

SUPREME COURT OF NIGERIA
14TH FEBRUARY, 1997. SC. 200/1992
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, E. O.
OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC.

CHIEF DAVIDSON OKAFOR IKEANYI PLAINTIFF/APPELLANT
AND
1. AFRICAN CONTINENTAL BANK LTD. DEFENDANTS/
2. EMMANUEL ORAKWUE RESPONDENTS

APPEALS - *New point of law - That was not in issue in the pleadings - Cannot be raised - Where further evidence would be required.*

MORTGAGES - *Sale by auction - Exercise of power to sale mortgaged landed property - Whether valid.*

PLEADINGS - *Consistency - Case fought on whether there was an auction sale - Plaintiff having failed to establish there was no sale - Cannot turn round to contend that sections of the Auctioneer's Law - Were not complied with.*

STATUTES - *Auctioneers Law - Provisions thereof - Cannot be considered 'in isolation from the parties case.*

FACTS

The plaintiff/appellant in 1977 mortgaged his landed property situate at 37 Afubera Street, Modebe Layout, Onitsha to the 1st defendant/respondent as security for the loan granted to Nobgroup Motors Limited. The deed of legal mortgage between the parties provided for a continuing security to cover an initial advance of N60,000.00 as well as any future or subsequent advances. The borrower Nobgroup Motors Ltd. defaulted in payment. Several demand notices were issued to the borrower and the plaintiff.

The 1st defendant subsequently advertised the property for sale in two news paper publications. It sold the property to the 2nd defendant by public auction and conveyed the land to him by a deed of assignment. Plaintiff sought to set aside the purported sale on the ground that it was fraudulent, made in an irregular manner and in contempt of Court. The trial court dismissed the plaintiff's case. His appeal to the Court of Appeal was also dismissed. Plaintiff has further appealed to the Supreme

Court raising 2 issues.

ISSUE FOR DETERMINATION

“(i) Were the learned Justices of the Court of Appeal right in not seeing any irregularity in the sale of the plaintiff/appellant’s property in the face of the finding by the learned trial judge about shortness of time advertised for the sale without considering the case of Chief Oseni versus A. I. I. C. Ltd. (1985) 3 N. W.L.R. Part 11,229 which is binding on them? Etc, see p 377

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

Statutes - Auctioneer’s Law

1. The provisions of the Auctioneers Law cannot be considered in isolation from the case the parties brought to the court. It is a settled principle of practice that parties are bound by their pleadings and cannot be allowed to set out in court a case at variance with their pleadings.(p. 381 C)

Pleadings - Consistency

2. There is no doubt that the parties fought the case principally on whether there was in fact an auction sale of the property on 28:9:81 or not and the plaintiff was not consistent in his pleading and evidence as to the advertisement of the sale. The plaintiff having failed to establish that there was no sale, he cannot turn round to contend that sections 19 and 20 of the Auctioneer’s Law were not complied with. Both averments and the evidence on them are inconsistent. (p. 383 D)

New point of law

3. Additionally, after a thorough scrutiny of the pleadings and the evidence, I am of the firm view that the applicability of sections 19 and 20 of the Auctioneer’s Law to the sale of the property was not directly in issue nor raised in the courts below. It cannot be said that no further evidence could have been adduced which would affect the decision on it. From the plaintiff’s evidence, apart from Exhibit “E” (the Publication in the Weekly Star Newspaper of 27:9:81), other notices were published advertising the sale. The dates of those other notices were not given in evidence by both parties. (p. 383 E)

Mortgages - Sale by auction

4. The courts below held that the sale was valid. The allegation in paragraph 22 of the statement of claim that the sale was fraudulent and in contempt of the court was withdrawn by the plaintiffs counsel at the trial. Therefore, the 1st

defendant acted within their powers in selling the property, and the 2nd defendant is entitled to the full benefit of his purchase since there is no proof that he acted in collusion with the 1st defendant or that the price was so low as in itself to be evidence of fraud or collusion. (p. 384 D)

NOTABLE POINTS OF INTEREST

OGWUGBUJSC

1. When a new point on appeal may be determined

The normal rule is that a point presented for the first time in an appellate court should be jealously scrutinized and the appellate court can only decide in favour of the appellant on such a point if it is satisfied that it has before it all the facts bearing on the contention as completely as would have been the case if, the point had arisen at the trial and no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been offered them. (p. 380 E)

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2. Evidence is to be confined to the pleadings

The principle of law needs not be overemphasized that evidence must at all times be directed and confined to the proof or disproof of the issues as settled by the parties in their pleadings. It is not open to a party to rely on issues which are not the basis of his claim or defence and which, at all events he should have, but had not pleaded at the trial. Courts must limit themselves to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of the right to fair hearing. (p. 388 D)

