

**SUPREME COURT OF NIGERIA**  
FRIDAY 20TH JUNE, 2003. SC. 144/1999  
**CORAM:- M. L. UWAIJS CJN, M. E. OGUNDARE,**  
**U. MOHAMMED, A. I. IGUH, D. MUSDAPHER, JJSC**

1. AFRICAN CONTINENTAL BANK LTD
  2. CHIEF OKAKA MBADUGHA
  3. CHUKWUMAEZE ANELE
  4. GOVERNOR OF IMO STATE
  5. ATTORNEY GENERAL, IMO STATE
  6. MR. RAPHAEL EKPE
  7. MRS. C. N. IHUOMA
  8. MR. H. C. UCHE
  9. MR. AKANNA
  10. MR. R. O. NJOKU
  11. MR. T. I AHIARAKWEM
  12. MR. J. K. UGWUEGBU NWOKOCHA
  13. PRINCE UWADIEGWU AMAESHI
- AND
1. SIMON U. IHEKWOABA
  2. MRS. CAROLINE IHEKWOABA
- ..... APPELLANTS
- ..... RESPONDENTS

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AUCTION SALES - Auctioneers Law s.19 - Breach - Effect - The issuance of public notice on the day sale was effected - Is in breach of the section - Which renders the sale irregular (H1)

PROPERTY LAW - Sale - Value of property - Determination - Value attached to property depends on the state of repairs at the time of sale - And the market value of same (H2)

MORTGAGES - Sale - Undervalue - Proof - Ekaete v. Nig Housing Dev. Society Ltd - Sale at undervalue is not enough to vitiate power of sale - As it must be shown that the sale was fraudulently made (H3)

PROPERTY LAW - Evidence - Fraud - Proof - Propriety - 1<sup>st</sup> respondent's letter of 6/4/87 did not portray 1<sup>st</sup> appellant - As someone who acted fraudulently in the sale of the property (H4)

PROPERTY LAW - Auction sale - Irregularity in - Effect - By virtue of s. 21(1) of Conveyancing Act 1881 - Such irregularity cannot defeat purchaser's title to the property (H5)

### **FACTS**

Plaintiffs/respondents obtained a loan from 1<sup>st</sup> defendant/appellant on a legal mortgage of the disputed property. Following their default in repaying the loan, an earlier attempt by 1<sup>st</sup> appellant to sell the property was aborted due to inability to secure a highest bidder. Sequel to this, respondents wrote a letter on the 6/4/87 thanking 1<sup>st</sup> appellant for rejecting the bid and promised to come in two weeks to repay the loan. When they failed to make good their promise, another auction was organized in which the property was sold to 3<sup>rd</sup> defendant/appellant at the sum of N115,000.00.

It was on the basis of the sale that 3<sup>rd</sup> appellant applied for and was issued a certificate of occupancy in respect of the property. Notices in respect of the successful auction sale were pasted on the same day the auction was held. Further the price at which the property was sold was lower than the amount for which it was valued at the time of executing the mortgage. Consequently, respondents commenced this action at the High Court of Imo State Owerri, claiming inter alia, for an order setting aside the sale of the property. After trial, the trial court gave judgment to 3<sup>rd</sup> appellant. Aggrieved, respondents successfully appealed to Court of Appeal which set aside the judgment of trial court. Dissatisfied, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Is the sale of Respondent's property effected on 3/6/87 valid?
2. Did the 3rd Appellant acquire a good title to the property in dispute?

**HELD** (Unanimously dismissing the appeal per

**OGUNDARE JSC)**

*Auctioneers Law s.19 - Breach - Effect*

**1. The Court of Appeal, in the majority decision of that court, per Uwaifo, JCA., as he then was, found that public notices as**

**required by Section 19 of the Auctioneers Law Cap. 12, Laws of Eastern Nigeria, 1963, applicable in Imo State at the time relevant to this action, was given on 3rd June, the day the sale was purportedly effected. That Court found that there was a breach of Section 19, that therefore, the sale effected on 3/6/87 was invalid. To this extent, I agree with their Lordships of the court below that there was a breach of Section 19 of the Auctioneers Law but say that the effect of the breach is to render the sale irregular. (p. 1627 B)**

*PROPERTY LAW - Sale - Value of property - Determination*

**2. The reasons given by the learned trial Judge for coming to the conclusion that there was no sale at under value equally cannot be faulted. True enough, there was evidence that the property was valued by a valuer at the time the mortgage was being executed at N194,000.00. But no valuer gave evidence as to the value of the property at the time of sale. A number of factors would have to be taken into consideration in determining whether the value of the property had appreciated or depreciated. This would depend on such factors as the state of repairs of the property at the time of sale and market value of real property at that time. The Respondents led no evidence on these factors. They relied on the ipse dixit of the 1st Respondent. (p. 1629 B)**

