P.C.
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Judgment
38/1964

IN THE PRIVY COUNCIL No. 48 of 1962

ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA

78649

B E T W E E N :

1. AMUSA YESUFU OBA and
2. RUFAI AKINHANMAI
(Defendants) Appellants

- and -

HUNMUANI AJOKE
(Plaintiff) Respondent

CASE FOR THE APPELLANTS

Record

1. This is an appeal from a Judgment and Order of the Federal Supreme Court of Nigeria (Brett, Unsworth and Bairamian F.JJ) dated the 5th February, 1962, dismissing with costs the appeal of the Appellants from and varying a Judgment and Order of the High Court, Western Region of Nigeria, Ibadan Judicial Division of Taylor J. dated the 29th August, 1958, whereby, having ex mero motu in the course of his said (reserved) Judgment amended the Writ of the Respondent who was the Plaintiff in the action against the Appellants, he gave Judgment for the Respondent setting aside the purchase by the 2nd Appellant from the 1st Appellant of certain property and ordering that the sum of £200 (as the balance of the purchase price) should be brought to the Registry of the said High Court by the Respondent, on a date and at a time named, together with the Conveyance of the said property by the 1st Appellant to the Respondent, in the presence of the Registrar of the said Court, when both the said sum and the said Conveyance should be delivered to the 1st Appellant who should issue receipts therefor; and that the Conveyance delivered to the 1st Appellant should be executed by him and delivered to the Respondent in the said Registry and before the said Registrar on a date named, and awarded a sum of costs against each of the Appellants.

pp.47 - 55.
p.55, 11.1-22.
pp.27 - 38.
p.36, 11.24-37.
p.36, 1.43 to p.37, 1.14.
p.38, 11.4-7.

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2. As the result of an action (Suit No. AB/10/1955) instituted by the 1st Appellant against the Respondent in the said High Court, Abeokuta Judicial Division, the 1st Appellant was declared the owner of the land situate and known as No. 7 (changed to 33) Adeyemi Street, Mushin, Western Region of Nigeria (hereinafter referred to as "the property"). Taylor J., the learned trial Judge, who tried the action, in arriving at his decision said as regards the evidence given by the 1st Appellant therein as follows:-

p.66, ll.11-13. "I found (the 1st Appellant) a reliable witness and have no hesitation in accepting his evidence."

And as regards the evidence given by the Respondent therein he said:-

Ex.A, p.66, ll.25-29; ll.40-41. "(The Respondent) opened her case and from her evidence I formed the impression that either she did not know which land was purchased by her or was trying to deceive the Court as to the whereabouts of same ..... I did not form a favourable impression of this witness ....."

Ex.F, p.70. 3. Thereafter by an agreement in writing made between the 1st Appellant and the Respondent dated the 14th February, 1957, the 1st Appellant as Vendor agreed to sell to the Respondent as Purchaser the property for the sum of £300, whereof the Exh.C, p.72. Respondent paid to Mr. K.A. Kotun, the Solicitor for the 1st Appellant, the sum of £100 in part payment, the balance of £200 to be paid as provided by the said agreement in full on or before the 31st March, 1957. Otherwise the 1st Appellant should be at liberty to sell the property to any other intending purchaser and refund the part payment to the Respondent.

Exh.B, pp.71-72. 4. By letter dated 5th April 1957, the 1st Appellant wrote to the Respondent as follows:-

"Dear Madam,

Suit No. AB/10/1955

With reference to the Agreement between us dated the 14th February, 1957, in regard to (the property) I need not call your attention

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to the fact that the sum of £200 is due from you payable in full on or before the 31st March, 1957; as this money was not paid up to the 4th April 1957, I was compelled to return your part payment of £100 to Mr. A.K. (sic) Kotun, Barrister-at-law from whom I am asking you to claim it, and to inform you that I have taken possession of (the property).

....."

