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IN THE PRIVY COUNCIL

23, 1959

No. 30 of 1958

ON APPEAL
55490 FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N:

TEJUMADE ONITIRI
(for and on behalf of herself and other
children of the late Lawani Idowu
Onitiri deceased) Plaintiff/Appellant

- and -

(1) SAMUEL A. OYADIRAN
(2) T.I. ONITIRI
(3) S.A. ONITIRI Defendants/Respondents

CASE OF THE FIRST RESPONDENT

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first Respondent.

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CASE OF THE FIRST RESPONDENT

Record

1.	This is an appeal from a Judgment of the Federal Supreme Court of Nigeria (Sir Stafford Foster Sutton, Chief Justice of the Federation: M.C. Nageone De Lestang and Myles John Abbott, F.JJ.) dated the 30th December, 1957, affirming a Judgment of The Honourable Olumuyiwa Jibowu, Acting Senior Puisne Judge, in the Supreme Court of Nigeria, Lagos Judicial Division, dated the 30th December, 1955, and dismissing with certain fixed costs, the appeal thereto of the Appellant (hereinafter also referred to as "the Plaintiff"), who was the plaintiff in the action, from that Judgment whereby the learned trial Judge held that the Plaintiff's action had failed and he dismissed the same with certain fixed costs awarded to this Respondent (hereinafter also referred to as "the first Defendant") only.	pp. 34-37. pp. 23-29. p. 36, 11. 28-32. p. 43, 11. 43-45.
20	2. The action, which was brought by the Appellant in a representative capacity as representing herself and the other children of Lawani Idowu Onitiri, deceased, and as being the beneficiaries of his estate, was to set aside the sale of a piece of land known as Onitiri Brickfield, Yaba, in the Mainland	
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of Lagos, by the second and third Respondents (hereinafter also referred to as "the first and second Defendants") as the Administrators of the estate of the said deceased, to this Respondent on the 21st March, 1948, on the ground of fraud.

p.3, 11.1-4;
p.7, 11.11-21.

3. In paragraph 4 of the amended Statement of Claim it was alleged -

"On the 21st day of March 1948, the first Defendant fraudulently bargained with the second and third Defendants and purchased the land known as Onitiri Brickfield for £650."

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p.3, 11.5-14.

The particulars of the said fraud giving rise to the substantial and main allegation of fraud as set out below, as stated therein, were as follows:-

"(a) The first Defendant on the 27th January 1948, was the highest bidder at a sale by Auction of the aforesaid property for £3800.

"(b) That the sale was eventually rescinded because the reserved price of £10,000 was not reached.

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"(c) On the 21st day of March 1948 the first Defendant purported to purchase the same piece of land for £650.

The allegation thus made was that the piece of land for which this Respondent had, at the auction sale held on the 27th January, 1948, made the highest bid of £3,800 and which was rescinded because there had been a reserve price of £10,000 placed thereon, was identically the same land as he had purchased on the 21st March, following, from the two other Respondents in their capacity as the Administrators of the estate of the said deceased, for the price of £650.

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4. The said allegation, although the further allegations, as set forth in paragraph 5 infra, were made, formed the substantial and main issue in the action and upon which the action was fought out and which was, as hereinbefore stated, decided in favour of this Respondent.

p.3, 11.15-30.

5. The further particulars of the said fraud as set forth in paragraph 4 of the amended Statement of Claim were as follows:-

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"(d) That the aforesaid Onitiri Brickfield was divided into plots on or about same period and sold at £800 a plot i.e. an acre.

"(e) The first Defendant now claims to have bought about 23 plots (acres) for £650. Rent on this land being about £1000 p.a.

"(f) That there was no notice of the sale to the Plaintiff.

10 "(g) That the alleged sale was by private treaty surreptitiously concluded by the defendants without any cause whatsoever in that the estate being solvent the sale in itself was unnecessary.

"(h) The Plaintiff says that the second and third Defendants have no power to sell aforesaid property."

20 6. To explain the course of the proceedings, and more particularly because of the learned trial Judge's Judgment in respect of the said particulars under (e) in supra paragraph 5 set out in paragraph 7 below, it is necessary to state that, by his defence, this Respondent as well as denying the said fraud set up a plea of res judicata. The said plea was based upon an action known as suit 55/1950 which was affirmed by the former West African Court of Appeal (W.A.C.A. 3809). The said action was brought by this Respondent against the two other Respondents as being the Administrators of the said deceased -

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p.4, 11.19-23
p.12, 1.26
to p.13, 1.12

(1) To set aside a deed of conveyance of a piece of land at Ajegunle Brickfield, dated 6th January, 1949, between the first and second Defendants of the one part and one Emanuel Ade Taiwo, of the other part, who was made the third Defendant.

