

SUPREME COURT OF NIGERIA

16TH DECEMBER, 2011. SC. 350A/2002, 350/2002

**CORAM:- M. MOHAMMED, M. S. MUNTAKA-COOMASSIE,
J. A. FABIYI, O. O. ADEKEYE, M. U. PETER-ODILI, JJSC**

MR. SEGUN BABATUNDE APPELLANT
(Substituted Mr. Julius Babatunde)

AND

1. BANK OF THE NORTH LTD.

2. A.T. AYANTUNDE RESPONDENTS

3. ALHAJA BAMIDELE ADEPATE

CONTRACTS - Binding nature - Where parties have embodied the terms of their contract in a written document - Extrinsic evidence is not admissible to contradict the terms therein (H1)

ACTIONS - Allegation of crime - Standard of proof - By Evidence Act s. 138(1) - It must be proved beyond reasonable doubt - And the burden of proving same is on the party who asserts it (H2)

MORTGAGES - Right of mortgagee - Power of sale - In exercise of this right - Mortgagee must act in good faith - And is not a trustee for mortgagor (H3)

LAND LAW - Conveyance - Consent to deed - The approval letter of 26/10/76 is valid - Having satisfied the provisions of Land Tenure Law 1963 (H4)

MORTGAGES - Deed of legal mortgage - Consent - Where consent is required and is obtained upon creation - It will no longer be required for up stamping of the mortgage - If further facility is granted on it (H5)

LAND LAW - Rules of equity - When two equities are equal - The first in time prevails - Exhibits 6 and 7 made in 1976 and 1978 take priority over exhibit 1 made in 1982 (H6)

LAND LAW - Mortgage - Scope - Building erected on a mortgaged land during its life span - Forms part of the mortgaged property (H7)

MORTGAGES - Right of mortgagee - Power of sale - Exercise of this power must arise - Before good title will be transferred to purchaser (H8)

FACTS

Plaintiff/appellant substituted Mr. Julius Babatunde (now deceased) who was a customer of 1st defendant/respondent (Bank of the North, Ilorin Branch, Kwara State). He was granted an overdraft facility of N12,000.00 on 26th of October 1976. A Deed of Legal Mortgage was executed between the Bank and appellant to this effect. Appellant presented as collateral, his landed property at Ilorin on which was erected a house containing four flats of three bedrooms each. The land was covered by an Alienation permit No. 1120 dated 10-3-76 and issued by Ilorin Local Government. The Bank of the North increased the overdraft facility to N30,000.00 in September 1978. Another Deed of Legal Mortgage was executed based on that same collateral which was simply up stamped. Appellant claimed that he bought an adjoining land which was covered by an Ilorin Local Government Customary Right of Occupancy No.248 dated 2nd June 1980. He erected a building of six flats of three bedrooms each besides the other building. Later on in 1982, he mortgaged the house of six flats to the United Bank for Africa, Ilorin for a loan of N70,000.00. On the 4th of November 1992, an auctioneer, acting on behalf of Bank of the North advertised for sale of the building of six flats through public auction. On 6th of April 1993, 3rd defendant/respondent who purchased the building, served notice to vacate on appellant's tenants.

Being dissatisfied, appellant sued respondents at Kwara State High court, Ilorin for several reliefs, inter alia: Declaration that the sale carried out by 1st and 2nd defendants/respondents was illegal, since the said house was not pledged as security on a deed of legal mortgage dated 26th October 1976 and the one dated 18th September 1978 between appellant and 1st respondent. Appellant also contends that the sale was contrary to Auctioneers Law, Cap 10 Laws of Northern Nigeria 1963 as applicable to Kwara State. He further

contends that the two deeds of legal mortgage between appellant and 1st respondent has no valid consent and that the purported consent letter attached to it is not a consent required by the Land Use Act 1978. At the trial, reliance was placed by both parties on both oral and documentary evidence. The court granted the reliefs sought by appellant. Aggrieved, 1st and 2nd respondents filed separate notices and grounds of appeal at Court of Appeal, Ilorin Division. The court allowed the appeal and accordingly set aside the judgment of the trial court. Aggrieved, appellant filed appeal No. SC.350A/2002 at Supreme Court. It is noteworthy that 3rd respondent also filed a separate Notice and grounds of appeal at Court of Appeal, Ilorin Division. In another judgment of the court, the appeal was allowed and the judgment of the trial court was set aside. Appellant being dissatisfied with this second judgment of the Court of Appeal finally appealed to Supreme Court in appeal No. SC.350/2002. The two appeals at the Supreme Court were consolidated with consent of counsel for the parties.

ISSUES FOR DETERMINATION

(1) Whether the sale of the appellant's property by the 2nd respondent to the 3rd respondent on the instructions of the 1st respondent was null and void having failed to comply with the mandatory provisions of the Auctioneers Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State.

(2) Whether having regard to the provisions of the Delegation of Powers (Ministry of Lands, Survey and Environment) Notice No. 8 of 1975 of Kwara State, the approval by the Commissioner for Lands dated 25/10/76 in relation to Exhibit 6 dated 27/10/76 was valid.

(3) Whether Exhibit 7 dated the 18th day of September 1978 is null and void and of no effect whatsoever as the consent of the appropriate authority was not obtained before the execution of same.

(4) Whether having regard to the Deed of Legal Mortgage (Exhibit 1) executed between the appellant and United Bank for Africa Ltd, the sale of the appellant's property by the 1st and 2nd respondents was valid.

(5) Whether from the totality of the pleadings of the appellant and the documents tendered, the appellant proved fraud by the respondents in the sale of his property.

HELD (Unanimously dismissing the two appeals per **ADEKEYE JSC**)

CONTRACTS - Binding nature

1. I shall at this stage examine the issue of sanctity of contracts generally. It is however trite that a court of law must always respect the sanctity of the agreements reached by parties. It must not make a contract for them or re-write the one they have already made themselves. The law is that written contract agreement freely entered into by the parties is binding on them. A court of law is equally bound by the terms of any written contract entered into by the parties. Where the intention of the parties to a contract is clearly expressed in a document, a contract agreement; the court cannot go outside that document to give effect to the intention of the parties. The general principle is that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument.

The court in this appeal cannot resort to the Auctioneer's Law of Northern Region as applicable to Kwara State which is not embodied in the Deeds of Legal Mortgage executed by the parties to effect the intention of the parties. The Auctioneer's Law does not form part of the agreement of the parties. A court will not however enforce an agreement between parties which is fraudulent or tainted with deceit or against public policy. This is not the case here and the court below was right to hold that Clause 3(b) is not prohibited by law. Since the Auctioneer's Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State does not form part of the agreement between the appellant and the respondents, this court has no business in considering the provisions of the Auctioneer's Law or whether the parties can contract out of this statute which makes provision for punishment for non-compliance in its sections 19-21. It is practically a non-issue to the claim of the parties before the court. This court will not waste its time or engage in a futile exercise in going into any elaborate consideration of that point.

In the interpretation of contractual transaction court will always hold parties bound by the terms of their agreements when construed according to the strict, plain and common meaning of the words in the instrument as they stand. (pp. 2584 E/2600 F)

Allegation of crime - Standard of proof

2. Under Nigeria Law of Evidence any allegation of fraud must be proved beyond reasonable doubt. Section 138(1) of the Evidence Act 1990 states that “If the commission of a crime by a party to any proceedings is directly in issue in any proceeding civil or criminal it must be proved beyond reasonable doubt. In this case, the nature and extent of the fraud must be properly pleaded and evidence must be sufficiently adduced to establish it to the satisfaction of the court. If the evidence before the court does not properly expose the fraud, the court will be left to rely on mere conjecture or speculation which to my mind is the position in this appeal.

I have considered the issue of fraud as it affected the sale of the appellant’s property to the 1st respondent by the 2nd and 3rd respondents. Fraud is a criminal offence under the Penal Code of Kwara State. The law is that any allegation of fraud must be proved beyond reasonable doubt. Section 138(1) of the Evidence Act and by virtue of Section 138(2), the burden of proving that any person has been guilty of a crime or wrongful act is subject to the provisions of Section 141 of this Act on the person who asserts it, whether the commission of such act is or is not directly an issue in the action. Any allegation of crime in a civil proceeding must be pleaded and particulars of such a crime must be expressly pleaded. The appellant failed to substantiate the Valuation Report tendered as Exhibit 3. The submission in an appellant’s brief can never take the place of evidence in proving an allegation of crime in a civil proceeding. The onus of proof beyond reasonable doubt rested of the appellant.
(pp. 2585 G/2600 A)

Right of mortgagee - Power of sale

3. It is not disputed that a sum of N205,626.50k was outstanding on the appellant’s current account No. 400634 with the 1st respondent for which there were demands. The amount therefore fell due and unpaid - so that the condition precedent to invoking clause 3 (b) of Exhibits 5, 6 and 7 was on ground and the 1st respondent exercised its power of sale. This brings me to emphasize that a mortgagee - the 1st respondent in this appeal - is not a trustee of a power of sale for the mortgagor. It is a power given to him for his own benefit enabling him to protect the mortgage debt. Complaint of 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. If a mortgagee exercises his power of sale bona fide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous to the mortgagor, unless the price is so low as in itself to be evidence of fraud. The court will always be on the lookout that mortgagee acts bona fide and observes reasonable precautions to obtain not the best price but a proper price.

In this appeal - the amount outstanding was N205,626.50k - and the mortgagee sold the property for N240,000.00. The mortgagor did not give evidence that the mortgagee exercised the power of sale mala fide for the purpose of realizing the debt or that there was collusion with the purchaser. In my candid view, the decision of the lower court gave effect to the terms of the contract between the parties and the sale of the property then was valid.

