

6,1953

# In the Privy Council.

## ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

33470

BETWEEN

JOHN OJOBO AGBEYEGBE . . . . .

AND

FESTUS MAKENE IKOMI . . . . .

AND

10 F. O. AMARAH . . . . .

UNIVERSITY OF LONDON  
W.C.1.  
Appellant  
9 - NOV 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
Respondent

*Pro Forma Respondent.*

## Case

FOR FESTUS MAKENE IKOMI.

RECORD

1. This is an appeal from a judgment and order of the West African Court of Appeal at Lagos, Nigeria, dated the 26th November, 1948, setting aside a judgment and order of the Supreme Court of Nigeria dated 2nd April, 1948, whereby the Supreme Court (Rhodes, J.) declared that a sale of the Appellant's property in the Warri Township made by the Deputy Sheriff on the 27th May, 1938, was a nullity.

p. 23  
p. 14

20 2. The principal issue in this appeal is whether the trial judge was right in allowing the Appellant's action to set aside the aforesaid sale, which had been struck out in 1938, to be re-listed nine years later or whether, as was held by the West African Court of Appeal, he failed to exercise his discretion judicially when he allowed the said action to be re-listed.

3. Some material sections of the Crown Lands Ordinance, Chapter 84 of the Laws of Nigeria (1923 Revision), of the Sheriffs and Enforcement of Judgments and Orders Ordinance, 1945, and of the Supreme Court (Civil Procedure) Rules are annexed hereto.

30 4. In November, 1937, the second Respondent (Amarah) brought an action against the Appellant in the Warri High Court of the Protectorate of Nigeria (Warri Judicial Division) at Warri, claiming £330 for building materials and damages. Judgment was entered in his favour for £212.

p. 6, l. 21

CASE FOR THE RESPONDENT

p. 29

5. On the 30th December, 1937, the Assistant Judge at Warri (Jackson, J.) made an order giving leave for the issue and execution of a Writ of Fi. Fa. to issue against the Appellant in respect of land described in a Crown Lease dated the 19th September, 1925, and registered as No. 54 at page 300 in Volume 176 of the Lands Registry in the Office at Lagos. The said order contained the following terms :—

p. 29, l. 20

“ Upon the issue of the writ I do order that the Deputy Sheriff (Capt. J. B. G. Austin, Superintendent of Police) do take and retain actual possession, of the land so described in that Indenture of Lease. 10

I do order that the sale of the Judgment-Debtor's interest in that land shall be conducted by public auction under the personal direction of the said Deputy Sheriff, Capt. J. B. G. Austin, subject to the provisions of section 11 of the Crown Lands Ordinance (Laws of Nigeria, Cap. 84).

Sic.

I do further order that prior to the auction of sale and a description of the land, so put up for auction, shall be published in three consecutive publications in the Nigeria Gazette.”

p. 30

On the 18th March, 1938, the Assistant Judge amended his said order by deleting the words “ Capt. J. B. G. Austin ” and substituting therefor 20 the words “ Mr. Ronald Stuart Shuel.”

p. 30, l. 30

6. On the 1st April, 1938, a letter was sent on behalf of the Sheriff to the Chief Secretary to the Government, Lagos, asking that the notice of this sale should be published in three consecutive publications of the Nigeria Gazette.

p. 31, l. 22

7. The sale of the said land was held by public auction at the Police Office on the 27th May, when it was purchased by the first Respondent (Festus Makene Ikomi) for £680.

p. 1

8. On the 31st May, 1938, the Appellant's solicitor applied in the said High Court (Warri Judicial Division) for a civil summons to set aside 30 the aforesaid sale. The summons was issued on the 8th June, 1938, impleading the first Respondent as second Defendant and the second Respondent as first Defendant.

p. 2

pp. 2-3

p. 1, l. 32

p. 3, l. 2

p. 3, l. 1

9. On the 7th July, 1938, the said claim to set aside the sale came before the High Court. No appearance was made by or on behalf of the Appellant although a letter was received from a firm of lawyers, who (the Court presumed) were acting on his behalf, asking for pleadings. The second Respondent had not been served and did not appear. The advocate who appeared for the first Respondent informed the Court that there had not yet been any sale, that the first Respondent bought subject to the approval of the Governor and such approval had not yet been given, so there had been no sale. He therefore applied for the order to be struck out. The Court made the following order :— 40

“ The case is struck out with costs to 2nd Defendant assessed at 5 guineas.”

