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UNIVERSITY OF LONDON  
W.C.1.  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

1.

IN THE PRIVY COUNCIL

No. 13 of 1959

63496

ON APPEAL FROM  
THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N :

C.A. SAVAGE, SOLOMON KAYODE and  
JONATHAN SUNDAY ROTIBI (Trustees  
of the Will of S.O. Rotibi deceased)  
Defendants-Appellants

- and -

10 M.O. UWECHIA Plaintiff - Respondent

CASE FOR THE APPELLANTS

Record

1. This is an appeal by special leave of Her Majesty in Council against an order made on the 18th day of March 1957 by the Federal Supreme Court of Nigeria (Sir Stafford Foster Sutton, F.C.J., Olumuyiwa Jibowu, F.J. and M.C. Nageon de Lestang, F.J.) whereby it was ordered that the Appeal of M.O. Uwechia, the Respondent herein, from the dismissal on the 14th day of December 1955 of an action brought by him in the Supreme Court of Nigeria, Onitsha Division, be allowed and that judgment be entered for the Respondent for specific performance of an agreement made between him and one S.O. Rotibi deceased on the 24th August 1954, with costs.

pp. 31, 32 and  
p.33, 1.1-10.

2. The proceedings were started in the Supreme Court of the Onitsha Judicial Division of the Supreme Court of Nigeria in the month of May 1955 and by a Statement of Claim dated 2nd day of May 1955 the Respondent alleged that by an "agreement to convey" made between the Respondent and S.O. Rotibi on the 24th day of August 1954 the said Rotibi agreed to convey to the Respondent for the sum of £780 (seven hundred and eighty pounds) after three months from the 24th day of August 1954 his freehold property with the appurtenances thereto situate

p.1, 11.14-31  
and p.2.

Record

at No. 6 New Market Road Onitsha, and claimed specific performance of the said alleged agreement.

pp. 6, 7, 8.

3. After divers interlocutory steps the Respondent delivered a further Statement of Claim dated the 4th day of October 1955 in which he alleged that the said S.O. Rotibi died on 9th September 1954 and that the Appellants were the executors and trustees of the Will of the said S.O. Rotibi deceased and had acted and intermeddled as such, that by an agreement made between the Respondent and the said S.O. Rotibi on the 24th August 1954 the said S.O. Rotibi had agreed to sell to the Respondent the property referred to in paragraph 2 hereof on the terms there stated, that he had a copy of the alleged agreement to convey to which he would refer at the trial for its full terms and effects, that after the death of the said S.O. Rotibi he had caused the existence of the said agreement to be brought to the attention of the Appellants, that the Appellants had failed to take any steps towards carrying out the alleged agreement to convey, and that he had performed his obligations to the deceased which had led to the alleged agreement and he claimed specific performance of the alleged agreement, further or other relief, and costs.

p.7, 11.33-41.

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p.8.

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4. In short the Respondents claim as pleaded was for specific performance of an alleged agreement for the sale of land alleged to be in writing.

5. The document to which the Respondent referred in paragraph 7 of his Statement of Claim dated the 4th October 1955 as being a copy of the agreement which he relied upon, read as follows:-

p.54.

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"

PROMISSORY NOTE

£780: -: -:

Owerri

I promise to pay to Mathew Uwechia or order three months after date the sum of seven hundred and eighty pounds for value received or in default to convey to him all those messuages together with appurtenances thereto situate at No. 6 New Market Road, in the township of Onitsha, to hold the same unto the said Mathew Uwechia or order in fee simple

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(Sgd.) S.O. Rotibi "