REPRESENTATION

Chief C. Ezebilo for the Appellant

E. C. Ibe for the 1st Respondent

Chief A. O. Mogboh, SAN with A. Haruna for the 2nd Respondent

CASES REFERRED TO

Edokpolo v. Sem Edo Ltd. (1989) 4 N.W.L.R. (Pt. 116) 473 at 498

Sanusi v. Daniel (1956) 1 F.S.C. 93 at 94 and 95

Gates v. Jacobs (1920) 1 Ch. 567

Okuojerero v. Sagay (1958) WRNLR 70

Ademji v. Adeniji (1972) 4 S.C. 10 at 17

Ochonma v. Unosi (1965) NMLR 321

Umunna v. Okwuraiwe (1978) 6-7 S.C. 1 at 7

Oloriode v. Oyebi (1984) 5 S.C. 1 at 37

Enterprises v. Otusanya (1987) 2 NWLR (Part 55) 179

Attorney-General of Oyo State v. Fairlakes Hotels Ltd (1988)

B STATUTES REFERRED TO

Auctioneer's Law of Anambra State ss. 19 & 20

Conveyancing Act 1881 s. 21(2)

High Court Law of Eastern Nigeria Cap. 61 s. 15(1)

C LEAD JUDGMENT BY OGWUEGBU JSC

This appeal came up for hearing on 18th November, 1996. After reading the record of appeal, the judgment of the courts below, the briefs of arguments filed by the parties to this appeal and hearing the oral arguments of counsel for the parties in amplification of their respective briefs, I found no merit in the appeal and dismissed it. I affirmed the decisions of the courts below and indicated that my reasons for the judgment would be delivered today. I now give and deliver those reasons.

The plaintiff who is the appellant in this court instituted a civil action in the High Court of the former Anambra State holden at Enugu against the defendants/respondents herein in Suit No. E/163/82. His claim against the defendants jointly and severally is for:

“an order of court setting aside the purported sale of his property numbered 37 Afubera Street, Modebe Layout, Onitsha by the 1st defendant to the 2nd defendant on the ground that the said sale was fraudulent, made in an irregular manner and in contempt of the court.”

Pleadings were filed and exchanged. After hearing evidence on the case, the learned trial Judge dismissed the plaintiff's case whereupon he appealed to the Court of Appeal. Enugu Division. The court below dismissed his appeal. He is dissatisfied with the judgment of the court below and has further appealed to this court.

The facts briefly stated are that in 1977, the plaintiff used his property the subject matter of the suit leading to this appeal to secure a loan granted by the 1st defendant to Messrs. Nobgroup Motors Limited. A deed of legal mortgage was executed between the parties. It provided for a continuing security to cover both an initial advance of N60,000.00 as well as any future or subsequent advances to be made by the 1st defendant to the principal borrower (Nobgroup Motors Limited). When the borrower defaulted in payment, the 1st defendant issued several demand notices to both the borrower and the plaintiff. It eventually advertised the property for sale in the Daily Star

issue of 14:10:80 and the Weekly Star issue of 27:9:81. The 1st defendant sold the property by public auction on 28:9:81. The property was sold and conveyed to the 2nd defendant by a deed of assignment (Exhibit "F"). The plaintiff thereupon instituted the action on the grounds stated above.

In the court of trial and at the address stage, learned counsel for the plaintiff Mr. Ifebunandu, abandoned the issue of fraud and the purported sale of the property in contempt of court. Counsel stated that he was relying on the issue of irregular sale only and the learned trial Judge considered this allegation alone in his judgment.

This court on 3:3:93 granted the plaintiff leave to appeal out of time and to raise a point of law not raised in the court of first instance and the court below. Three grounds of appeal were filed by the plaintiff numbered "A" to "C". From the three grounds of appeal, four issues were formulated by the plaintiff as arising for determination in this appeal.

At the hearing of the appeal, learned plaintiff/appellant's counsel D informed the court that he had abandoned the arguments in respect of issue numbers three and four. Those issues were covered by grounds "B" and "c" of the grounds of appeal. The court struck out issue numbers three and four together with arguments based on them.

The court was left with issue numbers one and two which read. E

"(i) Were the learned justices of the Court of Appeal right in not seeing any irregularity in the sale of the plaintiff/appellant's property in the face of the finding by the learned trial Judge about shortness of time advertised for the sale without considering the case of Chief Oseni v. A.I.I.C. Ltd. (1985) 3 NWLR (Pt.11) 229 which is binding on them?" F

(ii) Is the consideration of sections 19 and 20 of Anambra State Auctioneers Law Cap. 12 Laws of Anambra State not justified by the guidelines enunciated by the Supreme Court in Fadiora v. Gbadebo (1978) 1 L.R.N. 97 at 108?