The only obligation incumbent on a mortgagee in the exercise of his power of sale is that he should act in good faith. Whether selling under an express agreement as in this case in accordance with Clause 3(b) of the Deeds of Legal Mortgage made on 26/10/76 and 18/9/78 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". 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. (pp. 2586 A/2600 G)

Conveyance - Consent to deed

4. The legal issue raised here is that the power to grant consent to the Deed cannot be delegated. Further that the consent granted was not by the Ilorin Local Government authority in compliance with Section 27(a) & (b) (II) of the Land Tenure Law Cap 59 Laws of Northern Nigeria 1963. The Alienation Permit 1120 here is issued in favour of a native who wishes to alienate same by mortgage in favour of a non-native, the 1st respondent the Bank of the North. Under the Land Tenure Law 1963, prior to the promulgation of the Land Use

Act in March 1978 - such consent must be granted by a Minister. By virtue of Section 2(1)(b) (III) of the Constitution (Miscellaneous Provisions) Decree No.2 of 1967, at the creation of states in 1967, the regional ministers were replaced with state commissioners. The contention of the appellant is that under the Legal Notice No. 8 of 1975 that the approval should have been given by the Honourable Commissioner for Lands under the powers delegated to him by the Governor. The deed was signed at a period when regional ministers were already replaced by Commissioners by virtue of the Constitution (Miscellaneous Provisions) Decree No.2 of 1967. It is also noteworthy that the appropriate authority to approve or give consent at the operative time was the commissioner. However at page 6 of Exhibit 7, the approval was actually granted by the commissioner while the letter signed by the Principal Estate Officer for Chief Lands Officer dated 25/10/76 was meant to convey the approval to the applicant. The question of the validity of the approval would only arise if the commissioner for lands was not the authority who gave the consent. The cases of Savannah Bank v. Ajilo (1989) 1 NWLR pg.305; Adedeji v. N.B.N. Ltd (1991) (pt.96) pg.212 at 215 enjoining strict compliance with Section 21 of the Land Use Act 1978 as regards appropriate approval for validity of the legal mortgage are not applicable in the circumstance of this case. The deed of Legal Mortgage was executed on the 26th of October 1976 well before the Land Use Act 1978. The operation of the Land Use Act was not applicable.

The letter of approval dated the 26/10/76 and signed by the Principal Estate Officer for the permanent secretary is valid having satisfied the provision of the Land Tenure Law 1963.
(p. 2589 E)

Deed of legal mortgage - Consent

5. The first schedule gave the description of the property which is same as that indicated in the first schedule of the legal mortgage dated 26/10/76. The back cover indicated that the Deed of Legal Mortgage was up stamped with N15.75 on the 18th of September 1978 and registered as No.139 at page 139 in volume VIII of the Lands Registry in the Office at Ilorin. The term of the Deed referred to it as "Continuous Security for overdraft of N33,000. The second schedule referred to the Deed registered as No.23 of page 23 in volume VI (Misc.)

of the Lands Registry in the office at Ilorin on 28/10/76.

It is still the same deed that was up stamped to reflect the increase in overdraft. Generally, where consent is required to a Deed of legal mortgage and such consent was obtained at the creation of the mortgage, no further consent would be required for the up stamping of the mortgage if further facility is granted on it.
(p. 2591 G)

Rules of equity - When two equities are equal

6. However the approval of this mortgage by the Honourable Commissioner on the 12th of May 1982 made reference to the property erected on land at Ilorin covered by Alienation Permit No. 1120. The appellant had already mortgaged this same property to the 1st respondent in Exhibits 6 and 7 in 1976 and used it as a continuous security in 1978. The appellant did not satisfy the court as to the existence of the Customary Right of Occupancy No. 248 or the purchase of half a plot in addition to the existing plot of land - a plot 25 feet by 100 feet. He failed to exhibit an approval of the appropriate authority to mortgage the Customary Right of Occupancy No.248 to United Bank for Africa Ltd. It is clear that the mortgage in Exhibit 1 and the approval by Exhibit A1 covered the same property already mortgaged to the 1st respondent by the appellant.

According to the rule of equity that the first in time prevails - Exhibits 6 and 7 made in 1976 and 1978 enjoy priority over Exhibit 1 which was made in 1982. Exhibits 6 and 7 were duly registered as No.23 at page 23 in volume (VI) (miscellaneous) of the Lands Registry in the office at Ilorin on 28th October 1976 under the Land Registration Law Cap 58 Laws of Northern Nigeria - then applicable in Ilorin. (p. 2595 A)

Mortgage - Scope

7. In the instant appeal, the three deeds of legal mortgage were perfected over the same property covered by permit to Alienate No.1120. The appellant's bone of contention is the building of six flats of three bedrooms each was covered by the Deed of Legal Mortgage Exhibit I executed in favour of United Bank for Africa. A building erected on a mortgaged land during the life span of the mortgage forms part of the mortgaged property by virtue of the maxim quicquid plantatur

solo solo cedit meaning he who owns a land owns what is on it.

This maxim is applicable to the land covered by Alienation Permit No. 1120 the security for Exhibits 6 and 7. The six flats become part of the property mortgaged to the 1st respondent - the Bank of the North in 1976 and in 1978 by operation of law. The sale of the mortgage property was validly carried out pursuant to the powers conferred on the mortgagee in Clause 3(b) of Exhibits 6 and 7, while Exhibits 1 is null and void. (p. 2595 G) B

Right of mortgagee - Power of sale

8. Before a mortgagee can pass a good title to a purchaser free from the equity of redemption - the right to exercise the power of sale under a mortgage must have arisen, the mortgage debt must have fallen due. Any purchaser who bought a property sold by a legal mortgagee in exercise of his power of sale under a mortgage upon a default in repayment of a loan by the mortgagor is not a trespasser. C

Hence, once the precondition of notice of sale is given to the mortgagor by the mortgagee or his agent, preceded by a notice of demand of repayment of money lent to the mortgagor and the mortgagee proceeds to sell in good faith, subsequent purchaser in good faith gets a good title and a court will not intervene in the sale only because the sale did not meet with the satisfaction of the mortgagor. In my view the sale of the appellant's property by the 2nd and 3rd respondents to the 1st respondent was not tainted with fraud so as to affect the validity of the sale. The mortgagee, the 2nd respondent after exercising his power of sale rightly executed a deed of transfer in favour of the 1st respondent - as Exhibit 3(1). (p. 2601 B) D

REPRESENTATION

Mr. Zakaranu Garubam with Mr. Kingsley O. Idahosa for the Appellants G

Mr. Sheni Ibiwoye with Theophilus Okute for 1st and 2nd Respondents

Mr. Kolade Awojobi for the 3rd Respondent H

CASES REFERRED TO

Oseni v. American International Insurance Ltd. (1985) 1 NWLR (pt. 11) 229

2576 Babatunde v. Bank of the North Ltd (2011) 12 KLR Adekeye JSC

- Fojule v. Federal Mortgage Bank of Nig. Ltd. & 2 Ors (2001) FWLR (pt. 3) 893
Okonkwo v. CCB (Nig.) Plc (1997) 6 NWLR (pt. 507) 48
Anori v. Elemo (1983) 1 SC NLR 1
Okwunakwe v. Opara (2000) FWLR (pt. 13) 2282
B Iga v. Amakiri (1976) 6 UILR (pt. IV) 558
Niger Dam Authority v. Lajide (1973) 5 SC 203
Oduye v. Nigerian Airways Ltd. (1987) 2 NWLR (pt. 55) 126
UBN Ltd. v. Ozigi (1994) 3 NWLR (pt. 333) 385
C Owoniboye Technical Services Ltd. v. U.B.N. Ltd. (2003) 15 NWLR (pt. 844) 545
Okonkwo v. C.C.B. (Nig.) Plc. (1997) 6 NWLR (pt. 507) 48
Dalek (Nig) v. OMPADEC (2007) 7 NWLR (pt. 1033) 402
U.B.N. Ltd. v. Ozigi (1994) 3 NWLR (pt. 333) 385
D Nneji v. Zakhem Con. (Nig) Ltd. (2006) 12 NWLR (pt. 994) 297
U.B.N. Ltd. v. Sax (1994) 8 NWLR (pt. 361) 402

STATUTES REFERRED TO

- Auctioneers Law, Cap 10 Laws of Northern Nigeria 1963
E Land Use Act 1978
Land Tenure Law Cap 59 Laws of Northern Nigeria, s. 27 (a)(b)
Constitution (Miscellaneous Provisions) No. 2 Decree 1967, s. 2(1) (b)(iii)
F Land Registration Law Cap 58 Laws of Northern Nigeria

LEAD JUDGMENT BY ADEKEYE JSC

- By an order of this court made on the 10th of October, 2011, the two appeals SC.350/2002 - Mr. Segun Babatunde v. Alhaja G Bamidele Adepute & 2 Ors and SC.350A/2002 - Mr. Segun Babatunde v. Bank of the North and 2 Ors were consolidated with the consent of the counsel to the parties. The two appeals emanated from the same judgment of the trial court delivered on 3/12/99 and the contents of the Record Books are identical.
H The brief facts of the case were that Mr. Julius Babatunde now deceased and substituted with the present appellant, Mr. Segun Babatunde, was a customer of the Bank of the North at the Muritala Mohammed Road Branch, Ilorin. He operated the current account No.400634. He was granted an overdraft facility of N12,000.00 on

the 26th of October 1976. A Deed of Legal Mortgage was executed between the Bank and the customer to this effect. The collateral was a landed property of the customer at Mala Road, Isale Asa, Ilorin on which was erected a house containing four flats, of three bedrooms each. The land was covered by an Alienation permit No. 1120 dated 10-3-76 and issued by Ilorin Local Government. The Bank of the North increased the overdraft facility to N30,000.00 in September 1978. Another Deed of Legal Mortgage was executed based on that same collateral which was simply up stamped. The plaintiff's/appellant's case was that he bought an adjoining land which was covered by an Ilorin Local Government Customary Right of Occupancy No.248 dated 2nd June 1980 an area of 929.030 square meters. He erected a building of six flats of three bedrooms each besides the other building. In 1982, he mortgaged the house of six flats to the United Bank for Africa, Ilorin for a loan of N70,000.00. On the 4th of November 1992, an auctioneer, acting on behalf of the Bank of the North advertised for sale of the building of six flats at Isale Asa Area, off Sabo Line, Ilorin. On the same day, Auction Notice was pasted on the building declaring that it would be disposed through public auction the next day the 5th of November 1992. The plaintiff/appellant was communicated about the sale of the building on the 30th of March 1993. On the 6th of April, the 3rd defendant/respondent, who purchased the building, served notice to vacate on the plaintiff/appellant's tenants. Apparently distressed by the sale of the building with six flats which was a collateral for the mortgage to the United Bank for Africa for a loan, the plaintiff/appellant sued the respondents at the High court, Ilorin for the under mentioned reliefs: -

(1) Declaration that the 1st and 2nd defendants have no right to sell or advertise for sale the plaintiff's house containing six flats at Isale Asa Area, off Sabo line, Ilorin, covered by Ilorin Local Government Customary Right of Occupancy No.248 dated 2nd June 1980 since the said house was not pledged as security on a deed of legal mortgage dated 26th October 1976 and the one dated 18th September 1978 between the plaintiff and the 1st defendant.

(2) A declaration that any sale or transfer of the plaintiff's house of six flats at Isale Asa Area off Sabo line, Ilorin by the 1st and 2nd defendants to the 3rd defendant is illegal, null and void.

