

SUPREME COURT OF NIGERIA
23RD SEPTEMBER, 1994. SC. 129/1989
CORAM:- M.L. UWAIS. I.L. KUTIGI,
M.E. OGUNDARE, S. U. ONU, A.I. IGU, JJSC.

EDWIN O.C. EJKEME PLAINTIFF/APPELLANT

AND

1. VERONICA OKONKWO

2. NDUBISI OKONKWO DEFENDANTS/RESPONDENTS

MORTGAGES - *Covenant to pay the principal debt - On a given date - Where omitted - Whether there is implied promise to pay within a reasonable time.*

MORTGAGES - *Covenant to pay interest - Where no specific interest is stated - When interest of 9% will be implied.*

MORTGAGES - *Equity of redemption of the borrower - Whether plaintiff can rightly claim - That the defendant cannot redeem the mortgage until after 35 years - As contained in the mortgage deed.*

MORTGAGES - *Right to redeem - Whether it can be taken away - By an expressed agreement of the parties.*

FACTS

In 1966, Lawrence Okonkwo and Samuel Okonkwo (both deceased) borrowed from the plaintiff the sum of £3,700.00 (now N7,400.00) with which they developed a property at 3 Iweka Road Onitsha. The parties entered an agreement under seal which was registered in the Lands Registry in the office at Enugu. The agreement provided that the lender (ie plaintiff) was entitled to 50% of rent accruing from the property for the period of 35 years which will be 1966 - 2001. After the death of the borrowers, the defendants secured letters of administration in respect of the estate. In 1982, by a letter dated 19-5-82 and addressed to the plaintiff, the 1st defendant gave notice of her intention to pay off all the outstanding balance of the loan plus interest due thereon as at 20th June 1982. Plaintiff replied through his solicitor insisting on collecting 50% of the rent for the period of 35 years. Thereupon, defendant refused further sharing of the rent with the plaintiff.

The plaintiff then filed this action seeking to enforce his right to 50%

of to rent for 35 years. Defendants in their counter-claim claimed that the purported mortgage is void and alternatively sought an order setting aside the said deed of mortgage. The trial high court delivered judgment for the defendants and dismissed the plaintiffs claim. Plaintiffs appeal to the Court of Appeal was also dismissed. Being dissatisfied, the plaintiff has further appealed to the Supreme Court to determine whether the provision that the mortgage could only be redeemed at the end of 35 years was a clog on the defendants' equity of redemption.

HELD (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

Covenant to pay the principal debt

1. I pause here to consider Exhibit 'A'. Exhibit 'A' does not contain a covenant to pay the principal debt and interest on a given date. On the authorities however, there is an implied promise to pay and as no date has been fixed for the repayment it is my view that a reasonable time will be implied. (P.63 L.27)

Covenant to pay interest

2. On the second provision, that is, covenant to pay interest, although no specific interest is stated in the deed in Exhibit 'A', I agree however, with the two courts below that the interest of 9 % mentioned in the deed in respect of further advances will apply equally to the principal sum. (P. 63 L.30)

Right to redeem - Cannot be taken away by expressed agreement

3. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an expressed agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular time or to a particular description of persons. The right continues unless and until the mortgagor's title is extinguished or his interest is destroyed by sale either under the process of the court or of a power in the mortgage incident to the security. This is a very important provision of a legal mortgage. (P.64 L. 17)

Equity of redemption of the borrower

4. In view of the borrowers' equity of redemption therefore, the plaintiff will not be right to claim that the defendant could not redeem the mortgage by paying for the principal sum and interest until the year 2001, that is, 35 years from 1966. For this reason, therefore, the learned trial Judge was right to dis-

miss his claims and the Court of Appeal was right to affirm that decision.
(P.64L.24)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. When plaintiff's stance will bring a clog on the equity of redemption

The stance of the plaintiff seems to be that the mortgage cannot be redeemed until the expiration of the 35 years lease granted the plaintiff by Exhibit 'A'. If the position of the plaintiff is correct it would appear that there is a clog on the equity of redemption. Incident to every mortgage is a right of the mortgagor to redeem - this right is generally referred to as the equity of redemption.
(P.64L.2)