*MORTGAGES - Sale - Undervalue - Proof*

**3. The law as to sale under under-value is laid down by this court in *Ekaete v. Nigeria Housing Development Society Ltd.* (1973) 6 S.C. 183 at 198 in these words:**

***"We think it is now beyond controversy that undervalue alone is not enough to vitiate the exercise of a mortgagee's power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue. Indeed, it well established that 'if a mortgagee exercises his power of sale bona fide for the purpose of realising his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.***

***It is worthy of note that the mortgagee is expected to obtain 'not the best price' but 'a proper price.'***”(p. 1631 A / G)

*Evidence - Fraud - Proof - Propriety*

**B 4. The court below appeared to have overlooked a letter written by the 1st Respondent to the 1st Appellant following the aborted sale exercise of 6/4/87. In that letter the 1st Respondent wrote:**

**C “I am pleased to express my thanks for your rejection of auction price of N61,000. 00 placed on the above property today.**

***In view of that kindness of your bank, I am asking for two weeks of grace to come and lodge half of our indebtedness to the account.”***

**D This letter could not have portrayed the 1st Appellant as someone who had acted in bad faith or fraudulently in the sale of 3/6/87. From all I have been saying above, I cannot agree with the court below that fraud was proved in this case against the Appellants. Consequently, I set aside that finding**  
**E of the court below and affirm the findings of the learned trial Judge that there was no fraud or collusion in the sale of the property and that the property was not sold at undervalue.**  
**(p. 1632 E)**

**F Auction sale - Irregularity in - Effect**

**G 5. The trial Court found that the Certificate of Occupancy issued in favour of the 3rd Appellant was validly issued and registered. The Court of Appeal held to the contrary because, according to it, the sale to the 3rd Appellant was tainted with fraud. I have earlier disposed of the issue of fraud; I need not say more on that anymore. I have equally found that the auction sale was irregular being in breach of Section 19 of the Auctioneers Law of Eastern Nigeria. There is evidence that**  
**H there was a sale and that the 3rd Appellant was the highest bidder and the sale was to him and that in consequence of the sale to him he obtained a grant of statutory right of occupancy from the Military Governor. By virtue of Section 21(1) of the Conveyancing Act, 1881, (England) a statute of general ap-**

***plication applicable in Imo State at all times relevant to this case, his title to the property cannot be defeated by the irregularity in the auction sale of 3/6/87.*** (p. 1633 B)

## NOTABLE POINT OF INTEREST

### **OGUNDARE JSC**

#### ***1. An appeal inquires into trials not into disputes***

It must be borne in mind at all times that:

*“It is of intrinsic relevance to the administration of justice in our legal system that the hearing of an appeal does not permit the Appeal Court to enquire into disputes, but to inquire into ways the disputes have been tried and settled - see Zaria v. Maituwo (1966) NMLR 59; Oroke v. Edet (1964) NMLR 118.”*

per Karibi-Whyte, JSC., in Ajadi v. Okenihun (1985) ANLR 240 at 248. (p. 1630 H)

### **REPRESENTATION**

1st and 2nd Defendants/Appellants are absent and are unrepresented by counsel

L. Uzoukwu, SAN, with E. Enyinnia, for 3rd Defendant/Appellant

Y. A. Agbaje, SAN, with K. Adeosun), for 1st and 2nd Plaintiffs/Respondents

E. Duruiheoma, Esq., for 4th and 5th Defendants

### **CASES REFERRED TO**

Oroke v. Edet (1964) NMLR 118

Zaria v. Maituwo (1966) NMLR 59

Ajadi v. Okenihun (1985) ANLR 240

Ekaete v. Nigeria Housing Dev. Society Ltd. (1973) 6 S.C. 183

Sanusi v. Daniel (1956) SCNLR 288

Okonkwo v. Co-operative & Commerce Bank Nig. Plc. (2003) 2-3 S.C. 157

### **STATUTE REFERRED TO**

Auctioneers Law Cap 12 LFN 1963, s.19

Commencing Act 1881 (England), s.21(1)(2)

**LEAD JUDGMENT BY OGUNDARE JSC**

By a writ of summons issued in suit No. HOW/243/87 in 1987 in the High Court of Imo State, the plaintiffs, who are now Respondents before us, sued the 1st and 2nd Defendants claiming various orders and a declaration. In the course of the proceedings, plaintiffs sought and obtained an order of court joining the 3rd, 4th and 5th Defendants. Pleadings were ordered, filed and exchanged and with leave of court, amended. By paragraph 27 of their amended Statement of Claim, the plaintiffs finally claimed:

“(1) *An order setting aside the purported sale, on 3rd June, 1987, by 1st and 2nd Defendants to 3rd Defendant of the property of the plaintiffs situate at No. 5 Christ Church Close, Owerri, covered by Deed of Mortgage dated 21st December, 1982, and registered as No. 55 at page 55 in Volume 289 in the Lands Registry at Owerri, Imo State.*

