

IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA
SITTING IN ITS MARCH TERM OF COURT

BEFORE HER HONOR: SIE-A-NYENE G. YUOH.....CHIEF JUSTICE
BEFORE HER HONOR: JAMESETTA H. WOLOKOLIE.....ASSOCIATE JUSTICE
BEFORE HIS HONOR : YUSSIF D, KABA.....ASSOCIATE JUSTICE
BEFORE HIS HONOR : YAMIE QUIQUI GBEISAY, SR.....ASSOCIATE JUSTICE

His Honor Schearplor R. Dunbar, Assigned Judge,)
Civil Law Court, Montserrado County, and Mr. Morley)
Paul Kamara of the City of Monrovia, Liberia)
.....Appellants)

VERSUS)

APPEAL)

Mohammed K. Kafel and all those occupying the)
premises, same being two (2) lots of land with)
apartment buildings thereon, Sinkor, Monrovia,)
Montserrado County, Liberia.....Appellees)

GROWING OUT OF THE CASE:)

Mohammed K. Kafel and all those occupying the)
premises, same being two (2) lots of land with)
apartment buildings thereon, Sinkor, Monrovia,)
Montserrado County, Liberia.....Petitioners)

Versus)

PETITION FOR A WRIT OF)
CERTIORARI)

His Honor Schearplor R. Dunbar, Assigned Judge,)
Civil Law Court, Montserrado County, and Mr. Morley)
Paul Kamara of the City of Monrovia, Liberia)
.....Respondents)

GROWING OUT OF THE CASE:)

Mohammed K. Kafel and all those occupying the)
premises, same being two (2) lots of land with)
apartment buildings thereon, Sinkor, Monrovia,)
Montserrado County, Liberia.....Movants)

Versus)

MOTION TO DISMISS)

Mr. Morley Paul Kamara of the City of Monrovia,)
.....Respondents)

Heard: April 30, 2024

Delivered: August 27, 2024

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE COURT

This appeal emanates from a ruling rendered by His Honor Justice Yamie Quiqui Gbeisay, Sr. while he served as the Justice in Chambers.

The facts are that the original owner of the disputed property, the Intestate Estate of Elizabeth Barclay Cooper, entered into a lease agreement with the A. & K. Incorporation for two lot, for a term ending May 21, 2022; that subsequently, A. & K. Corporation assigned its leasehold rights to the appellee, Mohammed K. Kafel. While the assignment was in effect, Mr. John Gbedze bought the two lots of land, subject of the lease, from the intestate estate of Elizabeth Barclay Cooper and was issued an administrator's deed on September 10, 2007; that Gbedze's purchase being subject to the existing leased agreement that the appellee Kafel had, he became the landlord of the appellee, Mohammed K. Kafel, for the remaining period of the assignment of lease, which ended May 21, 2022.

On March 27, 2018, Mr. Gbedze took a loan of United States One Hundred and Fifty Thousand (US\$150,000) from the International Bank Liberia Limited (IBLL). Using the land purchased from the intestate estate of Elizabeth Barclay Cooper, as security, he contracted with the IBLL a mortgage agreement which created a lien on the disputed property occupied by the appellee, Mohammed K. Kafel. The mortgage agreement stated that Mr. Gbedze mortgage deed was first and second to no other mortgage or lien. The records, however, show that three months after Mr. Gbedze had mortgaged his property to the IBLL, on June 30, 2018, he entered into a fifteen-year lease agreement with the appellee, Kafel, for the period May 22, 2026 to May 21, 2041.

Eventually, Mr. Gbedze defaulted on the payment of the loan, and the IBLL filed a petition at the Commercial Court for foreclosure of the mortgaged property. The petition was heard and granted by the court. Thereafter, the court sold the property at a public auction to the co-appellant, Morley Paul Kamara, who was issued a Sheriff's deed, dated July 5, 2021.

Following the public auction sale of the property, the Commercial Court attempted to evict the appellee from the property, but the appellee, Kafel, filed in the Commercial Court a petition for adverse claim, referencing his lease agreement with Mr. Gbedze on June 30, 2018. The appellee, Kafel, contended that he had a current valid leasehold right to the property auctioned by the Commercial Court and purchased by the co-appellant; that the co-appellant had acquired said property subject to the June 30, 2018 lease agreement, which has a fifteen-year period certain, as well as a ten-year optional period; that the Commercial Court should give due recognition to said lease agreement and also indicate that the property purchased by the co-appellant is subject to the terms and conditions of the June 30, 2018, lease agreement that the appellee had entered into with Mr. John Gbedze.

The co-appellant, Morley Paul Kamara, on the other hand, argued in his returns that the foreclosed mortgaged property had a priority or superior claim over the June 30, 2018 lease

agreement in that the Mortgaged Deed Agreement was duly executed and signed between John Gbedze and IBLL before he entered the lease agreement with the appellee, Kafel.