Ground "A" of the grounds of appeal from which the above two G issues are formulated without its particulars reads:

"A. Error in Law:- The learned justices of the Court of Appeal erred in law when they held as follows:-

"I can see nothing irregular in the sale of the property in question," in effect approbating the Court of first instance which found as follows:-

"It may very well be that the notice was short in that the advertisement was on 27th September for a sale on 28th September, 1981? without considering sections 19 and 20 of Auctioneers Law Cap. 12 Laws of Anambra

State and came to a wrong decision occasioning injustice.”

The only complaint of the plaintiff in this appeal is that the court below dismissed his appeal without considering sections 19 and 20 of the Auctioneers Law of Anambra State applicable to the then Anambra State.

The learned appellant’s counsel submitted in the appellant’s brief B and in oral argument before us that even though sections 19 and 20 of the Auctioneers Law of Anambra State were not adverted to in the High Court and the Court of Appeal, this court should consider it since leave to raise it had been granted by the court. It was further submitted that the conditions laid down by this court in *Fadiora v. Gbadebo* (supra) had been met, namely: C
 “(a) *That it has before it all the facts bearing on the new contention as completely as if it has been raised in the lower court (i.e. Court of first instance).*

(b) That no satisfactory explanation could have been given in the court below if it had been so raised.”

D The following cases were also cited and relied upon by counsel: *Tasmania (Owners) and Freight Owners v. Smith etc. City of Corinth (Owners)* (1890) 15 App. Cases 223 and *Connecticut Fire Insurance Co. v. Kavanagh* (1892) A.C. 473.

Learned plaintiff/appellant’s counsel submitted that there are no E facts missing in the court of trial and the court below sought to be agitated in this court; that Exhibit “E” is the Daily Star newspaper publication dealing with the auction complained of as being irregular and that the finding of the learned trial Judge which was approved by the court below is as set out in the notice of appeal. He urged us to hold that the decision F of the Court of Appeal in *Chief Oseni v. A.I.I.C. Ltd* (supra) is binding on that court and that it cannot ignore it without distinguishing the facts from the facts of this case. We were urged to allow the appeal and make appropriate consequential orders.

G Both defendants/respondents filed separate briefs of arguments. The arguments in both briefs are substantially the same and I will consider them together. It was submitted in the defendant’s briefs that from the state of the pleadings, the issues before the trial court were:

Whether there was advertisement of the sale, was there any sale by public auction of the property on 28:9:81 and whether the sale was made H fraudulently, in an irregular manner and in contempt of court?

It was the contention of the 2nd defendant’s counsel Chief A.O. Mogboh, SAN that all the material evidence bearing on the issue for its conclusive determination are not before this court. He referred us to the evidence of the plaintiff admitting that notice of the sale of his property was published

in the Daily Star issue of 14:10:80 (Exhibit "J"), his admission in evidence that he saw posters relating to the sale of the property before 28:9:80 and that he did not say how long before 28:9:80 he saw the posters.

He referred us also to the evidence of Rapheal Ofor Ugwuka (P.W.3) where he stated under cross-examination as follows:

"I knew of the sale through a publication two days before the date of the sale. It was published that the auction sale would take place on the 28th September, 1981."

He did not state the nature and the exact date the publication was made. Learned Senior Advocate submitted that from the above pieces of evidence, no evidence was given either by the plaintiff or the defendant pinpointing the exact date on which this Notice/Publication of sale was made because the parties were only interested in showing whether or not there was a publication of sale at all. He argued that from the state of the evidence on the issue of advertisement, it will not be possible for this court at this stage to decide on the adequacy or not of the notice of sale without further evidence. He cited the case of *Edokpolo v. Sem Edo Wire Ind. Ltd.* (1989) 4 NWLR (Pt.116) 473 at 498.

On whether there was any public auction of the property on 28:9:81, Mr. Ibe, learned counsel for the 1st defendant submitted in his brief that the plaintiff and his witnesses gave evidence consistent with the statement of claim that no auction sale took place on 28:9:81 whereas the defendants and their witnesses asserted that an auction sale of the property took place on that date and that the property was in fact sold.