5. On the 18th July, 1947, acting in accordance with the terms of the said letter, the 1st Appellant sold the property to the 2nd Appellant, and by a Conveyance dated the 26th November, 1957 subsequent to the issue of the Writ by the Respondent against the 1st Appellant and the 2nd Appellant as set forth in paragraph 6 infra, the 1st Appellant conveyed the property to the 2nd Appellant. Exh.G, pp.74-76.

6. The Respondent, by Writ dated 21st August, 1957 instituted proceedings against the 1st Appellant claiming as follows:- pp. 1 - 2.

"The Plaintiff seeks against the Defendant an Order for specific performance of the Contract of Sale and Conveyance of (the property), entered into by the Plaintiff and Defendant in February, 1957, by which the Defendant had received £100 advance but which he now purports to repudiate."

7. By Order made on the 29th November, 1957, leave was granted to the Respondent to amend the Writ to join the 2nd Appellant as second Defendant in the action. p. 3.

8. The Respondent in her Statement of Claim undated alleged inter alia as follows:-

"3. Before the end of March, 1957, and at various times thereafter the plaintiff tendered the balance of £200 of the agreed price to the (1st Appellant), who, was on various excuses, refused to accept same. pp. 4 - 5.

"4. On 8/4/57, in fraud of the plaintiff the (1st Appellant) purported to repudiate the agreement of sale in a letter dated 5/4/57 and sent to the plaintiff knowing fully well that

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the said plaintiff was always ready and willing to pay the said balance at all times and at the same time holding the £100 part payment made by the plaintiff to the (1st Appellant).

"5. When all efforts by the plaintiff and her sympathisers failed to persuade the (1st Appellant) to take the said balance of £200 and to execute the Deed of Conveyance already prepared in her favour, the plaintiff consulted a Solicitor who sent the said £200 to the (1st Appellant) under cover of a registered letter dated 9th May, 1957, but he refused to claim the same and it was returned.

"6. During the time when the plaintiff was approaching the (1st Appellant) to receive the balance of the money (£200) due to him on the agreement and sign conveyance of the property in favour of the plaintiff, the (2nd Appellant) was one of those who intervened but he backed the (1st Appellant) in his demand for more than the £300 previously agreed upon in February 1957; he the (2nd Appellant) further said that the (1st Appellant) had right to deprive the plaintiff of (the property) if she would not submit to the demand.

"7. Despite the knowledge that the (2nd Appellant) had of the intention of the (1st Appellant) to deprive the plaintiff of (the property) the (2nd Appellant) purported to purchase same from the (1st Appellant) in or about July, 1957."

The said Statement of Claim concludes as follows:-

"8. The plaintiff will contend at the trial that the (1st Appellant's) refusal to receive the balance of £200 and convey (the property) to the plaintiff (because he wanted more than the £300 originally agreed upon), and the (2nd Appellant's) alleged purchase of same with full knowledge of the intention of the (1st Appellant) constitute a fraud on the plaintiff by both (Appellants)".

pp. 6 - 7

9. By his Defence dated 26th March 1958 the 1st Appellant denied the said allegations and pleaded

inter alia as follows:- Record

"6. The (1st Appellant) will further contend that on the 31st day of March, 1957 the plaintiff failed to pay the said balance of £200 in consequence whereof the (1st Appellant) by his letter dated 5th April, 1957 repudiated the said contract of sale to the plaintiff of (the property).

"7. On receipt of the said letter the plaintiff called several times with one Mr. Georgius Cole on the (1st Appellant's) Solicitor, who returned the deposit of the £100 to her but the plaintiff refused and still refuses to accept the ~~sum~~ said money."

10. The 2nd Appellant by his Defence dated 27th March, 1958, inter alia denied the said allegations 6, 7 and 8 of the Respondent's Statement of Claim and, as regards the said allegations in paragraphs 3, 4 and 5, alleged as follows:- p. 8.

