

19/1962

ON APPEAL
FROM THE FEDERAL SUPREME COURT OF NIGERIA

BETWEEN :-

- (1) OMAR LABABEDI
- (2) SAID LABABEDI
- (3) BASHIR LABABEDI
(Trading under the name
and style of Lababedi
& Company) (Defendants)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

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Appellants

68234

- and -

CHAIRMAN LAGOS EXECUTIVE
DEVELOPMENT BOARD (Applicant)

Respondent

CASE FOR THE RESPONDENT

PAGE OF
RECORD:

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1. This is an appeal by leave of the Federal Supreme Court of Nigeria from a Judgment delivered by the Federal Supreme Court of Nigeria on the 14th July, 1960, varying the Judgment given by the Honourable Mr. Justice Coker on the 13th March, 1959, in the High Court of Lagos, Supreme Court of Nigeria. The Honourable Mr. Justice Coker had given Judgment in favour of the Appellants upon the question in issue in this appeal.

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2. This appeal turns upon the construction of certain provisions of the Lagos Town Planning Ordinance (hereafter called "the Ordinance"). The Ordinance is Chapter 95 of the Laws of the Federation of Nigeria and Lagos (1958 Revised Edition). The Ordinance was previously Chapter 103 of the Laws of Nigeria (1948 Edition). The High Court and the Federal Supreme Court both referred to the Ordinance in the 1948 Edition. As the numbering of some of the relevant Sections differs in the two editions, the Respondent will refer throughout to Chapter 103 of the 1948 Edition of the Laws of Nigeria, the numbers of the corresponding sections in the 1958 Edition being given in brackets for

convenience of reference.

The Ordinance provides for the constitution of the Lagos Executive Development Board (hereinafter called "the Board") and for the making of town planning schemes as respects land situate within the town area of Lagos. Such schemes are to be framed by the Board and submitted to the Governor-General in Council. The Governor-General may make an order approving a scheme so submitted to him and such approval must be notified in the Gazette. A scheme is not to have effect unless and until it is approved by order of the Governor-General in Council and a scheme when so approved has effect as if enacted in the Ordinance.

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p.16 3. The question to be determined in this appeal is whether the Appellants are entitled to receive full compensation in respect of their Lease of No. 9 Aroloya Street, Lagos, for the unexpired portion of the term at the date of the vesting of the property in the Respondent by virtue of the Ordinance and a Scheme made thereunder.

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p. 1 4. The proceedings in the High Court of Lagos were commenced by Originating Summons issued by the Respondent on the 13th September, 1958, for the determination of (among other matters) whether the Appellants were entitled to be compensated for the full value of the term granted by their Lease of No. 9 Aroloya Street. On appeal to the Federal Supreme Court the Originating Summons was amended to raise the issue in the terms stated in paragraph 3 hereof.

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5. The relevant facts were agreed by the parties and are as follows:-

(a) The Board is a statutory corporation constituted under and by virtue of the Ordinance.

(b) The Board framed a town planning scheme known as the Lagos Central Planning Scheme 1951 (hereafter called "the Scheme")

(c) The Scheme was approved by the Governor-General in Council and was published in the Gazette on the 18th January, 1952, by Order-in-Council No. 3 of 1952. The Order-in-Council stated that the Scheme would come into operation on a date to be appointed by the Governor-General by Notice in the Gazette.

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(d) By a Deed of Lease dated the 3rd June, 1955,

(Exhibit B.) the freeholders of No. 9 Aroloya Street demised No. 9 Aroloya Street to the Appellants for a term of 70 years commencing from the 15th August 1955.

(e) The Scheme came into operation on the 1st October, 1955, the day appointed by Notice appearing in the Gazette as L.N. 103 of 1955 dated the 6th September, 1955. p. 8.

10 (f) No. 9 Aroloya Street fell within Sub-Area 4 of the Scheme, and in accordance with the provisions of the Scheme became vested in the Board on the 1st November 1956. p. 9.

6. The Scheme provided for the acquisition by the Board of land within the area to which the Scheme applied, including No. 9 Aroloya Street.

Section 41 of the Ordinance (Section 44 of 1958) provides as follows:-

20 "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 ~~Section 23 of 1958~~ 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" (Section 41 or 49 of 1958).

Clause 32 of the scheme provides, as follows :-

40 "All leases and rights of occupancy under any tenancy in respect of any land to be acquired under this Scheme shall terminate under Section 41 of the Ordinance ~~Section 44 of 1958~~ one month after the date of commencement of the Scheme appointed by the Governor of Nigeria in Council by notice in the Gazette in accordance with Section 22(2) of the said Ordinance" (Section 23(2) of 1958).

The combined effect of Section 41 (Section 44 of 1958) and Clause 32 was that all leases in existence on the 18th January, 1952, (the date of

the notification of the approval of the Scheme) were terminated on the 1st November, 1955, (one month after the date of commencement of the Scheme). These provisions did not affect the Appellants' Lease of No. 9 Aroloya Street, which was not in existence on the 18th January, 1952. That Lease was determined by virtue of Section 42(1) of the Ordinance, (Section 45(1) of 1958) which provides as follows:-

"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." (Section 41 or 49 of 1958).

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The Scheme appointed the 1st November, 1956, as the day on which Sub-Area No. 4 (which included No. 9 Aroloya Street) should vest in the board. Accordingly on the 1st November, 1956, No. 9 Aroloya Street vested in the board free from incumbrances. Such vesting terminated the Appellants' Lease of No. 9 Aroloya Street, which lease would otherwise have been an incumbrance on such land.

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7. The right to compensation is provided for in Part VI of the Ordinance.

