

SUPREME COURT OF NIGERIA

18TH JULY, 2005. SC. 18/2000

**CORAM:- S. M. A. BELGORE, S. U. ONU, A. O. EJIWUNMI,
D. O. EDOZIE, S. A. AKINTAN, JJSC**

1. NIGERIAN ADVERTISING SERVICES LTD. APPELLANTS
2. CHIEF ANYIBUOFU MEGAFU

AND

1. UNITED BANK FOR AFRICA PLC. RESPONDENTS
2. MRS. BRIDGET OKWESA

PLEADINGS - Averment - Admission - Where a party makes a statement - Which amounts to prior acknowledgment by him - That one of the material facts relevant to the issue - Is not as he now claims - Such fact admitted requires no further evidential proof (H1)

PLEADINGS - Proof - Averment - Must be proved by evidence - Except where they are admitted by the other party (H2)

APPEALS - Concurrent findings of fact - May be disturbed - Where there is insufficient evidence - To support them - Or where there is glaring miscarriage of justice (H3)

FACTS

Before the High Court of Lagos, the Plaintiffs/appellants instituted an action against the defendant/respondent. The appellants' claim arose over a dispute between the appellants and the 1st respondent. The claim was over a purported sale of the 2nd appellant's house at No. 52 Norman William Street, South West Ikoyi Lagos. When the appellants refused to pay the loan granted to them by the 1st respondent, it gave them notices of its intention to sell the mortgaged property. On the 3rd of April, 1989, the 1st respondent gave to the appellants a final notice of the sale and in reaction, the appellants in their reply dated 17/4/89 asked for an extension

of 4 weeks to produce a better offer.

On the 11/5/1989, the 1st appellant presented to the 1st respondent a bank draft of N1.3 million as liquidation of the mortgage debt which at that time stood at N700,395.93. The 1st respondent declined to accept the said bank draft alleging that the mortgaged property has been sold on 28/4/1989. The appellants therefore filed this suit against the 1st respondent claiming that purported sale of the appellants' property is null and void. The trial court dismissed the appellants' claim and entered judgment in favour of the 1st respondent. Dissatisfied with the judgment, the appellants lodged an appeal to the Court of Appeal. The Appeal was dismissed. The appellants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"i. Whether the Court of Appeal was right in upholding the decision of the trial court that the mortgaged property was sold on 28th April, 1989, on the ground that the 1st appellant had admitted the sale in its pleadings and evidence, having regard to the findings of the trial Judge that the parties had joined issue on that matter in their pleadings and that the onus was on the defendant to establish that it had sold the mortgaged property.

ii. Whether the Court of Appeal was right in treating the evidence of the 2nd plaintiff as to what one Mr. Obembe (who did not testify) had told him of the date of "the purported sale" as evidence of fact of the sale on the said date.

iii. Whether the Court of Appeal was right in failing to consider the application of Section 149(d) of the Evidence Act, Cap. 112, against the 1st respondent for failing to provide any evidence to support its averments that it had sold the mortgaged property, executed a deed of mortgage in favour of the purchaser and paid the purchase money into the 1st plaintiff's account before the cheque for the redemption of the mortgage was presented."

HELD (Unanimously allowing the appeal per **AKINTAN JSC**)

PLEADINGS - Averment - Admission

1. The plaintiffs merely pleaded in that paragraph 9 what the 2nd plaintiff was told when he went to present the bank draft in the bank. It is definitely wrong to hold that the plaintiffs had by that averment admitted both the sale and the date of the property. An admission, as defined in Black's Law Dictionary, 6th Edition, 1990, page 47, "*is a statement made by one of the parties to an action which amounts to a prior acknowledgment by him that one of the material facts relevant to the issues is not as he now claims.*" The position of the law is that facts admitted require no further evidential proof. In the instant case, the plaintiffs' case was that there was no sale as at the time they presented the cheque for full settlement of their indebtedness to the bank or if there was in fact a sale, it was fraudulent to sell the mortgaged property for N1.2 million after the bank had been informed of a higher offer of 1.3 million for the same property. The onus was therefore on the defence to establish that there was in fact a sale and that the sale was made before the plaintiffs notified the bank of a higher offer of N1.3 million. In other words, the defence would need to plead and lead credible evidence in support of the date the sale was made. As has been shown above, the only witness for the defence failed to satisfy this requirement. (p. 2171 H)