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6. The extent of the property to which the said document relates is in dispute. The Respondent alleges that the property which he claims that he is now entitled to have conveyed to him free under the said alleged agreement is the property shown on the plan which is Exhibit 2 to an affidavit made by the Respondent on the 24th day of August 1956 and received in evidence on the hearing of his Appeal herein. The property there shown consists of an area of land on which stand three buildings, one described as a "Two Storey Building", each of the others described as a "Cloth Dealers Shop". The "Two Storey Building" is known as No. 6 New Market Road and is the "storey house" referred to by the deceased in the 7th, 14th and 15th paragraphs of his Will. At all material times it has been let at rents totalling about £750 per annum. The remaining two buildings are separate and are known as 6a and 6b New Market Road and are the buildings leased by the deceased to one Uzodinma and referred to by the deceased in the 11th paragraph of his Will. The said Uzodinma collects a rent of £792 per annum from the said houses. The Respondent claims that he is entitled to a conveyance of the whole of the property shown on the said plan which has as appears from the foregoing a very substantial capital value far in excess of the sum of £780 for which the Respondent claims to have purchased it. The Appellants claim that if there was an enforceable agreement relating to any part of the said property it related solely to that part known specifically as No. 6 New Market Road. That issue is at present before the Supreme Court at Onitsha but the determination thereof has been adjourned by the said Court pending the determination of this Appeal.

p.18.

p.55, 11.32-34  
and p.56, 11.  
1-5 and 11.28-  
35.

p.56, 11.15-21.

7. By their Statement of Defence delivered herein the Appellants denied each and every allegation made in the Statement of Claim save where the same were expressly admitted, made certain admissions and raised divers issues not material to this Appeal, and further alleged that the alleged agreement pleaded and relied upon by the Respondent was in essence a mortgage for money lent and would not in any event entitle the Respondent to specific performance as claimed.

pp.9 and 10.  
p.10, 11.1-10.

8. The action was tried by Brown J. on the 4th day of November 1955. The Respondent did not give evidence and one witness only was called on his behalf.

Record  
p.12, 11.28-34  
and p.13, 11.  
1-24.

The witness said that his name was Lasisi Rotibi and he has known the deceased man Samson Omolona Rotibi. He had managed the deceased business in Owerri and Onitsha since 1930. He said that he was at Owerri when the deceased died on 3rd September 1954. He knew Christian Savage, Solomon Kayode and Jonothan Rotibi and said that they were the Executors of the estate of the deceased and were named in his Will. He said that he knew about "the agreement between the plaintiff and the deceased Rotibi" and said "Savage now has the agreement". Several persons including the witness and the Appellants went to Owerri about a week after Rotibi's death and one Isaac Akintola handed over some keys to the first of the Appellants, Savage, about four days later. The witness was present when the safe was opened and all papers were examined there and then in the presence of all who were there. The witness then identified a letter which was produced and marked Exhibit "A" as a letter written by him to the Respondent and said that that part of the letter which said that he had shown the agreement referred to to the trustees, the Appellants, on the 14th September, was true. He then identified a document which was produced and marked Exhibit "B", as "the copy of the agreement belonging to Rotibi deceased". (This was the document the contents of which are recited in paragraph 5 above). Cross-examined he said he showed the document Exhibit "A" to the trustees on 14th September.

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p.53.

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p.54.

p.13, 11.22-24

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p.13, 11.25-27.

9. At the conclusion of the evidence above referred to a certified copy of the Will of the said Rotibi deceased was admitted as evidence by consent and marked Exhibit "C". No further evidence oral or in writing was tendered on behalf of the Respondent in support of his claim or in proof of the allegations of fact made and relied upon by him. No evidence was given by or on behalf of the Appellants.

p.13, 11.31-36,  
p.14 and p.15,  
11.1-16.

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p.14, 11.16-32.

p.14, 11.32-35.

