Privy Council Appeal No. 25 of 1961

Omar Lababedi and others (trading under the name and style of Lababedi & Company) – – – – – – *Appellants*

v.

Chairman, Lagos Executive Development Board – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY 1962

Present at the Hearing:
LORD COHEN.
LORD GUEST.
LORD PEARCE.
[*Delivered by* LORD GUEST]

This appeal concerns the compensation, if any, payable to the appellants in respect of property at No. 9, Aroloya Street, Lagos, which was the subject of the Lagos Central Planning Scheme 1951. They claim to be so entitled under the Lagos Town Planning Ordinance in virtue of a Deed of Lease dated 3rd June 1955 whereby the freeholders of No. 9, Aroloya Street granted a lease of the premises to the appellants for seventy years commencing on 15th August 1955.

The respondents are a statutory corporation established under the provisions of the Lagos Town Planning Ordinance and empowered to make town planning schemes in respect of land in Lagos. The respondents framed the Lagos Central Planning Scheme, 1951. No. 9, Aroloya Street fell within the area of the Scheme and was part of the land to be compulsorily acquired.

The relative provisions of the Ordinance are as follows:—Section 16 provides that the Governor in Council may upon representations being made to him declare an area to be a town planning area. Section 18 provides for the Board upon the declaration of a town planning area causing town planning schemes to be made for the area. The scheme has to be published in the Gazette and notice has to be given to every owner of property affected by the scheme; there are provisions for the hearing of objections (section 20).

Section 22 provides that

> "(1) The Governor in Council may make an order approving a scheme submitted to him under section 21 or rejecting it or approving it with such conditions and modifications as he thinks fit.
>
> (2) The approval or rejection of any scheme under sub-section (1) shall be notified in the Gazette.
>
> (3) Notification of the approval or rejection of any scheme under sub-section (2) shall be conclusive evidence that such scheme was duly framed and approved or rejected, as the case may be."

Section 23 provides that

> "(1) A scheme shall not have effect unless and until it is approved by order of the Governor in Council, and before giving his approval the Governor in Council may make such modifications thereto as he thinks fit.
>
> (2) A scheme when so approved shall have effect as if enacted herein."

Section 38 (1), (3) and (4) provide that

" (1) Any person whose property is injuriously affected by the making of a scheme shall, if he makes a claim for the purpose within the time (if any) limited by the scheme, not being less than three months after the date when notification of the approval by the Governor in Council of the scheme is published in the Gazette in accordance with the provisions of section 22, be entitled to obtain compensation in respect thereof from the board."

" (3) Where, by the making of a scheme, any property is increased in value, the board, if it makes a claim for the purpose within the time (if any) limited by the scheme (not being less than three months after the date when notice of the approval by the Governor in Council of the scheme is published in the Gazette in accordance with the provisions of section 22 hereof), shall be entitled to recover from any person whose property is so increased in value a sum equal to one-half of the amount of that increase."

" (4) Any question as to whether any property is injuriously affected or increased in value and any question as to the amount and manner of payment (whether by instalments or otherwise) of the sum which is to be paid as compensation or which the board is entitled to recover and any question as to the apportionment of such a sum amongst the several interests in such property shall in default of agreement be determined by the court as hereinafter mentioned."

Section 41 provides that

" Where an approved scheme provides for the acquisition of any land by the board, all leases and all rights of occupancy under any tenancy in respect of such land which are existing at the time of the notification that the scheme is approved under section 22 shall be deemed to be terminated, if not previously terminated by agreement, on the expiration of the period appointed in the scheme in that behalf, but without prejudice to any lessees' or occupiers' rights in any compensation payable under section 38 or 46."

Sub-section (1) of section 42 provides that

" (1) Where an approved scheme provides for the acquisition of any land by the board, such land shall vest in the board on such day as is appointed in the scheme in that behalf, free from incumbrances, but without prejudice to any lessees' or occupiers' rights in any compensation payable under section 38 or 46."