(3) An order to set aside the sale or transfer and any agree-

ment thereto of the plaintiff's house of six flats at Isale Asa Area, off Sabo line, Ilorin by the 1st and 2nd defendants to the 3rd defendant.

(4) A sum of N100,000.00 as damages for trespass committed by the defendants jointly and severally on the plaintiff's house.

(5) A perpetual injunction restraining the defendants, their agents, servants and privies from further act of trespass on the plaintiff's house.

(6) A declaration that the purported sale of the plaintiff's house of six flats at Isale Asa Area, off Sabo Line, Ilorin carried out by way of public Auction on the 5th of November 1992 is invalid, null and void since the said sale was not in accordance with the Auctioneers Law, Cap 10 Laws of Northern Nigeria 1963 as applicable to Kwara State.

(7) A declaration that the two deeds of legal mortgage between the plaintiff and the 1st defendant has no valid consent and that the purported consent letter attached to it is not a consent required by the Land Use Act 1978.

(8) An order to nullify the two deeds of legal mortgage between the plaintiff and the 1st defendant for not complying with the mandatory provisions of the Land Use Act 1978.

In the considered judgment of the trial court delivered on the 3rd day of December 1999, the learned trial judge found for the plaintiff/appellant, granted all the declarations and orders sought, and further awarded N50,000.00 as damages for trespass. The three respondents were dissatisfied with the judgment of the trial court. The 1st and 2nd respondents - The Bank of the North and A.T. Ayantunde (the Auctioneer) filed separate notice and grounds of appeal against the decision of the trial court. The appeal was heard as No. CA/IL/44/2000. In the judgment of the lower court delivered by Patrick Ibe Amaizu, JCA on the 18th of October 2001, the lower court allowed the appeal and accordingly set aside the judgment of the trial court. The appellant, Mr. Segun Babatunde being aggrieved by the judgment of the lower court, lodged the appeal No. SC.350A/2002 to this court.

The 3rd respondent, Alhaja Bamidele Adepte filed a separate Notice and grounds of appeal. In another judgment of the lower court delivered by W.S.N. Onnoghen, JCA (as he then was) on the same 18th of October 2001, the appeal was allowed and the judg-

ment of the trial court was set aside. The appellant being dissatisfied with this second judgment of the lower court appealed to this court in the appeal No. SC.350/2002. I shall now consider the two consolidated appeals. Since the events in the appeal No. 350A2002 preceded and actually led to the sale of the property to Alhaja Bamidele Adepute in appeal No. SC.350/2002, it is right and proper and for ease of reference to first consider appeal. No. SC.350A/2002. APPEAL NO. SC.350A/2002.

In this appeal, the appellant adopted and relied on the brief filed on 13/1/03 in which four issues were formulated for determination as follows:-

(1) Whether the sale of the appellant's property by the 2nd respondent to the 3rd respondent on the instructions of the 1st respondent was null and void having failed to comply with the mandatory provisions of the Auctioneers Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State.

(2) Whether having regard to the provisions of the Delegation of Powers (Ministry of Lands, Survey and Environment) Notice No. 8 of 1975 of Kwara State, the approval by the Commissioner for Lands dated 25/10/76 in relation to Exhibit 6 dated 27/10/76 was valid.

(3) Whether Exhibit 7 dated the 18th day of September 1978 is null and void and of no effect whatsoever as the consent of the appropriate authority was not obtained before the execution of same.

(4) Whether having regard to the Deed of Legal Mortgage (Exhibit 1) executed between the appellant and United Bank for Africa Ltd, the sale of the appellant's property by the 1st and 2nd respondents was valid.

In the 1st and 2nd respondent's brief filed on 12/03/03, three issues were identified for determination which read as follows:-

(1) Whether the sale of the mortgaged property of the appellant to the 3rd respondent by the 2nd respondent on the instruction of the 1st respondent is assailable in view of the terms of the contract of mortgage between the appellant and the 1st respondent.

(2) Whether the deeds of legal mortgage between the appellant and the 1st respondent Exhibits 5, 6 and 7 are void for alleged want of appropriate consent/approval under the law.

(3) Whether Exhibit 1 (if valid at all) can stand in the way of Exhibits 5, 6 and 7 which were perfected earlier in time than Exhibit

1 such as to invalidate sale carried out pursuant to powers conferred by them.

The 3rd respondent adopted and relied on the brief filed on 6/2/03. Three, (sic, Four) issues were distilled therein for determination namely:-

B (1) Whether the sale of the appellant's property by the 2nd respondent on 5/11/92 to the 3rd respondent which sale was on the instruction of the 1st respondent was valid and whether the 1st and 2nd respondents on 5-11-92 were under any obligation to comply with the provision of the Auctioneers Law Cap 10 Laws of Northern Nigeria as applicable to Kwara.

C (2) Whether the Commissioner for Lands vide the Approval dated 25/10/76 validly in law approved Exhibit 6 dated 27/10/76 in conformity with the provisions of Delegation of Power (Ministry of D Lands, Survey and Environment) Notice No.8 of 1975.

(3) Whether Exhibit 7 dated 18th day of September 1978 is valid having regard to the fact that it was the Permanent Secretary that conveyed the fact of the grant of the consent.

E (4) Whether the sale by the 1st and 2nd respondents of the appellant's property to the 3rd respondent is valid and whether the appellant proved fraud by the respondents in the sale of his property.

In considering this appeal, I intend to be guided by the issues for determination as raised by the appellant.

F **ISSUE ONE**

G Whether the sale of the appellant's property by the 2nd respondent to the 3rd respondent on the instructions of the 1st respondent was null and void having failed to comply with the mandatory provisions of the Auctioneers Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State.

H The crux of the argument and submission of the appellant on this issue is that the respondents failed to comply with the provisions of Sections 19 - 21 of the Auctioneers Law as applicable to Kwara State in the process of disposal of the appellant's property; a building of six flats each with three bedrooms, situated at Amilegbe, Asa Area, Ilorin Kwara State. The 2nd respondent is an Auctioneer within the definition in Section 2 of the Auctioneer's Law and he was authorized by the 1st respondent; the Bank of the North to whom the ap-

pellant was indebted at the material time to sell the property of the appellant. The publication about the sale in the Herald Newspapers Exhibit 2 dated 4/11/92 was meant to serve as notice at large. An auction notice was pasted on the appellant's property on the 4th of November 1992. The actual sale of the property took place on 5/11/92. There was no compliance with section 19 of the Auctioneer's Law which stipulated that no sale by auction of any land shall take place until after at least seven days notice is made at the principal town and also at the place of the intended sale. The details about the sale were not submitted before and after the sale to the Chairman of Ilorin East Local Government contrary to section 20 of the Auctioneers law. B C

The provisions of Clause 3(b) of the Deeds of Legal Mortgage, Exhibits 6 and 7 executed by the appellant and 1st respondent Bank of the North cannot avail the respondents for reasons that:- D

(a) There is nowhere in Exhibits 6 and 7 where reference was made to any statutory power of sale without regard to the provisions of the Auctioneers Law.

(b) The appellant further submitted that parties cannot contract out of a statute which makes provisions for punishment for non-compliance. Non-compliance with the provisions of the Auctioneers law constitutes a criminal act. Criminal acts cannot be compromised. Consequently the sale of the appellant's property conducted on 5/11/92 is null and void under the Auctioneers law. E

(c) Though the lower court held that Clause 3 (b) is not deceptive or fraudulent, the property was sold below the reserved price. It was sold for N240,000.00 whereas the reserved price was N250,000. Exhibit 3, the valuation report by Oladipo, Atoyebi & partners - put the forced sale value as at 1992 at N800.000. The appellant cited cases - *Oseni v. American International Insurance Ltd.* (1985) 1 NWLR (pt.11) pg.229 at pg.233, *Fojule v. Federal Mortgage Bank of Nigeria Ltd.* & 2 Ors (2001) FWLR (pt.3) pg.893. F G

The 1st and 2nd respondents submitted on this issue that the 2nd respondent is a licensed engineer and an agent of the 1st respondent. The appellant defaulted in repaying the facilities granted to it in 1976 and 1978 by the 1st respondent. In exercise of the right under the deeds of legal mortgage, the 1st respondent instructed the 2nd respondent to realize its facilities through the sale of the mort- H

gaged property. The deeds of legal mortgage executed between the appellant and the 1st respondent are Exhibits 5, 6 and 7 and they constituted the contracts between the appellant and the 1st respondent. By Clause 3 (b) of Exhibits 5, 6 and 7, the parties excluded the operation of any statute that may limit or impede the exercise of the power of sale of the mortgagee - the 1st respondent. The appellant waived any protection or benefit, any statute as in this case; the auctioneer's law, may afford him in relation to exercise of power of sale by the 1st respondent after he might have defaulted in any repayment due.

The 1st and 2nd respondents cited cases in support of waiver of right by the appellant - *Okonkwo v. CCB (Nig.) Plc* (1997) 6 NWLR (pt.507) pg.48, *Anori v. Elemo* (1983) 1 SC NLR pg.1, *Okwunakwe v. Opara* (2000) FWLR (pt.13) pg.2282 at pg. 2287.

The complaint of the appellant about non-compliance with the Auctioneers Law is a non-issue in view of the contract of the parties particularly at Clause 3 (b) of the Deeds of Legal Mortgage. The doctrine of estoppel and the case of *Iga v. Amakiri* (1976) 6 UILR (pt.IV) pg.558 does not apply in the circumstance of this case.

The 1st and 2nd respondents contended further that the contract between the appellant and the 1st respondent is legal. The duty of the court is to give effect to the terms of contract between the parties except where the contract is illegal or against public policy or tainted with dishonesty or fraud or misrepresentation. None of the exceptions apply to this case. The respondents cited cases in support of the foregoing. *Niger Dam Authority v. Lajide* (1973) 5 SC 203, *Oduye v. Nigerian Airways Ltd.* (1987) 2 NWLR (pt.55) pg.126, *UBN Ltd. v. Ozigi* (1994) 3 NWLR (pt.333) pg.385 pg.404.

The cases *Oseni v. American International Ins. Co. Ltd.* (1955) 1 NWLR (pt.11) pg.229 and *Fojule v. Federal Mortgage Bank of Nigeria Ltd and 2 Ors.* (2001) FWLR (pt.36) at pg.893 cited by the appellant are clearly distinguishable from the facts of this appeal.