10. On the 16th August, 1938, the Acting Resident Warri Province approved the first Respondent as purchaser pursuant to Section 11 of the Crown Lands Ordinance. p. 32, l. 20

11. On the 22nd August, 1938, the Assistant Judge in the High Court of the Warri Judicial Division (Pearson A.J.) issued a certificate that the first Respondent had been declared the purchaser of the right, title and interest of the Appellant in the said land. p. 33, l. 11

12. On the 15th September, 1947, the Appellant moved the Supreme Court of Nigeria in the Warri Judicial Division at Warri to re-list the suit which had been struck out as aforesaid on the 7th July, 1938. The motion was supported by an affidavit dated 17th July, 1947, which included the following paragraphs :— p. 5  
pp. 4-5

“ 6. That late Lawyer Alakija and Alakija and Lawyer Olatunde Vincent whom I engaged applied for pleading and adjournment of the case. I come from Lagos in March, 1942, and I investigated from the records to know what happened before the case was struck out. I got the copies of the judgment of the case.”

20 “ 9. That my delay to bring up the case was due to all the documents about the case with Lawyer Alakija. I got only few of the documents.”

On the hearing of the motion both the Appellant and the Respondents appeared in person. The learned judge of the Supreme Court (Rhodes J.) granted leave to re-list the suit. p. 56, l. 26

13. At the hearing of the suit on the 18th December, 1947, the Appellant deposed (*inter alia*) that there were only two publications made in the Nigeria Gazette and not three, and that he had had offers of £2,000 made to him for the purchase of the land but “ they were waiting for the completion of the Gazette Notices.” Samuel Aina Falola, a Court Bailiff, deposed that there were only two Notices of Sale published in the Gazette. p. 7, l. 1  
p. 7, l. 40

30 14. On the same day the Appellant's advocate applied for leave to amend the Writ of Summons on terms. Both Respondents objected to any amendment at that stage but the application was granted with five guineas costs to each of the Respondents. The claim was accordingly amended to include the following ground :— p. 8, l. 12

40 “. . . that there was substantial irregularity in execution of the aforesaid order of the High Court of Warri Judicial Division in that the Deputy Sheriff did not comply with the essential conditions precedent to the sale required by the aforesaid order of 30th December, 1937, made by the High Court of Warri Judicial Division.” p. 8, l. 33

15. In the course of his judgment the trial judge cited the terms of Section 11 of the Crown Lands Ordinance and proceeded as follows :— p. 15, l. 42

“ Reading this section with Rule 31 of Order 45 there seems to be an anomaly created, for it is not stipulated how the days are to be computed. I am certain Section 11 of Cap. 84 did not

anticipate Rule 31. The wording of Section 11 seems to declare that the purchaser by sale of Crown Leases made by an Order of the Court is subject to a condition subsequent, that is the approval of the Governor, following this to its logical conclusion, it would mean that until such time as the Governor approves of the purchaser there is no sale. That being so, who is to inform the aggrieved judgment debtor that the Governor has approved of the purchaser? There is no machinery anywhere provided which makes it the duty of anyone to inform the judgment debtor of such approval, as in this case where it took the Governor almost 10 three months to approve the purchaser.

