

SUPREME COURT OF NIGERIA
3RD FEBRUARY, 2006. SC. 199/2001
CORAM:- I. L. KUTIGI, U. A. KALGO, D. MUSDAPHER, I. C.
PATS-ACHOLONU, G. A. OGUNTADE, JJSC

ALHAJA K. F. IBIYEYE

..... APPELLANT

AND

1. A. A. FOJULE

2. FEDERAL MORTGAGE BANK OF NIGERIA ... RESPONDENTS

3. NELSON OLADIMEJI

APPEALS - Grounds of appeal - Issues raised thereby - Are not of mixed fact and law - As facts are not in dispute in this appeal (H1)

AUCTION SALES - Mortgages - Conveyancing - Conflict of laws - Auction sale of land - That would have been invalid - Is validated by another law - In protection of a bona fide purchaser (H2)

LAND LAW - Sale - Auction sales - Where requisite notice was not given - Purchaser for value without notice - Acquires good title under another applicable law (H3)

FACTS

Before the Ilorin High Court of Kwara State the plaintiffs/1st respondent filed an action against the defendants/appellant/2nd and 3rd respondents. 1st respondent claimed inter alia, that the purported sale of his property to the appellant is null and void as it is contrary to s. 19 of the Auctioneers Law. The 1st respondent was given a loan by the 2nd respondent. Upon his default in paying back the loan 2nd respondent instructed the third respondent to sell the mortgaged property. Following a printed auction notice, the property was on 30/3/1992 sold to the appellant.

It is not in dispute that only two days notice was given of the public auction contrary to s. 19 of the Auctioneers Law that provided that at least

7 days public notice be given. Yet s. 123 of Law of Property Edict provided that the title of the purchaser shall not be invalidated merely because due notice was not given. So that the trial court has to determine which of the two Laws is applicable. At the conclusion of hearing, the trial court found that the appellant is a bona fide purchaser of property for value without notice and held that the sale of the property to her is not null and void as contended by the 1st respondent. The 1st respondent's appeal to the Court of Appeal was upheld. Being dissatisfied the appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the Auctioneers' Law of Kwara State applies to the transaction concerned and if it applies,

(ii) Whether non-compliance with Section 19 of that law renders the auction sale void.

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

Grounds of appeal - Issues raised thereby

1. The appellant's grounds of appeal have not in my view raised any issue of fact. Rather, it is simply necessary to determine whether the ascertained or undisputed facts are to be considered under section 19 of Cap. 10 or under section 123 of Cap. 128. The simple question is which of the two laws apply to the facts as found. Indeed the court below at page 156 of the record recognized that the facts are not in dispute when it said:

"I observe that the lower court however, in its wisdom found as follows-

I hold that the auction notice was given to the plaintiff on 28/3/92..... I also hold that the auction sale took place on 30/3/92.....'

There is no cross appeal against the above findings of the lower court. They are deemed therefore to have been correctly made. The respondents are also deemed to have accepted the findings. This court will not interfere with the findings."

I therefore overrule the preliminary objection. (p. 783 G)

AUCTION SALES - Mortgages - Conveyancing - Conflict of laws

2. As I observed earlier, the main issue in the appeal is the determination of the applicable law. Happily, the matter falls within an area of jurisprudence in which this Court has made a declaration of the law applicable in a situation such as this. I am bound by these judicial authorities which are *Okonkwo v. C.C.B.* [2003] 8 NWLR (Pt.822) 347 and *A.C.B. Ltd. V. Ihekwoaba* [2003] 16 NWLR (Pt.846) 249.

Now in *Okonkwo v. C.C.B. (Nig.) Plc* [2003] 8 NWLR (Pt.822) 347 at pp.388-389, this Court per Uwaifo J.S.C. observed:

“However, there are certain acts which will affect the proper conduct of an auction sale. These are improper or fraudulent acts which are likely to prevent the property put up from realizing its fair value. Collusion or want of good faith is an obvious one.