Sub-section (4) of this section provides that

" (4) When any land becomes vested in the board under the provisions of this section, the board shall by notice in writing proceed to offer to the owner thereof and to such other persons, if any, as have any interest therein, such compensation therefor as the board thinks fit."

Sub-section (2) of section 44 and section 46 provide for the lodging of objections and for the determination by the Supreme Court of any question as to the amount of compensation payable in respect of acquired land and as to the apportionment of such compensation among the persons having an interest in the land.

Sub-section (1) of section 51 provides for the basis upon which compensation for land compulsorily acquired is to be assessed. Paragraph (a) provides for the compensation being assessed upon an estimate of the fair market value of the interest estimated at the time when the scheme was published under section 20.

The respondent framed the Lagos Central Planning Scheme 1951 which received the approval of the Governor in Council on 18th January 1952. In pursuance of clause 2 of the Order in Council (Approval) the scheme came into operation on 1st October 1955 being the date appointed by the Governor. Clause 32 of the scheme provides that all leases and rights of occupancy under any tenancy in respect of any land to be acquired under the scheme should terminate under section 41 of the Ordinance one month

after the date of the commencement of the scheme as approved by the Governor. The lease to the appellants is dated 3rd June 1955, that is after the date of the Governor's approval, but before the scheme came into operation.

The proceedings out of which this appeal arises were commenced by the respondent taking out an originating summons in the High Court of Lagos for the determination of the question whether or not the appellants were entitled to be compensated for the full value of the term granted under the lease.

Mr. Justice Coker answered the question in the appellants' favour. When the respondent appealed against this judgment to the Federal Supreme Court, the question was amended to the effect of substituting for the words " to be compensated for the full value of the term " the words " to receive full compensation for the unexpired portion of the term at the date of the vesting of the property in the Board".

The Federal Supreme Court varied the judgment of Mr. Justice Coker by ruling that the appellants were not entitled to full compensation.

The first question is whether the appellants' right to compensation, if any, arises under section 38 (1) or under section 42 (4) of the Ordinance. This question was not dealt with in the Federal Supreme Court. The appellants contended before the Board that as the scheme provided for the acquisition of No. 9, Aroloya Street by the Board the land vested in terms of section 42 (1) of the Ordinance in the Board on the 1st October 1955 free from incumbrances and that the Board were bound under section 42 (4) to offer compensation to the appellants as lessees having an interest in the land which had been acquired by the Board. The respondent on the other hand argued that the appellants' rights, if any, arose under section 38 (1) for injurious affection. It was submitted that the appellants' rights were extinguished when the land vested in the Board under section 42(1) and that their property was accordingly injuriously affected. This submission by the respondent involved the assumption that section 38 (1) is the only section in the Ordinance which gives a right to compensation. This must therefore cover compensation for the acquisition of land, compensation for the extinguishment of leases, and compensation for the injurious affection of land by the making of a scheme. Upon this argument " injurious affection " must be an all embracing expression covering these three different conceptions. " Injurious affection " is a well-known term in English law and is in fact the very word used in the English Town Planning Act, 1925, section 10, a section which is in very similar terms to section 38 (1) of the Ordinance and was probably the origin of section 38 (1). In English law the term " injurious affection " does not cover the acquisition of land or leaseholds and is a term which is certainly not apt for such a purpose. Their Lordships would not be inclined to attribute such a meaning to the expression unless the construction of the Ordinance as a whole forced them to this conclusion and that no other interpretation was reasonably possible.

Their Lordships have these observations to make upon the general pattern of the Ordinance. Part VI, in which section 38 is to be found, is headed " Property injuriously affected or increased in value by a scheme." Part VII, which contains section 42, is headed " Acquisition and disposal of land for scheme." This layout indicates that the Ordinance is making separate provisions for the different effects of a scheme. Injurious affection is the antithesis to increase in value both of which are contained in Part VI, but the acquisition of land is an entirely different conception which falls under Part VII.