IGUH JSC

2. Determination of whether a transaction is a mortgage

In determining whether any given transaction is in the nature of a mortgage, equity looks at the substance of the matter and not merely at the form.
(P.66L.21)

3. Agreement that bars mortgagor's right of redemption is ineffectual

It is a settled rule of equity that any agreement which directly bar the mortgagor's right to redemption is ineffectual. (P.66 L.30)

REPRESENTATION

J.M.C. Agbu Esq. for the Appellant

Chief J.C. Ifebunandu with A. Ugwuanyi for the Respondent

CASES REFERRED TO

Seton v. Slade, Hunter v. Seton (1802) 7 VES 265-273; 34 ER 984

Are v. Ipaye (1990) 2 NWLR (Pt 132) 298

Lokoyi v. Olojo (1983) 8 SC 61

Otogbolu v. Okeluwa (1981) 6-7 SC 99

Re Watson, ex parte Official Receiver in Bankruptcy (1890) 25 Q.B.D. 27

Re Lovegrove (1935) Ch. 464

Salt v. Marquis Northampton (1892) AC 1

BOOK REFERRED TO

Halsbury's Laws of England 4th Ed. Vol. 32 para. 498

LEAD JUDGMENT BY OGUNDARE JSC

Sometime in 1966, Lawrence Okonkwo and Samuel Okonkwo (both now deceased) borrowed from Edwin O. C. Ejikeme the sum of 3,700.00 pounds
5 (now N7,400.00) with which they developed a property at 3 Iweka Road Onitsha. The parties entered into agreement under seal which agreement was registered in the Lands Registry in the office at Enugu. Part of the recitals of the agreement reads as follows:

“2. *The Borrowers are in course of erecting on the said property
10 dwelling house and has requested the mortgagee for the purpose of completing such dwelling house to lend to them the sum of 3,700 pounds (N7,400.00).*

*‘And whereas the mortgagee has agreed with the borrowers to lend to them the sum of ₦3,7000 out of the money belonging to his family upon
15 having the repayment thereof as hereinafter mentioned and secured in a manner hereinafter appearing.’*

The agreement demised unto the lender

“*All that plot of land with the dwelling house thereon situate at and known as and called No.3 Iweka Road, Onitsha to hold the same unto
20 the mortgagee for the term of 35 years from the first day of July, 1966.*”

Paragraph 6 of the agreement or deed provides:

“*6. Provided always that if the said sum of 3,700.00 with compound
interest thereon as aforesaid shall be paid to the mortgagee by way of half
the rents collected from the secured property monthly for a period of 35
25 years and in accordance with the foregoing covenant, the said hereditaments comprised in this security shall at the request and cost of the Borrowers and Mortgagee be reassigned to him at the end of 35 years from the date of this mortgage.*”

The Lender by virtue of the agreement was being paid by the Borrowers half the rent they were collecting from tenants in the house. The borrowers died during the Civil War and Veronica Okonkwo and Ndubisi Okonkwo wife and son respectively of Lawrence Okonkwo took out letters of administration with one other person Elizer Okonkwo in respect of the estate of Lawrence Okonkwo. In 1982 by a letter dated 19th May and addressed to Ejikeme, the Lender, Veronica gave notice of her intention.
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“*to payoff all the outstanding balance of the loan plus interest due thereon as at 20th June 1982*”
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Ejikeme replied through his solicitor that he would insist on his rights under

the agreement, that is, he would continue to collect 50% of the rent accruing from the property for 35 years as stipulated in the agreement. He refused to accept the offer made by Veronica Okonkwo. Thereupon, Veronica refused to share the rent with Ejikeme who then instituted the action leading to this appeal claiming as per paragraph 10 of the Statement of Claim against Veronica and Ndubisi as hereunder:

1. *A declaration that the plaintiff is entitled to fifty percent of all the rents collected from the house known as and called No.3 Iweka Road Onitsha for a period of thirty-five years from 1st day of July, 1966.*

2. *A perpetual injunction restraining the defendants either by themselves, their servant or agents from collecting rents on the said house to the exclusion of the plaintiff.*

3. *An account of all the money collected by the defendants in respect of the house from the 19th day of December 1983 up to date of the judgment."*

Pleadings having been filed and exchanged the defendants in their Statement of Defence and Counter-claim claimed as follows:

"(a) A declaration that the purported mortgage dated the 26th day of May 1966 made between the plaintiff and late Mr. Lawrence Okonkwo, Samuel Okonkwo and registered as No. 27 at page 27 in Volume 448 of the Lands Registry Enugu is void.