I have held that section 19 of the auctioneers’ Law was not complied with. The effect of this would have been perhaps that an important condition for, what I might call, a popular auction sale not having been met, the sale would be held invalid. But a provision of another statute, section 21(1) of the Conveyancing Act, 1881 applicable in Abia State, has interplayed with section 19 of the Auctioneers’ Law. It 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 authorize the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercise, but any person damnified by all unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.’

This is obviously to protect a bona fide purchaser who merely purchased under irregular circumstances as no purchaser who is tainted with fraud or collusion cannot be expected to benefit from this provision. (p. 784 C)

Auction sales - Where requisite notice was not given

3. It is obvious that the 2nd and 3rd respondents had not given the requisite notice for auction sale conducted on the 1st respondents property. This

was a clear infraction of section 19 of Cap. 10 Laws of Northern Nigeria. However the appellant in my view derives adequate protection from under section 123, it being shown that she was a purchaser for value without notice who bought in good faith. She therefore acquired a valid title to the B property.

In the final conclusion, this appeal succeeds. It is allowed. The judgment of the court below is set aside and the judgment of the trial court is restored. (p. 786 B)

C **REPRESENTATION**

Duro Adeyele Esq for the Appellant
 Ubong Esop Akpan for the 1st Respondent

D **CASES REFERRED TO**

- Sir Lloyd Kenyon M.R. in Twining v. Morrice (1788) 29 E.R. 182 at 184
- Sanusi v. Daniel (1956) SCNLR 288
- Haddington Island Quarry Co. Ltd. V. Huson (1911) AC 722 at 727
- E Eka-Eteh v. Nigserian Housing Development Society Ltd. (1973) 6 SC. 183 at 198
- Mason v. Armitage (1806) 13 Ves. 25; 13 E.R. 204 at 208
- Bexwell v. Christie (1776) 1 Cowp. 395 at 396; 98 ER. 1150
- F Okonkwo v. C.C.B. (Nig.) Plc [2003] 8 NWLR (Pt.822) 347 at pp.388-389
- A.C.B. Ltd. V. Ihekwoaba [2003] 16 NWLR (Pt.846) 249
- Nwadike & Ors. v. Ibekwe & Ors. [1987] 2 NSCC 1219 at 1235-1236
- Ogbechie & Ors. v. Onochie & Ors. (1986) 1 NSCC 443 at 445
- G Taiwo v. Adegboro & Ors. (1997) II NWLR (Pt.528) 224
- Oseni v. AIICO LTD. (1985) 3 NWLR (Pt. II) 229
- Chief F. B. Oseni v. American International Insurance Company Ltd. [1985] 3 NWLR (Pt. 11) 229
- H Orakosim & 2 Ors. v. Menkiti [2001] F.W.L.R. (Pt.52) 2068 at 2079

STATUTES REFERRED TO

Auctioneers Law Cap. 10 Laws of Northern Nigeria s. 19

Property Edict Cap. 128 Laws of Kwara State s. 123

Conveyancing Act 1881 ss. 19(1) & 21(1)

Evidence Act s. 146

LEAD JUDGMENT BY OGUNTADE JSC

The 1st Respondent was the plaintiff at the Ilorin High Court of Kwara State where he instituted against the 2nd and 3rd respondents and appellant respectively as 1st, 2nd and 3rd defendants a suit claiming jointly and severally against them the following reliefs:

“(a) A declaration that the plaintiff only owes the 1st defendant a maximum of N30,158.12k as at 31-12-92.

(b) A declaration that the 1st defendant can only charge 6 per cent interest per annum on the N37,500.00 paid to the plaintiff.

(c) The purported sale of the plaintiff's property to the 3rd defendant is null and void as it is contrary to section 19 of the Auctioneers Law.”

The parties filed and exchanged pleadings after which the suit was heard by Kawu J. At the trial, the plaintiff testified in support of his claim and tendered two documentary exhibits. He called one witness. The 1st and 2nd defendants called no evidence. The 3rd defendant (now appellant) testified on oath and tendered three exhibits. On 1-8-97, the trial judge in his judgment concluded in these words:

“Section 19(1) of the Conveyancing Act 1881 conferred on a mortgagee the statutory power of sale when the debt is due. This however can be done only after a notice in writing has been served on the mortgagor. See Darocha v. Hussain [1958] SCNLR 280 holding 7 at apge 281. Exhibit D1 dated 4th September, 1990 is both a notice of demand and of intended sale by the 1st defendant to the plaintiff (in) compliance with the decision in Darocha's case supra.