*(2) A declaration that the purported Statutory Certificate of Occupancy dated 1st December, 1987, granted by 4th Defendant to the 3rd Defendant was void, irregularly issued and accordingly void.*

*(3) N650,000.00 (Six Hundred and Fifty Thousand Naira) damages for wrongful and fraudulent exercise of power of sale by the 1st defendant whereby the plaintiffs were forced to incur legal and other expenses in connection with the prosecution of this case and in defending an action instituted by the 3rd Defendant against the plaintiffs in suit HOW/118/88.*

*(4) An order of injunction restraining the 1st and 2nd Defendants, their servants or agents from selling the said property and the 3rd Defendant from taking possession thereof otherwise than through proper exercise of power of sale.”*

Meanwhile in Suit No. HOW/118/1988 the plaintiff (Chukwumaeze Anele) sued the African Continental Bank Ltd., that is, the 1st Defendant in HOW/243/87, the 2 plaintiffs in that suit (that is, Simon Ihekwoaba and Mrs. Caroline Ihekwoaba) and 8 other persons all as Defendants claiming:

“1. *Declaration that by virtue of auction sale dated 3/6/87 at Owerri, the plaintiff is entitled to the STATUTORY CERTIFICATE OF OCCUPANCY dated 1/12/87 and registered as 82/82/179, Owerri in respect of the property with premises lying and situate at No. 5 Christ Church Close, Owerri within jurisdiction with an annual value*

*of N10.00 (Ten Naira).*

*2. Possession of the said property with premises lying and situate at No. 5, Christ Church Close, Owerri.*

*3. Order of the court for the 4th to 11th defendants to pay rent of N150.00 (One Hundred and Fifty Naira) per month or whatever monthly rent they paid previously to their former landlord to the plaintiff with effect from 3/6/87 or in the alternatively pay same to court until the substantive suit is finally determined.* B

*4. Order of the Court for 2nd or 3rd defendant or both to pay over to the Plaintiff such rent, if any received from any of 4th to 11th defendants as from the said 3/6/87 or pay same into Court until the substantive suit is finally determined.* C

*5. Failing 1, 2, 3 and 4 above, an order of the Court for the 1st defendant to return the whole of the purchase money to the Plaintiff with special and general damages assessed at N100,000.00 (One Hundred Thousand Naira)."* D

By a motion brought by the 2nd and 3rd defendants in suit No. HOW/118/88 who are Plaintiffs in suit HOW/243/87 leave of court was sought, and obtained, to join the 3rd defendant in suit No. HOW/243/87, that is, Chief Okaka Mbadugha as a co-defendant in suit No. HOW/118/88. Pleadings were also filed and exchanged in this suit. E

On the application of learned counsel for the Plaintiffs in suit No. HOW/243/87 who are 2nd and 3rd Defendants in suit No. HOW/118/88, the two actions were consolidated for hearing by order of court. By the same order the Plaintiff in suit No. HOW/118/88 became the Plaintiff in the consolidated suit while the Defendants in that action, that is, HOW/118/88 remained Defendants in the consolidated suit. The 4th and 5th Defendants in suit No. HOW/243/87 remained Defendants in the consolidated suit. At the trial of the consolidated suit, evidence was led on both sides in support of the facts pleaded by each party. At the conclusion of trial and after addresses by learned counsel for the parties, the learned trial Judge in a considered judgment adjudged as follows: F

*"1. It is hereby declared that by virtue of the auction sale conducted on 3rd June, 1987, the Statutory Certificate of Occupancy issued in favour of the plaintiff and registered as No. 82 at page 82 in Volume 179 of the Lands Registry, Owerri, in respect of the property* H

*with the premises situate and lying at No. 5 Christ Church Close, Owerri, Imo State, was validly issued and registered.*

2. *It is hereby ordered that the plaintiff is entitled to immediate possession, of the property together with all appurtenances situate and lying at No. 5 Christ Church Close, Owerri, Imo State, formerly registered as No. 42/42/678 but now registered as No. 82/82/179 at the Lands Registry Owerri, Imo State.*

3. *The Claim by the Plaintiff against the 1st defendant for return of the whole purchase money to the plaintiff is hereby dismissed.*

4. *The Claim by the Plaintiff against the 1st defendant for special and general damages is also dismissed.*

5. *All the reliefs claimed of (sic) the 2nd and 3rd defendants in Suit No. HOW/243/87 are hereby dismissed."*

The 2nd and 3rd Defendants in the consolidated suit who were Plaintiffs in HOW/243/87 were naturally displeased with the judgment of the trial court and appealed to the Court of Appeal which later court by majority decision, (Uwaifo and Katsina-Alu, JJCA., as they were then; Nsofor, JCA., dissenting), allowed the appeal, set aside the judgment of the trial High Court and adjudged as hereunder:

1. *An order setting aside the sale on 3rd June, 1987, of the property at No. 5 Christ Church Close, Owerri subject-matter of a Deed of mortgage registered as No. 55 at page 55 in Volume 289 in the Lands Registry in the office at Owerri having been conducted on an irregular auction and the sale is accordingly invalid, null and void.*

2. *A declaration that the Statutory Certificate of Occupancy No. 82 at page 82 in Volume 179 in the Lands Registry in the office at Owerri issued in favour of the 3rd respondent by the 4th respondent on December 1, 1987, was irregularly issued and without foundation, and accordingly invalid, null and void."*

The 1st and 2nd Defendants in suit No. HOW/243/87 appealed to this court against the said judgment with leave of this court. The Plaintiff in suit No. SC. 118/88 who is 3rd Defendant in Suit No. HOW/243/87 also appealed to this court. An attempt was also made at the oral hearing of this appeal by the 4th and 5th defendants in HOW/243/87 to appeal but the attempt was unsuccessful; they did not take part in the appeal in the Court of Appeal. All the other Defendants in suit No. HOW/118/88 did not appeal neither did they

take part in the appeal in the Court of Appeal. As things stand the parties to this appeal are the 1st to 3rd Defendants in HOW/243/87 as Appellants and the Plaintiffs in that suit as Respondents. They shall hereinafter be so referred to.

Before I proceed further with the consideration of the appeal now before us, I need to state the facts in a nutshell. The Respondents took a loan from the 1st Defendant and mortgaged their property situate at No.5 Christ Church Close, Owerri by way of legal mortgage dated 21/12/82 and registered at No. 55 at page 55 in Volume 289 at the Deeds Registry Owerri, Imo State. The property at the time was valued at N194,000.00. The Respondents defaulted in the repayment of the loan in consequence of which the 1st Appellant, decided to sell the property to recover the money owed to it. The 2nd Appellant, a licensed auctioneer, was engaged by the 1st Appellant to sell the property. Public Notices were issued and published in the Statesman Newspaper of 3/4/87 to the effect that the sale would be effected on 6th April, 1987. There was an auction of the property on that day, that is, on 6th April, 1987, but the exercise was aborted as the highest bid of N61,000.00 was considered by the 1st Appellant as too low. The Respondents who knew of the highest bid made on the 6th April and the rejection of that bid by the 1st Appellant wrote a letter dated 9th April, 1987, to the 1st Appellant thanking the latter for rejecting the bid and asking to be given two weeks to loan. In consequence of the letter, the 1st Appellant suspended the sale of the property. The Respondent, however, failed to pay up the loan within the period they asked for in the letter. As a result of this failure the 1st Appellant instructed the 2nd Appellant to sell the property.

The 2nd Appellant who resided in Lagos came to Owerri on 3rd of June, 1987, and pasted Notices for sale of the property on that same day. At the auction sale that followed a crowd numbering about 70 people gathered and made bids. The 3rd Appellant came out with the highest bid of N115,000.00. The property was sold to him at that amount and a receipt was issued to him by the 2nd Appellant. Subsequently, a power of attorney was given by the 1st Appellant to the 3rd Appellant by which the 3rd Appellant obtained a Certificate of Occupancy in respect of the property issued by the Military Governor of Imo State. The Respondents later took the ac-

tion resulting in this appeal. The 3rd Appellant being unable to gain possession of the premises also took an action against the 1st Appellant and all occupants (tenants) of the premises. It was these two actions that were consolidated and tried together.

In the Brief of Argument of the 1st and 2nd appellants, the following 3 issues are raised for determination of the appeal to wit:

“(i) *Whether the 1st and 2nd defendants/appellants were right in selling the mortgaged property when the power of sale arose and if so was the Court of Appeal right in holding that there was fraud in the conduct and sale of the property and therefore there was no sale (Grounds 1 and 2).*

“(ii) *Whether the Court of Appeal was right in holding that the Irrevocable Power of Attorney issued to the 3rd defendant/respondent was wrong in law as well as the Certificate of Occupancy issued to him by the Imo State Government, that is, the Governor of Imo State following the grant of Irrevocable Power of Attorney. (Grounds 3 and 4).*

“(iii) *Whether it was right in law for the Court of Appeal to introduce extraneous matters to the case which were neither pleaded nor given in evidence at the trial as well as whether the judgment of the Court of Appeal was not against the weight of evidence. (Grounds 5 and 6).”*

The 3rd Appellant in his own Brief formulated the following 2 issues:

“1. *Whether the Court of Appeal was right in setting aside the sale of the mortgaged property made in favour of the 3rd Appellant?*

2. *Whether the Court of Appeal was right in holding that the Certificate of Occupancy granted to the 3rd Appellant was irregularly issued and therefore invalid and void.”*

The 2 issues raised by the 3rd Appellant are subsumed in the 1st two issues formulated by the 1st and 2nd Appellants.