40 (2) For a declaration of title to the land covered by the said conveyance, or in the alternative for £2700, whereof £650 was the purchase price of the piece of land paid by this Respondent, the Plaintiff in the said suit, to the first and second Defendants, £50 being the interest thereon and £2,000 general damages for breach of contract.

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p.12, 1.41 to
p.13, 1.5.

The Court gave Judgment in favour of this Respondent setting aside the said conveyance to the said Taiwo and ordered the said Administrators to execute a conveyance of the land in dispute to this Respondent.

p.13, 11.5-8.

The defence raised in the said suit by the said Administrators was that this Respondent had procured a plan for a larger area of land than was sold to him. The Court found that there was no fraud in this Respondent but that the said Administrators and the said Taiwo had fraudulently conspired to cheat this Respondent. This Judgment was upheld, as stated, by the W.A.C.A.

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p.13, 11.8-12.

p.9
pp.12-14: p.14,
11. 1-7.

The learned trial Judge heard the said plea of res judicata as a preliminary point and over-ruled it.

p.9, 11.27-29.

The Record in the said suit was put in as an exhibit at the hearing of the said preliminary point but is not included in the Record of the now appeal and therefore the statements above made regarding the said suit are taken from the learned trial Judge's Decision on the said preliminary point.

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p.26, 11.11-16.

7. The learned trial Judge in his said Judgment of the 30th December 1955 states the said allegation (supra paragraphs 3 and 4) thus -

"The Plaintiff alleges that the land sold for £650 is identically the same as was put up for sale at the public auction at which the first Defendant was the highest bidder at £3,800 and that the sale did not go through as the reserved price of £10,000, was not reached."

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p.26, 11.27-30. He a little later says -

"The first question I have to decide therefore is whether the land sold by private treaty is identically the same land for which an offer of £3,800 at a public auction had been made and refused."

Then having dealt with the evidence he states his findings as follows -

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p.28, 11.3-7.

(1) "In view of the above, the Plaintiff has failed to prove that the land.....is the

same as the one for which the first Defendant has offered £3,800. The particular of fraud number 3(c) (i.e. 4(c) of the amended Statement of Claim) "therefore fails."

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The said finding as regards the particular of fraud 4(c) this Respondent would observe relates to the allegation as stated in paragraphs 3 and 4 supra, and thus includes the particulars of fraud 4(a) and 4(b) therein.

- 10 (2) As regards the particulars of fraud 4(d) to 4(h) inclusive of paragraph 4 of the amended Statement of Claim (supra paragraphs 4 and 5) his findings were as follows -
- "With regard to 3(d), there is no proof that Onitiri Brickfield has been divided into plots nor is there proof that a plot has been sold for £800....."
- 20 "Regarding 3(e) the first Defendant is justified by the judgment of the Court in Suit No. 55 of 1950" (supra paragraph 6) "in claiming that he bought the land.....which is 23 odd acres for £650. The question whether rent of £1,000 p.a. might be collected on it is beside the point:
- 30 "With respect to ground 3(f) of the particulars of fraud, there is an obvious mistake which makes nonsense of that ground. The Plaintiff's own evidence shows that the beneficiaries agreed that the land be sold to meet debts owing by the estate, the allegation that the sale was unnecessary in particulars of fraud No. 3(g) is therefore untrue. There is no doubt that the sale was by private treaty, but whatever might have been the fault or default of the second and third Defendants in selling by private treaty, while they should have sold by public auction will not, in my view, vitiate the sale to the first Defendant who apparently acted bona fide and has not been
- 40 shown to have acted otherwise.
- "There is no substance in the particulars of fraud No. 3(h) in view of the fact that the second and third Defendants were Administrators of the estate lawfully appointed by Court and empowered to administer real property for the

p.28, 11.8-42.

p.28, 11.8-15.

p.28, 11.16-22.

p.28, 11.23-27.

p.28, 11.27-35.

p.28, 11.37-42.

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purpose of paying off the debts of the estate."

He concluded as follows -

p.28, 1.43 to
p.29, 1.4.

"In view of the above, this action fails and is dismissed with costs to the first Defendant assessed at 35 guineas. The second Defendant did not appear; even if he had appeared like the third Defendant, the Court would not have been disposed to grant them costs. There will therefore be no order as to costs in their case."

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pp.34-36.

8. In their Judgment the Federal Supreme Court said as regards the fraud alleged, in terms, it is submitted, indistinguishable from those used by the learned trial Judge, as follows -

p.34, 11.29-37.

"The fraud alleged was that the first Defendants fraudulently bargained with the second and third Defendants to purchase the property in question for the sum of £650, he having previously made the highest bid of £3,800 for the same area of land at an auction sale held on the 27th January, 1948, and having then had the sale to him rescinded because the reserve price of £10,000 placed on the property had not been reached.