It has been argued that as Judges have concurrent jurisdiction, this Court will be acting as a Court of Appeal upon the action of Pearson, A.J., in issuing a certificate of purchase to Ikomi; that that act being one of this Court, it closes the matter subject to an appeal and there was none; I agree with Counsel that a Judge cannot interfere with the judgment or order of another Judge of concurrent jurisdiction but, where there is revealed before him a case of gross miscarriage of justice, a Judge can review the judgment of another Judge of concurrent jurisdiction, moreover the issuing 20 of a certificate of purchase by a Judge could not be said to be a Judgment or an Order.

The Order of the Court was for three consecutive publications in the Nigeria Gazette, that Order was never carried out, it was the duty of the Deputy Sheriff to have satisfied himself that the Order of the Court had been carried out before proceeding to sell, and the purchaser Ikomi should have satisfied himself that the sale was a proper one all conditions precedent to sale having been fulfilled, especially where the order used the word 'shall'.

The Order of the Court not being carried out before sale, all 30 subsequent acts under the sale together with the sale must be declared a nullity.

I find that there was no sale, and there being no sale the approval of the Chief Commissioner was based upon nothing, as he was misled into signing a document based upon a sale which did not exist."

The trial judge therefore gave judgment for the Appellant as aforesaid.

pp. 17-18

16. The first Respondent appealed from the said judgment to the West African Court of Appeal.

pp. 23-26

17. The principal judgment in the West African Court of Appeal 40 was delivered by Sir John Verity, Chief Justice of Nigeria. As regards the decision of the trial judge to re-list the case after nine years he said :

p. 24, l. 18

"While there is no time limit fixed by the local rule it is obvious that the granting of leave is not as of course, but is in the discretion of the Judge, a discretion which must not be exercised arbitrarily but judicially, 'according to the rules of reason and justice' (as was said in *Rooke's Case* so long ago as 1598 and

approved by Lord Halsbury, L.C., in *Sharp v. Wakefield* [1891] A.C. 173). In the exercise of this discretion the Judge is to take into consideration all the circumstances, including such questions as the extent of the delay in making the application, the reasons therefor, the nature of the claim and the effect of granting leave upon the rights of the other party. It is clear that in the present case the learned Judge either failed to consider or disregard these factors when he exercised his discretion in favour of the Respondent. The delay of nine years upon grounds which as set out in the affidavit supporting the motion are patently inadequate, the fact that the suit affected the ownership of land, to which the Appellant had acquired a certificate of title and in undisturbed possession of which he had remained for many years—these are factors to which due consideration should have been given and which should not have been lightly disregarded. Regard should have been had, moreover, to the fact that under the Rules of Court in force at the date of the sale (Order XLV, Rules 31 & 32, Cap. 3) and that statute in force at the date when leave was sought (The Sheriffs and Enforcement of Judgments and Orders Ordinance, 1945, Sections 46 and 47) purchasers at execution were and are protected against delayed actions to set aside sales for irregularity, by the requirement that applications to set aside such sales must be made within 21 days, and that if no such application be made within the prescribed time the sale shall be deemed absolute. Whatever may be the meaning of the word ‘sale’ in the present case and no matter what distinction may be drawn between the words ‘shall be deemed absolute’ and ‘shall be absolute’ (about which we have heard much argument) there can be no doubt that by the Order of the Court granting leave to re-list this case the Appellant has been deprived of the protection which the legislature intended to afford him.

In my view then, the learned Judge erred in exercising his discretion in favour of the Respondent in that he did not apply his mind to the proper considerations or else did not give effect to the rules of reason and justice applicable thereto.”

The Chief Justice further held that it would be wrong to penalise the first Respondent for not having objected at the earliest possible moment that the application was out of time since the first Respondent had not been represented by counsel at the material time and since the Appellant himself had slept on his rights for nine years. As regards the Respondents’ failure to appeal against the judge’s order to re-list the suit he held that this was covered by Rule 30 of the West African Court of Appeal Rules which provides that—

“ No interlocutory order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision on the appeal as may seem just.”