Alternatively

(b) An order setting aside the said deed of mortgage."

The plaintiff did not file a defence to the counter-claim. The action proceeded to trial. On the date fixed for the trial however, learned counsel for both parties informed the Court that they had settled issues and that the only issue calling for determination was whether the agreement was valid or not. Both referred to the agreement as a mortgage and the case was fought on the premise that it was a mortgage. Learned counsel addressed the court. In his judgment the learned trial Judge dismissed plaintiff's claims and allowed the defendants' counterclaim. He ordered as follows:

"1. The covenant not to redeem until 35 years has elapsed is irregular, a clog on the mortgage and cannot stand. The defendant is therefore entitled to an immediate right of redemption in this case.

2. The Mortgagee is entitled to the payment of his principal, interest and costs only. This in concrete terms means that the mortgagee is entitled to the repayment of the sum of N7,400.00 plus compound interest of 9% till the mortgaged property is redeemed."

Being dissatisfied with this judgment the plaintiff appealed to the Court of

Appeal which latter Court dismissed the appeal and affirmed the judgment of the trial High Court. The Court of Appeal ordered as follows:

“...it will cause unfair hardship to the defendants to pay interest as from July 1st, 1982 right through till now since as at 30th June 1982 they had evinced
5 an intention to pay off the loan and interest but for the refusal of the plaintiff.

Compound interest at 9% for about six and half years now will come to about N5,000.00. The defendants cannot be expected to bear that in the circumstances.

It is therefore ordered that the interest due shall be calculated up
10 to 30th June 1982 and to commence again from today’s date until the defendants redeem the property.”

Being again dissatisfied, the plaintiff has further appealed to this Court upon two grounds of appeal which read-as follows:

“(1) ERROR IN LAW

15 The Court of Appeal erred in law in the following passage in its judgment:-

‘It will be seen that there was a proviso for reconveyance contained in clause 7 already set out upon payment of all moneys thereby covenanted to be paid. The redemption clause was however not elegantly
20 expressed. It contains typographical and other errors and or omissions. For instance the word ‘mortgage’ should read ‘mortgagee.’ A few words have also been omitted between the words ‘mortgage by way’ and ‘or half the rents’. The entire proviso should read something like this:

‘Provided always that if the said sum of 3,700 pounds (three thou-
25 sand and seven hundred pounds) with compound interest thereon as afore- said shall be paid to the mortgagee by way or a lump sum or half the rents collected from the secured property monthly for a period of 35 (thirty five) years and in accordance with the foregoing covenant the said heredita-
30 ments comprised in the security shall at the request and (sic) of the Borrow- ers and Mortgagee be reassigned to him at the end of 35 (thirty five) years from the date of this Mortgage. It seems to me that it was the intention of the parties that when the Borrowers were able to pay off the loan by lump sum they should be free to do so and were it otherwise, clause 7 would have been unnecessary repetition of clause 1.’

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PARTICULARS

(i) Clause 7 of Ex A says nothing about the repayment of the mort-
gage loan. Clause 6 which the Court of Appeal referred to as clause 7

provides as follows:

'6) Provided always that if the said sum of 3,700 pound (three thousand and seven hundred pounds) with compound interest thereon as aforesaid shall be paid to the Mortgage by way or half the rents collected from the secured property mortgage for a period of 35 (thirty-five) years and in accordance with the foregoing covenant the said hereditaments comprised in this security shall at the request and cost of the Borrowers and Mortgage be reassigned to him at the end of 35 (thirty five) years from the date of this mortgage.'