The petition of adverse claim was heard by the Commercial Court and it ruled on the issue, whether the court had jurisdiction, considering that the petition for adverse claim was filed after the court's sale by auction had been completed and the property, subject of the adverse claim, was no longer under the jurisdiction of the Commercial Court.

The Commercial Court, relying on Section 44.46 of the Civil Procedure Law of Liberia, opined that the petition for adverse claim would not lie because the petition was filed when the court no longer had jurisdiction over the matter; that is, the public auction sale had already been consummated, and the requisite sheriff's deed issued to close or conclude the sale and testify to the conveyance of title through said auction sale. The court further held that even if the petition for adverse claim had been filed when the commercial court had jurisdiction over the matter, it would still have lacked the authority to grant the relief the appellee had prayed for because the court has no jurisdiction over matters relating to title of real property or priority of interest in real property.

The appellee, Kafel, excepted to the court's ruling, but he took no further steps to pursue the matter.

Considering that the appellee raised the issue of adverse claim which the Commercial Court said it had no jurisdiction over since the issue related to title of real property, the co-appellant filed a petition for summary proceedings to recover possession of real property at the Sixth Judicial, Civil Law Court, Montserrado County against the appellee. The appellee Kafel filed his returns to the petition along with a motion to dismiss the appellant's petition.

In the appellee's motion to dismiss the petition, he relied on Sections 62.1 and 62.21 of the Civil Procedure Law of Liberia, contending that an action of ejectment, not summary proceeding to recover possession of real property, should have been the appropriate action to file because the June 30, 2018 lease agreement grants him possessory right to the property, which rights puts title in issue.

The co-appellant Kamara filed his resistance to the motion to dismiss, countering that title was not in issue. The co-appellant argued that the laws relied on by appellee were not applicable to the case at bar, as title was not in issue but rather possessory right because title to the property is vested in him; that the June 30, 2018 lease agreement attached to the appellee's returns was void and of no legal effect; that the mortgage deed agreement executed by John Gbedze vested equitable title and priority lien in IBLL, pursuant to which the said property was sold to the appellant; that John Gbedze had no authority to have

executed the June 30, 2018 lease agreement with the appellee after he had entered the mortgage agreement with the IBLL; that summary proceeding to recover possession of real property would lie because the Sixth Judicial, Civil Law Court, has jurisdiction over the subject matter.

The Judge, His Honor Schearplor R. Dunbar, having reviewed the files and listened to the arguments of the parties on the motion to dismiss, ruled on one issue, whether or not the June 30, 2018 lease agreement executed between John Gbedze and the appellee, meant to take effect from May 22, 2026 to May 21, 2041, was valid and enforceable, and constituted a valid defense to the dismissal of the petition for summary proceedings to recover possession of real property.

Ruling on the appellee's motion to dismiss, Judge Dunbar held that the June 30, 2018 lease agreement was of no legal effect as the property had already been mortgaged to IBLL by the owner, John Gbedze. His Honor Dunbar, cited Section 6.23(2) of the Liberian Commercial Code of 2010, as reliance. The Judge in interpreting this Commercial Law provision ruled that it is settled law that a purchaser of mortgaged property takes title to the mortgaged property free of all interest to which the mortgagee who requests the sale has priority, but subject to the interests which are senior to the mortgagee; that the only lien that was existing on the property before the execution of the mortgage deed on March 27, 2018, was the December 13, 1999 leasehold right assignment which expired on May 21, 2022; that appellee Kafel was appellant Kamara's tenant up to May 21, 2022, and not after that date.

The appellee excepted to the ruling of Judge Dunbar and filed a petition for the writ of certiorari before the Chambers Justice, His Honor Justice Yamie Quiqui Gbeisay, Sr., to review and correct the ruling of Judge Dunbar on the motion to dismiss.

The alternative writ was ordered issued by the Chambers Justice after having reviewed the files, and heard arguments from both sides, he ruled on the issue, whether the execution of a mortgage agreement by a party divests the party of ownership of the property, and whether that party is precluded and/or estopped by law from dealing with the property in so far as there is no disposal thereof.

The Justice in his ruling held that in a mortgage arrangement, until there is a foreclosure, the mortgagor continues to be the real owner of the mortgaged property in fee although the property may have been conveyed to the mortgagee. The Justice cited *Brown v. Setro*, 8 LLR 284, 294 (1994) as his reliance. He held that all decisions, actions, agreements, and conclusions made by the mortgagor, as the real owner of the property, prior to the foreclosure of a mortgage are deemed legal and enforceable in the absence of fraud and

misrepresentation. He further ruled that in a mortgage agreement, the mortgagor retains possessory right and/or ownership to the property mortgaged; except *where the agreement sets out the conditional rights of ownership of a property or asset by its owner to a lender as security for a loan* (Emphasis ours).