Averment - Must be proved by evidence

2. The law is settled that an averment in pleadings is no evidence and cannot be so construed. They are mainly to set out the evidence that a party is likely to present so that the other side would not be caught unaware or unprepared. The averments in pleadings must be proved by evidence except however, where they are admitted by the other party. In the instant case, the defendant had pleaded in paragraph 14 of its Statement of Defence as follows.

"In reply to paragraph 9 of the Statement of Claim, the defendant avers that it has sold the mortgaged property, executed a Deed of Assignment in favour of the purchaser and paid the purchase money into

the plaintiff's account before the plaintiffs presented a bank draft for N1.3 million for the liquidation of the mortgaged debt." (p. 2172 E)

Concurrent findings of fact - May be disturbed

B 3. The law is settled that this court will only disturb concurrent findings of the lower courts in very rare instances, such as where there is insufficient evidence to support them or there is glaring miscarriage of justice clearly shown to have occurred. (p. 2173 E)

C **REPRESENTATION**

Chief G. N. Uwechue, SAN., (with him, chief P. O. Okolo), for the Appellants.

Mrs. N. C. Chukwurah, for the 1st Respondent.

D Mr. Olasupo Shasore, (with him, Mr. A. Ademola), for the 2nd Respondent.

CASES REFERRED TO

Bajoden v. Iromwanimu (1995) 7 NWLR (Pt.410) 655

E Obmiami Brick & Stone Nig. Ltd, v. A. C. B. Ltd. (1992) 3 NWLR (Pt.229) 260 at 301

Olagunju v. Oyeniran (1996) 6 NWLR (Pt.453) 127 at 143

Akanmu v. Adigun (1993) 7 NWLR (Pt.304) 218 at 231

Honika Sawmill Nig. Ltd. v. Hoff (1994) 2 NWLR (Pt.326) 252 at 260

F Insurance Brokers of Nigeria v. A. T. M. Co. Ltd. (1996) 8 NWLR (Pt.466) 316 at 328

Enang v. Adu (1981) 11-12 S.C. (Reprint) 17; (1981) 11-12 S.C 25 at 42

Lokoyi v. Olojo (1983) 8 S.C. 61 at 68

Bajoden v. Iromwanimu (1995) 7 NWLR (Pt.410) 655 at 670

G Temco Engineering & Co. Ltd. v. S. B. N. Ltd. (1995) NWLR (Pt.397) 607

STATUTE REFERRED TO

Evidence Act s. 149(d)

H

LEAD JUDGMENT BY AKINTAN JSC

The appellants, as plaintiffs, instituted this action in the Lagos Judicial Division of the High Court of Lagos State as Suit No.L/2112/89 against the present 1st respondent as defendant. The present 2nd respondent was joined as an interested party when the case was on appeal at the court below. The plaintiffs' claim arose over a dispute between the plaintiffs and the 1st respondent bank. It was over a purported sale of the 2nd appellant's house at 52 Norman Williams Street, South West Ikoyi, Lagos, which was mortgaged to the 1st respondent as security for overdraft facilities granted by the bank to the 1st appellant but guaranteed by the 2nd appellant.

The 1st respondent contended that the house was sold when it exercised its power of sale under a deed of mortgage. The appellants disagreed that there was in fact any sale or if there was one, it was made in breach of the terms of the deed of mortgage. The plaintiffs therefore filed their action in which they claimed the following reliefs from the court:

"(a) A declaration that the purported sale of the plaintiffs' property known and described as 52 Norman Williams Street, S.W. Ikoyi, Lagos, is null and void and of no effect whatsoever.