This clause emphasises clause 1 which says that the loan shall be repaid by the Borrowers by paying to the Mortgagee 50% or the rent collected from the mortgaged property monthly for 35 (thirty five) years.

Although the words 'mortgage' and 'or' which I have underlined should read 'mortgagee' and 'of' respectively there were no omissions in the clause as was found by the Court of Appeal.

(ii) In the High Court, Onitsha, the parties did not complain that there were omissions in clause 6 of the agreement either in their pleadings or in the address of their counsel.

(iii) The respondents' case was that no other provision was made for the repayment of the loan than by paying to the appellant 50% of the rents monthly for 35 (thirty-five) years and that this clogged their equity of redemption.

The Court of Appeal, by supplying the words "of a lump sum" also underlined by me, has re-written clause 6 of the deed of mortgage and thereby introduced an option to repay the loan by a lump sum contrary to the expressed intention of the parties, and thereby failed to consider the issue before it, that is, whether the provision which stipulates that the plaintiff shall be entitled to 50% of the rents received from the mortgaged property monthly for thirty five years is a clog on the equity of redemption of the defendants. If the Court of Appeal had considered the issue before it, it could have decided in favour of the appellant.

2. ERROR IN LAW

The Court of Appeal erred in law and misdirected itself in the following passage in its judgment:-

"If however the redemption clause means that the mortgage could only be redeemed at the end of 35 (thirty-five) years, then the said provision for redemption is nugatory since in that even (sic) the lease could have run its span with its attendant consequences."

PARTICULARS

The respondents were the owners of the mortgaged property in fee simple absolute in possession (the italics is mine). The property was demised to the appellant for thirty-five years by clause 2 of Ex A. It is inconceivable
 5 that a lease for 35 (thirty-five) years granted by the respondents could adversely affect their fee simple absolute in possession.

By reason of this error in law and misdirection the Court of Appeal came to the wrong conclusion that the respondent's equity of redemption was clogged and not merely postponed".

10 In accordance with the rules of this Court the parties filed and exchanged their Briefs of argument. In the plaintiff/appellant's brief, the following issues are set out as calling for determination in this appeal:

"(i) Whether the Court of Appeal was right in holding that the redemption clause in the agreement (Ex A) gave the respondents an option
 15 to pay off the loan by any other way than by paying the appellant 50% of the rent collected from the building for thirty-five years.

(ii) If the answer in (i) above is in the negative; whether the Court of Appeal was right in holding that the provision that the mortgage could only be redeemed at the end of thirty-five years was a clog on the equity of
 20 redemption of the defendants and therefore nugatory."

The defendants/respondents on their part formulated the issues for determination as follows:-

"I. Whether the Court of Appeal as a Court of Equity was right to interpret the contents of Exh.. 'A' as a mortgage deed in order to reach any
 25 reasonable conclusion as to its validity.

II. If the answer to the above question is in the position (sic) was the interpretation given by the Court of Appeal with regard to the validity of Exhibit 'A' that there is an option of redemption of the loan at 9% interest reasonable as a construction given to the deed of mortgage i.e. Exhibit 'A'".

30 It will appear from the pleadings and the issues placed before the trial Judge that the main question calling for determination in this matter is as to whether the agreement between the plaintiff and the borrowers which is Exhibit 'A' in these proceedings and which is in the nature of mortgage precludes the borrowers or their successors-in-title, as in this case, from redeeming the
 35 mortgage by paying off the balance of the capital and interest or whether as contended by the plaintiff, it must run the full term of 35 years. To determine this issue, one must ask what are the provisions of a valid legal mortgage. The learned author of Halsbury's Law of England 4th Edition vol. 32 at paragraph 498 lists the provisions of a legal mortgage as follows:-

“The main provisions of a legal mortgage are (1) a covenant to pay the principal debt and interest on a given date; (2) a covenant to pay interest in the event of default in payment of the principal on the day named; (3) the demise or sub-demise of, or the charge by way of legal mortgage on, the mortgaged property; (4) the proviso for cesser; and (5) such variations of the statutory provisions with regard to mortgages as the arrangement between the parties requires.”