The 3rd respondent submitted that compliance by the 2nd and 3rd respondents with the provisions of Sections 19, 20 and 21 of the Auctioneer's Law is not mandatory as the provision of Auctioneers Law Cap 10 Laws of Northern Nigeria is not applicable to the subject of this suit at Amilegbe, Isale Asa Area of Ilorin, Kwara State. The applicable law is the Auctioneer (Application) Order in

Council Cap 10 Laws of Northern Nigeria as applicable to Kwara State of Nigeria. The 3rd respondent going by Exhibits 6 and 7 have substantially complied with the provisions of Sections 19, 20 and 21 of the Auctioneer's Law Cap 10 Laws of Northern Nigeria. The respondents urged this court to answer Issue One in the negative. All the parties in this appeal in the course of trial at the High Court called witnesses and tendered Exhibits of particular importance to this case and the issue in this appeal by extension, are –

Exhibit 5 - Deed of legal Mortgage dated the 18th day of September 1978 between the appellant and the 1st respondent.

Exhibit 6 - Certified True Copy of the Deed of Legal Mortgage between Julius Babatunde and Bank of the North dated 26/10/76.

Exhibit 7 Certified True copy of the Deed of Legal Mortgage between Julius Babatunde and Bank of the North dated 18/9/1978.

It is necessary to highlight that the appellant did not dispute the overdraft facilities of N12,000.00 granted to him by the 1st respondent in 1976 which was increased to N33,000.00 in 1978. He submitted that the two facilities were secured by two deeds of legal mortgage executed over the appellant's property covered by customary right of occupancy No.248 titled Alienation Permit No. 1120 dated 10/3/76 granted by Ilorin Local Government. The appellant did not dispute that he defaulted in repaying the facilities or that the deeds of legal mortgage gave the 1st respondent the right to realize its facilities through the sale of the mortgaged property. The 1st respondent exercised the right to sell through a licensed auctioneer - the 2nd respondent who became an agent of the 1st respondent for that purpose; the 3rd respondent was the purchaser of the mortgaged property through sale by auction on the 5/11/92. The bone of contention between the parties in this issue is whether the parties in invoking the terms of contract as embodied in the clauses of the Deeds of Legal Mortgage dated 26/10/76 and 18/9/78 respectively, failed to comply with the mandatory provisions of the Auctioneer's Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State.

Can the 1st respondent going by Exhibits 5, 6 and 7 exercise its statutory power of sale without regard to the Auctioneer's Law? In order to answer this poser exhaustively, this court must read the terms of the contract between the parties as embodied in Exhibits 5, 6 and 7.

The trump card of the 1st and 2nd respondents is Clause 3 (b) of Exhibits 5, 6 and 7.

The provisions of clause 3 (b) in all the three exhibits are identical and I quote from Exhibit 6 as follows:- Clause 3 (b) -

B *“The Statutory power of sale shall be exercisable at any time after the moneys owing on this security shall have become payable without regard to any statute law and in any such sale the bank may call the fixtures and machinery comprised herein either together with the property to which they are affixed or separately and detached therefrom.”*

C The parties did not subject any provision of the Deed or even made reference anywhere in the Deeds to the Auctioneer’s Law of Kwara State.

D The appellant further argued that you cannot make reference to any power of sale in a mortgage Deed without reference to the provisions of the Auctioneer’s Law. Clause 3(b) of Exhibits 5, 6 and 7 cannot avail the respondents; in that sections 19, 20 and 21 of the Auctioneer’s Law confirm penal sanctions if the law is not complied with as non-compliance constitutes a criminal act. The appellant is
E firmly of the view that parties cannot contract out of a statute which makes provision for non compliance - as a criminal act cannot be compromised. ***I shall at this stage examine the issue of sanctity of contracts generally. It is however trite that a court of law must always respect the sanctity of the agreements reached by parties. It must not make a contract for them or re-write the one they have already made themselves.*** Owoniboye Technical Services Ltd. v. U.B.N. Ltd. (2003) 15 NWLR (pt. 844) pg. 545, S.E. Co. Ltd. v. N.B.C. 1 (2006) 7 NWLR (pt.978) pg.201.

F ***The law is that written contract agreement freely entered into by the parties is binding on them. A court of law is equally bound by the terms of any written contract entered into by the parties. Where the intention of the parties to a contract is clearly expressed in a document, a contract agreement; the court cannot go outside that document to give effect to the intention of the parties. The general principle is that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written***
G
H

instrument. Okonkwo v. C.C.B. (Nig.) Plc. (1997) 6 NWLR (pt.507) pg.48, Dalek (Nig) v. OMPADEC (2007) 7 NWLR (pt.1033) pg.402, U.B.N. Ltd. v. Ozigi (1994) 3 NWLR (pt.333) pg.385 at pg.404, Nneji v. Zakhem Con. (Nig) Ltd. (2006) 12 NWLR (pt.994) pg.297 SC, U.B.N. Ltd. v. Sax (1994) 8 NWLR (pt.361) pg.402.

The court in this appeal cannot resort to the Auctioneer's Law of Northern Region as applicable to Kwara State which is not embodied in the Deeds of Legal Mortgage executed by the parties to effect the intention of the parties. The Auctioneer's Law does not form part of the agreement of the parties. A court will not however enforce an agreement between parties which is fraudulent or tainted with deceit or against public policy. This is not the case here and the court below was right to hold that Clause 3(b) is not prohibited by law. Since the Auctioneer's Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State does not form part of the agreement between the appellant and the respondents, this court has no business in considering the provisions of the Auctioneer's Law or whether the parties can contract out of this statute which makes provision for punishment for non-compliance in its sections 19-21. It is practically a non-issue to the claim of the parties before the court. This court will not waste its time or engage in a futile exercise in going into any elaborate consideration of that point.

The appellant also disagreed with the decision of the lower court that Clause 3(b) is not deceptive or fraudulent as the respondent sold the property below the reserved price. The reserved price was N250,000.00 but the property was sold to the 3rd respondent for N240,000.00. The appellant alleged that the property was sold below its actual value - as Exhibit 3 a valuation report prepared by the appellant's valuers - Oladipo, Atoyebi & Partners put the forced sale value as at 1992 at N800,000.00.

Under Nigeria Law of Evidence any allegation of fraud must be proved beyond reasonable doubt. Section 138(1) of the Evidence Act 1990 states that "If the commission of a crime by a party to any proceedings is directly in issue in any proceeding civil or criminal it must be proved beyond reasonable doubt. In this case, the nature and extent of the fraud must be

properly pleaded and evidence must be sufficiently adduced to establish it to the satisfaction of the court. If the evidence before the court does not properly expose the fraud, the court will be left to rely on mere conjecture or speculation which to my mind is the position in this appeal. It is not disputed that a
B sum of N205,626.50k was outstanding on the appellant's current account No. 400634 with the 1st respondent for which there were demands. The amount therefore fell due and unpaid - so that the condition precedent to invoking clause 3 (b)
C of Exhibits 5, 6 and 7 was on ground and the 1st respondent exercised its power of sale. This brings me to emphasize that a mortgagee - the 1st respondent in this appeal - is not a trustee of a power of sale for the mortgagor. It is a power given to him for his own benefit enabling him to protect the mortgage
D debt. Complaint of 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. If a mortgagee exercises his power of sale bona fide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be
E very disadvantageous to the mortgagor, unless the price is so low as in itself to be evidence of fraud. The court will always be on the lookout that mortgagee acts bona fide and observes reasonable precautions to obtain not the best price but a
F proper price. A.C.B. Ltd. v. Ihekwoaba (2003) 16 NWLR (pt.846) pg.249, Ekaeteh v. Nigeria Housing Development Society Ltd. (1973) 6 S.C. 183, Rafukka v. Kurfi (1990) 6 NWLR (pt.453) 235.

In this appeal - the amount outstanding was
G N205,626.50k - and the mortgagee sold the property for N240,000.00. The mortgagor did not give evidence that the mortgagee exercised the power of sale mala fide for the purpose of realizing the debt or that there was collusion with the purchaser. In my candid view, the decision of the lower court
H gave effect to the terms of the contract between the parties and the sale of the property then was valid.

I resolve Issue Number One in the negative.

ISSUE NO. 2

Whether having regard to the provisions of the Delegation of

Powers (Ministry of Lands, Survey and Environment) Notice No. 8 of 1975 of Kwara State, the approval by the Commissioner for Lands dated 25/10/76 in relation to Exhibit 6 dated 27/10/76 was valid.

The appellant submitted that the deed of mortgage dated the 26th of October 1976 was made before the promulgation of the Land Use Act 1978. The operational law at the material time was the Land Tenure Law Cap 59 Laws of Northern Nigeria as applicable to Kwara State. The approval of mortgage attached to this Deed was dated the 25th of October 1976. The approval was in respect of the landed property of the appellant at Mala Road, Isale Asa, Ilorin, Kwara State with Alienation Permit No. 1120 dated 10/3/76. The property had four flats of three bedrooms and was supposed to have been approved by the commissioner for N12,000.00 with effect from 7th day of October 1976 though signed by the Chief Lands Officer for permanent secretary. The Alienation Permit No. 1120 of 10/3/76 was granted by the Ilorin Local Government Authority and signed by the Resident, vide schedule to Exhibit 7 Form 1. The approval in the Deed of Mortgage was not granted by the Ilorin Local Government Authority as stipulated in Section 27(a) & (b) (1) & (II) of the Land Tenure Law Cap 59 Laws of Northern Nigeria. The approval of the mortgage by the commissioner and the endorsement by the Chief Lands Officer for Permanent Secretary is null and void. The appellant cited cases like:- Savannah Bank Ltd & Anor v. Ajilo & Anor (1989) 1 SCJN pg.169, Adedeji v. N.B.N. Ltd. (1991) NWLR (pt.96) pg. 212 at pg. 215.

The 1st and 2nd respondents in their joint brief cleared the air that the deeds of legal mortgage are in fact two in number; Exhibits 6 and 7. The approval of the legal mortgage dated 26/10/76 was rightly granted by a commissioner under section 27 (a) of the Land Tenure Law of Kwara State. The Land Use Act came into force in March 1978. The 1st respondent; Bank of the North can only be referred to as non-native under the Land Tenure Law and it was the Minister and not the Ilorin Local Government that was the appropriate authority to approve the mortgage. On the creation of States in 1967, the State Executive Council Regional Ministers were replaced with State Commissioners and vested their functions in the commissioners by section 2(1) (b) (iii) of the Constitution (Miscellaneous Provisions) No, 2 Decree 1967. The power of consent created by section 27(a)

and (b) of the Land Tenure Law vested in the commissioner in charge of land, The Kwara State Legal Notice of 1975 cannot override an existing law - as legal notice can only be made pursuant to powers created or vested by an existing law.