Laying emphasis on Judge Dunbar's ruling and the Judge's interpretation referencing section 6.23(2) of the Commercial Code of 2010, the Chambers Justice held that Judge Dunbar's interpretation of this section of the Commercial Code of 2010 was erroneous because this provision of the Commercial Code makes it emphatically clear that the purchaser, in this case, the co-appellant Kamara, takes title to the property free of all interest to which the mortgagee, IBLL, who requested the sale had priority, but subject to the interest which are senior to the mortgagee. This means that all interests which are senior to the Mortgagee, IBLL, includes the petitioner's leasehold interest which is superior to the ownership and possessory rights of the purchaser, Kamara. This the Justice held is legally interpreted as the Mortgagee bank's interest to the property is subordinated to all other interests fully established prior to the foreclosure of the mortgage agreement. This is because, foreclosure is the legal process by which a lender attempts to recover the amount owed on a defaulted loan by taking ownership of the mortgaged property and selling it, but it does not extinguish prior lien preceding the foreclosure.

The co-appellant excepted to the Chambers Justice's ruling and announced an appeal to the full bench of the Supreme Court.

When the case was called for hearing, the counsels for both parties appeared and argued passionately regarding the legal support of their case.

We note the contentions of the parties. The appellee Kafel argues that it has a valid lease agreement for the occupancy of the property with the Mortgagor Gbedze up to and including May 21, 2041, which was entered prior to the foreclosure of the mortgage; that he cannot be ousted and evicted from the subject property by means of Summary Proceeding to Recover Possession of Real Property; that the lease agreement in his possession is a form of title that gives him the right of possession and occupancy up to end and including May 21, 2041.

The appellant, Kamara, on the other hand argues and highlights that it was more than three (3) months after the execution of the Mortgage Deed, that Mr. John Gbedze executed a lease agreement with the appellee Kafel for a period of fifteen (15) years, commencing on the 22nd day of May, 2026 up to and including the 21st day of May, 2041; that in as much as Mr. John Gbedze executed the Mortgage deed to International Bank Liberia Limited, he lacked the capacity to have executed a lease agreement with the appellee for the subject property; that

whatever Mr. John Gbedze did after the execution of the Mortgage Deed is void and of no legal effect. Further, when the Commercial Court attempted to evict and oust the appellee from the property, the appellee filed a petition for adverse claim against the subject property which was heard and a judgment entered by the Commercial Court denying the appellee's adverse claim, to which judgment the appellee excepted, but did not appeal, nor file bill of exceptions or appeal bond.

We note that the Chambers Justice, in his ruling referencing section 6.23(2) of the Commercial Code of 2010, ruled contrary to the lower court Judge's interpretation of section 6.23(2) of the Commercial Code of 2010. The Chamber Justice held that until foreclosure, the mortgagor continues to be the real owner of the mortgaged property in fee although the property may have been conveyed to the mortgagee, and that all decisions, actions, agreements, and conclusions made by the mortgagor, as the real owner of the property, prior to the foreclosure of a mortgage are deemed legal and enforceable in the absence of fraud and misrepresentation. He also held that in a mortgage agreement, the mortgagor retains possessory right and/or ownership to the property mortgaged, *except where the agreement sets out the conditional rights of ownership of a property or asset by its owner to a lender as security for a loan* (Emphasis ours).

In our review of the Chamber Justice's ruling, we feel compelled to refer to the mortgage agreement to determine the priority of lien placed on the property by the parties in answer to the question, whether summary proceeding will lie against the appellee who entered a lease agreement with the mortgagor for the property after it had been mortgaged to the IBLL, but before the foreclosure of the mortgage by IBLL.

We make reference to Clause 2, of the mortgage deed of March 27, 2018, entered into by Mr. Gbedze, the mortgagor, and the IBLL, the mortgagee. It reads as follows:

2. THE MONTGAGOR covenant with the MORTGAGEE as follows:

- i. The lien created by this Mortgage Deed Agreement is a first, and second to no other mortgage or lien; The MORTGAGOR hereby unconditionally undertakes to furnish the MORTGAGEE with *all particulars of its present and future lease of every kind and nature, which particulars when furnished will form and hereby forms a part hereof. It being expressly understood and agreed that the MORTGAGOR's failure to furnish such particulars shall constitute a default of this Mortgage Deed Agreement (emphasis ours).*