On the first provision, that is, covenant for repayment the learned author goes on to say:

“The first operative part of a mortgage is usually the covenant by the mortgagor to pay the principal and interest on a day named. If there is no covenant and no accompanying bond, there is still an implied promise to pay. The promise to pay implied in an instrument under seal may amount either to a covenant or a simple contract to pay, depending upon the construction of the instrument.

As every loan transaction implies a right to be repaid, if a person lending money is never to have his principal back, there must be something very definite and clear showing that such was the condition of the contract.”

On the date for repayment, the learned author has this to say at paragraph 500:-

“Fixing a day for payment does not generally indicate the parties’ intention that actual payment is to be made on the named date, but only that the mortgage may call for payment on or at any time after that date if so minded, but not before. The date fixed is usually six months from the date of the loan or deed, but may be at the end of three months or any other period, or the loan may be made repayable upon demand. In general, the mortgagor may not repay prior to the date fixed for repayment.”

I pause here to consider Exhibit ‘A’. Exhibit ‘A’ does not contain a covenant to pay the principal’s debt and interest on a given date. On the authorities however, there is an implied promise to pay and as no date has been fixed for the repayment it is my view that a reasonable time will be implied. On the second provision, that is, covenant to pay interest, although no specific interest is stated in the deed in Exhibit ‘A’, I agree however, with the two courts below that the interest of 9% mentioned in the deed in respect of further advances will apply equally to the principal sum. It does not appear that the defendants are contesting this finding as they have not appealed against it. Indeed both parties tacitly accepted that the loan was to carry 9% interest.

Exhibit ‘A’ demised unto the plaintiff by way of legal mortgage a term of 35 years.

It is the fourth requirement, the provision for cesser, that is the bone of contention in this matter. The stance of the plaintiff seems to be that the mortgage cannot be redeemed until the expiration of the 35 years lease granted the plaintiff by Exhibit 'A'. If the position of the plaintiff is correct it would appear that there is a clog on the equity of redemption. Incident to every mortgage is a right of the mortgagor to redeem - this right is generally referred to as the equity of redemption - see Seton v. Slade, Hunter v. Seton (1802) 7 Ves 265 - 273; 34 E.R. 984 - 985 where the following passage appears:

"But where the question is not whether all title is gone by force of the statute of limitations, but (as the point is put in the principal case), whether a mortgagor shall be at liberty to redeem after the day agreed upon, there equity says, relief may be given against the legal consequences of non-payment at the precise time appointed, and redemption allowed, on the ground that the whole object and original intention of the parties, was to secure, by the mortgage, repayment of the money: Radcliffe v. Warrington, 17 Ves, 332, 334."

The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an expressed agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular time or to a particular description of persons. The right continues unless and until the mortgagor's title is extinguished or his interest is destroyed by sale either under the process of the court or of a power in the mortgage incident to the security. This is a very important provision of a legal mortgage.

In view of the borrowers' equity of redemption therefore, the plaintiff will not be right to claim that the defendant could not redeem the mortgage by paying for the principal sum and interest until the year 2001, that is, 35 years from 1966. For this reason, therefore, the learned trial Judge was right to dismiss his claims and the Court of Appeal was right to affirm that decision.

In conclusion the plaintiff's appeal fails and it is hereby dismissed. As there is no ground of appeal attacking the conclusion of the learned trial judge as affirmed by the Court of Appeal that the counter-claim succeeded, I would say nothing on that. Suffice to say however, that in view of the time lag since the judgment of the Court below and the judgment of this Court, the final order made by the Court of Appeal will be varied to read:-

It is therefore, ordered that the interest due was to be calculated up to 30th June, 1982 and to commence again from the date of this judgment (23/9/94) until the defendants redeem the property.

In conclusion what is due to be paid to the plaintiff by the defendants by way of redemption of the mortgage shall take into consideration the

Ejikeme v. Okonkwo (1994) 13 KLR Ogundare JSC 65
amount of the monthly payments made to the plaintiff from July 1966 to the
time the defendants ceased to make any further payments to the plaintiff.
I award to the defendants/respondents N1,000.00 costs of this appeal.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my
learned brother Ogundare J.S.C. I agree that the appeal has no merit. Accord- 5
ingly, it is hereby dismissed with N 1,000.00 costs to the respondents.