The Respondents on their part formulated one issue in addition to the issues raised by the 1st and 2nd Appellants and that additional issue reads:

“*Whether or not this Honourable Court will interfere with the Court of Appeal’s exercise of its judicial discretion, in its majority decision, to set-aside the decision of the learned trial Judge and to give judgment is (sic) favour of the respondents on a proper consider-*

*ation of the facts, the law applicable and in the issues before the court?"*

In the Respondents' Brief in answer to the 3rd Appellant's Brief, the issues raised by the Respondents reads as follows:

*"Whether or not this Honourable Court will interfere with the Court of Appeal's exercise of its judicial discretion, in its majority decision, to set aside the decision of the learned trial Judge and to give judgment in favour of the respondents on a proper consideration of the facts, the law applicable and the issues before the court? Or, In the alternative,*

*Whether the mortgagee exercised his power of sale bona fide, without corruption or collusion with the purchaser or with reckless impropriety as to be tantamount to fraud and thereby render interference by the Court of Appeal proper?"*

I may mention that the 1st and 2nd Appellants filed a Reply Brief in answer to the arguments proffered in the Respondents' Brief.

It would appear that during the pendency of this appeal the 1st Respondent died. I say this because the Respondents' Brief in reply to the 3rd Appellant's brief is titled "2nd Respondent's Brief of Argument". As there is no formal notification to this court as regard the death of this Respondent I make no further comments on it.

From the pleadings, the evidence led by the parties, the judgments of the two courts below and arguments raised in the various Briefs filed in this court, it will appear to me that the issues arising for determination in this appeal can be broadly classified under two questions, to wit:

1. Is the sale of Respondent's property effected on 3/6/87 valid?
2. Did the 3rd Appellant acquire a good title to the property in dispute?

#### SALE OF PROPERTY:

It is not in dispute that the property situate at No. 5 Christ Church Close, Owerri, belonged to the Respondents. It is equally not in dispute that the Respondents mortgaged the said property to the 1st Appellant as security for a loan they raised from the latter. Equally not in dispute is the fact that the Respondents defaulted in the repayment of the loan and were owing the 1st Appellant a sum of over N81,000.00 as at April, 1987. The 1st Appellant decided to exercise its right of sale under the mortgage deed and instructed the 2nd

Appellant to carry out the sale of the Respondents' said property.

The learned trial Judge found as a fact that:

B *"...on facts before me, I believe that 12<sup>th</sup> defendant conducted a sale. Nothing else could attract as many as 70 persons except the process of sale. Soon after the sale and on payment of the purchase money by the Plaintiff, to the 12th defendant, he the 12th defendant then made out Exhibits A and CC in accordance with the requirements of the Law. I therefore find as a fact that the 12th defendant sold the property at No. 5 Christ Church Close, Owerri, by public auction on 3rd June, 1987, to the Plaintiff."*

C He also found that 1st Appellant gave notice of the sale to the respondents as required by law and went on to find that even if such notice was not given "the 2nd and 3rd defendants who had already waived their right by Exhibit V, cannot thereafter complain." Other  
D findings of fact made by the learned trial Judge in respect of allegations of fraud levied by the Respondents against the 1st appellant in respect of the sale are:

1. *"Again there is no evidence by any party to these proceedings, to support the submissions made on behalf of the 2nd and 3rd  
E defendants, that the 1st defendant instructed the 12th defendant to put up a mock auction, but privately invited the plaintiff to bring N115,000.00 which was deposited in the mortgage account of the plaintiff as purchase price. If the sale was fraudulent then the 2<sup>nd</sup>  
F and 3rd defendants would be required to prove the fraud by the standard laid down in Section 138(1) of the Evidence Act, namely, proof beyond reasonable doubt. But no attempt was made by 2nd and 3rd defendants to reach that standard. In any event if the 1st defendant did not act fraudulently in selling the property, it will be  
G difficult to conceive how the plaintiff would act fraudulently in buying."*

2. *"Even then that allegation has not been proved by valid evidence of 2nd and 3rd defendants that the 1st defendant acted fraudulently in selling the property in dispute. The property was not  
H sold at under value when the agent of 1st defendant, the 12th defendant, sold it at N115,000.00. There is no evidence by a valued of what could have been the proper value of the property other than what it was sold at. Rather, the presumption, which the 2nd and 3rd defendants put forward was that the value of the property must have*

*appreciated from what it was in 1977, that is N194,000,00 to something else. But there should have been evidence by a valued of the value of the property at the time of sale. The 2nd and 3rd defendants have the burden to establish the value of the property at the time of sale and this they failed to do."*

3. "I find as a fact that there was no fraud, collusion or mala fide in the sale of the property and that the property was not sold at under value."