10. On the 14th day of December 1955 judgment was given in the said action for the Appellants. The learned Judge held that the Appellants had inter-meddled and so could be sued and that the Respondent was entitled to the sum of £780 if the estate of the deceased was sufficient to satisfy that amount in due course when the amount available for the payment of debts was ascertained; but said that the Respondent had chosen to rely on such contingent interest as he might have in the said property, that the document

relied upon was described as a "Promissory Note", the wording of it was that of a Promissory Note, the promissor was not in default at the date of his death nor liable for payment until 24th November 1954, that by that date it was no longer possible for him to carry out his promise, that as the contingency of default had not arisen the Respondent had never become entitled to a conveyance, and that as the Respondent was not claiming the repayment of the sum of £780 but only specific performance of the alleged agreement to convey he was not entitled to succeed on the claim as presented; and the said claim was accordingly dismissed with costs.

Record  
p.14, 1.46  
et.seq.  
p.15.

11. The Respondent appealed against the said decision to the Federal Supreme Court of Nigeria and on the 5th day of March 1957 the said Appeal came before the said Court (Sir Stafford Foster Sutton, F.C.J., Olumuyiwa Jibowu, F.J. and M.C. Nageon de Lestang, F.J.) when, on a motion to put in new evidence, evidence was admitted that probate had not been granted to the Appellants at the time of the trial of the action, but was granted to them on 28th July 1956, and the plan above referred to and marked Exhibit "2" was received in evidence. On the 18th day of March 1957 the Federal Chief Justice (Sir Stafford Foster Sutton) delivered a reserved judgment in which the other members of the said Court concurred. The Federal Chief Justice began his said judgment as follows:- "In this case the Plaintiff sued the Defendants as Executors and Trustees of the Will of Mr. S.O. Rotibi deceased, claiming specific performance of an agreement entered into by the latter on the 24th August 1954. The document in question reads as follows". He then quoted the document, Exhibit "B", the contents of which are recited in paragraph 5 hereof. He made no other reference to the making of or validity of the alleged agreement. He stated that the general rule was that it was the duty of a legal personal representative to perform all the contracts of his Testator or Intestate which could be enforced and which could be vicariously performed and that such was the position in this case. He then concluded as follows:-

p.17, 11.12-36.  
p.24, 1.25 and  
p.26.

pp.27, 28, 29  
and 30.  
p.27, 1.22.

p.27, 1.29.

p.29, 11.9-26.

"The breaking of an enforceable contract is an unlawful act, and it is not the duty of an Executor or Administrator to commit such an act. They so completely represent their

p.29, 11.27-36.

Record

Testator or Intestate that every contract with the deceased (not being a contract personal to the deceased) includes them, though they are not named in the terms of it; for the Executors or Administrators of every person are implied in that person.

p.29, 1.37-45.

"Specific performance is an equitable remedy and the position might have been different if it could have been shown that the Defendants were not aware of the agreement, but that is not the case. Evidence was led that they were shown the document on the 14th September 1954 so that they had ample time in which to comply with the term regarding payment, had they chosen to do so.

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p.30, 11.1-8.

"Some time was occupied before us on a submission that the document in question was not a Promissory Note but it does not appear to me to be material what label is attached to it. It certainly is not a mortgage. It is an agreement to pay a specific sum by a certain date, and in default of such payment to convey the property referred to.

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p.30, 11.9-12.

"I would allow this appeal set aside the judgment of the Court below and enter judgment for the Plaintiff for specific performance of the agreement ....."

pp.31, 32 and  
p.33, 11.1-10.

Accordingly it was ordered by the said Court that the said Appeal be allowed, that the judgment of the Court below be set aside and that judgment be entered for the Respondent for specific performance of the agreement entered into between the Plaintiff and S.O. Rotibi on the 24th day of August 1954.

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12. The Appellants respectfully submit that the learned Judges of the Federal Supreme Court were wrong to reverse and set aside the judgment and order of Brown J. dismissing the Respondent's claim and were wrong in ordering that judgment be entered for the Respondent for specific performance of the alleged agreement and the principal points upon which those submissions are founded are as set out in the next succeeding paragraphs.

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13. The Appellants respectfully submit that there was no or no admissible evidence before the Court

of the agreement alleged in the Statement of Claim or of any agreement entitling the Respondent to a conveyance as alleged by him and accordingly that the learned trial Judge was correct in dismissing the Respondent's claim and action.