On whether the court below was bound by the decision of the Lagos Division of the Court of Appeal in *Chief Oseni v. A.I.I.C. Ltd* (supra) Chief Mogboh, S.A.N. submitted that the facts and issues in this case are quite different from those in Chief Oseni's case. He said that the affidavit evidence of the parties on which Chief Oseni's case was fought were considerably not in conflict. He contended that in Chief Oseni's case, the parties agreed that after the service of Notice of sale given on 26: 11:82, there was an intervening court action by the mortgagor to stop the sale; that it was after the disposal of the interlocutory proceedings in 1983 that a second No sale by auction of any land shall take place until after at least seven days public notice thereof made at the principal town of the district in which the land is situated, and also at the place of the intended sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated persons as may be prescribed, or if not prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller" notice was published on 28:2:84 for a proposed sale on 29:2:84 and that the Court of Appeal held that the first notice of sale given by the auctioneer on 26:11:82 ceased to have effect on the determination of the

interlocutory proceedings to which it is related. Learned Senior Advocate further submitted that in the present proceedings, there was no intervening proceedings which could have the effect of aborting the proposed sale advertised in the Daily Star issue of 14:10:80 so as to render the same invalid or ineffective for a sale on a subsequent date.

B He further submitted that the attention of the Court of Appeal was not drawn to the provisions of section 21(2) of the Conveyancing Act, 1881 or to the earlier decision of this court in *Sanusi v. Daniel* (1956) SCNLR 288 and 95 where this court held as follows:

C *“The appellant’s complaint is against irregular exercise of the power of sale on the ground that there was a contravention of S. 19(1) of the Sales by Auction Ordinance. It seems to me that the little of the 2nd respondent (purchaser) cannot be impeached since the property was conveyed to him, and that the appellant’s remedy is in damages against the 1st respondent (Mortgagee/lendor) as provided by S. 21(2) of the Conveyancing Act, 1881.....”*

D *It therefore follows that the second defendant had acquired a valid title to the house notwithstanding any defects due to the operation of the Money Lenders Ordinance.....”*

E We were urged to hold that the plaintiff’s remedy may be in damages against the mortgagee and that section 21(2) of the Conveyancing Act, 1881 was in force and applicable to Anambra State by virtue of section 15(1) of the High Court Law of Eastern Nigeria, Cap. 61 then applicable to Anambra State.

F There is no doubt that the point of law being canvassed by the plaintiff in this court, namely, the issue of non-compliance with sections 19 and 20 of the Auctioneer’s Law of Anambra State was not raised in the High Court and the Court of Appeal by either of the parties. The normal rule is that a point presented for the first time in an appellate court should be jealously scrutinised and the appellate court can only decide in favour of the appellant on such a point if it is satisfied that it has before it all the facts bearing on the contention as completely as would have been the case if, the point had arisen at the trial and no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been offered them. See *The Tasmania* (supra) at page 225; *Fadiora v. Gbadebo* (supra) at page 247 and *Conneticut Fire Insurance Co. v. Kayanagh* (supra).

H I will proceed to consider the application of sections 19 and 20 of the Auctioneer’s Law of Anambra State in this appeal. The said sections provide as follows:

“19. No sale by auction of any land shall take place until after at least seven days public notice thereof made at the principal town of the district in which the land is situated, and also at the place of the intended sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated per-

sons as may be prescribed, or if not prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller”

“20. Two days before any sale by auction shall take place, or within such shorter time as the divisional officer may in special circumstances authorize in his discretion notice thereof in writing together with a catalogue of the goods or lands to be sold shall be delivered by the auctioneer to such divisional officer, specifying the place and time at which such sale begins, and within sixty hours after such sale shall have terminated a complete account of the sale verified by oath or affirmation of the auctioneer shall be delivered to the said divisional officer, specifying the price at which each lot shall have been sold. Penalty: a fine of twenty pounds.”

The provisions of the Auctioneers Law cannot be considered in isolation from the case the parties brought to the court. It is a settled principle of practice that parties are bound by their pleadings and cannot be allowed to set out in court a case at variance with their pleadings. See *Metalimpex v. A.G. Leventis & Co. (Nigeria) Ltd.* (1976) All NLR 79; *George & Ors. v. Dominion Flour Mills Ltd.* (1963) 1 SCNLR 117 and *Gates v. Jacobs* (1920) 1 Ch. 567.

It was the contention of the plaintiff that there was no auction sale of the property. This contention is contained in the plaintiff’s statement of claim as well as the evidence led in proof of the averments. Paragraphs 13 and 20 of the statement of claim are relevant and they read:-

“13. No public auction of the plaintiff’s said property ever took place on or about the 28th of September, 1981 along Afubera Street, Modebe Layout, Onitsha, or anywhere near the plaintiff’s said property. The 1st defendant’s solicitor has not supplied to the plaintiff’s solicitor particulars of the place where the alleged auction took place and of the name of the auctioneer which were asked for in letter No. 33/81 of 11th December, 1981.

.....