(b) A declaration that the purported sale of the plaintiffs' said house by the defendant is not in accordance with the provisions of the law.

(c) An order setting aside the purported sale of the said property by the defendant on the ground that the sale was fraudulent and/or made in bad faith.

(d) A declaration that an offer of N1.3 million had "been made to the plaintiffs for their property by another person and this was communicated to the defendant and its solicitors, Mr. Obembe, before their purported sale of the same property for a lesser amount of N1.2 million.

(e) A declaration that the purported sale is also null and void because it was contrary to the terms of the mortgage agreement between the plaintiffs and the defendant."

The parties filed their respective pleadings. The defendant/1st respondent filed an amended counter-claim in which it counter-claimed

as follows:

“The defendant, as trustee for the purchaser, hereby claims against the 2nd plaintiff, Chief A. Megafu:

(a) Rent and mesne profits in respect of the property

B at No.52 Norman Williams Street, South West Ikoyi, Lagos.

(b) Possession of the said property.”

At the trial which took place before Adeyinka, J., the 2nd defendant/ respondent gave evidence for the plaintiffs and he was duly cross-examined by learned counsel for the defence. His evidence was in line with the plaintiffs’ pleadings. He told the court, inter alia, that he presented a draft for full payment of his indebtedness to the bank but was refused by the bank on the ground that the house had been sold to an unnamed buyer for N1.2 million even though he had earlier told the bank that he had an offer of N1.3 million for the same property. He denied that there was a sale of the property at the time he presented the draft for full settlement of his indebtedness to the bank.

The case for the defence was presented by one Francis Okunfolami, the Loans Recovery Officer of the Bank. He told the court, inter alia, that the 2nd defendant’s property in question was mortgaged to his bank as security for the over-draft facilities granted to the defendants. When the defendants failed to pay up their indebtedness to his bank, they decided to sell the property. The witness admitted under cross-examination that the 2nd defendant had asked, in a letter he wrote to the bank, to be given four weeks to pay the debt. He said they did not reply the letter and that the 2nd defendant brought the draft which they rejected before the expiration of the four weeks he had earlier requested in his letter. The witness also admitted that the property was sold by private negotiation. His answers to some of the questions put to him under cross-examination as recorded on page 89 of the record are, inter alia, as follows:

“The property was sold by private negotiation. We did not publish it. The property has been sold before he brought his cheque. I cannot remember the exact date it was sold. It was sold in 1988. I cannot remember the month.”

The defendants closed its case at the end of the evidence of their

only witness and learned counsel for the respective parties addressed the court. The learned trial Judge thereafter delivered his reserved judgment in the case on 16/12/92. The learned Judge dismissed the plaintiffs’ claim. He granted the defendant’s counter-claim and N100 costs was awarded to the defendants. The defendants’ appeal to the court below was dismissed with N3,000 as costs to the respondents. The present appeal is against the judgment of the court below.

The appellants filed five grounds of appeal against the said judgment of the court below. The parties filed their briefs in this court. The appellants formulated the following three issues as arising for determination in their brief:

“i. Whether the Court of Appeal was right in upholding the decision of the trial court that the mortgaged property was sold on 28th April, 1989, on the ground that the 1st appellant had admitted the sale in its pleadings and evidence, having regard to the findings of the trial Judge that the parties had joined issue on that matter in their pleadings and that the onus was on the defendant to establish that it had sold the mortgaged property.

ii. Whether the Court of Appeal was right in treating the evidence of the 2nd plaintiff as to what one Mr. Obembe (who did not testify) had told him of the date of “the purported sale” as evidence of fact of the sale on the said date.

iii. Whether the Court of Appeal was right in failing to consider the application of Section 149(d) of the Evidence Act, Cap. 112, against the 1st respondent for failing to provide any evidence to support its averments that it had sold the mortgaged property, executed a deed of mortgage in favour of the purchaser and paid the purchase money into the 1st plaintiff’s account before the cheque for the redemption of the mortgage was presented.”

