Privy Council Appeal No. 13 *of* 1959

C. A. Savage and others - - - - - - - - *Appellants*

v.

M. O. Uwechia - - - - - - - - - - *Respondent*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY, 1961

Present at the Hearing :

LORD TUCKER
LORD HODSON
MR. L. M. D. DE SILVA

[*Delivered by* LORD HODSON]

This is an appeal against an order dated the 18th March, 1957, made by the Federal Supreme Court of Nigeria allowing an appeal from a dismissal by the Supreme Court of Nigeria of a claim for specific performance.

The appellants are the trustees of the will of Samson Omolona Rotibi deceased. The respondent by his statement of claim alleged that by an agreement to convey made between him and the deceased on the 24th August, 1954, the deceased agreed to convey to him for the sum of £780 after three months from the date mentioned his freehold properties at No. 6 New Market Road, Onitsha. The deceased died on the 3rd September, 1954. The plaintiff himself gave no evidence as to the circumstances in which the agreement was reached and relied solely upon the copy of a document in the following terms :—

> " 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.
>
> (Sgd.) S. O. Rotibi."

The original of this document which does not correspond in terms with the agreement alleged in the statement of claim was not produced by the plaintiff but was said to be in the possession of one of the appellants namely Savage ; it was proved that the document was shown to the appellants on the 14th September, 1954.

Upon this evidence the case proceeded on the footing that the deceased and, after his death, the appellants, who stood in his shoes although they did not obtain probate until July 28th, 1956, were in default in that the £780 had not been paid. It was submitted by the respondent in the Federal Supreme Court that there was here a conditional contract to convey.

The trial judge dismissed the claim for a reason which is not now supported and need not be discussed. The Federal Supreme Court, however, admitted the claim and made an order for specific performance having arrived at the following conclusion (expressed by the Federal Chief Justice with whom the other members of the Court agreed) :—

> " It (that is to say the document of 24th August, 1954) is an agreement to pay a specific sum by a certain date, and in default of such payment to convey the property referred to."

In ordering specific performance as they did the Court must have treated the agreement as a contract for the sale of land upon the footing that the value received for the promise to pay £780 had been converted into the purchase price for the land.

It is clear that unless there is such a contract namely a contract for the sale of land at an ascertained or ascertainable price specific performance cannot be ordered.

Their Lordships agree with the Federal Supreme Court that the question whether the remedy of specific performance is available to the respondent turns on the construction of the document but they do not agree with the conclusion that there was an agreement which amounts to a contract for the sale of land.

Argument has been directed to various meanings which the document is said to be susceptible of bearing. It was for example submitted that it is a mortgage, that the land was made security for the £780 and that it is necessary to imply the words " by way of security for the debt " at the end of the document. The respondent's remedy thus it is said would be by way of foreclosure action.

Their Lordships are in agreement with the Federal Supreme Court in rejecting this submission. The document contains none of the ingredients of a mortgage and no words to indicate that the respondent was to have security for his debt. See *Tapply* v. *Sheather* 7 L.T.(N.S.) 298 to which reference will later be made.

It is in their Lordships' view unnecessary to consider the various other submissions made by the appellants for they are of opinion that the appeal succeeds upon the ground that on the true construction of the document there was no contract for the sale of land or, to put the matter in another way, the relationship of vendor and purchaser was never established between the respondent and the deceased.

It is not without significance that the document is called a Promissory Note. It is true that the title given to it may not be an accurate description of it but it is certainly appropriate to describe the first part down to and including the words " for value received ". These words are commonly included in promissory notes and may refer to a consideration which is past, remembering that past consideration is sufficient to support a promise in a promissory note, see The Nigerian Bills of Exchange Ordinance.

The words " for value received " are the only words in the document which refer to consideration moving from the promisee and there is nothing in them to show what the consideration was. In short no price is stated. It is left uncertain and is neither ascertained nor ascertainable.

Moreover value received if referring to a past consideration would be insufficient to support a contract for the sale of land although as stated earlier it would be sufficient to support a promise to pay given in a promissory note.

The case is in their Lordships' opinion different from *Tapply* v. *Sheather* (supra) where the consideration for the sale of land was clearly expressed in the contract.

There an agreement was entered into between the plaintiff and the defendant which after reciting that the latter was entitled to two leasehold farms and that the plaintiff had lent to him a certain sum and had agreed to make him further advances in consideration of the agreement thereinafter contained it was agreed that the said sum and such further

sums as should be advanced, with interest, should be repaid on a day named but if default shall be made in payment the defendant agreed to assign to the plaintiff the said leases for the residue of the terms without any further consideration together with the present use growing crops etc. at a valuation.

It was held by Lord Westbury L.C. reversing the decision of Sir Samuel Romilly M.R. that the relationship of vendor and purchaser and not that of mortgagor and mortgagee was constituted by the agreement. Accordingly, as there was nothing in the agreement which should cause the Court to refuse to exercise its discretion to grant specific performance, the agreement, he said, ought to be specifically performed.

This case was naturally relied upon by the respondent as bearing a strong resemblance to his own case upon the facts but their Lordships are of opinion that there is a vital distinction in that there was in *Tapply's* case a consideration clearly ascertainable in the document then to be considered whereas here the requirements of consideration are not fulfilled and there is therefore no contract for the sale of land.

This is sufficient to dispose of the appeal, but their Lordships are of the further opinion that had it been necessary to consider the question of the exercise of the discretion to decree specific performance they would have required to be satisfied that the circumstances were such that it was equitable to make a decree.

The evidence before the Court was meagre indeed. The respondent, who was the plaintiff in the suit, gave no evidence and failed in any way to explain the transaction which he had entered into with the deceased leading to the promise to pay £780 "for value received" whatever that may have been. It would be relevant also to take into consideration the position of the appellants who though standing in the shoes of the deceased had at the time of the default not yet obtained probate. Even if they could have raised the money before the expiration of the three months they would have been under a duty to consider the interests of the beneficiaries entitled to share in the estate of the deceased under his will.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Federal Supreme Court set aside and the judgment of the trial judge restored. The respondent must pay the costs of the appellants, including the costs of the petition for special leave to appeal.

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In the Privy Council

C. A. SAVAGE and others

v.

M. O. UWECHIA

DELIVERED BY LORD HODSON

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