From the reading of the above clause of the Mortgage Agreement, we see that the IBLL does recognize the mortgagor Gbedze right to ownership of the property until foreclosure, and that he continues to be real owner of the mortgaged property in fee, exercising the right to make

decisions, take actions, and enter agreements regarding the mortgaged property while the agreement remained in force. The Bank only required the mortgagor to furnish it with all particulars of its present and future lease of every kind and nature, which information, when furnished, will form a part of the mortgage agreement. There is no restriction in the mortgage agreement, limiting the mortgagor Gbedze to lease the property while the mortgage agreement is in force. The agreement only says that the mortgagor's failure to furnish such particulars shall constitute a default of the Mortgage Deed Agreement, and in which case the mortgagee bank could seek to foreclose on the mortgage. Foreclosure on the mortgage contract only takes ownership away from the mortgagor but does not extinguish the lease the mortgagor entered while he was in possession; except, where the mortgage agreement had set a conditional rights of ownership of the property by Gbedze, its owner, to the Bank, lender, as security for the loan, and in this case before us, the only condition set was for the mortgagor, Gbedze, to inform the IBLL of any future lease entered into after the mortgage agreement was concluded.

The Bank having foreclosed on the loan for the failure of the mortgagor to pay his loan, his interest in the property ceased and the Bank took over the property in his place, which interest the Bank transferred by sale to the appellant, Kamara. Kamara purchased the property, but however with the lien, that is, the lease on the subject property. This Court has held that a lease agreement is not only a possessory right but is prima facie evidence of title and is a defense in a summary ejectment action. *Christine V. Gibson v. National Housing Authority*, 40 LLR 217, 222 (2000), and that a tenant of a leased estate becomes absolute owner of demised premises during the existence of the lease while the landlord right is confined to that of reversionary interest: *Lerchel v. Eid*, 34 LLR, 648, 662 (1988).

We therefore agree with the ruling made by the Chambers Justice that the mortgagor, as the real owner of the property, prior to the foreclosure of a mortgage could have leased the property, and said agreement is deemed legal and enforceable in the absence of fraud and misrepresentation. As the Chambers Justice wrote, that was precisely why the mortgagee should have ensured that its interest in the property was sufficiently protected in order to avoid future complications that would jeopardize or endanger the Bank's future interest of its sale of the property. The Bank should have sought protective safe-guards and ensured that the mortgagor, Gbedze, did not commit the property to a third party in satisfaction of his self-interest. As the Justice wrote, "In an event wherein the mortgagor is not cautious and meticulous in the handling of the property, or he/she intends to take actions that will be in contrast to mortgagee's future property interest, appropriate actions or caution should be taken by the mortgagee to protect its interest in the property." We can add that it is equally

important for one that moves to purchase a foreclosed property to first investigate the lien imposed by the mortgagor on said property.

The co-appellant complains that when the Commercial Court attempted to evict and oust the appellee from the property, the appellee filed a petition for adverse claim against the subject property which was heard and a judgment entered by the Commercial Court denying the appellee's adverse claim; that the appellee excepted to the court's ruling but did not appeal therefrom nor file bill of exceptions or an appeal bond.

Our understanding of the Commercial Courts' ruling is that the court declined to entertain the appellee's petition filed for adverse claim, stating that the petition was filed after the foreclosure and auctioning of the property, and the appellee not having interposed objection to the sale and the sale had been consummated before the appellee filed his petition for adverse claim, the Commercial Court had no jurisdiction to entertain the said claim as the sale had been completed and the subject matter no longer before the court. The Commercial Court had the matter dismissed for lack of jurisdiction.

Where the court claimed that it was not the appropriate court to entertain the appellee's petition for adverse claim, the matter ended. We fail to see why an announcement of an appeal was necessary, unless the appellee felt and insisted that the Commercial Court was the proper court to hear his petition and therefore sought a review of this issue of jurisdiction. The appellee having agreed with the court's ruling on its lack of jurisdiction, he could only now move to the appropriate court to assert his claim which he asserted when the appellant sought to have him evicted, and which this Court has now delved into in this Opinion by stating that the appellee has a right of possession under the lease agreement for fifteen years, that is, beginning May 22, 2026, and ending May 21, 2041.

WHEREFORE AND IN VIEW OF THE FOREGOING, the ruling of the Justice in Chambers ordering issued the alternative writ of certiorari is sustained and the peremptory writ prayed for ordered issued. The Clerk of this Court is ordered to send a Mandate to the court below, instructing the judge presiding therein to resume jurisdiction over this case and give effect to this Judgment. AND IT IS HEREBY SO ORDERED.

WHEN THIS CASE WAS CALLED FOR HEARING, COUNSELLOR J. JOHNNY MOMOH OF THE J. JOHNNY MOMOH & ASSOCIATES LEGAL CHAMBERS APPEARED FOR THE APPELLANTS. COUNSELLORS G. MOSES PAEGAR AND ALBERT S. SIMS OF THE JUSTICE ADVOCATES & PARTNERS, INC. APPEARED FOR THE APPELLEES.