KUTIGI JSC

I had a preview of the judgment of my learned brother Ogundare,
J.S.C. just delivered and I entirely agree with his reasoning and conclusion 10
that the appeal lacks merit and ought to be dismissed. I will also order the
interest due to be calculated up to 30th June 1981 and to commence again from
today (23rd September, 1994) until the respondents redeem the property. The
respondents are awarded costs of N1,000.00 only. 15

ONU JSC

For the reasons for judgment contained in the lead judgment of my
learned brother, Ogundare, J.S.C., a preview of which I have had. I entirely
agree therewith that this appeal fails.

In the circumstances of this case wherein Exhibit 'A' is in the nature 20
of a mortgage, to have rendered that deed irredeemable (contrary to what a
true legal mortgage represents) thus preventing the respondents or their suc-
cessors-in-title, the former who had offered to payoff the capital and interest
sooner than the full term of 35 years set out therein from so doing, would have 25
been tantamount to clogging their equity of redemption. Besides, these find-
ings of the two lower courts, amounting as they do to concurrent findings of
fact, this court will be slow, as indeed it had decided through a long line of
authorities, not to disturb or interfere with same unless the appellant can
show special circumstances either that there has been a miscarriage of justice 30
or a serious violation of some principles of law or procedure or that the find-
ings are erroneous. See *Alhaji K.O.S Are & anor v. Raji Ipaye & Ors. (1990) 2*

NWLR (Pt.132) 298 at 317; Lokoyi v. Olojo (1983) 8 S.C. 61 at 63-73; (1983) 2 SCNLR 127, Ibodo v. Enarofia (1980) 5-7 S.C. 42 at 58; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 and Otogbolu v. Okeluwa (1981) 6-7 S. C. 99, to mention but a few. In the instant case, no error either latent or patent has been shown to warrant my disturbance of the decision of the court below.

For these and the fuller reason given in the judgment of my learned brother Ogundare, J.S.C. I too will dismiss this appeal with the same consequential orders inclusive of those as to costs.

IGUHJSC

My learned brother, Ogundare, J.S.C. in the judgment just delivered and which I had the privilege of reading in draft has dealt exhaustively with all the issues involved in this appeal.

I entirely agree with the reasoning and conclusion therein and adopt the same as mine.

The real issue between the parties is whether the respondents are entitled under the transaction. Exhibit A, to redeem the mortgage by paying off the balance of money owed thereunder or whether the period of repayment must run the full term of 35 years therein provided.

In determining whether any given transaction is in the nature of a mortgage, equity looks at the substance of the matter and not merely at the form. See *Re Watson, Ex parte Official Receiver In Bankruptcy* (1890) 25 Q. B. 27, *Re Lovegrove* (1935) Ch. 464 and *Grangeside Properties Ltd v. Collingwoods Securities Ltd* (1964) 1 WLR. 139. In the present case, both parties in their pleadings referred to the transaction in issue as a mortgage. It is also quite clear that the case was fought throughout the proceedings on that basis. I have myself studied Exhibit A and I am in agreement that the transaction is in the nature of a legal mortgage and must be so construed.

It is a settled rule of equity that any agreement which directly bars the mortgagor's right to redemption is ineffectual. See *Salt v. Magguess of Northampton* (1892) A.C. 1. Similarly stipulations which even indirectly tend to have the effect of making a mortgage irredeemable are equally void and unenforceable as clogging the equity of redemption, a doctrine which applies to all types of mortgages, whether legal or equitable. It seems to me therefore plain that the mortgage, Exhibit A, is clearly redeemable and that it would be wrong to contend, as the appellant has done, that the respondents could not

redeem the mortgage by payment of the balance of all money owed under the transaction until the expiration of 35 years from the 1st day of July 1966 on which date the mortgage was entered into.

It is for the foregoing and the more elaborate reasons set out in the lead judgment of my learned brother, Ogundare, J.S.C., that I, too, would dismiss this appeal. I endorse all the consequential orders therein contained in their entirety including those as to costs.

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