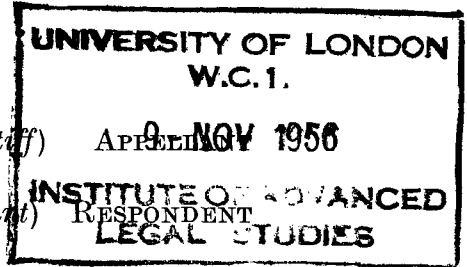


6,1953

In the Privy Council

No. 3 of 1951.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL 33469



BETWEEN

JOHN OJOBO AGBEYEGBE (Plaintiff)

AND

FESTUS MAKENE IKOMI (Defendant)

AND

F. O. AMARAH (Defendant) PRO FORMA RESPONDENT

CASE FOR THE APPELLANT

1.—This Appeal is brought from a Judgment of the West African Court of Appeal and turns upon the consequences of non-compliance with the terms of an Order for the forced sale of the Appellant's land held under lease from the Crown which order was made by His Honour John Jackson, Assistant Judge in the Supreme Court of Nigeria, Warri Judicial Division on the 30th December, 1937. RECORD
p. 29

2.—The material part of the said Order is as follows :—“ I do further order that prior to the auction a notice of sale and a description of the land so put up for auction shall be published by three consecutive publications in the Nigeria Gazette.” p. 29, l. 7

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3.—Contrary to the said Order, when only two notices of sale had been published, the property was sold by public auction on the 27th May, 1938, to the Respondent for £680. The importance of the omission of the third publication, as was made plain in the proceedings before Rhodes, J., hereinafter mentioned, lies in the facts that such publication was a condition precedent to a valid auction sale and that the Appellant had offers of £2,000 for the property from prospective purchasers who awaited the third and last publication of the notice of sale. p. 31.
Exhibit D 3
and D 4
p. 16

20 Consequently a low figure was accepted by the auctioneer resulting in what Rhodes, J., described as “ a gross miscarriage of justice ” whereby the Appellant as the Learned Judge found, sustained substantial injury. p. 16, l. 19
p. 16, l. 36

CASE FOR THE APPELLANT

RECORD

4.—Upon the day of the sale, namely on 27th May, 1938, the Respondent paid the purchase money and made application for the Governor's approval in accordance with the Crown Land Ordinance Section 1 which is as follows :—

“ No lease under this Ordinance or under any Ordinance
 “ repealed by this Ordinance which contains a covenant, whether
 “ express or implied by the lease not to assign without the consent
 “ of the Governor shall be sold by or under the order of a Court
 “ on execution of a decree or otherwise howsoever except to a
 “ purchaser approved by the Governor.”

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p. 32, l. 20 The approval was subsequently notified by letter dated 26th August.

5.—The sale by auction having taken place on the 27th May without due notice, on the 7th June, 1938, the Appellant commenced proceedings in the High Court to set aside the sale in accordance with Order 45, Rule 31, of the Rules of the Supreme Court which reads as follows :—

“ At any time within 21 days from the date of the sale of any
 “ immovable property application may be made to the High Court
 “ to set aside the sale on the ground of any material irregularity
 “ in the conduct of the sale, but no sale shall be set aside on the
 “ ground of such irregularity unless the Applicant shall prove to
 “ the satisfaction of the Court that he has sustained substantial
 “ injury by reason of such irregularity.”

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p. 3, l. 2 6.—The summary hearing of the action was fixed for the 7th July, 1938, and the Appellant who was resident in Lagos applied through his Solicitors by letter and telegram to the High Court, Warri (a day's journey by water from Lagos) asking that Pleadings be ordered and that the hearing be adjourned for the same to be delivered.

p. 3, l. 6 7.—The Respondent appeared by Counsel at the hearing on the 7th July and submitted that because the Governor's approval required by the Crown Lands Ordinance, Section 11, had not yet been given, there was no sale for the Court to set aside and that the action therefore should be struck out. 30

p. 23, l. 24
 p. 14, l. 35 8.—The Appellant submits that “ the date of sale ” clearly is that of the sale, by auction when, after bidding, the identity of the purchaser was determined and the price fixed and paid. Whenever “ the date of Sale ” is referred to in the relevant Orders and Legislation the words have this meaning. The Courts have so found in this case.

9.—Under Order 45 rule 31 the Appellant's action would have been out of time had he waited till the Governor's approval of the purchaser was given. Indeed if no action is commenced within 21 days of the Sale the Governor may well assume that no suggestion of irregularity can be made in 40

respect of the sale and he is likely to await the expiry of that period before approving the purchaser. RECORD

10.—The Appellant submits that the representation that there was no sale which the Court could set aside for irregularity was wrong in law and was wholly improper in the case of a Sale which the Respondent intended to, and did, implement by taking possession of the land.

11.—Nevertheless on 7th July, 1938, the Chief Judge of the High Court, Warri Judicial Division, in spite of the Plaintiff's application for pleadings which would have set out his grounds of claim, acceded to the representation of the Respondent and struck the case out, purporting to act under Order 18 rule 1.