"2. The (2nd Appellant) is not in a position to admit or deny paragraphs 3, 4 and 5 of the Plaintiff's Statement of Claim."

And further alleged:

"4. The (2nd Appellant) will contend at the hearing of this suit that he purchased from the (1st Appellant) the property in dispute for valuable consideration and without notice of any fraud, and is in possession thereof."

11. In support of the said allegations in paragraphs 3, 4, 5, 6, 7 and 8, and the amendment referred to by the learned trial Judge set forth in paragraph 12 below, of the Respondent's Statement of Claim, the Respondent gave evidence and called as witnesses one Daniel Adebiyi (also referred to as "P.W.3") and one Emanuel O. Shadare (also referred to as "P.W.4"). pp. 9-13; pp.14-15; pp.16-17.

12. As regards the said amendment the learned trial Judge in his Judgment said as follows:- p.27, l.27 to p.28, l.4.

"On the 26th day of September, 1957, a motion was filed by the plaintiff seeking an order restraining the 1st defendant from selling the property. A Counter-Affidavit was filed by

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the 1st defendant and in paragraph 5 of same he disclosed that he had sold the property to the present 2nd defendant in July 1957 and that the latter was in possession. As a result, the plaintiff's prayer was refused. Consequent upon this disclosure, the plaintiff on the 4th November 1957 filed a motion seeking to amend the Writ of Summons by making an additional claim for a declaration that any purported sale of the property by the defendant to anyone was a fraud by the defendant as against the plaintiff and was therefore void and should be set aside. A prayer to join Rufai Akinhanmi as 2nd Defendant was also added to the request for amendment. This motion was granted as prayed on the 29th November, 1957."

13. The learned trial Judge in his Judgment said as follows:-

p.30, l.6.

"In one thing the witnesses for the plaintiff i.e., the plaintiff, P.W.'s 3 and 4 are all agreed upon and that is that at a certain time which on reckoning would appear to be in the same month as the agreement was entered into i.e. February or early in March, 1957, the plaintiff carried money which Plaintiff's Witness 3 and the plaintiff said was £200 to the 1st defendant with the object of paying him such sum in accordance with the agreement. That she offered to pay this sum and that the 1st defendant dispensed with payment and instead asked the parties to meet him at his Counsel's office next day. Further the plaintiff and Plaintiff's Witness 3 say that they went on the next day but they met neither the 1st defendant nor his Counsel. If this evidence is accepted then there is a tender in law for the defence is to the effect that the parties never came to the house of the 1st defendant at all before the month of May. The point at issue resolves itself to this:- Can I rely on the evidence of the plaintiff and her witnesses in preference to the evidence of the two defendants and the evidence of their witness for what it is worth. The issue is simple but the choice is not quite as clear cut as may appear in words."

14. The learned trial Judge having reviewed the evidence of the plaintiff and that of Adebiyi, which he said (wrongly it is submitted) materially supported that of the plaintiff, then dealt with the evidence of Shadore as follows:-

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p.30, l.32 to p.31, l.29.
p.31, l.30 to p.32, l.7.
p.30, ll.30-31.

p.32, ll.8-47.

"The last witness was one E.O. Shadare who was offered for x-examination. Now he stated that the plaintiff came to him about 15 days after the making of exhibit "F" i.e. on or about the 1st March, 1957. That she came with the money and he followed her to the office of Counsel for the defence - Mr. Kotun - and met him. That Mr. Kotun told him to go and call the 1st defendant. He went with the plaintiff and met the 1st defendant who would not however come on that day but said that he would do so on the next. He then went with the plaintiff to Mr. Kotun's house on the next day i.e. on or about the 2nd March, but did not meet either the Counsel or the 1st defendant. The 3rd Plaintiff Witness met them as they were going out of Counsel's office and together they proceeded to the house of the 1st defendant. They met him and a stranger identified as the 2nd defendant. The plaintiff tendered the money but the 1st defendant would not take it and the 2nd defendant requested an additional £50. The 1st defendant however told them to meet him at the Lawyer's office and on this occasion this witness went alone but did not meet Counsel. Now there can be no doubt that the evidence of this last witness materially detracts from that of the plaintiff supported as it was by that of Plaintiff's witness 3. Must I or should I on this score reject the plaintiff's version as a concocted story, in spite of the fact that the demeanour of this witness Plaintiff's Witness 4 and the manner in which he gave his evidence neither impressed me nor did he strike me as one being possessed of much or sufficient intelligence or memory for recollection of events taking place over a year ago as happened here. It is true he described himself as an estate agent but that term in this country often means nothing more than a tout for vendors of land, and, looking at this witness, I doubt whether he was more than that."

