

IN THE FEDERAL COURT OF APPEAL
HOLDEN AT LAGOS
22ND MARCH, 1998. FCA/L/153/77
CORAM:- S.A. OGUNKEYE, M.L. UWAIS, R.O. OKAGBUE JJCA.

MADAM AJIKE AJEYALEMI PLAINTIFF/RESPONDENT
AND
ANIMASHAUN DEFENDANT/APPELLANT

JUDGMENTS - *Enforcement - Sale of property- Where on the date of the sale the judgment debt had been satisfied - The sheriff had nothing to dispose of.*

JUDGMENTS - *Writ of execution - The payment of the judgment debt rendered the issue of the writ void ab initio - And the purported sale following the execution was irregular.*

TRESPASS - *Better title - Trespass by the appellant when the respondent was in possession - Appellant's claim to title based on an irregular sale cannot be construed as a better title*

FACTS

The plaintiff/respondent instituted an action at the Lagos High Court claiming against the defendant/appellant as follows, damages for trespass, recovery of possession and an injunction restraining the defendant his servant or agent from committing further acts of trespass on the land and property known as 32 Oke Ona Street, Ikate Lagos.

The case of the defendant was that the property in dispute became vested in him by virtue of a certificate of purchase issued by the High Court of Justice. He said the property was sold at public auction by an order of Court and that he was put in possession by the High Court sheriff in exercise of his powers under the provisions of the Sheriff and Civil Process Act and the Judgement Enforcement Rules. The case of the plaintiff on the other hand was that she bought the property in ques-

tion from the judgment debtor before the purported sale by the bailiff. Moreover the judgment debt had been satisfied before the sale to the defendant. The trial High Court gave judgment for the plaintiff. Dissatisfied, the defendant appealed to the Court of Appeal, Lagos Division.

ISSUE FOR DETERMINATION

Whether the learned trial judge was right to hold that the sale of the property in dispute to the defendant was defective.

HELD (Unanimously dismissing the appeal per judgment delivered by **OKAGBUE JCA**)

Sale of property

1. In our view the entire case really turns on the purported sale of the property. If on the date of the sale the judgment had been satisfied, then the Sheriff had nothing to dispose of. (p. 1219 C)

Writ of execution

2. There is evidence to the effect that the judgment debt and costs had been satisfied before the date of sale. There was evidence that when the bailiff was told that the judgment had been satisfied he insisted on official confirmation. There is also evidence in Exh. D. to the effect that the Senior Registrar had on that very day instructed the Deputy Sheriff to withdraw the attachment on the property. In their judgment in Total Nigeria Ltd v. Electrical & Mechanical Construction Co. Ltd. cited by Mr. Sikuade the Supreme Court said ".....the payment of the debt by the judgment debtor rendered the issue of the writ of execution of July 15, 1970 void ab initio and that the purported sale following the execution was irregular and should be set aside ex debito justitiae." (p. 1219 D)

Trespass - Better title

3. We agree with the learned trial Judge that the action was not for setting the sale aside, but the only defence which the appellant advanced was his title based on the purported sale. The learned trial Judge found that the Respondent was in possession when the appellant committed the trespass and the only possible justification would be a better title in the al-

leged trespasser. Obviously, a title based on an irregular sale cannot be construed as a better title. (p. 1219 G)

CASES REFERRED TO

Federal Commissioner of Works & Housing v. Labadebi (1977) 11 - 12 S.C. 15

Total (Nig) Ltd. v. Electrical & Mechanical Construction Co. Ltd. (1972) 8/9 S.C. 64 p. 80

Savage v. Uwechia (1972) 1 ALL N.L.R. 251 pp. 258 259

JUDGMENT DELIVERED BY OKAGBUE JCA

The plaintiff's claim against the defendant was for damages for trespass, recovery of possession and an injunction restraining the defendant his servant or agent from committing further acts of trespass on the land and property known as 32 Oke Ona Street, Ikate, hereafter referred to as "the property."