Section 38(1) (Section 41(1) of 1958) provides as follows:-

"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-General in Council of the Scheme is published.....shall be entitled to obtain compensation in respect thereof from the board."

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Section 38(4) (Section 41(4) of 1958) provides as follows:-

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"Any question as to whether any property is injuriously affected...and any question as to the amount and manner of payment...of the sum which is to be paid as compensation...shall in default of agreement be determined by the Court as hereinafter mentioned."

By Section 73 in Part X of the Ordinance (Section 76 of 1958) it is provided that:-

10 "In any case not otherwise expressly provided for in this Ordinance the board may pay reasonable compensation to any person who sustains damage by reason of the exercise of any of the powers vested by this Ordinance, or any regulation made or scheme sanctioned thereunder, in the board, or in the Chairman or in any officer or servant of the board".

8. The learned trial Judge held that the Appellants were entitled to be paid full compensation for the whole of their leasehold interest in No.9 Aroloya Street. He said in his judgment:

20 "...the interest of a freeholder does not determine until the vesting date of the property in the Lagos Executive Development Board. This is so because Section 41 /Section 44 of 1958/ deals with the termination of leases and rights of occupancy under any existing tenancy. Section 41 is silent as to leases and rights of occupancy not in existence until after the 18th January, 1952, and so a freeholder may, in theory, at any time before the vesting date of the property in the L.E.D.B. (i.e. in this case the 1st day of November, 1956) demise his property for any time he liked. Such a demise would however be deemed to be terminated on the 1st day of November, 1955, though without prejudice to the rights of the lessees to receive compensation for the acquisition of the property. If such a lease were made after the 1st day of November, 1955, it terminates as soon as it is executed. Any assignment of a lease or any underlease by a lessee or a tenant executed after the date of termination (i.e. 1st November, 1955) is void and as Nemo dat quod non habet, the grantee could not claim any compensation in respect thereof. ... The lease Exhibit B, being a lease to the Respondents of the property No.9 Aroloya Street is dated the 3rd day of June, 1955 and is expressed to take effect in possession on the 15th day of August, 1955. The Respondents took a valid lease from the freeholders and their interest had vested both in interest and possession before the termination of all leases or rights of occupancy.

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50 They are therefore entitled to be paid full compensation for the whole of the leasehold interest."

9. The Federal Supreme Court of Nigeria held that the Appellants were not entitled to full compensation in respect of the Lease of No.9 Aroloya Street. In his judgment (with which the other two members of the Court concurred) Hubbard AG.F.J. said:-

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"Finally, as to No.9 Aroloya Street. This lease was made some three years after the notification of the approval of the Scheme, including the terms of the Scheme itself, had been published in the Gazette. In view (sic), all interested persons must be deemed to have had notice that the Scheme affected the property in which they had or proposed to acquire an interest. It is true that between 18th January, 1952, and 29th September, 1955, when legal notice 103/55 announcing the date of coming into force of the Scheme was published, there was uncertainty when the Scheme would come into force, and indeed, in theory, uncertainty whether it would come into force at all. Further, there is no doubt, I think, that until the date of the vesting order, a date unknown at the time when the lease of No.9 Aroloya Street was made, the freeholder was entitled to grant a lease of the property. Nevertheless, the lessees, (as indeed also the lessor) must be deemed to have acted with full knowledge that their interest was liable to be compulsorily terminated within a few years, and if, in those circumstances, they chose to enter into a lease for seventy years, I do not think they can, on the balance of equities between the parties, claim full compensation for its termination."

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10. The learned trial Judge clearly assumed that the Appellants were entitled to full compensation in respect of the lease of No. 9 Aroloya Street provided that a valid lease of this property was vested in the Appellants in possession before the date on which the leases or rights of occupancy terminated. It is submitted on behalf of the Respondent that this assumption is erroneous. It ignores the fact that compensation is only payable under the Ordinance where property is injuriously affected by the making of a Scheme. The Respondent submits that a Scheme is "made" when it is approved by the Governor-General in Council pursuant to Sections 22 and 23 of the Ordinance (Section 23 and 24 of 1958) - that is, on or shortly before the 18th January, 1952 in this case. A leasehold interest cannot be injuriously affected by the making of a Scheme which was made before that interest was created. Injurious affection necessarily connotes a diminution in value of

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property already in existence, but a leasehold interest created after the making of a Scheme never had a "pre-Scheme value" to be diminished. The Appellants made their bargain for the lease with full notice of the making of the Scheme and have suffered no injurious affection by the making of the Scheme. In the premises the Appellants are not entitled to any compensation for that portion of the term of their lease of No. 9 Aroloya Street which was unexpired at the date of the vesting of No. 9 Aroloya Street in the Respondent. A fortiori the Appellants are not entitled to full compensation therefor.

11. The Respondent respectfully submits that the judgment of the Federal Supreme Court of Nigeria was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (among other):

R E A S O N S

- 20 (1) BECAUSE the Appellants are only entitled to obtain compensation from the Respondent if their property was injuriously affected by the making of the Scheme;
- (2) BECAUSE the Appellants' leasehold interest in No. 9 Aroloya Street was not injuriously affected by the making of the Scheme in that the Scheme was made on or shortly before 18th January, 1952, and the Appellants said interest in the said property did not then exist;
- 30 (3) BECAUSE when the Appellants entered into their Lease of No. 9 Aroloya Street on the 3rd June, 1955, to commence from the 15th August, 1955, they had or must be deemed to have had notice of the making of the Scheme;
- (4) For the reasons given in the Judgment of the Federal Supreme Court of Nigeria.

PATRICK BROWNE

DAVID KEMP