I am satisfied that the 3rd defendant is a bona fide purchaser of property for value without notice.

I accordingly hold that the sale to the 3rd defendant is not null and void as contended by the plaintiff. I also resolve this issue in the negative.

All the declaratory reliefs brought by the plaintiff fail and are

hereby dismissed.”

The plaintiff was dissatisfied with the judgment of the trial court. He brought an appeal against it before the Court of Appeal, Ilorin Division (hereinafter called the ‘court below’). The court below in its judgment on
B 13-7-2000 allowed the appeal in part. Directly relevant to this appeal is the conclusion of the court below that the sale of the mortgaged property to the 3rd defendant (now appellant) by the 2nd defendant (now 3rd respondent) on the instruction of 1st respondent (now 2nd respondent) was null and void.

C The 3rd defendant before the court of trial to whom the property was sold was dissatisfied with the judgment of the court below. She has brought this appeal against the judgment. In the appellant’s brief filed, the issues for determination in the appeal were identified as the following:

D “(i) *Whether the Court below was not in error when it held that the Conveyancing Law of Property Act 1881 (then a statute of general application in Kwara State) was not applicable as to length of notice of auction sale and that the applicable law was the Auctioneers’ Law.*

E (ii) *Whether non compliance with the provision of section 19 of the Auctioneers Law as to length of auction notice automatically renders the sale carried out by the 3rd respondent on behalf of the 2nd respondent in professed exercise of the latter’s power of sale as an unpaid mortgagee invalid and void*

F (iii) *Whether the court below had any justifiable reason in law to have set aside the sale of the mortgaged property in issue to the appellant).”*

G The 1st respondent in his brief raised one issue for determination. The solitary issue however is similar to the appellant’s second issue. Further the 1st respondent in the said brief raised a preliminary objection to the appellant’s grounds of appeal nos. 1, 2 and 3. It was contended that those grounds although described as “*Error in Law*” were when consid-
H ered along with the particulars supplied under each ground in fact grounds of mixed law and fact for which the appellant required the leave of this court or the court below in order to raise them validly. 1st Respondent’s counsel relied on *Nwadike & Ors. v. Ibekwe & Ors.* [1987] 11-12 SC NJ

72 at 99 and Orakosim & 2 Ors. v. Menkiti [2001] F.W.L.R. (Pt.52) 2068 at 2079. This Court was asked to strike out the appeal.

I shall consider later in this judgment the preliminary objection raised by the appellant. The facts relevant to the questions of law to be considered in this appeal are virtually undisputed. The 1st respondent B obtained a loan from the 2nd respondent. As a collateral security for the loan, the 1st respondent executed a deed of mortgage exhibit PI in favour of 2nd respondent. The deed covered 1st respondent's property at No. 21 Offa Road, Ilorin. Clause 10 of the deed of mortgage exhibit PI confers C the power of sale on the 2nd respondent in a clear language. The power of sale was to be exercisable if any of the following happened:

“(a) Notice requiring the payment of the principal sum payable hereunder or part thereof has been served on the borrower and default has been made in payment of the sum demanded or part thereof for one D calendar month after such service or

(a) some interest under these presents is in arrear and unpaid for one calendar month or

(c) There has been a breach of some provisions contained in these E presents and on the part of the borrower to be served and performed other than and besides the covenant for payment of the said principal sum and interest.”

The 1st respondent defaulted in the payment of the mortgage loan. F The 2nd respondent in writing asked the 1st respondent to redeem the mortgaged property by paying the outstanding sums. The demand notice was tendered in evidence as exhibit DI. Following 1st respondent's inability to redeem the mortgaged property, the 2nd respondent instructed G the 3rd respondent to sell the mortgaged property. Following a printed auction notice, the property was on 30/3/92 sold to the appellant. It was undisputed that the auction notice was pasted on the mortgaged property on 28/3/92 and the property sold on 30th March, 1992. In effect only 2 H days notice was given of the public auction.