**The Court of Appeal, in the majority decision of that court, per Uwaifo, JCA., as he then was, found that public notices as required by Section 19 of the Auctioneers Law Cap. 12, Laws of Eastern Nigeria, 1963, applicable in Imo State at the time relevant to this action, was given on 3rd June, the day the sale was purportedly effected. That Court found that there was a breach of Section 19, that therefore, the sale effected on 3/6/87 was invalid. To this extent, I agree with their Lordships of the court below that there was a breach of Section 19 of the Auctioneers Law but say that the effect of the breach is to render the sale irregular.**

The court also found, however, that the sale effected on 3/6/87 was a sham. By this finding the Court of Appeal reversed the finding of the learned trial Judge who found that fraud was not proved.

In their amended Statement of Claim in HOW/243/87, the Respondents pleaded as hereunder:

"18. On the 3rd of June, 1987, there were people outside and inside the said house, throughout that day, and they did not see the 2nd defendant or the 3rd defendant or any prospective purchasers attending any auction sale conducted at any time on that day."

19. The plaintiffs contend that the alleged sale, carried out by the 2nd defendant on 3rd of June, 1987, on the instruction given by the 1st defendant on 3rd of June, 1987, as admitted by the 1st and 2nd defendants in paragraph 28 of the Statement of Defence of 17th June, 1992, and filed in this suit on 23rd June, 1992, was in breach of mortgagee's duty of care;

- (a) To act in good faith
- (b) To have regard to the interest of the plaintiffs' mortgagors and
- (c) To properly advertise by properly published auction notice

*so as to get the best price to reasonably obtainable in the market.*

*(d) Not to sell to itself.*

*20. The plaintiffs will rely on the following as particulars of breach by 1st defendant:-*

*(i) The alleged sale was conducted in a manner calculated or designed to prevent competition and to depress the value of the said property so that sale will be affected below market price and at an under-value.*

*(ii) That the purported sale to the 3rd Defendant was a collusive and sham sale in truth and in fact it was selling the said property to the 1st Defendant, itself, at an under-value.*

*(iii) The sale of the said property, at a ridiculous sum of N115,000.00 (One Hundred and Fifteen Thousand Naira) when it has been valued in 1977 at N194,000.00 and after it had appreciated in value to about N3,000,000.00 (Three Million Naira) in 1987, was at an under value.*

*21. The Plaintiffs will contend:-*

*(i) That the alleged sale to the 3<sup>rd</sup> Defendant was a camouflage for sale to the 1st Defendant who actually bought the said mortgaged property using the 3rd defendant as a front by issuing a power of attorney to the 3rd Defendant, was accordingly null and void.*

*(ii) That the alleged sale by 1st and 2nd defendants to 3rd Defendant by reason of the above facts was pre-arranged and evidence of bad faith and fraudulent intent on the part of 1st and 2nd defendants and therefore null and void.*

*(iii) That the said purported sale alleged by the 2nd defendant to the 3rd defendant did not take place at least seven days of alleged publication of 3rd June, 1987, and no report of return of the said sale was made to the Divisional Officer in the area contrary to Sections 19 and 20 of Auctioneers' Law of Imo State Cap. 12, Laws of Imo State and accordingly void."*

It is clear from the pleadings of the Respondents that the facts being relied on by them in alleging fraud are –

*(1) Inadequate notice to the public as required by law.*

*(2) Sale at under value.*

*(3) That the sale was in fact made to the 1st Appellant who used the 3rd Appellant as a front.*

The learned trial Judge found on the evidence before him -

and I dare say rightly too - (1) that at the sale of 3/6/87 there were over 70 people present; (2) that the sale was not at under value; (3) that there was no proof of fraud against the Appellants. On the evidence adduced at the trial the findings of the learned trial Judge that there were about 70 people present at the auction sale cannot be faulted. Again ***the reasons given by the learned trial Judge for coming to the conclusion that there was no sale at under value equally cannot be faulted. True enough, there was evidence that the property was valued by a valuer at the time the mortgage was being executed at N194, 000.00. But no valuer gave evidence as to the value of the property at the time of sale. A number of factors would have to be taken into consideration in determining whether the value of the property had appreciated or depreciated. This would depend on such factors as the state of repairs of the property at the time of sale and market value of real property at that time. The Respondents led no evidence on these factors. They relied on the ipse dixit of the 1st Respondent*** when he said in evidence:

*"I did not hear that my property was sold. I did not hear that it was bought by the Plaintiff. The auctioneer void me that the property had been sold. He also told me the name of the person that bought it - the Plaintiff - the same auctioneer told me that the property was sold for N115,000.00. In 1987 I caused valuation of that property to be made. It was before the auctioneer gave me the information regarding the sale of the property. I had already done the valuation before 3rd April, 1987. The valuation report was issued in May, 1987. I required it for my own purpose. That report was in my possession before I filed my suit. I did not refer to that report in my Amended Statement of Defence. Also in my Amended Statement of Claim I did not refer to it. The valuation report was available as at 17/1/96 when I filed the Amendments. I did not make it for the purpose of prosecuting this case."*

Earlier in his evidence- in- chief, the 1st Plaintiff had said:

*"As at 1987, the property was worth N3 million. I caused a valuation of same to be made. This is the valuation report the valuer gave me - IDI"*

I would find it difficult to disagree with the learned trial Judge that the Respondents on whom lay the burden of proof that the

property was sold at under value, discharged that burden on the evidence highlighted above.

