribes the requirements for originating processes commenced by way of a writ of summons, notwithstanding the provisions of Order 6 of the High Court Rules 2007. Counsel has not sought to raise an issue with regard to the provisions of Order 8 and I need not go further than the prescription of the said rules. Similarly Order 9 makes provision as to the requirements of instituting proceedings by Originating Summons. Again, there is no dispute about compliance with the said rule 9 by the defendant. There is nothing in rules 8 or 9 that restricts the use of the originating summons process.

27. Mr Margai requested the court to interpret rule 10 of the FastTrack commercial court rules in tandem with rule 7 of the said rules. He claims the provisions of rule 7 are generic and as I understood his arguments the said rule 7 of the Commercial court rules are somehow inconsistent with the High Court rules, although he has not stated what the inconsistency is.

28. I do not find that submission by Mr Margai convincing neither do I find it arguable. At paragraph 23 above, I dealt with the application of the commercial rules to proceedings in the fast-track commercial court. The first point to note is that the High Court Rules of 2007 was made by constitutional instrument, by the Rules of Court Committee, virtue of the powers conferred upon it by section 145 of the 1991 Constitution and apply to the High court.

29. The fast-track rules were also made by constitutional instrument by the Rules of Court Committee, by virtue of the powers conferred upon it by section 145 of the 1991 Constitution. It was enacted to apply specifically to the Fast Track Commercial and Admiralty Division of the High Court.

Subsection (4) of Section 120 of the constitution of Sierra Leone, 1991 establishes the High Court. The Chief Justice by virtue of the powers vested in him pursuant to section 131 of the 1991 Constitution, made the Fast track Commercial and Admiralty division as a division of the High Court, by virtue of the High Court (Divisions) Order 2019.

30. How then is the court to approach the supremacy or otherwise of the either of the two rules? The pendulum has swung towards the purposive methods of construction in judicial interpretation of statutes. This does not mean the purposive approach is a new phenomenon. A classic early statement of the purposive approach can be found in the speech of ***Lord Blackburn in River Wear Commissioners v Adamson (1877) 2 App Cas 743***. Notwithstanding the clear judicial shift in favour of the purposive approach to construction of statutes generally, such an approach is amply justified on wider grounds. In **Cabell v Markham (1945) 148 F 2d 737** Justice Learned Hand explained the merits of purposive interpretation, at p 739:

"***Of course, it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.***"

I am therefore satisfied that on its true construction, both the High Court Rules and the fast-track rules apply to the proceedings in the High Court generally. However, the commercial rules specifically apply (and was so intended to apply) to the Fast Track Commercial and Admiralty Division. Rule 2 sub rule 2 deals with the application of both rules to the fast-track Commercial Court. I have referred to rule 2 of the Commercial Rules at para 23 above. The simple purposive interpretation of rule 2 sub rule 2 of the

Commercial Rules can be found in the literal and ordinary usage of the wording of sub rule 2. The use of the words " ***unless otherwise provided for in these rules"*** amply demonstrates that Parliament intended in the enactment of the Commercial rules that where the Commercial Court rules make provision for a particular issue, the provisions in the Commercial court rules must apply and where there is no provision, the High Court rules shall apply with necessary modifications, adaptations and exceptions in order to give effect to the Commercial rules, which essentially would take precedence over the High Court Rules where provision is made in those rules for the matter in issue. Rule 10 of the Commercial rules is therefore not applicable in this case. I agree with Miss Conteh that Rule 10 (1) merely deals with the time within which the originating process should have been served. The rules cannot be read in a manner as to require a second or subsequent service on a defendant when the matter is proceeding within the courts system.

Submissions by the Plaintiffs

31. Miss MK Conteh who appeared for the Plaintiffs, referred to the mode and manner in which the application was commenced in response to Mr Margai's preliminary objection. She relied upon the provisions of Order 5 rule(4) (1) of the High Court rules and argued that the words "under any enactment" has been complied with as the matter is proceeded with under the Conveyancing Act 1881 which is an enactment for those purposes.

32. She further argued that having regard to the wording of Order 5 rule 4 of the High Court Rules 2007, the same option is given to the Plaintiff in order 7 of the Commercial rules as to the mode of beginning proceedings in the Commercial Court. She relied upon several authorities which included ***GTB v Kelvin Lewis***, ***UTB v Mariama Deen Swarray*** and argued that notwithstanding the fact that there were disputes of facts these proceedings were begun by originating summons.

Disposal

33. I find considerable force in Miss Conteh's arguments which she put succinctly. Upon a reading of Order 5 rule 4(1), assuming that the High Court Rules 2007 takes precedence over the commercial court rules, the said Order 5 rule 4 (1) is clear as to its interpretation. Except in a situation where the Commercial court rules or the High Court rules or any enactment makes provision for an action to be commenced by writ of summons, it is the Plaintiff that has a choice of whether to commence the action by writ of summons or originating summons.

34. I am required to consider and interpret subrule 2 of Order 5 rule 4. Upon its true construction, proceedings involving sub paragraphs (a) or (b) are appropriate to be commenced by originating summons unless the Plaintiffs intends to apply for judgement under Order 16. The Plaintiffs has not so applied for such a judgement. I am satisfied that neither sub paragraphs (a) or (b) applies in this case and the commencement by originating summons cannot be said to be inappropriate. I am reinforced in this view in the light of the fact that the sole or principal issue is not one of the construction of an enactment or of any deed, will, contract or other document or some other question of law.