10 14. The Appellants respectfully submit that the learned Judges of the Federal Supreme Court erred in that they proceeded on the assumption that the document entitled "Promissory Note" (that is to say that document the contents of which are recited in paragraph 5 of this Case and which is hereinafter called "the Promissory Note") was itself an agree-  
 20 ment proved otherwise than by the mere production of that document, whereas in fact and law (a) that document was not itself an agreement in writing, (b) there was no evidence before the Court of the making of any agreement, (c) there was no evidence before the Court that the said or any similar docu-  
 30 ment was signed by the deceased or delivered to the Respondent, or of any consideration moving from the Respondent such as would have supported the alleged agreement and (d) by reason of its form, its terms and its effects the said document was not capable of being evidence of the only agreement alleged and relied upon by the Respondent which was as herein-  
 40 before appears alleged to be a simple agreement to convey for the sum of £780 after three months from the 24th August 1954.

p.7, 11.33-41.

30 15. The Appellants respectfully submit that the learned Judges of the Federal Supreme Court further erred in that they overlooked the fact that even if there was as they assumed to be the case an agree-  
 40 ment between the Respondent and the deceased in the terms set out in the document last referred to, and even if such agreement had been pleaded and proved, it was essential that in any action or claim founded upon such agreement the Respondent should both aver in his pleadings, and in default of admission, prove affirmatively at the trial, that there had been default in the payment of the sum stipulated in the said agreement; and that the Respondent had neither averred nor proved nor sought to prove any such default.

16. The Land Registration Ordinance of Nigeria (Chapter 108 of the Revised Laws of Nigeria 1948) provides, inter alia, as follows:-

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"2. Definitions:-

"instrument" means a document affecting land in Nigeria whereby one party (hereinafter called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to, or interest in land in Nigeria, and includes a certificate of purchase and a power of attorney under which any instrument may be executed, but does not include a Will.

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"6. Subject to the provisions of this Ordinance, every instrument executed after the commencement of this Ordinance shall be registered.

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"15. No instrument shall be pleaded or given in evidence in any Court as affecting any land unless the same shall have been registered."

and it is respectfully submitted that if the "Promissory note" conferred on the Respondent the right to the relief given to him by the order the subject of this Appeal it was an "instrument" within the meaning of the above provisions and should not have been pleaded or given in evidence without an averment and proof of registration as required by the said Ordinance.

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17. The Appellants respectfully submit that the learned Judges of the Federal Supreme Court further erred in that they failed to observe or give the effect to the fact that the agreement which they assumed or found to have been proved, namely an agreement in the terms contained in the "Promissory Note", was not the agreement alleged and relied upon, which was the only type of agreement which could entitle the Respondent to the relief which he sought and was given, but was a simple agreement to pay the sum of £780 coupled with provisions which should be construed as an agreement to convey the property referred to as security for the payment of the said money, that is to say, coupled with an equitable charge on the said property for the payment of the said money, and (i) that in such case

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10 the "Promissory Note" was an "instrument" within  
the meaning of clause 1 of the above recited Ordinance and by reason of the above recited provisions of the said Ordinance should not have been pleaded or given in evidence without an averment and proof of registration as required by the said Ordinance, and (ii) that in any event the Respondent was not entitled to the relief claimed but only to the remedies available to the holder of an equitable charge on land for the recovery of such amount if any as was due to him; and accordingly that the learned trial Judge was correct in dismissing the action and claim of the Respondent as pleaded and presented.