Now Section 19 of the Auctioneers Law Cap. 10 Laws of Northern Nigeria applicable in Kwara State provides:

“No sale by auction of any land shall take place until after at Least

seven days' public notice thereof made at the principal town of the district in which the land is situated, and also at the place of the intended sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated persons as
B may be prescribed, or if not prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller”

As against the above section 19 of Cap. 10, there is also the Law of Property Edict Cap. 128, Laws of Kwara State which became operative
C with effect from 15-8-91. Section 123 thereof provides:

“123(1) A Mortgagee exercising the power of sale conferred by this Edict (Law) shall have power, by deed to transfer the property sold, for such interest therein as he is by this Edict (Law) authorized to sell or
D transfer or may be the subject of the mortgage, freed from all interests and rights to which the mortgage has priority, but subject to all interests and rights which have priority to the mortgage.

(2) Where a transfer is made in exercise of the power of sale
E conferred by this Edict (Law) the title of the Purchaser shall not be impeachable on the ground:

(a) that no case has arisen to authorize the sale;
(b) that due notice was not given; or
F (c) whether the mortgage was made before or after the commencement of this Edict (Law), that the power was otherwise improperly or irregularly exercised;

(3) A transfer on sale by a Mortgagee, made after the commencement of this Edict, (Law)l shall be deemed to have been made in exercise
G of the power of sale conferred by this Edict (Law), unless a contrary intention appears.”

(underlining mine)

The straight issue in this appeal is - which of the two Kwara State
H Laws above is applicable to the facts of this case. Whereas Section 19 Cap 10 provides that 7 days notice shall be given before a property is auctioned, Section 123 of Cap 128 provides that the sale of a mortgaged property shall not be impeachable on the ground that due notice was not given. The court

of trial took the view that since the appellant purchased the property in good faith for value and without notice, the fact that the notice of sale was less than the 7 days stipulated under the auctioneers Law would not render the sale invalid. The court below thought other wise. The court below relied on Sunday Abigbite Taiwo v. Serah Adegboro & Ors. [1997] 11 NWLR (Pt.528) 224 to arrive at the conclusion that the sale was invalid. Another case relied on was Chief F. B. Oseni v. American International Insurance Company Ltd. [1985] 3 NWLR (Pt. 11) 229. I shall pause here for a while.

The next matter I like to consider is the preliminary objection to the 1st, 2nd and 3rd grounds of appeal. The said grounds read:

“GROUND ONE ERROR IN LAW

The lower court erred in law when it held, after referring to section 19 of the Auctioneers’ Law of Kwara State as follows ‘In my considered view, the provision is very clear and unambiguous. There is no lacuna in the provision to be filled by reference to any law. In that case, it is not permissible, also in my considered view, to refer to or to apply any ‘received law’ be it a statute of general application or whatever, in interpreting the provision. This is because the local law by its completeness supplanted any foreign law in that regard’ and this has occasioned a serious miscarriage of justice.

Particulars of Error in Law

(i) *The subject matter under consideration is the law relation to mortgages and the appropriate and only existing governing law is the Conveyancing law of Property Act 1881, a Statute of general application and thereby a received English Law.*

(ii) *The Auctioneers’ Law governs sales by auction generally without any reference to sale in professed exercise of power of sale under a deed of mortgage.*

(iii) *The Conveyancing law of Property Act 1881 is the actual legislation applicable in the instant case.*

GROUND TWO ERROR IN LAW

*The Court of Appeal erred in law when it held as follows:-
."it is my view that the purported sale of the mortgaged property to 3rd*

respondent is invalid because of non-compliance with the provisions of section 19 of the Auctioneers' Law" and this has occasioned a grave miscarriage of justice.