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15. The learned trial Judge continued to say as follows:-

p.32, l.48 to p.33, l.2.

> "Before deciding the question, I have set myself above" /namely, whether he should reject the Respondent's version as a concocted story/ "I propose to turn to the defence first for on the evidence before me in spite of the contradiction quite a strong prima facie case has been made out."

It is respectfully submitted that the learned trial Judge misdirected himself since whether a prima facie case had been made out by the plaintiff depended on whether the evidence of the plaintiff was credible and unless it was no such case would have been made out, and the learned trial Judge had misdirected himself in making such an approach in reaching a conclusion on the evidence. It is further submitted the evidence of the plaintiff was not credible but was such as could only be regarded as fantastically incredible.

16. The learned trial Judge having reviewed the evidence of the 1st Appellant and 2nd Appellant and a witness called on their behalf, one Asibia Aromashodun, said:-

p.33, ll.33-34.
p.33, l.35 to p.34, l.22.
p.34, ll.23-46.

p.34, l.47 to p.35, l.5.

> "After reviewing the whole of the evidence before me and in particular the demeanour of each witness and the way in which they shaped under x-examination, I still say without hesitation that the plaintiff and her witness (Adebiyi) impressed me as witnesses of truth and I accept their version to that of the defendants and their witness (Aromashodun) as well as that of Plaintiff's witness (Shadare)".

Further to the submission made (paragraph 15 supra) it is submitted that, in saying that the Respondent was a witness of truth, the learned trial Judge had not taken into consideration, as he should have done, the view expressed by him regarding her evidence in the previous action by the 1st Appellant against the Respondent, where he said in his Judgment therein as follows:-

pp. 58-70.

p.66, ll.25-45.

> "The 1st defendant (i.e. the Respondent) opened the case and from her evidence I formed the impression that she either did not know which

land was purchased by her or was trying to deceive the Court as to the whereabouts of same ..... I did not form a favourable impression of this witness. She contradicted herself in some material points, the most important of which was as to the situation of the land in relation to Adeyemi Street and Kosobameji Road and the Church referred to."

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And in regard to the evidence of the 1st Appellant in the said action the learned trial Judge said:-

"The plaintiff (i.e. the 1st Appellant) himself gave evidence ..... I found this witness a reliable witness and have no hesitation in accepting his evidence."

p.65, l.48 to p.66, l.13.

17. The learned trial Judge concluded his said review of the evidence and based thereon as follows:-

p.35, ll.20-35

"..... my judgment is based against the (1st Appellant) on the finding that the money was tendered in law and within the accepted time and he would not accept it. As for the (2nd Appellant) having accepted the version of the plaintiff and the Respondent's witness (Adebiyi) I have no doubt that he was present and made the remark credited to him by the Respondent and Respondent's witness (Adebiyi). Further I also find that he also knew of the arrangement and contract of sale existing between the Respondent and the (1st Appellant). He is in my view a purchaser for value but with notice not only of the contract existing between the parties but of the fact that the Respondent made a tender of the balance within the period required. He is not entitled to any protection in law."