12.—Owing to the death of the Appellant's legal advisers, his own illness and the difficulties of ascertaining his true position in the matter it was not until 1947 that leave to relist the case was given by Rhodes, J. p. 4, l. 7

13.—By his amended Claim the Appellant sought to set aside the Sale on the ground of irregularity through non-compliance with the Order of the Court. Judgment was given by Rhodes, J., in the Appellant's favour on 2nd April, 1948. p. 5
p. 14

14.—The learned Judge found that, the Order of the Court not being carried out, the Sale was a nullity whereby the Appellant had sustained substantial injury. p. 16,
ll. 30-36

15.—The Respondent appealed to the West African Court of Appeal (Blackall, P., Sir John Verity, C.J., and Lewey, J.A.). The appeal was allowed and from that Judgment the present appeal is brought. p. 27

16.—The leading Judgment rests upon the erroneous view that "on the 7th July, 1938, when it came on for hearing the Respondent did not appear and the action was struck out." p. 23, l. 26

17.—The Appellant submits that in a Judgment which consists in criticism of the discretion of the Trial Judge this is a fundamental error. Owing to the distances involved it is customary in Nigeria that applications, as in this case for pleadings, should be made by letter, and the case was struck out on the unwarranted representation of the Respondent. p. 3

18.—The Appellant respectfully submits that the obligations upon the Trial Judge in the exercise of his judicial discretion "according to the Rules of Reason and Justice" are rightly stated; and that the Chief Justice erred in saying that Rhodes, J., had disregarded the extent as well as the reasons for delay, the nature of the claim and the effect of granting leave upon the rights of the other party. p. 24,
ll. 18-27

RECORD

p. 5

p. 4

p. 16, l. 18

19.—It is submitted that the reasons for delay had been considered by the Trial Judge in granting leave to relist, the Appellant in person and his affidavit being before him in September, 1947; the learned Judge rightly considered not only the nature of the claim and the reason for striking it out but also the effect of reinstatement upon the rights of the Appellant and upon the interests of Justice. He found “revealed before him a case of gross miscarriage of Justice”; “a material irregularity in the conduct of the non-existent Sale” and that “the Plaintiff has sustained substantial injury by reason of such irregularity.”

p. 25, l. 3

20.—It is submitted that these were matters essentially for the Trial Judge who saw the witnesses and heard their evidence and that they justifiably outweighed the mere fact of delay. In dealing with the 1945 Ordinance the Court of Appeal failed to appreciate that the Respondent's occupation of the land had not been undisputed by the Appellant who had sought his remedy within the statutory period of 21 days and so far from the Respondent being “deprived of the protection which the legislature intended to afford him” it was the present Appellant who was deprived thereof by the wrong representation made by the Respondent to the Court. 10

21.—The Appellant submits that the Court of Appeal was in error in assessing and overriding the reasons which determined the Judgment of the Trial Judge. 20

In suggesting a line of cross-examination which might have been applied to the Appellant Blackall, P., omitted to observe that the Appellant had been cross-examined by the Defendant who did not challenge him on the particular point of value.

22.—Final leave to appeal to Her Majesty's Privy Council was granted on the 28th July, 1949.

23.—The Appellant humbly submits that the Judgment of the West African Court of Appeal dated the 26th November, 1948, was wrong and that the Judgment of Rhodes, J., dated the 2nd April, 1948, was correct. It is submitted that his Judgment should stand and that effect should be given to his declaration that the sale aforesaid is null and void and that the Judgment of the West African Court of Appeal be set aside and judgment entered for the Appellant for the following amongst other 30

REASONS

1. BECAUSE the omission of the third publication in the Nigeria Gazette of the Notice of Sale was a material irregularity in the conduct of the sale within the meaning of Order 45 Rule 31 of the Supreme Court Rules applying in

1938 ; as the result of which upon ample evidence the trial Judge rightly found as a fact that the Appellant sustained substantial injury to which the Court of Appeal paid less than due regard.

2. BECAUSE the Appellant had rightly brought his action to set aside the Sale by 27th May, 1938, and the Chief Judge was wrong in striking out the action (*a*) without acceding to the request for pleadings (*b*) in holding that the said Sale was not a sale cognisable by the Court.
- 10 3. BECAUSE in all the circumstances Rhodes, J., was entitled in his discretion to restore the action to the list and in the subsequent hearing was justified in giving judgment for the Appellant.
4. BECAUSE it was the Respondent who improperly benefited by the breach of the Order of the Court as to Notice of Sale and by his submission that the Sale of 27th May was no sale whereas the Appellant had properly brought his action within the prescribed period from that date and was obliged by Order 45 Rule 31 so to do. p. 29
- 20 5. BECAUSE the action was struck out, not because of the absence of the Appellant, which in view of his application for pleadings would have been improper, but because of the wrong representation as to there being no sale which could be set aside.
6. BECAUSE on a proper appreciation of all the facts the exercise of the discretion of the Trial Judge who saw the witnesses was judicial and right and the reasons of the Court of Appeal for reversing it were wrong and insufficient.
- 30 7. BECAUSE no appeal had been made against the decision to relist the case and the Judge at the subsequent hearing was not obliged or likely to state at large his reasons for thinking the restoration of the case justified.
8. BECAUSE on the facts of the case and the law applicable thereto the decision of the Supreme Court of Nigeria dated 2nd April, 1948, was right and the decision of the West African Court of Appeal dated 26th November, 1948, was wrong.

S. COPE MORGAN.

F. H. COLLIER.

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No. 3 of 1951.

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COURT OF APPEAL.

BETWEEN

JOHN OJOBO AGBEYEGBE
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AND

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(*Defendant*) RESPONDENT

AND

F. AMARAH
(*Defendant*) PRO FORMA RESPONDENT

CASE FOR THE APPELLANT

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