35. It is a simple application for foreclosure on a mortgage. I am also satisfied that there are no "substantial" disputes of fact. Having a dispute of fact does not imply that such a dispute is substantial. In the instant case, I did remind Mr Margai that the parties had earlier reached a settlement with regard to the sale of the property, in the presence of their respective counsel. There was no dispute about the following:

    1. That there was an agreement which resulted in a settlement between the parties;
    2. That the agreement involved the mortgaged properties belonging to the Defendants which were used as collateral to secure the loan;

3. That the Defendants have defaulted in making the required payment for a considerable period of time.
4. That there are monies owing and due to the Plaintiffs as a direct result of the defendant's default.

36. Had there been a dispute of fact about any or all of the above, I would have been inclined to consider them individually or cumulatively as substantial enough to warrant commencement of this action by writ of summons. However, the issue of dispute between the parties is in relation to the price of sale of the 6-storey building. In reality the defendant cannot dictate the amount the sale of the mortgaged property would bring. It is the buyer that evidently will make that decision. The Plaintiff in seeking to foreclose is only duty bound to secure a sale of the property in order to satisfy the outstanding mortgage. Thus, the dispute between the parties is not a causative matter that requires legal determination but a matter of resolution of the entire action.

37. As Miss Conteh put it in her submission, the same option on commencement by originating summons given in order 5 rule 4 of the High Court Rules 2007 is also given to the Plaintiff in order 7 of the Commercial court rules. For the reasons I have given at paragraph 25 above, the ordinary, clear and unambiguous meaning of the words "***proceedings in the court shall be instituted by"*** clearly show that Parliament by the enactment of those words clearly intended that the methods set out in sub paragraphs (a) – (d) of rule 7 are available to the Plaintiff. Where a Plaintiff uses either of the methods specified, it cannot be open to objection as it is clearly within the rules. In any event, Order 5 rule 4 (1) is not inconsistent with rule 7 of the Commercial court rules, where a Plaintiffs utilises the originating summons method, as this method is provided for in the rules.

38. Consequently, I hold that rule 2 subrule 2 of the commercial court rules is not contravened by the use of the originating summons in these

proceedings. I also hold that Order 5 rule 4 is also not contravened by the use of the originating summons process by the Plaintiffs in this case.

39. As I referred to above, the parties have relied upon authorities in support of their arguments. Mr Margai has relied upon the case of ***Aiah Momoh v Sahr Samuel Nyandemoh SC CIV APP 6/2006*** and a host of other international cases from Nigeria. Having considered those authorities, I am satisfied that the authorities relied upon do not advance the defendant's case in any respect and in any event are persuasive authorities. I am not so persuaded by them.

40. With regard to the Aiah Momoh case, I have considered it in full and conclude that it can be distinguished and disapplied for the following reasons:

    1. The subject matter of the dispute involves a substantial dispute of fact, i.e., the owner ship of property and the proportion of rent and profits to be accounted for and divided amongst the parties;

    2. The decision of the court was based largely on Order 2 rule 1 of the Supreme Court Rules CAP 7 of 1960, which states:

       "Every action in the supreme court unless otherwise expressly provided for shall be commenced by a writ of summons which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action"

    3. That this decision has been superseded by the enactment of the High Court Rules 2007 and the Commercial Court Rules, 2020 by constitutional instrument, which have different provisions from the old Supreme Court rules for the commencement of originating processes.

4. The court was clear as to simplicity being the advantage of the originating summons process which explains why the legislators left the choice of the commencement method to the Plaintiff to determine in order 5 rule 4 (1) of the 2007 rules, where the Plaintiff considers the originating summons "appropriate" and where there is unlikely to be a substantial dispute of fact not just a dispute of fact.

41. For the reasons I have pointed out above, there is clearly no substantial dispute of fact such that the use of the originating summons can be considered to be inappropriate. As Miss Conteh of counsel remarked during submissions, all the matters she relies upon were brought by originating summons without objection. In the *Commerce and Mortgage Bank v Umaro Kamara and anothe*r decision, it is unclear the method by which the action was commenced. In the *Guarantee Trust Bank v Emmanuel Kelvin Williams* case, the action was commenced by originating summons. In the *Union Trust Bank Ltd v Mariama Deen Swarray cas*e, the originating summons process was used to commence the action.

42. I am unable to hold that three different judges and different sets of solicitors and counsel appearing in those cases are wrong on the use of the originating summons in such matters and only Mr Margai is correct in his interpretation of these processes. In any event, for the reasons given above, I am not persuaded that there is an arguable legal basis to support Mr Margai's argument. I am therefore satisfied that the basis of the preliminary objection is wrong, and the application is dismissed in its entirety.

43. Further as I had indicated to Mr Margai the jurisdictional objection cannot stand. The parties had already submitted themselves to the jurisdiction of the court and had already reached agreement on the matter before the preliminary objection was raised. I see no need to deal with the provisions

of rule 18 (2) of the Commercial court rules 2020, in view of my decision in relation to the substantive parts of the action.

Costs

44. I had indicated to Mr Margai that the parties had reached an agreement in this case and it is of some surprise he considered it appropriate to make such an application, in the light of the clear and unambiguous provisions of law. This application has caused further delays in the disposal of this matter and occasioned additional and unnecessary costs for which the Defendants would have to be penalised in costs. I shall however hear the parties' submissions on the issue of costs.

The Hon Mr Justice A Fisher J

Justice A. Fisher J

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