The defendant pleaded that the property was vested in him by virtue of a certificate of purchase issued by the High Court of Justice. He said the property was sold at a public auction by an order of Court and that he was put in possession by the High Court Sheriff in exercise of his powers under the provisions of the Sheriff and Civil Process Act and the Judgment Enforcement Rules

Plaintiff in evidence said she had bought the property from the judgment debtor before the purported sale by the bailiff and that she eventually purchased the freehold from the landlords the Ajao family.

The Lagos High Court gave judgment for the plaintiff. He ordered the defendant to give up possession of the property and also granting an injunction against the defendant. It is against this decision of the High Court that the appellant who was the defendant in the lower Court has appealed to this Court.

There grounds of appeal were filed, but counsel for Appellant sought and obtained leave to argue eleven additional grounds. These were numbered 4-14. Counsel then announced that he was abandoning grounds 2 and 3 and these were struck out.

Counsel for Appellant said he would argue Grounds 1,5,6,7,9, 10, and 11 together and later take grounds 8, 12, 13 and 14.

Grounds 1 states *"that judgment is against the weight of evidence."*

B Grounds 5 states:

"The learned trial Judge erred in law in admitting Exh. "C" in evidence and for overruling the objections of the counsel for the defendant/appellant at the trial."

C Ground 6 states:

"The learned trial Judge erred in law and on the facts in relying on Exh. "C".

Ground 7 states as follows:

D *The learned trial Judge misdirected himself in law and on the facts in holding as follows:-*

"The plaintiff has adduced evidence of how she became the owner of this property, and thereby came into possession. According to her, the house was sold to her on 1st July, 1967 by Miss Oputa before the purported sale on 28th July, 1967..... Both Exhibits "C" and "C3" seem to confirm this evidence which was never contradicted by the defendant".

Ground 9 states as follows:-

F *"The learned trial Judge misdirected himself in law and on the facts in holding as follows:-*

"There was evidence at the time of sale that the house has been sold to the plaintiff by the judgment debtor".

Ground 10 states:-

G *"The learned trial Judge erred in law and on the facts in finding against the defendant/Appellant without considering the provision of or in spite of the provisions of section 20(1) and (2), 41, 44, 46,(1), 48 and 50 of the Sheriff and civil Process Act."*

Grounds 11 states:-

H *"The learned trial Judge misdirected himself in law and on the fact in holding as follows:-*

"There was also evidence that the lease of the land on which the house was erected had expired so that the leasehold interest of the judg-

ment debtor has expired."

Counsel said evidence of plaintiff/Respondent on oath departed materially from the pleadings: He attacked the admission of Exh.C. which was a receipt of the judgment debt and costs from the firm of Coker and Sikuade, Solicitors and thumb impressed by the judgment creditor. He B said it contained no jurat and was never pleaded. He said there was no evidence that Exhs. D. and D1 were ever received.

Exh. D. is a letter from the firm of Coker and Sikuade informing the Registrar, High Court, Ikeja that the Judgment debt and costs had been paid and that he should withdraw the writ of attachment issued at C the instance of the judgment creditor.

Exh. "D1" is the letter from the Senior Registrar' High Court, Ikeja to the Assistant Sheriff, Magistrates' Court, Ikeja instructing him to remove execution from the attached property and stop the sale scheduled for the date of the letter. This letter was dispatched on the 28th of July, 1967. D

Counsel submitted that if the learned trial Judge had made a proper evaluation of the evidence before him he could have come to the E conclusion that the plaintiff had not made out her case.

He referred to the case of Federal Commissioner of Works & Housing v. Labadebi (1977) 11 - 12 S.C. 15.

To referred points Mr. Sikuade Counsel for the respondent said F the arguments were on admissibility. He said counsel did not at any time in the lower Court raise the point that a document was not pleaded. He said the document was admitted as a res.