The Legal Notice No. 8 of 1975 of Kwara State was a law void ab initio - as it was under the Constitution (Suspension and Modification) Decree 1966. The respondents submitted further that the appellant having consented to the Deed of Legal Mortgage dated 26/10/76 cannot turn around to question its validity for lack of appropriate consent. The commissioner granted the approval - and what the Chief Lands Officer or Principal Estate Officer did while signing for the permanent secretary was to simply convey approval. The act of conveying approval is different from the act of approval. The Deed of Legal Mortgage dated 18/9/78 and registered as No.139 at pg.139 Vol. III (Misc.) of the Lands Registry is valid in law without any further consent required. As this other Deed of Legal Mortgage perfected in 18/9/78 covered the same property, the mortgage of which had been consented to in the Deed of Mortgage dated 26/10/76. This was reflected in the First and 2nd Schedule of the Deed, and is even described as continuous security for overdraft of N33,000.00. The 1st and 2nd respondents supported their submission with the case *Moses Ola & Sons v. Bank of the North Ltd.* (1992) 3 NWLR (pt.229) pg. 377. It is apparent from the foregoing that Exhibits 6 and 7 are not void for lack of consent.

The 3rd respondent submitted that under Section 40(1) of the Land Tenure Law 1963, the Governor in Council or the Minister in charge of land matters can delegate his powers in section 28, which powers include the power to grant consent. Under the Legal Notice No. 8 of 1975, the Governor of Kwara State can delegate his power to the permanent secretary, Ministry of Lands, Survey and Environment. The 3rd respondent observed that some form of consent was obtained before Exhibit 6 was executed.

Whoever granted the consent did so on behalf of the Governor for reason of administrative convenience. Presumption of regularity is in favour of Exhibit 6. The 3rd respondent urged this court to do substantial justice in this matter. The respondent observed that the two cases of *Savannah Bank Limited and & Anor. v. Ajilo & Anor* (1989) 1 SCNJ 169 and *Adedeji v. N.B.N. Ltd.* (1991) NWLR (pt.96)

pg.212 at 215 are not relevant to the points raised in this issue. This court is urged to answer Issue Two in the affirmative.

I agree with the 1st and 2nd respondents that the Deeds of Legal Mortgage for reference in this issue are marked Exhibits 6 and 7. Exhibit 5 is a replica of Exhibit 6. The letter of consent is at page 6 of the Deed of Legal Mortgage dated 26/10/76. This letter dated the 25th of October 1976 was addressed to Mr. Julius Babatunde the appellant and it reads: -

"Dear Sir/Madam

Approval of Mortgage

Property at Ilorin under alienation Permit No. 1120.

I am directed to refer to your letter No _ of 17th September 1976 and to inform you that the mortgage of your property at Mala road, Ilorin and covered by alienation permit No. 1120 to the Bank of the North Ltd. Lagos at Kano has been approved by the Honourable Commissioner for N12,000 with effect from the 7th October 1976.

Yours faithfully

Signed

E. O. Toki

Principal Estate Officer"

The legal issue raised here is that the power to grant consent to the Deed cannot be delegated. Further that the consent granted was not by the Ilorin Local Government authority in compliance with Section 27(a) & (b) (II) of the Land Tenure Law Cap 59 Laws of Northern Nigeria 1963. The Alienation Permit 1120 here is issued in favour of a native who wishes to alienate same by mortgage in favour of a non-native, the 1st respondent the Bank of the North. Under the Land Tenure Law 1963, prior to the promulgation of the Land Use Act in March 1978 - such consent must be granted by a Minister. By virtue of Section 2(1)(b) (III) of the Constitution (Miscellaneous Provisions) Decree No.2 of 1967, at the creation of states in 1967, the regional ministers were replaced with state commissioners. The contention of the appellant is that under the Legal Notice No. 8 of 1975 that the approval should have been given by the Honourable Commissioner for Lands under the powers delegated to him by the Governor. The deed was signed at a period when regional ministers were already

replaced by Commissioners by virtue of the Constitution (Miscellaneous Provisions) Decree No.2 of 1967. It is also noteworthy that the appropriate authority to approve or give consent at the operative time was the commissioner. However at page 6 of Exhibit 7, the approval was actually granted by the commissioner while the letter signed by the Principal Estate Officer for Chief Lands Officer dated 25/10/76 was meant to convey the approval to the applicant. The question of the validity of the approval would only arise if the commissioner for lands was not the authority who gave the consent. The cases of Savannah Bank v. Ajilo (1989) 1 NWLR pg.305; Adedeji v. N.B.N. Ltd (1991) (pt.96) pg.212 at 215 enjoining strict compliance with Section 21 of the Land Use Act 1978 as regards appropriate approval for validity of the legal mortgage are not applicable in the circumstance of this case. The deed of Legal Mortgage was executed on the 26th of October 1976 well before the Land Use Act 1978. The operation of the Land Use Act was not applicable. Ojokolobo v. Alamu (1987) 7 SC page 124, Salami Afolabi v. Government of Oyo State (1985) 9 SC pg.112, Okafor v. Utomi (1964) 1 All NLR pg.348.

The letter of approval dated the 26/10/76 and signed by the Principal Estate Officer for the permanent secretary is valid having satisfied the provision of the Land Tenure Law 1963.

I resolve issue No.2 in favour of the respondents.

ISSUE NO. 3

Whether Exhibit 7 dated the 18th day of September 1978 is null and void and of no effect whatsoever as the consent of the appropriate authority was not obtained before the execution of same.

The appellant submitted that the Deed of Legal Mortgage dated 18/9/78 was made after the promulgation of the Land Use Act 1978. By virtue of the provisions of Section 21(b) of the Land Use Act, the consent of Ilorin Local Government that issued Alienation Permit No. 1120 ought to have been obtained to validate it - hence it is void and of no effect whatsoever. The appellant argued further that since the Deed of Legal Mortgage dated 26/10/76 was void; the deed dated 18/9/78 cannot rest on it as the consent of the appropriate authority was not obtained in accordance with Section 21(b) of the Land Use Act 1978. The appellant cited the case of Moses Ola & Sons Ltd. V.

Bank of the North Ltd. (1992) 3 NWLR (pt.229) pg.377 in support of the foregoing submission.

The 1st and 2nd respondents submitted that the Deed of Legal Mortgage dated 18/9/78 which was duly registered as No.139 in Vol. VIII (Miscellaneous) of the Lands Registry in the office at Ilorin is valid in law without any further consent required. The Legal Mortgage perfected in this document covered the same property, the mortgage of which has been consented to in the Deed of Legal Mortgage dated 26/10/76. The respondents cited the case of Moses Ola & Sons v, Bank of the North (1992) 3 NWLR (pt.229) pg.377. The Deed of Legal Mortgage dated 18/9/78 was not void by lack of consent.

The 3rd respondent pointed out that appellant being the mortgagor had the responsibility to obtain the appropriate consent before the execution of Exhibits 6 and 7 - the two Deeds of legal mortgage. The appellant ought not in equity to be allowed to succeed in annulling the two Deeds under which he had enjoyed credit facilities.

This issue is a follow up to Issue No.2 where this court held that the Deed of Legal Mortgage dated 26/10/76 had the consent of the appropriate authority - the Commissioner for Lands under the Land Tenure Law 1976. In the Deed of Legal Mortgage executed, Julius Babatunde and Bank of the North on the 18th of September 1978, the preamble at paragraph three reads as follows: -

“And whereas the mortgagor and the bank have agreed to increase the said overdraft of N12,000 to the sum of thirty-three thousand Naira (N33,000.00) Nigerian currency on the same security of landed property but with increased improvements and on the same terms and conditions mutatis mutandis and in addition as hereby agreed.”

The first schedule gave the description of the property which is same as that indicated in the first schedule of the legal mortgage dated 26/10/76. The back cover indicated that the Deed of Legal Mortgage was up stamped with N15.75 on the 18th of September 1978 and registered as No.139 at page 139 in volume VIII of the Lands Registry in the Office at Ilorin. The term of the Deed referred to it as “Continuous Security for overdraft of N33,000. The second schedule referred to the Deed registered as No.23 of page 23 in volume VI (Misc) of

the Lands Registry in the office at Ilorin on 28/10/76.

It is still the same deed that was up stamped to reflect the increase in overdraft. Generally, where consent is required to a Deed of legal mortgage and such consent was obtained at the creation of the mortgage, no further consent would be required for the up stamping of the mortgage if further facility is granted on it. I resolve issue No. 3 in favour of the respondent.
ISSUE NO. 4

Whether having regard to the Deed of Legal Mortgage (Exhibit 1) executed between the appellant and United Bank for Africa Ltd. the sale of the appellant's property by the 1st and 2nd respondents was valid.

The appellant gave the description of the property mortgaged to United Bank for Africa in the schedule of the Deed of Legal Mortgage dated the 6th of July 1982. The property was registered as No.32 at page 32 in volume XX (Misc.) of the Lands Registry office at Ilorin and also of the property mortgaged to the 1st respondent. The document of title of both properties were issued at different times - the Alienation Permit No. 1120 for Exhibits 6 and 7, the Deeds of Legal Mortgage for the 1st respondent and Customary Right of Occupancy No. 248 in respect of Exhibit 5 - the Deed of Legal Mortgage for United Bank for Africa was issued by the Ilorin Local Government at different times. The lower court was wrong to hold that the respondents were right to have sold the block of six flats to the 3rd respondent as it was mortgaged on Exhibit 1 to the United Bank for Africa.

The court was wrong to have relied on the case of Awojugbagbe Light Industries Ltd v. PN. Chinukwe (1995) 4 NWLR (pt.390) pg.379, to allow the 1st respondent to forcibly enter or trespass on a property upon which there was no mortgage in its favour.

The 1st and 2nd respondents submitted that Exhibits 6 and 7 were perfected over the appellant's property covered by Permit Alienate Land No. 1120 - a customary right of occupancy in 1976 and 1978 respectively. The two Exhibits created collateral security for banking facility of N12,000.00 in 1976 which was increased to N33,000.00 in 1978. Exhibit 1, another Deed of Legal Mortgage was perfected in July 1982 over the same property covered by Alienation Permit No. 1120 in favour of United Bank for Africa Ltd.