20 The plaintiff contends that if the 1st defendant had a genuine motive to recover the plaintiff’s indebtedness to the said 1st defendant by the sale of the mortgaged property on the 28th September, 1981 and a public auction conducted within the vicinity of the building would have realised a sum far in excess of N72,000.00 which the 1st defendant alleges he realised from the alleged sale.”

The plaintiff (P.W.1) testified as follows:

“No public auction was conducted in that premises on the 28th September, 1981 as advertised.”

Chief Reuben Oba Nkocha (P.W.2) stated as follows:

"I promised that I would travel to Onitsha the next morning 28:9:81 being the date the auction sale would be conducted. At 8 a.m. on 28:9:81 I was at Onitsha. On my arrival at No. 37 Afubera Street Onitsha I saw the plaintiff already there. I arrived at the property at 8 a.m. I also saw the plaintiff's son at the site of the property..... I was there till 12 noon but there was no auction sale. I went and had my lunch and returned at 1 p.m. and waited till 5 p.m. but no auction sale."

P.W.3 (Rapheal Ofor Ugwuka) said:

"I trade at No. 37 Afubera Street, Onitsha, I was in the premises in 1981 and I am still there. There was no auction sale of or in the premises in 1981. On the 28th September, 1981 I was in the premises but there was no auction sale of the premises."

In paragraph 13 and 14 of the statement of defence of the 1st defendant, it was averred as follows:

"13. In further answer to paragraphs 13 and 14 of the statement of claim the 1st defendant states that the property was sold by Public Auction and that the best price offered was that for which it was sold and that the sale of the 28th September, 1981 was not only advertised in the press but also advertised in many public places by posting on bill boards of banks, court houses. The 1st defendant will rely on the copies of the said advertisements....."

14. The first defendant denies paragraphs 17, 18, 19 and 20 of the statement of claim. The first defendant will urge the court to strike out the paragraph 20 of the statement of claim as it is not based on facts but merely speculative."

The defendants led evidence in support of their averments and in particular, that there was an auction sale of the property on 28:9:81 at the premises and that the 2nd defendant made the highest offer and paid cash on the spot.

From the summary of the pleadings and evidence led by the parties, the case of the plaintiff was that there was no public auction of the property on 28:9:81. On this issue, the learned trial Judge held as follows:

"There was also the allegation that there was no auction sale at all. This is borne out by the evidence of P.W.1, P.W.2 and P.W.3. The allegation that there was no public auction is denied in the statement of defence of both defendants and by D.W.1 and D.W.2. The evidence of P.W.2 Reuben Oba Nkwocha is not very helpful in this issue since he said that he arrived at the site by 8 a.m. but D.W. 1 told me that the property was sold at 7.45 a.m. I have carefully considered the evidence of the plaintiff and his witnesses on this issue of public auction and that of D.W.1 and D.W. 2 on the same issue and I

prefer the evidence of D.W.1 and D.W. 2 that there was in fact an auction sale.”

The court below agreed with the learned trial Judge on the above issue and held as follows:

“As regards whether the judgment is against the weight of evidence on the question as to an auction sale having been held on 28th September, 1981, it is necessary to consider a vital aspect of the statement of claim. In paragraph 14 the plaintiff averred that there was no advertisement of the alleged sale on 28th September. If that be so, then his evidence and that of PW.2, Chief Reuben Oba Nkwocha, that they went to the property in question on the said 28 September as a result of the advertisement in the Daily Star Newspaper of 27th September and in posters cannot be regarded as any evidence but a fabrication. If the plaintiff can contrive such evidence, it only seems to follow that he also got P.W.3, Rapheal Ofor Ugwuoka, to give false evidence.” (Italics is for emphasis only).

There is no doubt that the parties fought the case principally on whether there was in fact an auction sale of the property on 28:9:81 or not and the plaintiff was not consistent in his pleading and evidence as to the advertisement of the sale. The plaintiff having failed to establish that there was no sale, he cannot turn round to contend that sections 19 and 20 of the Auctioneer’s Law were not complied with. Both averments and the evidence on them are inconsistent. Additionally, after a thorough scrutiny of the pleadings and the evidence, I am of the firm view that the applicability of sections 19 and 20 of the Auctioneer’s Law to the sale of the property was not directly in issue nor raised in the courts below. It cannot be said that no further evidence could have been adduced which would affect the decision on it. From the plaintiff’s evidence, apart from Exhibit “E” (the Publication in the Weekly Star Newspaper of 27:9:81), other notices were published advertising the sale. The dates of those other notices were not given in evidence by both parties.

Chief Mogboh, SAN referred to the statement of the learned counsel for the plaintiff/appellant in his brief of argument in the court below where the learned counsel said:

“The Auctioneer who alone would give direct evidence on the date he posted notices of sale on the wall of the premises did not testify and there was no other direct evidence that notices were pasted at least seven days before 28th of September, 1981.”