As I have stated earlier above, the 2nd respondent was joined as an interested party by an order of the Court of Appeal. Each of the two respondents filed a respondent’s brief in this court. The 1st respondent formulated five issues as arising for determination in the 1st respondent brief while two issues were formulated in the 2nd respondent’s brief. All

the issues formulated in the two respondents' briefs are, however, well covered in the three issues raised in the appellants' brief. I therefore, do not consider it necessary to reproduce the issues formulated in the two briefs filed by the respondents. I believe that the three issues formulated by the appellants are quite adequate in resolving the questions raised in the appeal.

On the appellants' issue 1, it is submitted that it was quite clear from the pleadings of the parties that the parties joined issues on whether the property was sold on 28th April, 1989, before the mortgagor tendered a bank draft for N1.3 million to redeem the mortgage on 11th May, 1989. Reference is made to the evidence of the only witness called by the defence in the case. It is submitted that the said witness failed to tell the court the exact date the property was sold. The learned Justices of the Court of Appeal are therefore said to have acted wrongly when they held that the sale was made on 28th April, 1989, when no such evidence was tendered at the trial. They are therefore, said to be wrong when they upheld the findings of fact made by the learned trial Judge that the sale was made before the appellants presented the cheque for full payment of their indebtedness to the bank when no such evidence was tendered before the trial court.

It is submitted in reply in the two briefs filed by the two respondents that it was clear from the plaintiffs' claim and pleadings filed in the case that the plaintiffs acknowledge that there was sale of the mortgage property. It is therefore submitted that it was not necessary for the defence to lead evidence in denial of the sale.

It is clear from the appellants' claim, which I have already set out above, that the main grouse of the appellants was directed at the sale of the mortgaged property. They clearly asked, in the first leg of their claim for "a declaration that the purported sale of the plaintiffs' property..... is null and void and of no effect whatsoever." They also asked in their third claim, for "an order setting aside the purported sale of the said property by the defendant on the ground that the sale was fraudulent and/or made in bad faith." The appellants also set out in their pleadings that they had earlier informed the 1st respondent that they received an offer for N1.3 million naira for the house and also wrote the 1st respondent to ask for

four weeks to enable them settle their indebtedness. The 1st respondent bank did not reply to any of the two information conveyed to it in the two letters from the appellants.

The 2nd appellant, also contended in his evidence at the trial that there was no sale and if there was one, it was fraudulent in that the purported sale of the house for N1.2 million was made after he informed the 1st respondent that he already had an offer of N1.3 million and after he asked for 4 weeks within which to fully settle the indebtedness to the bank.

The only witness who testified for the respondent, on the other hand, could not tell the court the exact date or month when the sale was made. He said the sale was not published or advertised. He merely said that the sale was made before the 2nd appellant brought his cheque for full settlement of his indebtedness to the bank. It may also be mentioned that when the 2nd appellant presented his cheque at the bank, he was merely told that the house had been sold. He was not shown the statement of his account where and the date the purchaser of the house paid the purchase money into the bank account. It is very ridiculous for the respondents to hold that there was no need for them to lead evidence to rebut the allegation clearly made by the appellants that there was no sale or that if there was one, it was fraudulent.

On the other hand, the 1st respondent contended that it relied on the averments contained in paragraph 9 of the plaintiffs' Statement of Claim to the effect that the appellants were told that the house was sold on 28/4/89. The plaintiffs had pleaded as follows in paragraph 9:

"The plaintiffs aver that a bank draft No.017466 dated 11/ 5/89 for N 1.3 million drawn on Nigerian Merchant Bank Ltd., was presented to the defendant on 11/5/89 for the liquidation of the mortgage debt, but was rejected by the defendant on the ground of the property having been sold on 28/4/89 thereby denying the plaintiffs opportunity to redeem their property."