He said the question whether the sale was proper was dealt with G by the learned trial Judge, who found as a fact that before the sale to the appellant, the judgment debt and costs had been paid. He pointed out that the learned trial Judge accepted Exh. G, which was tendered on behalf of the appellant and which clearly put the case of the respondent.

He submitted that any sale of the property of the judgment debtor H after the judgment debt had been satisfied is void ab initio. He referred to the case of Total (Nigeria) Ltd. v. Electrical & Mechanical Construction Co. Ltd (1972) 8/9 S.C. 64 p. 80.

In the second group counsel for Appellant dealt with Grounds 8, 12 and 13.

Ground 8 states:

"The learned trial Judge misdirected himself in law and on the facts against the defendant/appellant in holding as follows:

There was no evidence that both Exhibits D and D1 were never received before the sale and if they were not received I think (sic) that the protest by both the judgment debtor and the plaintiff should have put the bailiff on guard before proceeding with the sale."

Ground 12 states"

The learned trial Judge erred in law and on the facts in holding as follows:-

"On the evidence before me it would appear that the defendant's title was defective in the sense that at the time of sale the debt has been discharged, and also at the time judgment debtor had no title to pass."

Ground 13 states:-

"That the learned trial Judge failed in law to consider adequately the defence of the defendant/appellant that the sale of the property to the defendant/appellant by process of law had become absolute, twenty-one days after the sale and at the time of hearing of the matter."

In dealing with these grounds counsel for appellant said there were two conflicting findings which cannot stand. He said finding that the bailiff should have been called, was never an issue.

He said it was never an issue that absence of notice invalidated the sale. He said the learned trial Judge placed a far heavier onus on the defendant.

Counsel for respondent said he had dealt with the question of the sale and need not repeat his arguments.

Finally, Ground 14 states:-

"The learned trial Judge erred in law and on the facts in stating as follows:-

"The defendant also pleads by way of estoppel the ruling in motion in suit No. IK/190/64. This was a motion for extension of time within which the plaintiff should apply for the sale to be set aside. I do

not see how this can be a defence to an action for possession and damages for trespass. For a judgment to operate as Estoppel per rem judicatum, it must be a final judgment. The ruling referred to above seems to me an interlocutory judgment and not a final one This is not such a judgment: as such I do not think that the plea avails the defendant." B

Counsel for appellant submitted that where a step has been taken by the parties and the finding of the tribunal is left as it is, it will be binding on the parties. He referred to the Supreme Court decision in Savage v. Uwechia (1972) 1 All N..L.R. 251 pp 258, 259. C

To this Mr Sikuade said that a notice in an interlocutory application for extension of time can never amount to res judicata

In our view the entire case really turns on the purported sale of the property. D

If on the date of the sale the judgment had been satisfied, then the Sheriff had nothing to dispose of.

There is evidence to the effect that the judgment debt and costs had been satisfied before the date of sale. There was evidence that when the bailiff was told that the judgment had been satisfied he insisted on official confirmation. There is also evidence in Exh. D. to the effect that the Senior Registrar had on that very day instructed the Deputy Sheriff to withdraw the attachment on the property. E F

In their judgment in Total Nigeria Ltd v. Electrical & Mechanical Construction Co. Ltd. cited by Mr. Sikuade the Supreme Court said ".....the payment of the debt by the judgment debtor rendered the issue of the writ of execution of July 15, 1970 void ab initio and that the purported sale following the execution was irregular and should be set aside ex debito justitiae." G

We agree with the learned trial Judge that the action was not for setting the sale aside, but the only defence which the appellant advanced was his title based on the purported sale. H

The learned trial Judge found that the Respondent was in possession when the appellant committed the trespass and the only

possible justification would be a better title in the alleged trespasser. Obviously, a title based on an irregular sale cannot be construed as a better title.

In the circumstances therefore the appeal fails and it is hereby
B dismissed.

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