

SUPREME COURT OF NIGERIA

14TH JULY, 2000. SC. 60/1995

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, M. E.
OGUNDARE, U. MOHAMMED, A. O. EJIWUNMI, JJSC**

G. C. AKPUNONU APPELLANT
(DOING BUSINESS UNDER THE NAME AND STYLE
OF G. C. AKPUNONU TRADING COMPANY)

AND

1. BEAKART OVERSEAS RESPONDENTS
2. EDDY UGWU (NIGERIA) LTD
3. CHIEF EMMANUEL OBI

APPEALS - Issues - Incompetence - Ruling that was not appealed against
- Issues which seek to question that ruling - Are incompetent and ought to
be struck out.

AUCTION SALES - Legality of sale of immovable properties - Setting
aside - For the sale to be set aside - It must be proved that there was
material irregularity in the conduct of the sale - Which resulted in sub-
stantial injury.

AUCTION SALES - Notice of sale - Where properties had been adver-
tised for sale - Which was suspended until a motion for stay of execution
was disposed of - There was no need to issue a fresh notice of sale.

PRACTICE & PROCEDURE - Crime alleged in a civil case - A party
who intends to prove charges of fraud - Must do so beyond reasonable
doubt - And must have set them down specifically in his pleading.

FACTS

In the Aba High Court, the appellant prayed for an order to set
aside the sale of his immovable properties pursuant to a writ of execution
because of irregularities. Between 1977 and 1978 the 1st respondent

sold goods to the appellant on credit. The goods had been shipped to him. The appellant cleared the goods from the Wharf, sold them and refused to pay the 1st respondent despite repeated demands. In suit No. A/237/81 the 1st respondent sued the appellant in the High Court claiming BF 24,949.031 (Belgian Francs) equivalent to N623,725.78 being the total price of the goods sold and delivered to the appellant. The appellant did not contest the suit. On 15/4/82, the High Court entered judgment in favour of the 1st respondent for the sum of N623,725.78 with N120.00 costs. The appellant paid only the costs. He did not appeal against the judgment. Subsequently the appellant brought several applications in the High Court to stay execution of the court's judgment. The applications were all dismissed. On 13/8/86 the appellant applied to the Court of Appeal for stay of execution of the judgment pending appeal; and extension of time within which to appeal against the judgment. In its ruling, the Court of Appeal, granted the extension of time sought for and made an order of stay of execution of the judgment subject to a condition. The appellant failed to comply with any of the orders given by the Court of Appeal. Appellant's movable properties were later attached and sold but the proceeds were grossly insufficient to satisfy the judgment debt.

Consequently, the 1st respondent sought and obtained leave in the High Court to attach and sell appellant's immovable properties. To prevent the sale from taking place the appellant paid part of the judgment debt. Thereafter he brought an application in the High Court praying inter alia, that the balance of the judgment debt be liquidated instalmentally. The application was struck out for want of diligent prosecution. There was no appeal against this order. Consequently, a public notice advertising the sale of the appellant's immovable properties was issued by the deputy sheriff and a date of sale was fixed. Before then however, the appellant filed another application seeking for the same reliefs as he did in the motion which was struck out with one additional prayer. The application was unsuccessful. There was also no appeal against the decision. After the ruling, the appellant's immovable properties were sold at an auction conducted by the chief bailiff. The 2nd and 3rd defendants bought the properties. Hence the appellant brought an application in the High

Court praying as aforesaid. The application was heard and dismissed by the High Court. Dissatisfied, the appellant appealed against the ruling to the Court of Appeal, Port Harcourt Division. The appeal was unanimously dismissed. The appellant has further appealed to the Supreme Court raising five issues. Four of the issues were adjudged in competent.

ISSUE FOR DETERMINATION

Whether or not the sale of Appellant's immovable properties on 9/1/92 was in accordance with the law.

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

Appeals - Issues - Incompetence

1. The Ruling of 23/6/89 was not appealed. The issues which now seek to question that ruling without an appeal are therefore clearly incompetent. And they ought to be struck-out. I hereby strike them out. It makes no difference that the same or similar issues had been raised and answered in the Court of Appeal because they were not properly or validly raised either. (p. 2725 A)

Legality of sale of immovable properties

2. On the state of the facts as stated above, I am inclined to agree with the lower courts that the sale by auction of Appellant's immovable properties was done in accordance with the law. I also agree with them that the properties were not undervalued because there was no such evidence anywhere before the trial court. Moreover for the sale to be set aside the Appellant must not only prove that there was material irregularity in the conduct of the sale but also that he sustained substantial injury by reason of such irregularity (See for example section 46 of the Sheriffs and Civil Process Law Cap. 118 Laws of East Eastern Nigeria, 1963, ALHAJI NAKYAUTA VS ALHAJI MAIKIMA (1977) 6 SC. 51 GOVERNMENT OF ASHANTI VS KORKOR 4 WACA 83). The Appellant as I said failed to prove any irregularity let alone that he had sustained any injury as a result of the irregularity. (p. 2725 E)