The mortgage in Exhibit 1 covered the same property already mortgaged to the 1st respondent by the appellant. No document had been exhibited by the appellant that he had approval of the appropriate authority to mortgage the customary right of occupancy No.248 to United Bank for Africa Ltd. The sale of the mortgaged property was validly carried out pursuant to powers conferred by Exhibits 6 and 7 and Exhibit 1 does not enjoy priority over Exhibits 6 and 7. B

The 3rd respondent concluded that the sale of the appellant's property to the 3rd respondent is valid in that the appellant failed to prove fraud in the transaction. C

I cannot consider this issue without reference to relevant paragraphs of the pleadings of the appellant and the 1st and 2nd respondents. -

The appellant in the further and further Amended Statement of Claim averred as follows: - D

Paragraph 10 -

"The plaintiff says that two years after he mortgaged his home containing 4 flats (3 bedrooms each) to the 1st defendant, he, plaintiff decided to build another house containing 6 flats on a separate land beside the mortgaged house at No.50 Isale Asa Area, off Sabo Line Street, Ilorin." E

Paragraph 11-

"The plaintiff says that the 6 flats (3 bedrooms each) built in 1980 was covered by Ilorin Local Government Customary Right of Occupancy, No.248 dated 2nd June 1980 and having an area of 929.030 square metres. The certificate is hereby pleaded. Also pleaded are relevant documents on the building." F

The 1st and 2nd respondents in their Amended joint Statement of Defence pleaded as follows, - G

Paragraph 4

"As security for the facilities enjoyed from the 1st defendant, the plaintiff executed a deed at Mala Road, Isale Asa, Ilorin. The property is a piece of land measuring 10,000 square metres feet two plots with all the developments thereon since 1978. The defendants plead the two deeds of legal mortgage executed by the plaintiff in favour of the 1st defendant." H

Paragraph 5

"The plaintiff built another house on the same piece of land

described on the schedule of the legal mortgage and not on a separate piece of land.”

Paragraph 6

B *“The defendants aver that the deed of legal mortgage referred to above covers the landed property and buildings thereon belonging to the plaintiff, situated at Mala Road, Isale Asa, Ilorin, security for overdraft facility since 1978.”*

Paragraph 7

C *“The defendants deny paragraph 11 of the statement of claim and state that customary right of occupancy No.248 dated 2/6/80 covers the same piece of land as that covered by the deed of mortgage referred in paragraph 4 above.”*

The schedule of Exhibits 6 and 7 aptly described the mortgage property as:

D *“All the property and premises comprised in or affected by all or any of the following -*

E *The landed property with the buildings thereon of Mr. Julius Babatunde at Mala Road, Isale Asa, Ilorin, Kwara State of Nigeria on site plan signed by the supervisor of work, Ilorin Local Government Authority and dated 28/10/75 and Permit to Alienate Land No.1120 dated 10/3/76 and signed by the Resident, Ilorin Division. The land is on an area 10,000 square feet and contains four semi-self contained 3 bedroom flats, each flat contains sitting room, 3 bedrooms, kitchen, bathroom, W. C. and store.”*

F The foregoing was the security for overdraft raised in October 1976 a sum of N12,000.00. The Deed of Legal Mortgage was up stamped in September 1978, when the facility was increased to N33,000.00. The approval of the honourable Commissioner under G the Land Tenure Law dated the 25th of October 1976 was in respect of the foregoing property.

H The appellant executed another Deed of Legal Mortgage in favour of the United Bank for Africa on the 6th of July 1982 as security for a facility of N70,000.00. The description of the property in the Schedule of Exhibit I reads: -

“The landed property and the building thereon of Mr. Julius Babatunde of No.50 Sabo Line, Ilorin, situate and lying at Amilegbe Asa Area of Ilorin, Kwara State of Nigeria under Customary Right of Occupancy No.248 signed by the Secretary to Ilorin Local Govern-

ment and dated 2nd June 1986. The landed property is having an area of 929.030 square metres and this is more particularly described in Approved Site plan signed by the Land Estate Officer to Ilorin Local Government and dated 2nd June 1980."

However the approval of this mortgage by the Honourable Commissioner on the 12th of May 1982 made reference to the property erected on land at Ilorin covered by Alienation Permit No. 1120. The appellant had already mortgaged this same property to the 1st respondent in Exhibits 6 and 7 in 1976 and used it as a continuous security in 1978. The appellant did not satisfy the court as to the existence of the Customary Right of Occupancy No. 248 or the purchase of half a plot in addition to the existing plot of land - a plot 25 feet by 100 feet. He failed to exhibit an approval of the appropriate authority to mortgage the Customary Right of Occupancy No.248 to United Bank for Africa Ltd. It is clear that the mortgage in Exhibit 1 and the approval by Exhibit A1 covered the same property already mortgaged to the 1st respondent by the appellant.

According to the rule of equity that the first in time prevails - Exhibits 6 and 7 made in 1976 and 1978 enjoy priority over Exhibit 1 which was made in 1982. Exhibits 6 and 7 were duly registered as No.23 at page 23 in volume (VI) (miscellaneous) of the Lands Registry in the office at Ilorin on 28th October 1976 under the Land Registration Law Cap 58 Laws of Northern Nigeria - then applicable in Ilorin.

Section 16 of the Land Registration Law reads: -

"Subject to the provisions of this law every instrument registered under this law shall, so far as it affects any land, take effect as against other instruments affecting the same land from the date of its registration."

In the instant appeal, the three deeds of legal mortgage were perfected over the same property covered by permit to Alienate No.1120. The appellant's bone of contention is the building of six flats of three bedrooms each was covered by the Deed of Legal Mortgage Exhibit I executed in favour of United Bank for Africa. A building erected on a mortgaged land during the life span of the mortgage forms part of the

mortgaged property by virtue of the maxim quicquid plaintiffur solo solo credit meaning he who owns a land owns what is on it.

This maxim is applicable to the land covered by Alienation Permit No. 1120 the security for Exhibits 6 and 7. The six flats become part of the property mortgaged to the 1st respondent - the Bank of the North in 1976 and in 1978 by operation of law. The sale of the mortgage property was validly carried out pursuant to the powers conferred on the mortgagee in Clause 3(b) of Exhibits 6 and 7, while Exhibits 1 is null and void.

I resolve Issue No. 4 in favour of the respondent. In sum, having resolved all the four issues in this appeal in favour of the respondents, I find that this appeal lacks merit and it is accordingly dismissed.

D APPEAL NO SC.350/2002

This appeal is against another judgment of the Court of Appeal, Ilorin Division delivered on the 18th of October 2001. The judgment was delivered in the appeal filed by the 1st respondent, Alhaja Bamidele Adepte against the judgment of the trial court delivered on the 3rd of December 1999. The 1st respondent was the purchaser of the property of the appellant - the six flats of 3 bedrooms each at the public auction that was conducted by the 3rd respondent, A.I.A. Ayantunde on the 5th of November 1992. The 3rd respondent acted as an agent of the 2nd respondent - the Bank of the North. This appeal is the other appeal consolidated pursuant to the order of this court made on 10/10/11.

The background facts are similar to the facts in appeal No. SC.350A/2002. The bone of contention of the appellant in this appeal is that the 3rd respondent on the instructions of the 2nd respondent advertised the appellant's property for sale - the building of six flats mortgaged to the United Bank for Africa Ltd in Exhibit 1 and sold on 5/11/92. The property was sold according to the appellant without compliance with the provisions of the Auctioneer's Law of Northern Nigeria as applicable to Kwara State. The parties relied on both oral and documentary evidence at the trial court. The trial judge granted the reliefs of the plaintiff/appellant. The three respondents appealed to the Court of Appeal Ilorin division - which allowed their appeals. Being aggrieved with the two judgments of the Court

of Appeal, the appellant made a further appeal to this court.

In the appellant's brief filed on 15/1/03, the appellant distilled five issues for determination as follows: -

(1) Whether the sale of the appellant's property by the 3rd respondent to the 1st respondent on the instruction of the 2nd respondent was null and void having failed to comply with the mandatory provisions of the Auctioneers Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State. B

(2) Whether having regard to the provisions of the Delegation of Powers (Ministry of Lands, Surveys and Environment) Notice No.8 of 1975 of Kwara State, the approval by the Commissioner for Lands dated 25/10/76 in relation to Exhibit 6 dated 27/10/76 was valid. C

(3) Whether Exhibit 7 dated the 18th day of September 1978 is null and void and of no effect whatsoever as the consent of the appropriate authority was not obtained before the execution of same. D

(4) Whether having regard to the Deed of Legal Mortgage (Exhibit 1) executed between the appellant and United Bank for Africa Ltd, the sale of the appellant's property by the 1st and 2nd respondents was valid.

(5) Whether from the totality of the pleadings of the appellant and the documents tendered, the appellant proved fraud by the respondents in the sale of his property. E

The 1st respondent in the brief filed 6/2/03 adopted and relied on four issues for determination as follows:-

(1) Whether the sale of the appellant's property by the 3rd respondent on 5/11/92 to the 1st respondent which sale was on the instruction of the 2nd respondent was valid and whether the 2nd and 3rd respondents on 5/11/92 were under any obligation to comply with the provision of the Auctioneer's Law Cap 10 Laws of Northern Nigeria as applicable to Kwara State. F G

(2) Whether the Commissioner for Lands vide the approval dated 25/10/76 validly in law approved Exhibit 6 dated 27/10/76 in conformity with the provisions of Delegation of Power (Ministry of Lands, survey and Environment) Notice No.8 of 1975. H

(3) Whether Exhibit 7 dated 18th day of September 1978 is valid having regard to the fact that it was the permanent secretary that conveyed the fact of the grant of the consent.

(4) Whether the sale by the 2nd and 3rd respondents is valid

and whether the appellant proved fraud by the respondents in the sale of his property.

In 2nd and 3rd respondents' brief filed on 12/3/03, respondents adopted and relied on four issues for determination as follows. -

(1) Whether the sale of mortgaged property of the appellant to the 1st respondent by the 3rd respondent on the instruction of the 2nd respondent is assailable in view of the terms of the contract of mortgage between the appellant and the 2nd respondent.

(2) Whether the deeds of legal mortgage between the appellant and the 2nd respondent Exhibits 5, 6 and 7 are void for any alleged want of appropriate consent/approval under the law.

(3) Whether Exhibit 1 (if valid at all) can stand in the way of Exhibits 5, 6 and 7 which were perfected earlier in time than Exhibit 1 such as to invalidate sale carried out pursuant to power conferred by them.

(4) Whether fraud was properly pleaded or raised and proved by the appellant.

On gleaning through the briefs of the parties, I find that in the two appeals SC.350A/2002 and SC.350/2002, the first four issues raised by the appellants are identical. I have dealt with them exhaustively in appeal SC.350A/2002. It will amount to undue repetition and tautology to deal with each of the first four issues raised by the appellant in the instant appeal. I therefore adopt and rely in this appeal on my findings and conclusion in each of the first four issues raised for determination in appeal No. 350A/2002.