Particulars of Error in Law

B *The decision of the lower Court is in utter disregard of section 21(2) of the Conveyancing law of Property Act 1881 (a statute of General Application) which provides as follows:*

'Where a conveyancing is made in professed exercise of the power of sale conferred by this Act, title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that the notice was not given, or that the power was otherwise improperly or irregularly exercise; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in
C
D *damages against the person exercising the power.'*

(ii) The cases of Taiwo v. Adegboro & Ors. (1997) II NWLR (Pt.528) 224 and Oseni v. AIICO LTD. (1985) 3 NWLR (Pt. II) 229 were decided under different circumstances quite different from the one at
E *hand.*

(iii) The Court of Appeal wrongly disregarded the Supreme Court decision in Okonkwo v. C.C.B. (Nig.) Ltd. (1997) 5 NWLR (Pt.507) 58.

(iv) Section 19 of the Auctioneers' Law does not render invalid a sale carried out without the requisite length of Notice.
F

(v) The only sanction for non compliance with section 19 of the Auctioneers' Law is imposition of a fine on the defaulting auctioneer.

(vi) Section 19 of the Auctioneers' Law is not intended to defeat the title of a bona fide Purchaser for value without Notice.

G *(vii) The 2nd respondent sold the mortgaged property through the 3rd respondent to the appellant in exercise of her power of sale under a Deed of Mortgage.*

(viii) The validity of the Deed of Mortgage was not called to
H *question.*

GROUND THREE: ERROR IN LAW

The Court of Appeal erred in law when it held that the sale of the Mortgaged Property to the appellant was invalid, even though the finding

of the trial court that the appellant was a bona fide Purchaser for value without Notice was in no form reversed.

Particulars of Error in Law

(i) *The finding of the court that the appellant was a bona Fide Purchaser for value without Notice was not made an issue before the Court of Appeal by the 1st respondent.* B

(ii) *Against the background of the unchallenged finding that the appellant was a bona fide Purchaser for value without Notice the Court of Appeal ought to dismiss the appeal.*

(iii) *The Court of Appeal erroneously disregarded the case of Oguehi v. Fed. Mortgage Bank of Nigeria (1990) 6 NWLR (Pt. 153) 330 cited before it which is a decision of the selfsame Court of Appeal.* C

(iv) *The bona fide of the purchaser in Taiwo Adegboro & Ors. (1997) 11 NWLR (Pt. 528) 224 relied upon by the lower court was seriously attacked.”* D

Now in *Ogbechie & Ors. v. Onochie & Ors. (1986) 1 NSCC 443* at 445, this Court per *Eso JSC* observed:

“There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law. Where however the grounds are such that would reveal or are grounds that would question the evaluation of facts by the lower tribunal before the application of the law, that would amount to question of mixed law and fact. The issue of pure fact is easier to determine.” E F G

See also on the point *Nwadike & Ors. v. Ibekwe & Ors. [1987] 2 NSCC 1219* at 1235-1236.

The appellant’s grounds of appeal have not in my view raised any issue of fact. Rather, it is simply necessary to determine whether the ascertained or undisputed facts are to be considered under section 19 of Cap. 10 or under section 123 of Cap. 128. The simple question is which of the two laws apply to the facts as found. H

Indeed the court below at page 156 of the record recognized that the facts are not in dispute when it said:

“I observe that the lower court however, in its wisdom found as follows-

B *I hold that the auction notice was given to the plaintiff on 28/3/92..... I also hold that the auction sale took place on 30/3/92.....’*

C *There is no cross appeal against the above findings of the lower court. They are deemed therefore to have been correctly made. The respondents are also deemed to have accepted the findings. This court will not interfere with the findings.”*

I therefore overrule the preliminary objection. As I observed earlier, the main issue in the appeal is the determination of the applicable law. Happily, the matter falls within an area of jurisprudence in which this Court has made a declaration of the law applicable in a situation such as this. I am bound by these judicial authorities which are *Okonkwo v. C.C.B. [2003] 8 NWLR (Pt.822) 347* and *A.C.B. Ltd. V. Ihekwoaba [2003] 16 NWLR (Pt.846) 249*.