The plaintiffs merely pleaded in that paragraph 9 what the 2nd plaintiff was told when he went to present the bank draft in the bank. It is definitely wrong to hold that the plaintiffs had by that averment

admitted both the sale and the date of the property. An admission, as defined in *Black's Law Dictionary*, 6th Edition, 1990, page 47, "*is a statement made by one of the parties to an action which amounts to a prior acknowledgment by him that one of the material facts relevant to the issues is not as he now claims.*" The position of the law is that facts admitted require no further evidential proof. See *Bajoden v. Iromwanimu* (1995) 7 NWLR (Pt.410) 655; *Obmiami Brick & Stone Nig. Ltd. v. A. C. B. Ltd.* (1992) 3 NWLR (Pt.229) 260 at 301; and *Olagunju v. Oyeniran* (1996) 6 NWLR (Pt.453) 127 at 143. In the instant case, the plaintiffs' case was that there was no sale as at the time they presented the cheque for full settlement of their indebtedness to the bank or if there was in fact a sale, it was fraudulent to sell the mortgaged property for N1.2 million after the bank had been informed of a higher offer of 1.3 million for the same property. The onus was therefore on the defence to establish that there was in fact a sale and that the sale was made before the plaintiffs notified the bank of a higher offer of N1.3 million. In other words, the defence would need to plead and lead credible evidence in support of the date the sale was made. As has been shown above, the only witness for the defence failed to satisfy this requirement.

The law is settled that an averment in pleadings is no evidence and cannot be so construed. They are mainly to set out the evidence that a party is likely to present so that the other side would not be caught unaware or unprepared. The averments in pleadings must be proved by evidence except however, where they are admitted by the other party. See *Akanmu v. Adigun* (1993) 7 NWLR (Pt.304) 218 at 231; *Honika Sawmill Nig. Ltd. v. Hoff* (1994) 2 NWLR (Pt.326) 252 at 260; and *Insurance Brokers of Nigeria v. A. T. M. Co. Ltd.* (1996) 8 NWLR (Pt.466) 316 at 328. In the instant case, the defendant had pleaded in paragraph 14 of its Statement of Defence as follows:

"In reply to paragraph 9 of the Statement of Claim, the defendant avers that it has sold the mortgaged property, executed a Deed of Assignment in favour of the purchaser and paid the purchase money into the plaintiff's account before the plaintiffs presented a bank draft for N1.3 million for the liquidation of the mortgaged debt."

But the defence failed to lead any evidence in support of the above averments pleaded. The only witness for the defence merely told the court that the property was sold in 1988 and that he could not remember the month. He said nothing about averments in their pleadings concerning payment of the amount realized from the sale of the property into the plaintiffs' bank account. If that evidence was given, the entry in the plaintiffs' statement of account would have probably confirmed whether the date the payment was made into the account was before or after the plaintiffs notified the bank of the higher offer of N1.3 million the plaintiffs received for the property which the bank now sold for a lesser sum of N1.2 million. The plaintiffs' allegation of fraud made against the defendant would have been debunked.

As already declared above, pleadings could not replace evidence. Any pleaded fact which is not given in evidence is therefore deemed abandoned. The defence therefore failed to controvert all the very serious allegations levelled against it on the sale of the property. The findings of fact made by the trial court on the issue are therefore totally erroneous. The court below was also in error when it affirmed the judgment premised on those erroneous findings of fact.

The law is settled that this court will only disturb concurrent findings of the lower courts in very rare instances, such as where there is insufficient evidence to support them or there is glaring miscarriage of justice clearly shown to have occurred. See *Enang v. Adu* (1981) 11-12 S.C. (Reprint) 17; (1981) 11-12 S.C 25 at 42; *Lokoyi v. Olojo* (1983) 8 S.C. 61 at 68; and *Bajoden v. Iromwanimu* (1995) 7 NWLR (Pt.410) 655 at 670.