I shall now consider Issue No.5 which reads:-
ISSUE 5

Whether from the totality of the pleadings of the appellant and the documents tendered, the appellant proved fraud by the respondents in the sale of his property.

The appellant submitted that the 1st and 2nd respondents failed to comply with the provisions of the Auctioneers Law before the sale of the appellant's property a building with six flats of 3 bedrooms each lying and being at Amilegbe, Asa Area, Ilorin, Kwara State particularly the provisions of Sections 19, 20 and 21 - as to give the proper notice about the sale of the property. There is nowhere in Exhibits 6 and 7 - the Deeds of Legal Mortgage where reference was made to any statutory power of sale without regard to the provisions

of the Auctioneers Law. The appellant challenged as follows: -

(a) The nature of the notice given for the sale of the property whether it was in accordance with the Auctioneers Law.

(b) The reserved sale price of the property which was N250,000.00 - as same was sold to the 3rd respondent for N240,000.00

(c) The property was sold below its actual value as the Valuation report Exhibit 3 prepared by Oladipo Atoyebi & Partners put the forced sale value as at 1992 at N800,000.00. This court is urged to hold that in view of the foregoing the sale was null and void.

The 1st respondent submitted that the 2nd and 3rd respondents validly sold the appellant's property to the 1st respondent. The sale was carried out in accordance with Clause 3(b) of the Deeds of Legal Mortgage Exhibits 6 and 7. The parties have subjected themselves to this clause in their Deeds and that it shall apply to their transaction to the exclusion of any other law including the Auctioneers Law. It was the duty of the court to interpret their agreement. The 1st respondent referred to the decision of this court in the case of Union Bank Ltd. V. Sax (Nig.) Limited (1994) SCNJ pg.1.

The lower court properly evaluated the evidence on record before arriving at the conclusion that the sale of the appellant's property by the 2nd and 3rd respondents to the 1st respondent was valid. The 1st respondent submitted further that the appellant failed to prove fraud - as (a) the 2nd and 3rd respondents advertised the sale of the property.

(b) The 1st respondent was a bona fide purchaser for value and she was the highest bidder during the Auction Sale when she purchased the property on 5/11/92. The lower court thereby rightly concluded that the appellant did not prove fraud, as there was substantial compliance with Clause 3(b) of the Deed of Legal Mortgage.

The 2nd and 3rd respondents submitted that fraud was not properly pleaded nor proved beyond reasonable doubt against the 2nd and 3rd respondents. No evidence was called in support of the purported value indicated in Exhibit 3 - a Valuation Report. They further contended that the appellant cannot substitute pleadings with the appellant's brief. Neither did the steps taken by the 2nd and 3rd respondents in selling the property to the 1st respondent deceive the appellant in line with the definition of crime under the penal code.

This court is urged to affirm the decision of the Court of Appeal that issue of fraud was not properly pleaded with particulars, as to affect the validity of the sale of the mortgaged property to 1st respondent.

I have considered the issue of fraud as it affected the sale of the appellant's property to the 1st respondent by the 2nd and 3rd respondents. Fraud is a criminal offence under the Penal Code of Kwara State. The law is that any allegation of fraud must be proved beyond reasonable doubt. Section 138(1) of the Evidence Act and by virtue of Section 138(2), the burden of proving that any person has been guilty of a crime or wrongful act is subject to the provisions of Section 141 of this Act on the person who asserts it, whether the commission of such act is or is not directly an issue in the action. Any allegation of crime in a civil proceeding must be pleaded and particulars of such a crime must be expressly pleaded. The appellant failed to substantiate the Valuation Report tendered as Exhibit 3. The submission in an appellant's brief can never take the place of evidence in proving an allegation of crime in a civil proceeding. The onus of proof beyond reasonable doubt rested of the appellant. The appellant and the 1st respondent subjected themselves to the clauses in their deeds of legal mortgage, Exhibits 6 and 7 which shall apply to their transaction to the exclusion of any other statute law including the Auctioneers Law. By so, the appellant had contractually waived compliance with the Auctioneers Law by Clause 3 (b) of Exhibits 6 and 7.

In the interpretation of contractual transaction court will always hold parties bound by the terms of their agreements when construed according to the strict, plain and common meaning of the words in the instrument as they stand. Solicitor-General Western Nigeria v. Adebajo (1971) 1 All NLR pg.178, U.B.N. v. Ozigi (1994) 3 NWLR (pt.333) pg.385.

The only obligation incumbent on a mortgagee in the exercise of his power of sale is that he should act in good faith. Whether selling under an express agreement as in this case in accordance with Clause 3(b) of the Deeds of Legal Mortgage made on 26/10/76 and 18/9/78 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 con-

tains 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”. 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. A.C.B. Ltd. v. Ihekwoaba (2003) 16 NWLR (pt.846) pg.249, Ekaeteh v. Nigeria Housing Development Society Ltd. (1973) 6 SC 183, Rafukka v. Kurfi (1996) 6 NWLR (pt.453) pg.235.

Before a mortgagee can pass a good title to a purchaser free from the equity of redemption - the right to exercise the power of sale under a mortgage must have arisen, the mortgage debt must have fallen due. Any purchaser who bought a property sold by a legal mortgagee in exercise of his power of sale under a mortgage upon a default in repayment of a loan by the mortgagor is not a trespasser.

Hence, once the precondition of notice of sale is given to the mortgagor by the mortgagee or his agent, preceded by a notice of demand of repayment of money lent to the mortgagor and the mortgagee proceeds to sell in good faith, subsequent purchaser in good faith gets a good title and a court will not intervene in the sale only because the sale did not meet with the satisfaction of the mortgagor. In my view the sale of the appellant’s property by the 2nd and 3rd respondents to the 1st respondent was not tainted with fraud so as to affect the validity of the sale. The mortgagee, the 2nd respondent after exercising his power of sale rightly executed a deed of transfer in favour of the 1st respondent - as Exhibit 3(1).

All the five issues in this appeal are resolved in favour of respondents. The appeal lacks merit and it is accordingly dismissed. In the final analysis, the two appeals lack merit and they are accordingly dismissed. Judgment of the lower court are affirmed. The cost of this consolidated appeal N50,000.00 is awarded in favour of respondents.

MOHAMMED JSC

I have been privileged before today of reading in draft the

judgment of my learned brother Adekeye JSC which has just been delivered. I completely agree with the lucid reasons therein advanced to arrive at the conclusion that the two sister appeals are devoid of merit and obviously deserve nothing other than outright dismissal.

However, I wish to say a word or two on the first issue in the
 B Appellant's brief of argument in both appeals which states -

"Whether the sale of the Appellant's property by the 2nd Respondent to the 3rd Respondent on the instruction of the 1st Respondent was null and void having failed to comply with the mandatory provisions of the Auctioneers law Cap 10 Law of Northern Nigeria as applicable in Kwara State."
 C

On the validity or otherwise of the sale the Appellant's property by the 2nd Respondent on the instruction of the 1st Respondent, the provisions of the relevant Deeds of Legal Mortgage executed
 D by the parties to secure the loan facilities granted to the Appellant namely, Exhibits 5, 6 and 7, in my view, will answer the question. The relevant clause in the Deeds of Mortgage spelling out of the right of sale or power of sale in the event of the sum of money owing on the same security shall become due, is clause 3(b) which states -

E 3 (b) The statutory power of sale shall be exercisable at any time after the moneys owing on this security shall have become payable without regard to any statute law and in any such sale the Bank may call the fixtures and machinery comprised herein either together
 F with the property to which they are affixed or separately and detached therefrom."

Each of the Deeds of Legal Mortgage, Exhibits 5, 6 and 7, containing clause 3(b) no doubt constituted a binding agreement between the Appellant and the Respondent Bank. Clause 3(b) clearly
 G empowered the Mortgagee Bank to exercise its right of sale of the Appellant's Mortgaged property at any time after the moneys owing on the security shall have become payable without regard to any statute law. This means the parties had decided to exclude the application of any statute law in the performance of their respective obligations particularly regarding the exercise of the Mortgagee's right of
 H sale of the Appellant's Mortgaged property. Therefore, the attempt by the Appellant to hide behind the provisions of the Auctioneers law CAP 10 of the Laws of Northern Nigeria applicable in Kwara State to absolve himself from his contractual obligation under the agreement

he freely executed was rightly prevented by the Court below as it was not the duty of the Court to make contract for the parties. See S.E. Co. Ltd. v. N.B.C.I. (2006) 7 N.W.L.R. (pt. 978) 201. Thus, the sale of the Appellant's property by the 2nd Respondent on the instruction of the 1st Respondent was quite valid.

With these few comments on the first issue identified by the Appellant in his Appellant's briefs for the determination of the two appeals, I am fully with my learned brother Adekeye, JSC that the two appeals have no merit at all. Accordingly appeal No. 350A/2002 is hereby dismissed and for the same reasons, appeal No. 350/2002 is also dismissed'

I abide by the order on costs in the two lead judgments.

MUNTAKA-COOMASSIE JSC

I had an opportunity of reading before now, the all encompassing judgment of my learned lord Adekeye JSC just delivered.

The reasons and conclusions ably and carefully advanced are agreeable to me, and with tremendous respect, I adopt them as mine. For the reasons adumbrated in the lead judgments, I too hold that, the consolidated appeals are lacking in merit and I dismiss both.

I have nothing more useful to add. There is no way I can improve on the lead judgment. In fact it is quite unnecessary to attempt to so improve. The court below, in my view, did a good job and arrived at a correct decision. I endorse the order as to costs contained in the lead judgment.

FABIYI JSC

I have read before now the judgment just delivered by my learned brother Adekeye, JSC. I agree with reasons therein carefully advanced to arrive at the conclusion that the two consolidated appeals lack merit and should be dismissed.

The judgment of my learned brother is very comprehensive. I shall only say a word in respect of issue 2 which reads as follows:-

"Whether having regard to the provisions of the Delegation of Powers (Ministry of Lands, Survey and Environment) Notice No. 8 of 1975 of Kwara State, the approval by the Commissioner of Lands

dated 25/10/76 in relation to Exhibit 6 dated 27/10/76 was valid."

With respect to the validity or otherwise of Exhibit 6 and Exhibit 7, the learned trial judge found as follows:-

B "...Lastly, there is the outstanding issue of the validity of the two deeds of legal mortgage between the plaintiff and the 1st respondent which are challenged on the ground that there was no valid consent as required by the Land Use Act, 1978".

C "However the law as enunciated in *Savannah Bank V. Ajilo* (1989) 1 NWLR 305 enjoining the strict compliance with the statute as regards appropriate approval for validity of the Legal Mortgage under Section 21 of the Land Use Act, 1978 still remains valid as the Supreme Court has not overruled itself. In the circumstance, with the greatest respect, therefore, I cannot hold that the deed of Legal Mortgage Exhibits 6 and 7 are valid."