In the view of Chief Mogboh, SAN the above statement amounts to an admission that if this point had been raised in the trial court it would have

been effectively answered by appropriate evidence. I agree with him. The remarks about the notice of sale made by the courts below are passing remarks and not a finding made in consideration of sections 19 and 20 of the Auctioneer's Law.

Exhibit "E" is not the only evidence touching on the Notice of B sale of the property and the evidence of the plaintiff and his witnesses on this fresh point might depend on the degree of credibility to be attached to them. In fact, the court below berated the evidence of the plaintiff and his witnesses on the issues of advertisement and sale. The evidence was found to be a fabrication and false.

C I am satisfied that the pleadings and evidence bearing on sections 19 and 20 of the Auctioneer's Law are not as full and satisfactory as they would have been had the question of non-compliance with the said sections of the Auctioneer's Law been raised at the trial. See *Fadiora v. Gbadebo* (supra).

D **The courts below held that the sale was valid. The allegation in paragraph 22 of the statement of claim that the sale was fraudulent and in contempt of the court was withdrawn by the plaintiff's counsel at the trial. Therefore, the 1st defendant acted within their powers in selling the property, and the 2nd defendant E is entitled to the full benefit of his purchase since there is no proof that he acted in collusion with the 1st defendant or that the price was so low as in itself to be evidence of fraud or collusion.**

On the whole, there was a misapprehension on the part of learned plaintiff's counsel that the issue of the application of sections 19 and 20 of the F Auctioneer's Law can be raised in this court for the first time.

It was for these reasons that I agreed on 18:11:96 that this appeal failed and that it should be dismissed with N1,000.00 costs to each of the respondents.

G

BELGORE JSC

I agree with the reasoning and the conclusion reached in the judgment of my learned brother, Ogwuegbu, J.S.C. I adopt the judgment as mine in dismissing this appeal as lacking in merit and make the same consequential H orders as made therein.

OGUNDARE JSC

When I dismissed this appeal on 18th November, 1996 I indicated then that I would give reasons for my judgment today. I now give reasons for my judgment dismissing the appeal.

I have had the advantage of reading in advance the reasons given by my learned brother Ogwuegbu, J.S.C. for his judgment dismissing the appeal. B I agree with the reasons given by him which I adopt as mine. The plaintiff having based his case in the two courts below on there being no auction sale on 28th September 1981, cannot now turn around in this court and say that there was a sale but that that sale was in breach of sections 19 and 20 of the Auctioneers Law of Anambra State - see: Ogunade v. Ogunade (1965) NMLR C 136. To sustain that case he would need to amend his pleadings and lead evidence in contradiction to evidence led by him at the trial. All that he cannot now do in this court.

It is for the above reasons that I dismissed the appeal on 18th November, 1996.

D

ONU JSC

On 18th November, 1996 I dismissed the appellant's appeal, declined to call upon the respondent's counsel to reply, awarded in the respondent's favour N1,000 costs each and indicated I would give my reasons for dismissing the appellant's appeal today. I now give my reasons as follows:-

In my consideration of issues 1 and 2 which together overlap ground A of the appellant's grounds of appeal, I wish to say emphatically that in as much as the idea of taking cognisance of sections 19 and 20 of the Auctioneer's Law Cap. 12, applicable to Anambra State is concerned, the appellant's grouse in the trial court to the effect that "*no public auction of the plaintiff's said property ever took place on or about the 28th of September, 1981 along Afubera Street, Modebe Layout, Onitsha, or anywhere near the plaintiff's said property,*" Vide paragraph 13 of the Statement of Claim, this was countered by 1st respondent's paragraph 13 of the Statement of Defence where it was pleaded inter alia "*that the sale of the 28th September, 1981 was not only advertised in many public places by pasting on boards of banks, court houses. The first defendant will rely on the copies of the said advertisements*" H "The advertisements under reference which were made in the Weekly Star Newspaper of 14/10/80 and 27/9/81 tendered by the appellant himself and received in evidence as Exhibits J and E; the evidence of P.W.2, Chief Reuben Oba Nkwocha, to the effect that he "saw notices of sale pasted on the wall of

the (property)" and P.W.3, Raphael Ofor Ugwuoka, to the effect that he "knew of sale through a publication two days before the date of sale" - are all but overwhelming evidence of advertisement of the sale of the property to leave any room for it (the sale) to be successfully impeached. Besides, the trial court which saw and heard the witnesses dealt extensively with the issue and preferred the evidence of the respondents. When therefore under the heat of rigorous cross-examination the appellant said *inter alia*" I had also seen posters for the sale before the 28th September, 1981 saying that there would be a sale on the 28th September, 1981" he was thereby corroborating the above averment in the 1st respondent's statement of defence and cannot now be heard to equivocate. Indeed, the deposition knocks the bottom off the appellant's complaint since the issue before the court was not whether the period between the advertisement of sale and the actual sale was long or short, but whether there was in fact an auction sale at all.