The Chief Justice further expressed himself at a loss to understand how the trial judge could have held upon the vague and extremely unsatisfactory evidence before him that by reason of the irregularity in the conduct of the sale the Appellant had sustained substantial injury.

p. 26  
p. 27

Blackall P. delivered judgment in agreement with Sir John Verity. Lewey J. A. concurred and had nothing to add. An order was passed accordingly setting aside the order by which the court below had granted leave to replace this cause in the cause list and the proceedings in the court below subsequent thereto and entering judgment for the first Respondent in the court below with costs fixed at 25 guineas, together with costs of the appeal assessed at £31 4s. 9d.

p. 27, l. 19  
p. 28, l. 18

18. Conditional leave to appeal to His Majesty in Council was granted to the Appellant by an order of the West African Court of Appeal dated the 20th April, 1949, and final leave by an order of the said court 10 dated the 28th July, 1949.

19. The Respondent humbly submits that this appeal should be dismissed with costs, and the judgment and order of the West African Court of Appeal upheld for the following, amongst other

### REASONS

- (1) BECAUSE the West African Court of Appeal were right in holding that in restoring this cause to the list after a lapse of nine years the trial judge had failed to exercise judicially the discretion vested in him.
- (2) BECAUSE the West African Court of Appeal were right 20 in holding that the trial judge in exercising his said discretion failed to take into account such questions as the extent of the delay in making the application, the nature of the claim and the effect of granting leave upon the rights of the other party.
- (3) BECAUSE by the order of the trial judge granting leave to re-list the cause the Respondents were deprived of the protection intended to be given to purchasers at execution sales by the Sheriff and Enforcement of Judgments and Orders Ordinance, 1945. 30
- (4) BECAUSE there was no sufficient evidence that by reason of the irregularity in the conduct of the sale the Appellant had sustained substantial injury.
- (5) BECAUSE the judgments and order of the West African Court of Appeal were right.

DINGLE FOOT.

**ANNEXURE.**

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THE CROWN LANDS ORDINANCE (CAP. 84 OF LAWS OF NIGERIA, 1923).

“4. Subject to the regulations made under this Ordinance the Governor may grant leases of Crown Lands for any term or in the case of a lease to a native of Nigeria for an indefinite term, and may grant licences for the temporary occupation of Crown Lands.”

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

SHERIFFS AND ENFORCEMENT OF JUDGMENTS AND ORDERS  
(CAP. 205 OF THE LAWS OF NIGERIA, 1948).

“46. At any time within twenty-one days from the date of the sale of any immovable property, application may be made to the 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.”

20 “47. If no such application as is mentioned in the last preceding rule be made, the sale shall be deemed absolute. If such application be made and the objection be disallowed the court shall make an order confirming the sale; and in like manner, if the objection be allowed, the court shall make an order setting aside the sale for irregularity.”

“48. Wherever a sale of immovable property is set aside the purchaser shall be entitled to receive back any money deposited or paid by him on account of such sale, with or without interest, to be paid by such parties and in such manner as it may appear proper to the court to direct in each instance.”

30 “49. After a sale of immovable property shall have become absolute in manner aforesaid, the court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right title and interest of the judgment debtor in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right title and interest.”

SUPREME COURT RULES.

Order 45, Rule 31. “At any time within twenty-one days of the sale of any immovable property application may be made to the court to set  
40 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.”

[N.B.—This is one of the old rules which were replaced by new rules in 1945.]

SUPREME COURT (CIVIL PROCEDURE) RULES, 1945.

“Any cause struck out may, by leave of the court, be replaced on the cause list on such terms as to the court may seem fit.”

**In the Privy Council.**

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**ON APPEAL**  
*from the West African Court of Appeal*

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BETWEEN

**JOHN OJOBO AGBEYEGBE**      *Appellant*

AND

**FESTUS MAKENE IKOMI**      *Respondent*

AND

**F. O. AMARAH**      -      -      *Pro forma  
Respondent.*

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**Case**

FOR **FESTUS MAKENE IKOMI**

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