Now in *Okonkwo v. C.C.B. (Nig.) Plc [2003] 8 NWLR (Pt.822) 347* at pp.388-389, this Court per Uwaifo J.S.C. observed:

F *“However, there are certain acts which will affect the proper conduct of an auction sale. These are improper or fraudulent acts which are likely to prevent the property put up from realizing its fair value. Collusion or want of good faith is an obvious one: See Haddington Island Quarry Co. Ltd. V. Huson (1911) AC 722 at 727; Eka-Eteh v. Nigserian Housing Development Society Ltd. (1973) 6 SC. 183 at 198. It is also*
 G *recognized as another, any act which is likely to ‘chill’ the sale, for example, the solicitor in a cause in which property is sold bidding for it: see Nelthorpe v. Pennyman 14 Ves. 517; 33 E.R 619 per Lord Eldon L.C. who said: ‘It would be a very wholesome rule to lay down, that the solicitor*
 H *in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor in the cause is, that the sale is immediately chilled’. See also Mason v. Armitage (1806) 13 Ves. 25; 13 E.R. 204 at 208. as Lord Mansfield said in Bexwell v. Christie (1776) 1 Cowp. 395 at*

396; 98 ER. 1150:

'The basis of all dealings ought to be good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder.'

I have held that section 19 of the auctioneers' Law was not complied with. The effect of this would have been perhaps that an important condition for, what I might call, a popular auction sale not having been met, the sale would be held invalid. But a provision of another statute, section 21(1) of the Conveyancing Act, 1881 applicable in Abia State, has interplayed with section 19 of the Auctioneers' Law. It 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 authorize the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercise, but any person damnified by all unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.'

This is obviously to protect a bona fide purchaser who merely purchased under irregular circumstances as no purchaser who is tainted with fraud or collusion cannot be expected to benefit from this provision. Equity will intervene since as said by Sir Lloyd Kenyon M.R. in Twining v. Morrice (1788) 29 E.R. 182 at 184. 'It is not every contract which is entered into that a court of equity will carry into execution.'

In Sanusi v. Daniel (1956) SCNLR 288, the Federal Supreme Court per Jibowu Ag. FCJ, after considering section 21(2) of the Conveyancing Act in almost similar situation as this case observed at page 291 thus:

'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 Action 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,'

Section 19(1) of the Sales by Auction Ordinance is in pan material with section 19(1) of the Auctioneers' Law. The property in question has been duly conveyed to the 3rd respondent following the auction sale. Nothing has been shown to have been done by her to attract the intervention of equity to deny her the right to the property."

This Court in AC.B. Ltd. V. Ihekwoaba (supra) made observations similar to the above.

It is obvious that the 2nd and 3rd respondents had not given the requisite notice for auction sale conducted on the 1st respondents property. This was a clear infraction of section 19 of Cap. 10 Laws of Northern Nigeria. However the appellant in my view derives adequate protection from under section 123, it being shown that she was a purchaser for value without notice who bought in good faith. She therefore acquired a valid title to the property.

In the final conclusion, this appeal succeeds. It is allowed. The judgment of the court below is set aside and the judgment of the trial court is restored. The appellant is entitled to costs in the court below and this court, which are fixed at N5,000.00 and N10,000.00 respectively against the 1st respondent.

KUTKIGIJSC

I have had the privilege of reading in advance the lead judgment just delivered by my learned brother Oguntade, J.S.C. I agree with his reasoning and conclusions which are ably set out in the judgment. I will also allow the appeal, set aside the judgment of the Court of Appeal and restore that of the trial High Court. I endorse the order for costs.

KALGO JSC

I have had the privilege of reading in advance the judgment of my learned brother Oguntade JSC just delivered. I entirely agree with him that there is merit in this appeal and it ought to be allowed.