The conclusion arrived at by the court below underscores once more the need for courts to abide by their function to adjudicate on issues properly brought before them by the contesting parties in accordance with the rules of court and procedure. See *Okuojerero v. Sagay* (1958) WRNLR 70; *Adeniji v. Adeniji* (1972) 4 S.C 10 at 17; *Ochonma v. Unosi* (1965) NMLR 321 and *Umunna & Ors. v. Okwuraiwe & Ors.* (1978) 6-7 S.C 1 at 7. In the instant case, since this issue of length of notice is being raised for the first time in this court and prior leave has not been obtained, it is not an issue arising from the decision of the court below and it is therefore incompetent and I so hold. See *Oloriode v. Oyebi & Ors.* (1984) 5 S.C 1 at 37; *Management Enterprises v. Otusanya* (1987) 2 NWLR (Pt.55) 179; *Bennet Ifediorah & 4 Ors v. Ben Ume & Ors.* (1988) 2 NWLR (Pt.74) 5 at 16 and *Honika Sawmill (Nig.) Ltd. v. Hoff* (1994) 2 NWLR (Pt.326) 252 at 261.

For these reasons and the more elaborate ones contained in the lead judgment of my learned brother Ogwuegbu, J.S.C a preview of which I had, I too dismiss this appeal. I subscribe to the consequential orders inclusive of costs contained therein.

H **IGUHJSC**

On the 18th November, 1996, I dismissed this appeal and then indicated that I would give my reasons for so doing today.

I have since had the advantage of reading in draft the reasons for judgment just delivered by my learned brother, Ogwuegbu, J.S.C, and I agree

entirely with the reasoning and conclusions therein.

Only issues (i) and (ii) were canvassed before us in this appeal. They relate to the irregularity or otherwise in the sale of the appellant's property under the deed of mortgage, Exhibit A. They also raise the question whether the appellant can now for the first time raise the fresh issue of compliance with the mandatory provision of sections 19 and 20 of the Auctioneers Law, Cap. B 12, Laws of Anambra State of Nigeria. For ease of reference, the said sections provide thus -

"19. No sale by auction of any land shall take place until after at least seven days public notice thereof made at the principal town of the district in which the land is situated, and also at the place of the intended C sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated persons as may be prescribed, or if not prescribed, as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller."

"20 Two days before any sale by auction shall take place, or within such shorter time as the divisional officer of the district where such sale is to take place, may, in special circumstances, authorize in his discretion, notice thereof in writing together with a catalogue of the goods or lands to be sold E shall be delivered by the auctioneer to such divisional officer, specifying the place and time at which such sale begins, and within sixty hours after such sale shall have terminated a complete account of the sale verified by oath or affirmation of the auctioneer shall be delivered to the said divisional officer, specifying the price at which each lot shall have been sold. Penalty: a fine of F twenty pounds."

The contention of the appellant is that even though the said provisions of that law were not adverted to in either the trial court or the Court of Appeal, they can now be considered by this court with leave.

Without doubt, an appellant will not be allowed to raise on appeal a fresh point which was not raised, tried or considered and pronounced upon G by the courts below. Where, however, the question involves substantial point of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision on it, the appellate court will allow the question to be raised and the point taken so as to prevent an obvious miscarriage of justice. See Attorney-General H of Oyo State v. Fairlakes Hotels Ltd (1988) 5 NWLR (pt.92) 1 at 29; John Bankole and Others v. Mojidi Pelu and Others(1991) 8 NWLR (Pt.211) 523.

It cannot be disputed that the question of compliance or otherwise

with the provisions of sections 19 and 20 of the Auctioneers Law, Cap 12, of Anambra State being raised for the first time in this court as a distinct issue for determination, the appellant necessarily requires the leave of this court to canvass the point. See *Uza Uor and others v. Paul Loko* (1988) 2 NWLR (Pt.77) 430 at 437. It is plain that the leave of this court was not obtained to raise the B new point now sought to be canvassed.

In the second place, learned counsel for the respondents did stress that the necessary material evidence relevant to the new issue for its fair and just determination are conspicuously not before the court. They argued that the provisions of sections 19 and 20 of the Auctioneers Law now sought to be C invoked were fully complied with by the respondents prior to the sale in question. They however added that as the points concerned were neither raised nor canvassed nor were they live issues before the trial court or the Court of Appeal, the respondents had no reason to lead any evidence there-upon.