The submissions made in paragraphs 15 and 16 supra are hereon repeated. It is further submitted the learned Judge has misdirected himself in having disregarded the following viz:-

(1) That whereas in the evidence of the Respondent and Adebiyi it is stated that it was the 2nd Appellant who asked for a greater price than that of £300 and that the 1st Appellant told the Respondent to ignore it, in paragraph 6

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aforesaid, of her Statement of Claim it is alleged as follows:-

> "6. During the time when the Plaintiff was approaching the (1st Appellant) to receive the balance of the money (£200) due to him ..... the (2nd Appellant) was one of those who intervened but he backed the (1st Appellant) in his demand for more than the £300 previously agreed upon ....." 10

And in having disregarded -

(2) Paragraphs 4 and 8 of the said Statement of Claim (which are set out in paragraph 8 of this Case).

p.35, ll.36-42. 18. In regard to a submission made at the trial by Counsel for the present Appellants that even if it were held (contrary to the submission there made and repeated in this appeal) that the 2nd Appellant had notice of the interests of the Respondent, the sale to the 2nd Appellant could not be affected, 20 inasmuch as no fraud was proved, the learned trial Judge in the course of his Judgment, acting entirely mero motu, amended the Writ as follows:-

p.36, ll.25-27. "....I amend the Writ to read as follows: i.e. the additional claim:-

> 'The Plaintiff also seeks against the (Appellants) a declaration that the purported sale of the property which is the subject matter of this action by the (1st Appellant) to the (2nd Appellant) since the 14th February, 30 1957, is a fraud on the part of (the Appellants) as against the plaintiff and therefore void and further that it should be set aside on the grounds that the (2nd Appellant) is a purchaser with notice of the plaintiffs prior interests.' "

The learned trial Judge proceeded to say:-

p.36, ll.35-39. "In view of the existence of paragraph 9 of the Statement of Claim there is no need for the Statement of Claim to be amended. I shall of course take this into account in the assessment of costs. 40 No fraud has been proved but the other 'leg' of the claim has been amply proved."

It is respectfully submitted that the said amendment made as aforesaid was made entirely erroneously in law. Record

19. The learned trial Judge gave judgment (erroneously it is submitted) for the Respondent, setting aside the purchase by the 2nd Appellant of the property and made the aforesaid further Order.

20. The Federal Supreme Court in their said Judgment, in regard to the said allegations of fraud made in the Statement of Claim said, erroneously it is submitted, as follows:-

> "It will be observed that paragraph 8 of the Statement of Claim repeats the allegation of fraud and specifies the acts on the part of each (Appellant) which are said to constitute fraud. It has at no time been submitted on behalf of the Appellants that the acts in question did not amount to fraud and no application was made to strike out the pleading...." p.50, ll.20-27.

21. As regards the issues and the evidence in regard thereto the Federal Supreme Court said as follows:-

> "It is now possible to turn to the issues involved in this appeal. The appellants say, as regards the trial judge's findings of fact, that he ought not to have found it proved that the sum of £200 was tendered at all, and that in any event there was no satisfactory evidence that a tender was made on or before the 31st March, 1957. As a corollary they submit that on the proper construction of the agreement, Exhibit F, time was of the essence of the contract, and the first defendant was within his rights in rescinding the agreement. The Respondent relies on the evidence of the tender made in the presence of Adebiyi, not only as showing that a tender was made before the 31st March, 1957, but as proving the second appellant's knowledge of the respondent's interest, which is a vital part of the respondent's case. Mr. Kotun, for the appellants, has drawn our attention to certain respects in which he says the evidence of the plaintiff is obscure or self-contradictory or fails to tally with that of Adebiyi; in particular he says that two witnesses disagree as to the number of times they p.52, l.3.