Moreover, if section 42 (4) gives no independent right to compensation and the only right to compensation derives from section 38 (1), as contended for by the respondent, then it is at least strange to find that there are two different methods of procedure for obtaining compensation under Parts VI and VII. Under section 38 (1) a claim has to be made for injurious affection within a limited period. Under sub-section (4) of that section any question as to the amount of compensation is determined by the Court. In contrast, in Part VII under section 42 (4) an offer of compensation has to be made by the Board to the owner or other persons interested. If any question arises as to the amount of the compensation this is determined by the Court

following upon an originating summons and the procedure set out in sections 44 to 47. This consideration of the pattern of the Ordinance indicates that it is probable that the procedure for obtaining compensation under Part VI is for injurious affection and the procedure for obtaining compensation under Part VII is for the acquisition of land. Their Lordships have accordingly reached the conclusion that the compensation payable for injurious affection is separately dealt with under section 38 from the compensation payable for acquisition under section 42 (4). It is moreover reasonable to suppose that the Board might be unaware of a claim for injurious affection unless it was made to them; hence the reason for a claim under section 38 (1). Whereas if property is acquired compulsorily, the Board would presumably know the persons interested and would therefore be in a position to make an offer of compensation under section 42 (4). Their Lordships have accordingly reached the conclusion that the appellants' right to compensation arises under section 42 (4) in respect that upon vesting of the land in the Board free from incumbrances their lease was acquired and that the Board were bound to offer to the appellants compensation under section 42 (4) as persons other than the owner interested in the land. It follows that the appeal will be allowed and the judgment of Mr. Justice Coker restored.

With regard to the judgment of the Federal Supreme Court their Lordships find themselves in agreement with Acting Federal Justice Hubbard, that until vesting date the freeholder was entitled to grant a lease of the property. This reinforces the view which their Lordships have formed upon the construction of the Ordinance. But they do not agree with the views of the Federal Supreme Court that the question of compensation is to be determined " upon a balance of equities". In their Lordships' view the question depends upon a proper construction of the various provisions of the Ordinance.

If the appellants' right to compensation had depended on section 38 (1) of the Ordinance, there was a dispute between the parties as to whether they were so entitled. Under section 38 (1) the parties entitled to compensation are those whose property " is injuriously affected by the making of a scheme." The appellants argued as an alternative to their first submission and on the assumption that their right to compensation depended upon section 38 that the date of the making of the scheme was the date when the scheme came into operation on 1st October 1955, and that as their lease was then in existence they were entitled to compensation. The respondent on the other hand contended that the date of the making of the scheme was the date when the Governor approved the scheme under section 23 and that as the appellants' lease was not then in existence, they were not entitled to compensation. As the Board have held that the appellants' right to compensation arose under section 42 and not under section 38, the question of the proper interpretation of section 38 is academic. However argument was devoted to this question and it may be of assistance to parties to know the Board's views. Their Lordships will express them quite shortly. They have no hesitation in rejecting the appellants' argument on this question. It is implicit in the wording of section 38 that the date of the making of the scheme is the date of the Governor's approval because the time limit of three months begins to run from the date of the Governor's approval under section 22. Moreover, by section 23 upon the Governor's approval the scheme has effect as if it had been enacted in the Ordinance. Having regard to the provisions in the Ordinance as to the inception and approval of a scheme, their Lordships have little doubt that a scheme is made when the Governor signifies his approval. Although the scheme may not come into operation until a later date, it has effect under section 23 upon the Governor's approval. The making of a scheme is not suspended until it comes into operation; it is none the less made although its operation may be postponed.

Certain decisions of the English Courts were referred to dealing with the effect of notices to treat under the Lands Clauses Act. But in their Lordships' view there is no proper analogy between these provisions and those contained in the Ordinance.

Their Lordships will humbly advise Her Majesty that the appeal be allowed and the judgment of Mr. Justice Coker restored. The respondent must pay the appellants' costs of the appeal.

85988) Wt. 8004/82 100 8/62 Hw.

In the Privy Council

OMAR LABABEDI AND OTHERS
(Trading under the name and style of Lababedi & Company)

v.

CHAIRMAN,
LAGOS EXECUTIVE DEVELOPMENT BOARD

DELIVERED BY
LORD GUEST

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