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Then as regards the particulars of fraud alleged in paragraphs 4(d) to 4(h) of the amended Statement of Claim they said -

p.34, 1.38.

"Various other allegations were made in the 'Particulars of Fraud' given in the Statement of Claim none of which were established at the trial."

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And proceeded as follows -

p.34, 1.41 to
p.35, 1.43 to
p.37, 1.27.

"The substantial issue fought out in the Court below, between the Plaintiff and the first Defendant, who was the only one of the three Defendants who appeared at the trial, was the question whether or not the area of land purchased for £650 was the identical area the first Defendant had previously made a bid of £3,800 for. As the Plaintiff herself put it when giving her evidence: 'The fraud is that the land was sold for £650 after we refused to accept £3,800 for it.'

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"After reviewing the evidence the learned trial Judge, Jibowu, J., as he then was, reached the conclusion that the area of land purchased by the first Defendant on the 21st March, 1948 was not the same area as that bid for by him at the auction sale held on the 27th January, 1948 and he accordingly entered judgment for the Defendant.

10 "If the area had been the same, and not smaller as contended by the first Defendant, there would, of course, have been a clear case of fraud.

20 "At the hearing of the appeal before us, Counsel for the Plaintiff/Appellant contended, firstly, that the learned Trial Judge had erred in concluding that the land bid for was not the same area as that ultimately purchased, and secondly, that he also erred in not finding that in any event the land was sold at such a gross undervalue as to constitute a fraud.

"On the first point it seems clear to me that there was evidence before the learned Judge upon which he could properly reach the conclusion that the land purchased was not the same area as that bid for at the Auction Sale.

"Indeed, I do not see how he could have reached any other conclusion."

30 9. The statement of the issue, and the conclusion and finding thereon by the Federal Supreme Court as set forth in paragraph 8 above constitute, it is submitted, together with that in the Judgment of the learned trial Judge, a concurrence of two judgments on mere question of fact and accordingly concurrent findings of fact such that Your Lordships of the Privy Council will, in accordance with the Judgment in Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy ((1946) A.C.508.), decline to review the evidence for a third time.

40 10. A point was taken as a ground of appeal by the Appellant in the Federal Supreme Court which had never been raised as an issue in the pleadings or taken before the learned trial Judge or of which this Respondent had any hint or warning of any kind. This was dealt with by the Federal Supreme Court in their Judgment, rightly in fact, as well as in law

p.35, 1.35 to
p.36, 1.27.

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inssofar as it was a matter of law, it is respectfully submitted, as follows:-

"The second point appears to me to raise a question of greater difficulty, because it does seem arguable that the Statement of Claim by inference raises the issue of a sale as (sic) a gross undervalue, and one witness, Emanuel Sosanya, gave evidence that in the year 1948 the land in question was worth between £250 and £300 per acre (the area purchased was 23.95 acres). This evidence was not objected to or the witness cross-examined. 10

"After anxious consideration, however, I have reached the conclusion that the point is not now open to the Plaintiff.

"No rule is more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it is not allowable to leave fraud to be inferred from the facts, Thesiger L.J. in Davy v. Garrett (1877-8) 7. Ch. D. 489. It has repeatedly been held that any charge of fraud must be pleaded with the utmost particularity. The reason for this rule is obvious; it is only fair and right that the person against whom fraud is charged may have the opportunity of knowing what he has to meet, and of shaping his defence accordingly. 20

"In the present instance it is clear that the issue of fraud was that set out with particularity in paragraph 3(a) (b) and (c) of the Statement of Claim, and which was so succinctly put by the Plaintiff in her evidence. Gross undervalue as an issue was not once referred to by Counsel for the Plaintiff during his closing address at the trial. 30

"In these circumstances I think it would be wrong at this late stage to allow the Plaintiff to contend, for the first time, that the pleading and evidence disclosed another fraud to the one upon which the case was fought in the Court below." 40

11. It is submitted that the said Judgment appealed from was right and should be affirmed and this appeal dismissed for the following, amongst other,

R E A S O N S

1. BECAUSE there are concurrent findings of fact;
2. BECAUSE the land purchased by this Respondent for £650 was not the same as that for which he had made the highest bid of £3,800 at the auction sale;
- 10 3. BECAUSE neither as regards the alleged similar identity of the land purchased by this Respondent and that bid for by him at the auction sale, nor in any of the other respects alleged, was any fraud made out as a matter of proof by the Appellant in regard to this Respondent's purchase of the land in dispute;
- 20 4. BECAUSE for the reasons given therein and for other good and sufficient reasons the Judgments of both the learned trial Judge and the Federal Supreme Court were right and, accordingly, the latter Judgment should be affirmed.

S.N. BERNSTEIN.

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