This is an appeal against the decision of the Court of Appeal, Ilorin

Judicial Division, holden at Ilorin Kwara State. The appellant, as plaintiff, sued the respondents in the High Court Ilorin, claiming from them jointly and severally the following reliefs:-

“(a) A declaration that the plaintiff only owes the 1st defendant a maximum of 30,158.12 as at 31/12/92;

(b) A declaration that the 1st defendant can only charge 6 per cent interest per annum on the 1437,500.00 paid to the plaintiff and

(c) The purported sale of the plaintiffs property to the 3rd defendant is null and void as it is contrary to Section 19 of the Auctioneers Law”.

Pleadings were ordered, filed and exchanged in the High Court and after completing all preliminary matters, the trial commenced on 22/10/96. The appellant gave evidence and called only one witness in support of his claim. The 1st and 2nd respondents did not give evidence or call any witness. The 3rd respondent gave evidence in her own defence but called no witness in support. Learned counsel for the parties addressed the court and on 19/5/97, the case was adjourned for judgment to 31/7/97. The judgment was however only delivered on 1/8/97, in which the learned trial judge, Kawu J. dismissed all the claims of the appellant as per his writ of summons.

Not satisfied with the decision of the trial court the appellant filed a notice of appeal in the Court of Appeal against the decision on 8/8/97. Written briefs of argument were then filed and exchanged between the parties. The appeal was heard and in the lead judgment delivered on 13/7/2000, the Court of Appeal per Amaizu JCA concluded thus:-

“In the result, it is my view that this appeal is allowed in part. The sale of the mortgaged property to the 3rd respondent by the 2nd respondent on the instruction of the 1st respondent is hereby declared null and void”

Dissatisfied with this decision, the appellant as 3rd respondent filed a notice of appeal to this court on 29/8/2000 against the decision on 3 grounds of appeal.

In this court, the parties filed their respective briefs and exchanged them in accordance with the rules of court. The appeal was then heard by

the court on 8/11/05 and the judgment was reserved to today.

The appellant in his brief formulated 3 issues for the determination of the court which read:-

B “(i) *Whether the court below was not in error when it held that the conveyancing Law ‘of Property Act 1881 (then a Statute of general application in Kwara State) was not applicable as to length of notice of auction sale and that the applicable law was the Auctioneers’ Law.*

C (ii) *Whether non-compliance with the provisions of Section 19 of the Auctioneers Law as to length of auction notice automatically renders the sale carried out by the 3rd respondent on behalf of the 2nd respondent in professed exercise of the letter’s power of sale as an unpaid mortgage invalid and void.*

D (iii) *Whether the court below had any justifiable reason in law to have set aside the sale of the mortgage property in issue to the Appellant”.*

The 1st respondent in his brief identified only one issue to be determined in this appeal and it is this:-

E “*Whether the lower court was right in holding that there was no compliance with the provisions of Section 19 of the Auctioneers Laws Cap. 10, Laws of Northern Nigeria as applicable to Kwara State in the sale of the 1st respondent’s property”.*

F From the grounds of appeal filed by the appellant, the issue formulated by the appellant and the 1st respondent in their respective briefs, it appears to me that there are only two issues to be determined by this court in this appeal. These issues are (i) Whether the Auctioneers’ Law of Kwara State applies to the transaction concerned and if it applies, (ii) Whether non-compliance with Section 19 of that law renders the auction sale void. For this purpose therefore, I shall consider together in this appeal, issues 1, 2, and 3 of the appellant. The 1st respondent’s sole issue can be taken care of in issue 2 of the appellant.

H The 1st respondent also filed a notice of a preliminary objection in the appeal to the effect that:-

(a) Grounds of appeal 1, 2, and 3 filed by the appellant are of mixed law and fact for which no leave of this court or the lower court was obtained before they were filed and therefore the appeal is incompetent.

(b) The issue relating to law of Property (Edict) Law Cap. 128 of Kwara State Laws did not arise in the appeal.

