*Privy Council Appeal No.* 48 *of* 1962

**Amusa Yesufu Oba and another** – – – – – – *Appellants*

*v.*

**Hunmuani Ajoke** – – – – – – – – *Respondent*

FROM

## THE FEDERAL SUPREME COURT OF NIGERIA

## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1964.

*Present at the Hearing:*
LORD MORRIS OF BORTH-Y-GEST.
LORD GUEST.
LORD DONOVAN.
[*Delivered by* LORD DONOVAN]

This is an appeal from a judgment of the Federal Supreme Court of Nigeria given in favour of the respondent on 5th February 1962.

In an action between the first appellant and the respondent in January 1957, the first appellant was adjudged to be the owner of a plot of land with a house on it in Adeyemi Street, Mushin. On 14th February 1957 following his success in this action, the first appellant agreed to sell the property to the respondent for £300. Of this purchase price £100 was paid on the signing of the agreement, and £200 was to be paid on or before 31st March 1957. The respondent claimed that she had tendered this £200 before 31st March, but that the first appellant had refused to accept it. She alleged further that in this refusal he was encouraged by the second appellant who tried to induce her to proffer a further £50. In July 1957 the first appellant sold the property to the second appellant for £800, and evicted the respondent from the house.

She thereupon brought her action in August 1957, claiming in her writ specific performance of the contract of 14th February 1957. The action was originally against the first appellant only, but by leave the second appellant was added as a defendant in November 1957.

In the statement of claim delivered in February 1958 the respondent alleged against both appellants *inter alia* that the first appellant's refusal to receive the balance of £200 and his subsequent sale of the property to the second appellant for a higher sum, was a fraud upon the respondent, in which fraud the second appellant was implicated because he had full knowledge of the facts.

At the trial the respondent and her witnesses deposed, *inter alia*, to having made the tender of the £200 before the 31st March 1957 in the presence of the second appellant, who urged the respondent to proffer £50 more. Her story was corroborated by a witness who went with her, one Adeleye. The appellants gave evidence completely denying this story. The first appellant denied having seen the respondent as she alleged. It was for this reason that he wrote her a letter dated 5th April 1957 in which he referred to the non-payment of the £200, and said that in the circumstances he was returning the deposit of £100 and re-taking possession of the property.

It may be remarked that this letter called forth a reply from the respondent's lawyer alleging that the first appellant had evaded taking the balance of £200, warning him against " this trick ", and proffering the £200 once more.

On behalf of the appellants the point was taken that this reply (which was not written until the 9th May) did not assert that there had been a tender before the end of March but stated that the balance had been offered since the end of March.

The second appellant also gave evidence denying that he was present on any occasion when the £200 was tendered to the first appellant, and denying also the allegation that he had suggested the payment of an additional £50.

In his judgment Taylor J. said that both the present appellants were most unsatisfactory witnesses, in particular the second appellant, who had been very evasive in his evidence. By contrast the present respondent and her supporting witness impressed him as witnesses of truth. He found that the £200 had been tendered in time to the first appellant who would not accept it. He further found that the second appellant was present at the time of the tender and asked the respondent to pay a further £50. Further, the second appellant knew of the existing contract of sale of the property between the first appellant and the respondent. He ordered that the first appellant execute a conveyance of the property to the respondent against payment of the £200, the transaction to take place on 6th September 1958 before the Registrar of the Court.

Both appellants appealed to the Federal Supreme Court of Nigeria, in which judgment was delivered on 5th February 1962, dismissing the appeals. Brett, F.J. with whom Unsworth and Bairamian F.JJ. concurred, after reciting the facts, upheld Taylor J.'s finding that the £200 had been tendered to the first appellant before 31st March 1957, and that the second appellant knew at the time of such tender of the respondent's interest in the property.

The learned Federal Justice then went on to deal with a procedural point raised by the two appellants. In his judgment Taylor J. found that no fraud had been proved on the part of the two appellants: and he referred to an argument for the second appellant to the effect that if no fraud were proved against him, the sale of the property to him could not be set aside, even if he knew of the interest of the respondent. The learned judge rejected that argument: but since the writ did not specifically ask that the sale be set aside as against the second appellant, on the ground that he had notice of the respondent's prior interest, the learned Judge, of his own motion, suitably amended the writ. He did this pursuant to Order 33 of the Nigerian Rules of Court which in terms confer a power on the Judge to do so. In the Federal Supreme Court complaint was made of the learned Judge's action, on the ground that the parties were not given an opportunity of being heard first. But this amendment as Brett F.J. pointed out, raised no new issue of fact on which further evidence might be necessary, and did not prejudice the appellants. The statement of claim fully pleaded the issue against both appellants, and the facts pleaded had been proved against them. It was true that the learned Judge had held that the facts were wrongly described as fraud, but no argument on that particular point had been addressed to the Federal Supreme Court. In the older cases the Court of Chancery had used the word " fraud " to describe conduct such as the appellants' conduct here. But since the appellants did not take exception to the word, and were aware of the sense in which it was used, he would hold that the relief asked for could have been given on the writ as it stood before the learned Judge's amendment. He thought however that prudence required that it should be an invariable rule of practice for a judge to invite the parties to address him, before he amended the writ or the pleadings of his own motion. In this connection Brett F.J. referred to the decision of the Board in *Ambrosini v. Tinko* (1929) 9 N.L.R.8.

Their Lordships are in agreement with the observations of Brett F.J. on this point and do not desire to add to them. The Federal Supreme Court varied the order of Taylor J. by ordering the second appellant to join in the conveyance of the property to the respondent. No point is raised concerning this variation.

The case therefore emerges simply as one where there are concurrent findings of fact in the Courts below adverse to the two appellants, and which does not come within the exceptions to the rule that their Lordships

will not interfere with such findings. It has been urged upon them that the respondent's story, even though corroborated, was so improbable that it should be treated as incredible and rejected. The Courts below did not take that view. They regarded it as a case where an attempt had been made to cheat an illiterate woman out of her property for the sake of getting a higher price. In their Lordships' view the evidence, once accepted, amply justified that conclusion. They will accordingly humbly advise Her Majesty that the appeal be dismissed. There will be no order as to costs, the respondent having taken no part in the appeal.

(90388) Wt. 8069,118 90 8/64 Hw.

In the Privy Council

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AMUSA YESUFU OBA AND ANOTHER

*v.*

HANMUANI AJOKE

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DELIVERED BY

LORD DONOVAN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
HARROW

1964