Crime alleged in a civil case

3. It is also settled that a party who intends to prove charges of fraud or charges of criminal malversation or felony must do so beyond reasonable
B doubt. And that before he can be allowed to prove them, he must have set them down specifically in his pleading (see section 37(1) of the Evidence Act IKOKU VS OLI (1962) 1 ALL NLR 194). That is not the case here. (p. 2725 H)

C
Auction sales - Notice of sale

4. The facts again show that the properties had been advertised for sale on 17/12/91 and that it was because of the Appellant's motion for a stay of execution that the sale was suspended until that motion was disposed
D of on 8/1/92, and the sale conducted on 9/1/92. That was the right thing to do. The Notice of sale was never withdrawn or cancelled by anyone. There was therefore no need to have issued a fresh notice of sale when the Appellant's motion was finally disposed of. (p. 2726 A)

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REPRESENTATION

Chief Enechi Onyia, S. A. N. with D. J. Maduekwe for the Appellant.

Chief O. Ugolo for 1st Respondent.

F K. E. Ogbonna for 2nd Respondent.

F. C. Abosi for 3rd Respondent.

CASES REFERRED TO

G Nakyauta v. Maikima (1977) 6 SC. 51

Government of Ashanti v. Korkoro 4 WACA 83

Ikoku v. Oil (1962) 1 ALL NLR 194

LEAD JUDGMENT BY KUTIGI JSC

H This is an appeal against the decision of the Court of Appeal delivered on 28th February 1995, dismissing Appellant's appeal against the Ruling of Aba High Court dated 7/7/92 refusing Appellant's application for an order to set aside the sale of Appellant's immovable properties

pursuant to a Writ of Execution.

The facts giving rise to this appeal arose between 1977 and 1978 when the 1st Respondent sold goods to the Appellant on credit. The goods had been shipped to him. The Appellant cleared the goods from the Wharf, sold them and refused to pay the 1st Respondent despite repeated demands. In Suit No. A/237/81 the 1st Respondent sued the Appellant in the High Court claiming BF24,949.031 (Belgian Francs) equivalent to N623,725.78 being the total price of goods sold and delivered to the Appellant. The Appellant did not contest the suit. On 15/4/82, the High Court entered judgment in favour of the 1st Respondent for the sum of N623,725.78 with N120.00 costs. The Appellant paid only the costs. He did not appeal against the judgment. I shall have more to say on this later.

Five months after the judgment, the Appellant on 17/9/82 filed a Motion in the High Court asking for a stay of execution of the court's judgment and for instalmental payment of the judgment debt. In its Ruling the High Court dismissed the application saying that it would amount to frustrating the judgment of the court. On 18/4/83 the Appellant filed another motion for a stay of execution. The application was dismissed only on 8/7/85. On 24/7/85 he filed yet another motion in the High Court to substitute fresh figures of N363,903. 34 for the judgment debt. The motion was also dismissed on 27/3/86. Subsequently on 8/8/86 Appellant's movable properties were attached.

The Appellant who remained undaunted on 13/8/86 by Motion on Notice applied to the Court of Appeal for the following reliefs:-

- (a) Stay of execution of the judgment of High Court of Imo State, Aba, Aba Judicial Division dated 15/4/82 pending appeal.
- (b) Extension of time within which to appeal against the said judgment of 15/4/82.

In its Ruling delivered on 25/11/86, the Court of Appeal ordered as follows:-

- "(i) That Extension of time is hereby granted as sought until 20th December 1986 with N25.00 costs to the Respondent.*
- (ii) It is further ordered that the stay of execution of the judg-*

ment debt outstanding since April 1982 be stayed subject to this condition that the sum of N350,000.00 be paid to the Respondent on or before 31st December, 1986. The balance due shall be paid half yearly at the rate of N50,000.00 until the debt is disposed off. Costs of this application is assessed at N100.00 to the Respondent."