The learned Justices of the Court below, with profound respect to them, based their conclusion on mere speculation rather than on evidence. Uwaifo, JCA., in his lead judgment opined:

B “Ordinarily, the property valued at N194, 000.00 in 1977  
would have appreciated reasonably ten years later in 1987. The eco-  
C nomic history of this country tells us that in 1977 the exchange rate  
of the Naira to the pound sterling was almost at par. We cannot feign  
D ignorance of that. With the known devaluation of the Naira in 1987,  
the least the sum of N194,000.00 in 1977 would have been consid-  
ered worth in 1987 would be upwards of three times. That would  
easily make it about N600,000.00 (N582,000.00 if three times). This  
does not take account yet of the expected appreciation of the prop-  
erty itself over the years. We sometimes ignore such prospects only at  
E the risk of being regarded as unfamiliar with (perhaps better to say  
ignorant of) basic knowledge or common principles to help us decide  
these matters; or as unrealistic in our approach to circumstances which  
should normally be taken for granted; or as if, in some extreme opin-  
F ion, we appear to live in a cocoon. I admit that what cannot be stated  
definitively as facts and figures owing to the absence of concrete evi-  
dence is the exact valuation. But that should not deter the making of  
a comparative use of the accepted value of N194,000.00 of the prop-  
erty as at 1977 when the property was purportedly sold in 1987 for  
N115,000.00 to see, at least, what might represent a proper value.”

I have scanned through the record of appeal and do not find that any evidence of economic history of this country was led at the trial. Indeed the premise upon which the learned Justices of the Court  
G of Appeal came to the conclusion that:

“Taking all these into consideration, it would be difficult not to regard the price of N115,000.00 as gross undervalue of the property in question. There can hardly be any pretence about these matters.”  
H was based on mere speculation unrelated to any evidence adduced at the trial.

It must be borne in mind at all times that:

“It is of intrinsic relevance to the administration of justice in our legal system that the hearing of an appeal does not permit the Appeal Court to enquire into disputes, but to inquire into ways the dis-

*putes have been tried and settled - see Zaria v. Maituwo (1966) NMLR 59; Oroke v. Edet (1964) NMLR 118."*

per Karibi-Whyte, JSC., in Ajadi v. Okenihun (1985) ANLR 240 at 248.

***The law as to sale under under-value is laid down by this court in Ekaete v. Nigeria Housing Development Society Ltd. (1973) 6 S.C. 183 at 198 in these words:*** B

***"We think it is now beyond controversy that undervalue alone is not enough to vitiate the exercise of a mortgagee's power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue. Indeed, it well established that 'if a mortgagee exercises his power of sale bona fide for the purpose of realising his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud. (See Warner v. Jacob (1882) 20 Ch.D 220.)*** C D

In Coote on Mortgages, vol. 2, 9th ed., at p. 927, the law on this point is stated as follows:-

*'The only obligation incumbent on a mortgagee selling under a power of sale in his mortgage is that he should act in good faith. Whether selling under an express or statutory power, he may generally conduct the sale in such manner as he may think most conducive to his own benefit, unless the deed contains any restrictions as to the mode of exercising the power, provided he acts bona fide and observes reasonable precautions to obtain not the 'best price' but 'a proper price.'* E F

*We think the learned editors of this treatise have correctly stated the law and we agree with them on the point.*

***It is worthy of note that the mortgagee is expected to obtain 'not the best price' but 'a proper price.'*** G

With profound respect to their Lordships of the court below who gave the majority decision, I cannot agree that on the evidence, sale at under value was disclosed.

The court below made a lot of fuss over the execution of a power of attorney by the 1st Appellant to the 3rd Appellant instead of a Deed of transfer. True enough what the 1st Appellant ought to have given the 3rd Appellant is a deed of transfer with the Governor's consent but I am not prepared to say that by giving irrevocable power H

of attorney to the 3rd Appellant had acted fraudulently. I have read the power of attorney, I can see nothing in it to suggest that the 1st and 3rd Appellants acted in collusion. On the contrary, that power recited exactly what happened, that is, that the property in dispute was sold at public auction to the 3rd Appellant who paid for it. It must be borne in mind that under the Land Use Act, the 3rd Appellant would need a Certificate of Occupancy to perfect his title to the property. I can see nothing in the evidence led in this case to justify the strictures passed by Uwaifo, JCA., on the 1st Appellant for giving a power of attorney to the 3rd Appellant instead of a Deed of Transfer. If anything, the 1st Appellant must have acted under a wrong legal advice. I think the less, said about this aspect of the case the better. On the evidence available at the trial and on the findings of the learned trial Judge who saw and heard the witnesses, there was a sale of the property on 3/6/87 which could not in any sense be described as a sham. It was irregular for the simple reason that the 7 days statutory notice before the sale was not given, otherwise everything was done properly in my respectful view, and as disclosed by the credible evidence led at the trial.