In the instant case, the main dispute before the trial court was whether the sale of the property was made before the plaintiffs offered to settle the debt owed the bank and if so whether the sale was made before or after the plaintiffs notified the 1st respondent of a higher offer for the building. Although the 1st respondent pleaded the date the sale was made, it failed to lead evidence in support of its pleadings. The trial court therefore failed to hold that the evidence led in support of the plaintiffs' case stood uncontroverted. The result was that the plaintiffs' claim was wrongly dismissed by the trial court and the counter-claim was wrongly

granted by the same trial court. Similarly and based on the same reasons, the court below was wrong when it affirmed the judgment of the trial court by dismissing the appellants' appeal. There is therefore merit in the appeal on the appellants' issue 1.

B The question raised in the appellants' issue 2 is whether the court below was right in treating the evidence of the 2nd plaintiff as to what Mr. Obembe had told him regarding the date of the purported sale as evidence of the fact of the sale on the said date. As I have said earlier above, this was the information that prompted the plaintiffs to commence their C action. It was the same information that they were challenging in court. That information could therefore not be evidence against them at the trial.

D Also in issue 3, the appellants raised the question whether the court below was right in failing to consider the application of Section 149(d) of the Evidence Act against the 1st respondent for failing to provide any evidence to support its averment that it had sold the mortgaged property, executed a deed of assignment in favour of the purchaser and paid the purchase money into the 1st plaintiff's account before the draft for the redemption of the mortgage was presented. Section 149(d) of the E Evidence Act provides that:

"149. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their F relation to the facts of the particular case, and in particular the court may presume -

(d) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

G The appellants again raised in this issue the failure of the defence to lead evidence in support of the averments in their pleadings. As I have fully discussed above the effect of the failure, I need not repeat same again.

H In conclusion, I allow the appeal. I accordingly set aside the judgment of the Court of Appeal delivered in this case on 9th June, 1999, including all the orders made therein. I also set aside the judgment of Adeyinka. J., delivered in the case on 16th December, 1992 and all the orders made therein. In their place, I hereby order that the plaintiffs proved

their claim before the court and I accordingly enter judgment for them as per their claim. I hold that the defendant's counter-claim failed and I accordingly make an order dismissing it. The appellants are entitled to their costs both at the High Court, the Court of Appeal and in this court which I assess respectively as N3.000, N5,000 and N10.000. All the costs B are to be paid by the 1st respondent.

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BELGORE JSC

C Clearly, the purported sale of the property by the defendant bank was not in good faith. The whole was done stealthily and in secrecy whereby even the appellant/mortgagor was not given access to his account so that the alleged purchase would be known. Equity of redemption is a D strong point in equity and it cannot lightly be vitiated. The purported sale is null and void. I therefore agree with Akintan, JSC., that the appeal has merit. I also allow it with the same consequential orders as to costs as the judgment of Akintan, JSC. E

ONU JSC

F Having been privileged to read before now the judgment of my learned brother, Akintan. JSC., just delivered, I agree with him that the appeal must perforce succeed.

In the circumstances, I too allow the appeal and make similar consequential orders inclusive of costs awarded in favour of the appellants. G

EJIWUNMI JSC

Having had the advantage of reading the draft of the judgment just delivered by my learned brother, Akintan, JSC., I also uphold this H appeal for the reasons given in the said judgment and also abide with the orders made with regard to costs in favour of the appellant.

