Privy Council Appeal No. 3 of 1951

John Ojobo Agbeyegbe - - - - - - - - *Appellant*

v.

Festus Makene Ikomi and another - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY, 1953

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD OAKSEY]

This is an appeal from a judgment of the West African Court of Appeal at Lagos, Nigeria, dated the 26th November, 1948, setting aside a judgment of the Supreme Court of Nigeria dated the 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.

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 and in deciding that the sale should be set aside or whether, as was held by the West African Court of Appeal, the learned judge failed to exercise his discretion judicially when he allowed the said action to be re-listed, and decided that the sale should be set aside.

Section 46 of the Sheriffs and Enforcement of Judgments and Orders Ordinance (Cap. 205 of the Laws of Nigeria, 1948) is as follows:—

> "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."

The facts are as follows. 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.

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 the land in question.

The learned judge ordered that the sale of the judgment-debtor's interest in the land should be conducted by public auction under the personal direction of the Deputy Sheriff and that prior to the auction the sale and a description of the land so put up for auction should be published in three consecutive publications in the Nigeria Gazette.

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. Two only of such publications were made.

The sale of the 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.

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 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.

On the 7th July, 1938, the said claim to set aside the sale came before the High Court. The judge's note is as follows:—

"Claim to set aside a sale.

No appearance by or for Plaintiff.

2nd Defendant in person—says he has briefed Wright.

1st Defendant not served—no appearance.

Letter from Alakija and Alakija asking for pleadings—presumably for Plaintiff.

Telegram from Vincent for Plaintiff asking for pleadings and adjournment.

Wright informs Court that there has not yet been any sale.

2nd Defendant bought subject to the approval of the Governor and that approval has not yet been given, so there has been no sale.

Applies for case to be struckout. Order 18 Rule 1.

ORDER:

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

(Sgd.) DONALD KINGDON.

Chief Judge."

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.

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.

No further proceedings were taken by the appellant until 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 the 19th July, 1947, which included the following paragraphs:—

"6. That late Lawyer Alakija and Alakija and Lawyer Olatunde Vincent whom I engaged 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."

"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 and no note of any argument appears to have been made. The learned judge of the Supreme Court (Rhodes, J.) granted leave to re-list the suit.

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." He also stated that the respondent during his occupation had removed some of the buildings on the land and rebuilt others.

Mr. Justice Rhodes in giving judgment did not comment upon the nine years delay which had elapsed between the sale and the application to have the case re-listed or upon the reasons given by the appellant to excuse the delay, but found that owing to the fact that only two notices of the sale had been given the sale was irregular and null and stated that he was satisfied from the evidence that the appellant had sustained substantial injury by reason of the irregularity.

On appeal by the respondent to the West African Court of Appeal the appeal was allowed the Court (Sir John Verity, C.J., Sir Henry Blackall, P., and Lewey, J.A.), being of opinion that in the exercise of his discretion the trial judge did not appear to have taken into consideration all the relevant circumstances including such questions as to the extent of the delay in making the application to re-list the case, the reasons for the delay, the nature of the claim and the effect of granting leave upon the rights of the respondent.

Their Lordships are in agreement with the West African Court of Appeal in thinking that the learned trial judge did not exercise his discretion judicially on these matters.

A number of technical points have been argued on both sides before their Lordships. It has been argued for the appellant that the respondent ought to have appealed against the order to re-list and that the *laches* was not taken as a formal point at the earliest possible moment. The parties however were not legally represented at the hearing to re-list, no note was taken of their arguments at that stage, the question of delay was put in the forefront of the cross-examination of the respondent at the hearing and counsel for the appellant before their Lordships recognised that the delay which had occurred was the real difficulty which he had to face.

In cases of laches the law was stated by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Company* (1878 L.R. 3 A.C. at p. 1279):—

> "In *Lindsay Petroleum Company* v. *Hurd* (L.R. 5 P.C. 239) it is said: 'The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice

> or injustice in taking the one course or the other, so far as relates to the remedy.' I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or with-holding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

The length of the delay and the nature of the acts done during the interval in the present case in their Lordships' opinion cause a balance of justice in favour of the respondent who had been in possession of the land for nine years at the time of the trial.

Reliance was placed on behalf of the appellant upon the cases of *Weld* v. *Petre* (1929 1 Ch. 33) and *Clifford* v. *Clifford* (1948 1 All E.R. 394) but in their Lordships' view these cases are not in point in the present case.

Weld v. *Petre* (*ubi sup.*) was a case of a mortgage and it was expressly stated by Lord Russell of Killowen that delay in exercising the rights of a mortgagee stood upon an entirely different footing from delays in cases such as the present where the Court is asked to re-open a matter which has been already decided. *Clifford* v. *Clifford* (*ubi sup.*) was a case of nullity of marriage and in such a case it is obvious that there may be circumstances which induce the delay which have no resemblance to the facts of the present case. In no other case to which their Lordships' attention has been drawn has there been anything like a delay of nine years and having regard to the length of the delay, the inadequacy of the explanation of the delay and the consequences of setting aside the sale of land as against a bona fide purchaser for value who had been in occupation of the land during the whole period and had apparently altered the buildings thereon, their Lordships are of opinion that the case ought not to have been re-listed and having been re-listed ought to have been dismissed.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

(17847) Wt. 8096—1 100 1/53 D.L./PI/3

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DRURY LANE, W.C.2.

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