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visited the first defendant's house together. Much of his criticism dealt with the discrepancy between the names Adeleye, Adetunji and Adebiyi, which I have already described as a mere error in transcription, and I do not regard the other matters to which he has drawn attention as sufficient to outweigh the trial judge's considered opinion that the plaintiff and Adebiyi were witnesses of truth and that the two defendants were not. There is nothing inherently improbable in the account of the prevaricating tactics adopted by the two defendants and I would uphold the trial judge's finding that the plaintiff had tendered the sum of £200 to the first defendant before the 31st March, 1957, and that the second defendant knew of her interest in the property."

22. In regard to the said amendment of the Writ made mero motu by the learned trial Judge the Federal Supreme Court, erroneously it is submitted, said as follows:-

"As regards the amendment made by the trial judge, Mr. Kotun's complaint was that it raised a new issue of fact, as to the knowledge of the second defendant, and he drew our attention to the judgment of the Privy Council in Ambrosini v. Tinko (1929) 9 N.L.R. 8. In that case, various sets of accounts had been produced in evidence, and in the course of preparing his judgment the judge observed certain facts about them to which no reference had been made by either party in the pleadings or in the course of argument. He formed the mistaken view that these facts could have only one legal consequence, and gave effect to this view of his judgment, without allowing the parties to address him, or to call evidence to show the real consequence of these fresh facts. The Full Court upheld his view and allowed the plea to be amended, but the Privy Council held that he and the Full Court were wrong. It is well settled that neither party will be allowed to raise an issue which has not been pleaded and on which the full facts are not before the Court, and this decision merely recognises the existence of a similar limit to the judge's powers.

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"In the present case it was fully pleaded in paragraphs 6, 7 and 8 of the Statement of Claim that the second defendant knew of the plaintiff's interest in the property, and of the first defendant's intention to defeat that interest, indeed the fraud alleged against the second defendant in paragraph 8 consists in purchasing the property with that knowledge. The present case, therefore, has nothing in common with Ambrosini v. Tinko and there is no substance in the submission that a fresh issue of fact was raised. What happened in this case was that the judge held that the facts pleaded in the Statement of Claim had been proved, and constituted a good cause of action against both defendants, but that they were wrongly described as fraud. As to that, no argument has been addressed to us, any more than it seems to have been to the trial judge; there is no doubt that in the older reported cases the Court of Chancery applied the word "fraud" to a transaction of this nature: see, for example, Willoughby v. Willoughby (1756) 1 T.R. 763. In any event, since the defendants did not take exception to the word, and were fully aware of the sense in which it was used, I would hold that it was unnecessary to amend the writ, and that the relief asked for could have been given on the writ as it stood after it had been first amended.

"If this is the correct view, it is perhaps unnecessary to consider the submission that the judge ought not to have amended the writ without allowing the parties to address him on the proposed amendment."

23. It is respectfully submitted that the Judgment of the Federal Supreme Court is wrong and ought to be reversed and Judgment entered for the Appellants with costs or a new trial had between the parties for the following amongst other

R E A S O N S

(1) BECAUSE the evidence of the Respondent and Adebiyi was not credible.

(2) BECAUSE the evidence of the Respondent and Adebiyi was inherently improbable.

(3) BECAUSE the Respondent and Adebiyi were not witnesses of truth.

(4) BECAUSE the evidence of the Respondent and Adebiyi contradicted the allegations made in the Statement of Claim.

(5) BECAUSE the Respondent's case against the 1st Appellant was based upon an allegation of fraud and no fraud was proved.

(6) BECAUSE the Respondent's case against the Appellants was based on fraud and no fraud was proved.

(7) BECAUSE the learned trial Judge amended the Writ entirely mero motu.

(8) BECAUSE paragraph 8 of the Statement of Claim constituted an allegation of fraud against the Appellants, and no fraud was proved.

(9) BECAUSE the Order made by the Federal Supreme Court was wrong in law.

(10) BECAUSE the Judgments respectively of the learned trial Judge and the Federal Supreme Court were wrong.

S.N. BERNSTEIN.

No. 48 of 1962

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- and -

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(Plaintiff) Respondent

CASE FOR THE APPELLANTS

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