***The court below appeared to have overlooked a letter written by the 1st Respondent to the 1st Appellant following the aborted sale exercise of 6/4/87. In that letter the 1st Respondent wrote:***

***"I am pleased to express my thanks for your rejection of auction price of N61,000. 00 placed on the above property today.***

***In view of that kindness of your bank, I am asking for two weeks of grace to come and lodge half of our indebtedness to the account."***

***This letter could not have portrayed the 1st Appellant as someone who had acted in bad faith or fraudulently in the sale of 3/6/87. From all I have been saying above, I cannot agree with the court below that fraud was proved in this case against the Appellants. Consequently, I set aside that finding of the court below and affirm the findings of the learned trial Judge that there was no fraud or collusion in the sale of the property and that the property was not sold at undervalue.***

TITLE OF THE 3RD DEFENDANT:

Armed with the power of attorney given him by the 1st Appellant (Exhibit B), the 3rd Appellant applied to the Military Governor of Imo State for the grant of Statutory Right of Occupancy. The Military Governor (4th Defendant in suit No. HOW/243/87) approved the application and granted to the 3rd Appellant a Statutory Right of Occupancy to the property in dispute and evidenced this with a Certificate of Occupancy (Exhibit C). ***The trial Court found that the Certificate of Occupancy issued in favour of the 3rd Appellant was validly issued and registered. The Court of Appeal held to the contrary because, according to it, the sale to the 3rd Appellant was tainted with fraud. I have earlier disposed of the issue of fraud; I need not say more on that anymore. I have equally found that the auction sale was irregular being in breach of Section 19 of the Auctioneers Law of Eastern Nigeria. There is evidence that there was a sale and that the 3rd Appellant was the highest bidder and the sale was to him and that in consequence of the sale to him he obtained a grant of statutory right of occupancy from the Military Governor. By virtue of Section 21(1) of the Conveyancing Act, 1881, (England) a statute of general application applicable in Imo State at all times relevant to this case, his title to the property cannot be defeated by the irregularity in the auction sale of 3/6/87.*** Section 21(1) provides:

*“Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeached on the ground that no case has arisen to authorise the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the powers.”*

From the findings of the learned trial Judge, the 3rd Appellant is obviously a bona fide purchaser for value without notice of the irregularity of non-compliance of Section 19 by the 2nd Appellant. As the property in question has been duly granted to the 3rd Appellant following the auction sale and in accordance with the provisions of the Land Use Act, his title to the property remains valid. See *Sanusi v. Daniel* (1956) SCNLR 288 at 291; (1956) 1 NSCC 85 at 88; (1956)

1 FSC 93 at 95 where Jibowu, Ag. FCJ., as he then was, said:

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

*Both the Supreme Court of Nigeria and the West African Court of Appeal came to the same conclusion in Momodu Raji v. M. Williams and Ors 16 NLR 149 above referred to, and with the views expressed in the case by their Lordships respectfully agree.”*

See also Andrew N. Okonkwo v. Co-operative & Commerce Bank Nig. Plc. & Others (2003) 2-3 S.C. 157 per Uwaifo, JSC

From all I have said above, I have come to the conclusion that there is merit in the appeals of the Appellants which I hereby allow. I set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court. The 3rd Appellant is entitled to N2,000.00 costs of the trial in the High Court as awarded by that court against the Respondents. Each set of Appellants is entitled to N2,000.00 costs of the appeal in the Court of Appeal against the Respondents and N10,000.00 costs of this appeal also against the Respondents.

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### **UWAIS CJN**

I have had the opportunity of reading in draft the judgment read by my learned brother, Ogundare, JSC. I entirely agree with him that the appeal has merit. Accordingly, I too hereby allow the appeal and make order as to costs as contained in the said judgment.

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### **IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, JSC., and I agree with the reasoning and conclusions therein reached. I have nothing more to add.

Consequently, I, too allow the appeals of the appellants. The

judgment of the Court of Appeal is set aside and that of the trial court is hereby restored. I endorse all the orders as to costs made in the leading judgment.

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**MUSDAPHER JSC**

I was privileged to have read before now the judgment of my Lord Ogundare, JSC., just delivered. I respectfully agree with the reasoning and the conclusion arrived at. For the same reasons, which I adopt as mine, I too, allow the appeal. I set aside the decision of the Court of Appeal and restore the judgment of the trial court.

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