D The principle of law needs not be over-emphasized that evidence must at all times be directed and confined to the proof or disproof of the issues as settled by the parties in their pleadings. It is not open to a party to rely on issues which are not the basis of his claim or defence and which, at all events, he should have, but had not pleaded at the trial. Courts must limit themselves E to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of the right to fair hearing. See *Metalimpex v. A.G. Leventis and Co. Ltd.* (1976) 2 S.C. 91; *Shell B.P. Ltd. v. Abedi* (1974) 1 All NLR (Pt.1) 13; *Alhaji Ogunlowo v. Prince Ogundare* (1993) 7 NWLR (Pt.307) 610 at 624 etc. To found a F judgment in favour of a plaintiff in a court of pleadings upon a material point neither pleaded nor canvassed at the trial will necessarily result in a miscarriage of justice. This is because such a plaintiff would have, owing to his failure to plead such a material point, forced the defendant into an invidious position of losing the opportunity of calling evidence to con- G trovert or disprove such a point. See *tool. O. Idahosa and Another v. D.N. Oronsaye* (1959) SCNLR 407 . Besides it is a basic principle of the determination of disputes between parties that judgment must be confined to the issues raised by the parties in their pleadings. It is not competent for the court to give judgment on a case contrary to the issues before H it as raised by the parties. See *Commissioner for Works Benue State and Another v. Devcon Development Consultants Ltd and Another* (1988) 3 NWLR (Pt.83) 407; *Nigerian Housing Development Ltd. and another v. Yaya Mumuni* (1977) 2 S.C. 57; *Adeniji and others v. Adeniji and others* (1972) 1 All NLR (Pt.1) 278.

In the present case, the point now sought to be raised is an entirely new issue neither pleaded nor canvassed, before the trial. It was also not raised directly as an issue in the court below and neither the trial court nor the Court of Appeal was in a position to consider or pronounce upon it. The appellant's grouse before the trial court was essentially as pleaded in paragraph 13 of his Statement of Claim as follows -

"13. No public auction of the appellant's said property ever took place on or about the 28th September, 1981 along Afubera Street, Modebe Layout, Onitsha, or any where near the appellant's said property "

The appellant's case, in the trial court therefore was that there was no public auction of his property at all.

There was no plea in the alternative that even if an auction sale was conducted, the same was illegal for non-compliance with the necessary length of notices. Had this been done, the same would have constituted an issue which the respondents would be obliged by law to controvert or disprove. The position, therefore, is that the new point now sought to be raised was not an issue before the trial court. Consequently the respondents, as they were perfectly entitled to do, adduced no evidence to controvert the same. It is clear to me that further evidence will be necessary for its fair and just determination. In my view, the new issue now sought to be raised cannot now be canvassed before this court. See too *Edokpolo v. Sem Edo Line* (1989) 4 NWLR (Pt.116) 473 at 498.

Additionally, no leave of this court was sought by the appellant or granted by this court to raise for the first time, the new point now sought to be raised, which was clearly not an issue disclosed in the pleadings before the trial court. This seems to me fatal to the issue under consideration.

The conclusion I therefore reach is that no matter from what ever angle one examines this matter, issues (i) and (ii) must be resolved against the appellant.

On the case as fought before the trial court, the learned trial Judge after a painstaking and most careful review of the evidence found thus -

"The issue raised in the plaintiff's pleading is that there was no advertisement at all. That issue was demolished by the plaintiff himself. There was also the allegation that there was no auction sale at all. This is borne out by the evidence of P.W.1, P.W.2 and P.W. 3. The allegation that there was no public auction is denied in the Statement of Defence of both defendants and by P.W.1 and D.W.2.

The evidence of P.W.2 Reuben Oba Nkwocha is not very helpful in this issue since he said that he arrived at the site at 8 a.m. but D.W.1 told me that the property was sold at about 7.40 a.m. I have carefully considered the

evidence of the plaintiff and his witnesses on this issue of public auction and that of the D.W.1 and D.W.2 on the same issue and I prefer the evidence of D.W. land D.W.2 that there was in fact an auction sale I hold that there was an auction sale.”

He then proceeded to dismiss the appellant’s case.

B The above findings of the trial court were affirmed by the Court of Appeal. These are concurrent findings of fact which I myself have carefully examined and can find nothing to interfere with them. It is for the above and the more detailed reasons contained in the leading “Reasons for judgment” of my learned brother, Ogwuegbu, J.S.C., that I dismissed the appeal with N1,000.00 costs to the respondents.

Appeal dismissed

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