20 18. The Appellants further respectfully submit that if an agreement in the terms contained in the said document was proved and the Respondent was entitled to rely on it in support of his claim as presented to the Court and if the agreement to convey was not by way of security only for the payment of the sum of £780, the same was a penalty for breach of the contract to pay and as such was unenforceable.

p.54

30 19. The Appellants further respectfully submit that if contrary to the foregoing submissions any agreement entitling the Respondent in any circumstances to a simple conveyance of the property was proved, such right was a contingent right only, contingent upon default in payment, the deceased was not at the date of his death in default of the payment of the sum of £780 and accordingly there was no enforceable contract at the date of his death under which he was obliged to convey the property and the obligation if any to convey being conditional only did not devolve upon the Appellants and could not be enforced against them by a decree for specific performance and the unpaid debt if proved was a simple debt due by the estate of the deceased and the only right of the Respondent was to institute a claim against the Executors for such debt.

40 20. For the foregoing reasons the Appellants respectfully submit that the Respondent did not prove any agreement or grounds upon which he was entitled to ask the Court to exercise its discretion to grant specific performance of the alleged or any agreement but the Appellants further respectfully submit that the learned Judges of the Federal Supreme Court were in any event wrong in holding that in the circum-

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stances of this case it was a proper case for granting the equitable remedy of specific performance and in particular

(i) that they erred in saying that the Appellants had ample time in which to comply with the term regarding payment had they chosen to, and

(ii) they failed to take into consideration the fact that if the Respondent was entitled to the sum of £780 on the 24th November 1954 his common law remedy for payment of the said sum or damages, with interest, would have been wholly adequate relief for the failure if any to pay the said sum on the due date, and 10

p.55, 11.42-44,  
p.56, 1.1 and  
11.33-35.

(iii) they failed to give any or adequate consideration to the fact that the remedy of specific performance seriously prejudices the thirteen children of the deceased, beneficiaries under his said Will, without fault on their part, in that it deprives them at the least of a capital asset of the value of about £7,000 and of the rents thereof amounting to £750 per annum which under the provisions of the said Will are directed to be used for their maintenance and education, and, if the Respondent be right in his contentions referred to in paragraph 6 hereof, of further properties of substantial value. 20 30

21. The Appellants humbly submit that their appeal should be allowed with costs throughout and that the order of the Federal Supreme Court made on the 18th day of March 1957 should be set aside and that the order of Brown J. made on the 14th day of December 1955 should be restored, for the following, amongst other

R E A S O N S

1. BECAUSE the Respondent did not prove his case as pleaded or any case entitling him to, or entitling the Court to give to him, the relief claimed by and given to him. 40

2. BECAUSE there was no or no admissible evidence

of the making of any agreement between the Respondent and the said S.O. Rotibi.

3. BECAUSE if the Respondent did prove any agreement it was not an agreement entitling him to the relief claimed by and given to him.
4. BECAUSE if the Respondent did prove any agreement he neither pleaded nor proved the facts necessary to substantiate any claim based thereon.
- 10 5. BECAUSE if the Respondent did prove any agreement his action was an action to enforce a penalty for breach of the said agreement which penalty was not enforceable.
6. BECAUSE the Respondent could not and did not identify the property to which he referred with sufficient particularity to give certainty to an order for specific performance.
- 20 7. BECAUSE the liability of the Appellants as Executors and trustees was only to repay to the Respondent such sums if any as were owed by the deceased to the Respondent and the Respondent neither alleged nor proved that any sums were so owing.
8. BECAUSE the equitable relief of specific performance should not in any event have been given in the circumstances of this case.
9. BECAUSE the judgment and order of the Federal Supreme Court of Nigeria were wrong in law.
- 30 10. BECAUSE the learned trial Judge was right in dismissing the Respondent's claim and action and his decision and order so doing should be supported.

IAN PERCIVAL.

No. 13 of 1959

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL  
SUPREME COURT OF NIGERIA

B E T W E E N :

C.A. SAVAGE, SOLOMON KAYODE  
and JONATHAN SUNDAY ROTIBI  
(Trustees of the Will of  
S.O. Rotibi deceased)  
Defendants-Appellants

- and -

M.O. UWECHIA  
Plaintiff - Respondent

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CASE FOR THE APPELLANTS

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