EDOZIE JSC

The dispute culminating into this appeal emanated from a mortgage transaction under which the 2nd appellant, in consideration of a loan and overdraft facilities granted by the 1st respondent bank to the 1st appellant, mortgaged to the 1st respondent bank his property at No.52, Norman Williams Street, South-West, Ikoyi, Lagos. In default of repayment, the 1st respondent gave to the appellants written notices of its intention to sell the mortgaged property. On 3/4/89, the 1st respondent gave to the appellants a final notice of a sale and in reaction, the appellants in their reply dated 17/4/89 asked for an extension of 4 weeks “to produce a better offer” having known that the 1st respondent had got an offer of N1.2 million. Subsequently, the appellants on 21/4/89, intimated the 1st respondent’s solicitor, that they had got an offer of N1.3 million. Consistent with that, the appellants on 11/5/89 presented to the 1st respondent a bank draft for N1.3 million as liquidation of the mortgage debt which at the time stood at N700,395.93. The 1st respondent declined to accept the said bank draft alleging that the mortgaged property had been sold on 28/4/89.

In consequence of the foregoing, the appellants as plaintiffs by a Writ of Summons dated 18/10/89 held in the High Court of Lagos State in Suit No.L/2182/89 commenced an action against the 1st respondent as defendant claiming, inter alia, that the purported sale of the plaintiffs’ property is null and void and an order to set aside the same. Pleadings were filed and exchanged. In the Statement of Defence and amended counter-claim filed by the defendant bank, it denied the plaintiffs’ claim and counter- claimed for rent and mesne profits as well as the possession of the mortgaged property.

In the ensuing trial, each party called witnesses to substantiate its case and at the end, the learned trial Judge, Adeyinka. J., in a reserved judgment delivered on 16/12/92, found against the plaintiffs, dismissing their claim and entering judgment for possession of the mortgaged property in favour of the 2nd defendant.

Dissatisfied with the judgment, the plaintiffs as appellants lodged an appeal to the Court of Appeal, Lagos Division. The 2nd respondent who presumably bought the mortgaged property on application was joined in the suit as an interested party. The Court of Appeal by a unanimous

decision delivered on 2/6/99 dismissed the plaintiffs/appellants’ appeal and affirmed the judgment of the trial court. Against that decision of the Court of Appeal, the appellants have lodged the present appeal. Briefs of argument were filed by the appellants and each set of the two respondents with issues for determination formulated therein.

From the pleadings, evidence and issues agitated by the parties, I think that the crux of this case is whether as at 11/5/89, when the 2nd appellant presented to the 1st respondent bank a draft of N1.3 million in liquidation of the mortgage debt, the 1st respondent/mortgagee had exercised its power of sale to effect the sale of the mortgaged property. This point is evident from paragraph 9 of the Statement of Claim and paragraphs 14, 15 and 16 of the defendants’ Statement of Defence reproduced hereunder:-

Statement of Claim

“9. The plaintiffs aver that a Bank draft No.017466 dated 11/5/89 for N1.3 drawn on Nigerian Merchant Bank Limited. Broad Street Branch in favour of the defendant was presented to the defendant on 11/5/89 for the liquidation of the mortgage debt but was rejected by the defendant on the ground of the property having been sold on 28th April, 1989, thereby denying the plaintiffs opportunity to redeem their property. The plaintiffs plead this document and will rely on it at the trial of this action.”

Statement of Defence

“14. In reply to paragraph 9 of the Statement of Claim, the defendant avers that it had sold the mortgaged property, executed a deed of assignment in favour of the purchaser and paid the purchase money into the 1st plaintiff’s account before the plaintiff presented a Bank Draft for N1.3 million for the liquidation of the mortgage debt.

15. The defendant avers that the willingness and manifestation of the plaintiffs’ intention to redeem the mortgaged property came too late, in that the defendant as mortgagee/vendor had sold and transferred title to the purchaser hence the defendants’ refusal to accept the said Bank draft.

16.

A letter informing the plaintiffs that the property has been sold will be relied and founded upon.”

From the state of the pleadings, it is common ground that on

11/5/89, the appellants presented or tendered to the 1st respondent bank a draft of N1.3 million more than what was sufficient to liquidate the mortgage debt. The 1st respondent refused to accept the draft on the ground that before the draft was tendered, the mortgaged property had been sold.