The Appellant woefully failed to comply with any of the orders given by the Court of Appeal above. It later became necessary to sell Appellant's attached movable properties as earlier mentioned. These were sold and the proceeds thereon were grossly insufficient to satisfy the judgment debt. Consequently the 1st Respondent filed a Motion on Notice in the High Court for leave to attach and sell Appellant's immovable properties. The application was granted on 23/6/89 on the condition that the properties "shall not be sold on or before 31/12/89." being the date when the last half yearly instalmental payment ordered by the Court of Appeal above, would have become due and payable. To prevent the sale taking place, the Appellant on 9/11/90 paid the sum of N371,000.00 as part payment, leaving the outstanding balance of N251,973.78 to be paid.

Smelling imminent sale of his immovable properties, the Appellant on 12/10/91 filed an application in the High Court praying for the following reliefs -

(a) To suspend the execution of the balance of judgment debt of N251,973.78.

(b) That the balance of the judgment debt be liquidated by N5,000.00 monthly instalment or on the payment by the Federal Ministry of Defence the debt of N2,000,000.00 which the applicant is being owed.

The application was struck out on 2/12/91 for want of prosecution as both appellant and his counsel were absent. There was no appeal against this order. Consequently, a public notice advertising the sale of Appellant's immovable properties was prepared and signed by the Deputy Sheriff on 10/12/91, and the date of sale was fixed for 17/12/91. Before then, however, the Appellant had on 10/12/91 filed another application in Court seeking for the same reliefs as he did in the motion which was struck out on 2/12/91 above with one additional prayer only thus:-

"That part of the landed property mortgaged by the Appellant

be released to him so that the Appellant may sell same for the liquidation of the balance of the judgment debt."

The motion came up on 8/1/92 and it was dismissed. There was also no appeal against the decision. After the Ruling, the 1st Respondent and the court officials fixed the date of sale of Appellant's immovable properties for 9/1/92. The sale was duly conducted by the Chief Bailiff and his other officers on the said date. The 2nd Respondent bought one of the properties known as No. 188 Faulks Road, Aba, an uncompleted building; while the 3rd Respondent purchased the property described as No. 180 Faulks Road, Aba, (Opposite former No. 169 Sam Mbakwe Road, Aba).

By Motion on Notice dated 17/1/92, the Appellant now prayed the High Court for an order setting aside the sale of his immovable properties because of irregularities. Numerous affidavits and counter affidavits were filed. The sale had been challenged mainly because of irregularities, fraud and collusion. The motion was heard and dismissed by the High Court on 7/7/92.

The Appellant not being satisfied with said Ruling appealed to the Court of Appeal. Port-Harcourt. The Court of Appeal in a unanimous judgment delivered on 25/2/95 dismissed Appellant's appeal. The Appellant still dissatisfied with the judgment of the Court of Appeal has further appealed to this court.

In view of the number of applications or motions filed by the Appellant in the High Court and which were either struck-out or dismissed. I propose to settle once and for all which of the Rulings or Orders of the High Court were the subject matter of appeal to the Court of Appeal and which consequently gave rise to the present appeal in this Court. This exercise is necessary because as we shall soon see the Appellant in his brief of argument clearly appears to be arguing other Rulings or. Orders or decisions of the High Court which he did not appeal against. That is totally wrong as the law does not allow it.

Now, pages 114-116 of the record is the Notice of Appeal dated 8/7/92 and filed on 9/7/92 by the Appellant in the Court of Appeal. The Appellant on page 114 of the Notice of Appeal clearly stated that he was

appealing against the decision/Ruling of the High Court delivered on 7/7/92 and with which he was dissatisfied. The Ruling of 7/7/92 as I have shown above, is the one which dismissed Appellant's motion to have the sale by auction of his immovable properties set aside. The Court of Appeal as above stated in its judgment of 28/2/95 confirmed the decision of the High Court and dismissed Appellant's appeal. In other words both the High Court and the Court of Appeal ruled that the sale (by auction) of Appellant's immovable properties was valid and proper. The appeal in this Court which is against the judgment of the Court of Appeal should therefore, generally concern itself with the proprieties of the sale of the immovable properties only and nothing else.

All the parties involved in the appeal filed and exchanged their briefs of argument. At the hearing of the appeal learned counsel for the parties adopted their respective briefs. The Appellant on page 4 of his brief raised five (5) issues for determination as follows -

"1. Whether the High Court or Court of Appeal has jurisdiction to hear and determine application to sell part of the attached immovable properties of the Appellant to satisfy the balance of the judgment debt.

2. Whether the application in the High Court was an abuse of process.

3. Whether the court below properly stated the law on the fact when they held that failure to hear the appellant in respect of the application to sell part of the attached landed properties to satisfy the judgment debt is not a denial of fair hearing which occasioned miscarriage of justice.

4. Whether the failure of the court below to exercise its power under sections 16 & 27 of the Court of Appeal Act resulted in miscarriage of justice.