Let me deal with the preliminary objection first before going into the issues. I have read and studied the 3 grounds of appeal filed by the appellant in this appeal. It appears to me that all the grounds are complaining about the apparent failure of the Court of Appeal to properly apply the relevant provisions of the Auctioneers Law. They do not relate to or deal with the evaluation or treatment of any evidence. The facts proved in relation to the notice to sell and the day the actual sale took place were not in dispute but the application of the law to those facts makes the grounds of pure law and no more. It is my view therefore that all the 3 grounds of appeal filed by the appellant in this appeal, together with their particulars can properly be christened grounds of law, and not of fact or mixed law and fact. See *Metal Construction Ltd V. Migliore* (1990) 1 NWLR (pt. 126) 299; *Total International Ltd V. Awogboro* (1994) 4 NWLR (pt. 337) 147 at 163; *UBA V. GMBH* 1989) 3 NWLR (pt. 110) 374; *NNSC V. Estab. Sima of Vadus* (1990) 7 NWLR (pt. 164) 526.

In respect of the 2nd leg of the preliminary objection, I see no substance in it. The law of Property (Edict) Law of Kwara State 1991, was intended to replace the Conveyancing Law of Property Act 1881 of England and the appellant has the right to draw the attention of the court to the relevant applicable law in the matter before it. This was what the appellant did in his brief and did not raise a fresh issue for which leave is required. There is no doubt that the law of Property (Edict) Law, Cap. 128 of Laws of Kwara State is relevant to the instant appeal and could properly be raised and discussed as the appellant did.

I now return to the issues for determination raised by the appellant, and I shall take them together very briefly. It is not in dispute that section 19 of the Auctioneers Law Cap. 10 of Laws of Northern Nigeria 1963 applicable to kwara State also applies to this case. This section requires that there must be seven days notice given before any landed property is sold by auction. In this case, the property concerned was sold after only 2 days notice. There was therefore non-compliance with the law. What then is the remedy or consequences of this? The law of Property (Edict) Law of

Kwara State Cap. 128, Section 123, which clearly applied to this case, says in subsection (2) thereof that:-

“(2) *where a transfer is made in exercise of the power of sale conferred by this Edict (Law) or any enactment replaced by this Edict (Law) the title of the purchaser shall not be impeachable on the ground*

(a) *That no case has arisen to authorize the sale;*

(b) *That due notice was not given or*

(c) *Whether the mortgage was made before or after the commencement of this Edict (Law) that the power was otherwise improperly or irregularly exercised”.*

(Underlining mine)

Provisions similar in all respects with the above and in similar circumstances were considered by this court in the cases of Okonkwo V. Cooperative & Commerce Bank (Nig.) Plc 2003 8 NWLR (pt. 822) 347 and A. C. B. Ltd V. Ihekwoaba (2003) 16 NWLR (pt. 846) 249 and in both cases, the court held that where the sale is not tainted with any fraud or collusion, and the buyer bought in good faith and is not aware of any irregular circumstances surrounding the sale or anything likely to affect the propriety of the sale, the sale must be valid and subsisting. I am bound by this decision and I accordingly apply it to the instant appeal. I find that there is no fraud or collusion on the facts of this case proved against the appellant and there was nothing affecting the propriety of the auction sale to the appellant in this appeal. I am therefore of the view that Section 123 of the Law of Property (Edict) Law provides sufficient protection to the appellant in respect of the auction sale and the purchase of the property concerned. I resolve the appellant’s issues in his favour.

For the above reasons and the more detailed ones given by my learned brother Oguntade JSC in the leading judgment, I also find merit in this appeal. I hereby allow the appeal, set aside the decision of the Court of Appeal and restore that of the trial court. I abide by the order of costs made in the said judgement.

MUSDAPHERJSC

I have had the opportunity to read before now the judgment of my lord Oguntade, JSC which has just been delivered. I entirely agree with it. B
I adopt the reasonings as mine and I accordingly allow the appeal and set aside the judgment of the Court of Appeal and restore the judgment of the trial Court. I abide by the order for costs contained in the aforesaid judgment.

C

PATS-ACHOLONUJSC

I agree. After a careful reading of the case and given the matter the consideration it deserves having regard to the peculiar nature of the case, D
I become convinced that I should agree with the judgment as civil cases are determined on the preponderance of evidence. I therefore allow the appeal and abide by the orders as contained in the leading judgment.

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