B That would have been a complete defence to the appellants' action if that allegation were established. The onus is on the party who asserts to prove its assertion. At the trial, the 1st respondent's sole witness testifying in chief stated at pp.87. 88 thus:-

C "My name is Francis Okunfolami.....
I am a loan recovery officer with U.B.A.....
During the course of business, the plaintiff applied for overdraft and loan which was granted to him. It was in 1979 to he due by 1982, but unfortunately he did not pay up. We wrote letter of demand.

D Court.....
The three letters of demand dated 9/12/88, 5/6/89 and 3/4/ 89 are admitted in evidence as Exhibits D2. D3 and D4 respectively.

E When he failed to pay up after series of letters of demand. I have decide to realize one of the securities he mortgaged for the facility by selling his property at No.52, Norman Williams Street, Ikoyi. The property was sold to Mrs. Okwesa. We prepared a deed of assignment in her favour. The original deed was given to her as the purchaser. This is a copy of the deed of assignment.

F Court: The copy of the Deed of Assignment is tendered and no objection admitted in evidence as Exhibit D5.

G Cross Exam:
I know that the plaintiff brought a cheque to our bank before the four weeks. Obembe said we got a cheque for N1.2 million. We went and sold the property. I have never seen Mrs. Okwesa. I don't know whether she signed any document with our bank..... The property has been sold before he brought his cheque. I cannot remember the exact date it was sold. It was sold in 1988. I cannot remember the exact month....."

H It is evident from the above excerpts of the evidence of the sole witness of the respondent bank that it had not established by credible evidence that the mortgaged property was sold before 11/5/89 when the appellants tendered their bank draft. If, as pleaded by the respondent in

paragraph 14 of the Statement of Defence that the purchase money was paid into the appellants' account, the best evidence to that effect would have been the appellants' statement of account which was in the custody of the 1st respondent. Again the letter pleaded in paragraph 16 of the Statement of Defence in which the bank claimed to have informed the appellants B that the property had been sold was not tendered despite the averment that the bank would rely on it. By Section 149(d) of the Evidence Act, the presumption is that there was no such letter. The Deed of Assignment, "Exhibit 25" was made on 12th September, 1989. It seems to me manifest C that the respondent bank was unable to discharge the burden of proving that it had sold the mortgaged property before 11/5/89 when the draft of N1.3 million was presented to it by the appellants. The irresistible inference, therefore, is that as at that date the mortgaged property had not been sold.

D What then is the legal consequence? In this regard, I think the statement of law in the case of Nigerian Housing Development Society & Anor. v. Yaya Mumuni (1977) 2 S.C. (Reprint) 30; (1977) 2 S.C 30 at p.38 and 39 is apposite. In that case, this court per Sir Udo Udoma JSC., as he then was had this to say:-

E "It is a well established principle of law that a mortgagee will not be restrained on the exercise of his power of sale merely because the mortgagor objects to the manner in which the sale is being arranged or because the mortgagor has commenced a redemption action in court (see F Adams v. Scott (1859) 7 WR 213). But the mortgagee will be restrained if the mortgagor pays the amount claimed by the mortgagor into court (see Hickson v. Barlow (1883) 23 Ch. D 690)."

G See also the case of Temco Engineering & Co. Ltd. v. S. B. N. Ltd. (1995) NWLR (Pt.397) 607.

I am of the view that the sale of the mortgaged property after the appellants had tendered the bank draft of N1.3. million could not have been done in good faith without collusion with the purchaser. The sale therefore was null and void. The appellants are entitled to their claim. H

The foregoing is in support of the leading judgment just delivered by my learned brother, Akintan, JSC. I agree with him that the appeal is meritorious and is hereby allowed with all the consequential orders

2180 N.A.S. Ltd. v. U.B.A. Plc. (2005) 7 KLR Edozie JSC
contained in the leading judgment.

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