5. Whether the sale of the attached landed properties of the appellant on 9th January 1992 was in accordance with the provisions of the H Sheriffs and Civil Process Law and Rules; and if not whether the irregularities did not result in substantial injury to the Appellant."

Issues 1, 2, 3, & 4 in short all relate to "an application in the High Court to sell part of the attached immovable properties of the Appellant."

The facts revealed above show that it was the 1st Respondent who made the application and which the High Court granted on 23/6/89 on condition that the properties shall not be sold on or before 31/12/89. **The Ruling of 23/6/89 was not appealed.** The issues which now seek to question that ruling without an appeal are therefore clearly incompetent. And they ought to be struck-out. I hereby strike them out. It makes no difference that the same or similar issues had been raised and answered in the Court of Appeal because they were not properly or validly raised either.

I am now left with issue (5) only which is whether or not the sale of Appellant's immovable properties on 9/1/92 was in accordance with the law.

The Appellant contended amongst others that the sale of the immovable properties was tainted with fraud, collusion and irregularities. He said there was no valid notice of sale and that the properties were undervalued. Both the trial High Court and the Court of Appeal carefully went into these issues and came to the conclusion that no fraud, collusion or irregularity was proved and that the sale was validly and legally conducted. **On the state of the facts as stated above, I am inclined to agree with the lower courts that the sale by auction of Appellant's immovable properties was done in accordance with the law. I also agree with them that the properties were not undervalued because there was no such evidence anywhere before the trial court. Moreover for the sale to be set aside the Appellant must not only prove that there was material irregularity in the conduct of the sale but also that he sustained substantial injury by reason of such irregularity (See for example section 46 of the Sheriffs and Civil Process Law Cap. 118 Laws of East Eastern Nigeria, 1963, ALHAJI NAKYAUTA VS ALHAJI MAIKIMA (1977) 6 SC. 51 GOVERNMENT OF ASHANTI VS KORKOR 4 WACA 83).** The Appellant as I said failed to prove any irregularity let alone that he had sustained any injury as a result of the irregularity. It is also settled that a party who intends to prove charges of fraud or charges of criminal malversation or felony must do so beyond reasonable doubt. And

that before he can be allowed to prove them, he must have set them down specifically in his pleading (see section 37(1) of the Evidence Act **IKOKU VS OLI (1962) 1 ALL NLR 194**). That is not the case here. The facts again show that the properties had been advertised for sale on 17/12/91 and that it was because of the Appellant's motion for a stay of execution that the sale was suspended until that motion was disposed of on 8/1/92, and the sale conducted on 9/1/92. That was the right thing to do. The Notice of sale was never withdrawn or cancelled by anyone. There was therefore no need to have issued a fresh notice of sale when the Appellant's motion was finally disposed of. The Court of Appeal summed it up well when it said in its lead judgment thus:-

"The sale was conducted in accordance with the law. I must stress that the properties were not sold at undervalue. This is so because the son of the appellant and his brother who bid for the properties did not offer higher than the 2nd and 3rd Respondents. Moreover there was no expert evidence on the value of the properties. The allegation of collusion between court officials and the 2nd and 3rd Respondents is totally baseless.

In the final analysis I hold that no material irregularities in the conduct of the sale was proved, and it was not shown that the Appellant sustained substantial injury on account of any irregularity."

I agree. The appeal therefore fails. It is hereby dismissed with N10,000 costs to each of the Respondents.

G **BELGORE JSC**

The appellant failed to carry out the order of Court of Appeal made on 25th November 1986 and further applications to High Court from 12th October 1991 amount to nothing but blantant abuse of Court process. As my learned brother, Kutigi JSC has admirably set out the scenario of abuses by appellant I agree with him that this appeal has no merit. I therefore dismiss it with N10,000.00 costs to respondent.

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Kutigi JSC just delivered. He has stated the facts with clarity. I agree with the reasons he gave for dismissing this appeal. For the same reasons I too, dismiss the appeal and subscribe to the order for costs made by him. B

MOHAMMED JSC

I have had the preview of the judgment just delivered by my learned brother, Kutigi, J.S.C., and I agree with him that this appeal has failed. For the reasons advanced in that judgment, I, too, hereby dismiss the appeal. I also award N10,000.00 costs to each of the respondents. C

EJIWUNMI JSC

I have read in its draft form the judgment just delivered by my learned brother Kutigi, JSC. In that judgment the facts and issues raised thereon, having been properly identified for the purposes of the appeal, the appeal was dismissed. E

As I am in full agreement with the reasons given for dismissing the appeal, I also dismiss the appeal with costs in the sum of N10,000.00 to each of the respondents. F

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