D It is not in contention that the Land Use Act, 1978 came into force on the 29th day of March, 1978. The Military Authority at the time did not make the provisions of the Act retrospective as there are no express words in same showing such an intention. Same cannot be construed or read into the Act. See: *Ojokolobo & Ors. v. Lapade*
E *Alamu* (1978) 2 NSCC 991.

In this matter, the approval of the Mortgage came into effect on the 7th October, 1976 - that is before the Land Use Act came into operation. The attack on the validity of the mortgage transaction based
F on the inapplicable provisions of the Land Use Act, 1978 was most inappropriate as the provisions of the said Act are not relevant to the transaction between the parties. The decision in *Savannah Bank V. Ajilo* (1989) 1 NWLR 305 is not in point herein.

G It should be stated that the approval for the mortgage transaction herein was given by the Hon. Commissioner for Lands. By Legal Notice No. 8 of 1975, the Governor delegated his powers under the Land Tenure Law, 1963 to the Hon. Commissioner for Lands. Same, as contained in Gazette publication, can be taken judicial notice of by all courts of record. It required no viva voce evidence; in the main.
H The Commissioner for Lands approved and the Chief Lands Officer conveyed same to the appellant who should not be heard to complain about the administrative procedure employed.

The difference between Exhibit 6 and 7 is that the facilities offered to the appellant was increased from N12,000:00 to

N33,000:00. Where consent is required in a deed of legal mortgage and such has been obtained when the mortgage was originally created, no consent is required for the up-stamping of the mortgage if a further facility is granted. Refer to *Moses Ola & Sons (Nig.) Ltd. & Ors. v. Bank of the North Ltd. & Ors.* (1992) 3 NWLR (Pt. 229) 337.

The Court of Appeal got it right. The issue is resolved in favour of the respondents. For the above and the detailed reasons adumbrated in respect of the other issues, I too hereby dismiss the two consolidated appeals and endorse the order relating to costs contained in the lead judgment.

PETER-ODILI JSC

I had the opportunity of reading in draft the judgment just delivered. I agree with the decision of my learned brother, Adekeye JSC in the lead judgment.

In this consolidated appeal, SC.350A/2002 and SC.350/2002 which arose from the judgment of the Court of Appeal sitting at Ilorin, Kwara State delivered on 18th day of October, 2001 - coram Hon. Justice Muritala Aremu Okunora, Hon. Justice Patrick Ibe Amaizu and Hon. Justice W.S.N Onnoghen JCA.

Briefly the facts relevant for the purpose of this appeal were that Mr. Julius Babatunde, was a customer of the Bank of the North at the Muritala Mohammed Road branch, Ilorin and operated a current account No. 400634 through which an overdraft facility of N12,000,000.00 on the 26th of October 1976. A Deed of legal mortgage was executed between the bank and the customer to this effect. The collateral was a landed property of the customer at Mala Road, Isale Asa, Ilorin on which was erected a house containing four flats, of three bedroom each. The land was covered by an alienation permit No. 1120 dated 10/3/76 and issued by Ilorin Local Government. The Bank of the North increased the overdraft facility to N30,000.00 in September, 1978. Another Deed of legal mortgage was executed based on that same collateral which was simply up stamped, The plaintiff/appellant's case was that he bought an adjoining land which was covered by an Ilorin Local Government customary Right of occupancy No.248 dated 2nd June, 1980 - an area of 929.030 square metres. In 1982, he mortgaged the house of six flats

to the United Bank for Africa, Ilorin for a loan of N70,000.00. On the 4th November, 1992 an auctioneer, acting on behalf of the Bank of the North advertised for sale the building of six flats at Isale, Asa Area, off Sabo line, Ilorin. On the same day, Auction Notice was pasted on the building declaring that it would be disposed through public auction the next day the 5th of November 1992. The plaintiff/appellant was communicated about the sale of the building on the 30th of March 1993. On the 6th of April, the 3rd defendant/respondent, who purchased the building, served notice to vacate on the plaintiff/appellant's tenants with the sale of the building of six flats which was a collateral for the mortgage to the United Bank for Africa for a loan, the plaintiff /appellant sued the respondents at the High court, Ilorin with the reliefs as stated in the statement of claim and are as follows:

1. Declaration that the 1st and 2nd defendants have no right to sell or advertise for sale the plaintiff's house containing six flats at Isala Asa Area, Off Sabo line, Ilorin covered by Government Customary Right of Occupancy No.248 dated 2nd June 1980 since the said house was not pledged as security on a deed of legal mortgage dated 26th October, 1976 and the one dated 18th September, 1978 between the plaintiff and the 1st defendant.

2. A declaration that any sale or transfer of the plaintiff's house of six flats at Isale Asa Area off Sabo line, Ilorin by the 1st and 2nd defendants to the 3rd defendants is illegal, null and void.

3. An order to set aside the sale or transfer and any agreement thereto of the plaintiff's house of six flats at Isale Asa Area, off Sabo line, Ilorin by the 1st and 2nd defendants to the 3rd defendant.

4. A sum of N100,000.00 as damages for trespass committed by the defendants jointly and severally on the plaintiff's house.

5. A perpetual injunction restraining the defendants, their agents, servant and privies from further act of trespass on the plaintiff's house.

6. A declaration that the purported sale of the plaintiff's house of six flats at Isale Asa area, off Sabo line, Ilorin carried out by any of public auction on the 5th of November, 1992 is invalid, null and void since the said sale was not in accordance with the Auctioneer's Law cap 10 Laws of Northern Nigeria 1963 as applicable to Kwara State.

7. A declaration that the two deeds of legal mortgage between the plaintiff and the 1st defendant has no valid consent and that the

purported consent letter attached to it is not a consent required by the land use Act 1978.

8. An order to nullify the two deeds of legal mortgage between the plaintiff and the 1st defendant for not complying with the mandatory provisions of the Land use Act 1978.

The trial court in a considered judgment delivered on the 3rd day of December 1999 found for the plaintiff/appellant granted all the declarations and orders sought with N50,000.00 as damages for trespass. The three respondents being dissatisfied with the judgment. The 1st and 2nd respondents- the Bank of the North and A. T. Ayatunde (the auctioneer) filed a separate notice and grounds of appeal against the decision of the trial court. The appeal was heard as No. CA/IL/44/2000. The court of Appeal in a judgment delivered by Patrick Ibe Amaizu JCA on the 18th day of October 2001, allowed the appeal and set aside the judgment of the trial court. The appellant, Julius Babatunde being aggrieved by the judgment of the Court of Appeal appealed to this court with Appeal No. SC.350A/2002.

The 3rd respondent, Alhaja Bamidele Adepte filed a separate notice and grounds of appeal. In another judgment of the Court of Appeal delivered by W.S.N. Onnoghen JCA (as he then was) on the same 18th October, 2001, the appeal was allowed and the judgment of the trial court was set aside. The appellant aggrieved with this second judgment of the court below appealed to this court in the appeal No. SC.350/2002.

The two appeals being consolidated shall be considered with appeal No. SC.350A/2002 being taken first and after appeal No. 350/2002. On the death of Julius Babatunde and on application the name of Segun Babatunde was substituted as appellant.

APPEAL NO. SC.350A/2002

The appellant adopted their brief filed on 13/1/03, in which are couched 4 issues for determination which are:

1. Whether the sale of the appellant's property by the 2nd respondent to the 3rd respondent on the instructions of the 1st respondent was null and void having failed to comply with the mandatory provisions of the Auctioneer's Law Cap. 10 Laws of the Northern Nigeria as applicable to Kwara State.

2. Where having regard to the provisions of the delegation of powers (Ministry of Lands, Surveys and Environment Notice No. 8

of 1975 of Kwara State, the approval by the commissioner for land dated 25/10/76 in relation to exhibit 6 dated 27/10/76 was valid.

3. Whether Exhibit 7 dated the 18th day of September, 1978 is null and void and of no effect whatsoever as the consent of the appropriate authority was not obtained before the execution of same.

B 4. Whether having regard to the deed of legal mortgage (Exhibit 1) executed between the appellant and United Bank for Africa Ltd., the sale of the appellant's property by the 1st and 2nd respondents was valid. The 1st and 2nd respondents adopted their brief of arguments filed on 12/3/03 in which was formulated three issues for
C determination viz:

1. Whether the sale of the mortgaged property of the appellant to the 3rd respondent by the 2nd respondent on the instructions of the 1st respondent is assailable in view of the terms of the contract
D of mortgage between the appellant and the 1st respondent.

2. Whether the deeds of legal mortgage between the appellant and the 1st respondent, Exhibit 5, 6 and 7 are void for alleged want of appropriate consent/approval under the law.

E 3. Whether Exhibit 1 (if valid at all) can stand in the way of Exhibit 5, 6 and 7 which were perfected earlier in time than exhibit 1 such as to invalidate sale carried out pursuant to powers conferred by them.

The 3rd respondent also adopted their brief of argument filed
F on 6/2/03 in which the 3rd respondent framed four issues for determination which are as follows:

1. Whether the sale of the appellant's property by the 2nd respondent on 5/11/92 to the 1st respondent which sale was on the instruction of the 1st respondent was valid and whether the 1st and
G 2nd respondent on 5/11/92 were under any obligation to comply with the provision of the Auctioneers law cap 10 Laws of Northern Nigeria as applicable to Kwara State.

2. Whether the commissioner for lands vide the approval dated 25//10/76 validly in law approved Exhibit 6 dated 27/10/76 in conformity with the provisions of Delegation Power (Ministry of Lands, Survey and Environment) Notice No. 8 of 1975.
H

3. Whether Exhibit 7 dated 18th day of September 1978 is valid having regard to the fact that it was the permanent secretary that conveyed the fact of the grant of the consent.

4. Whether the sale by the 1st and 2nd respondent of the appellant's property to the 3rd respondent is valid and whether the appellant proved and framed by the respondents in the sale of his property.

The issues as couched by the appellant seem to me most apt to utilize in the determination of this appeal and I shall go along with them. B

ISSUE ONE

Whether the sale of the appellant's property by the 2nd Respondent to the 3rd Respondent on the instructions of the 1st Respondent was null and void having failed to comply with the mandatory provisions of the Auctioneer's Law cap 10 Laws of Northern Nigeria as applicable to Kwara State. C

Learned counsel for the appellant argued that the respondents failed to comply with the Provisions of the Auctioneers' Law D before the sale of the appellant's property i.e. a 6 flat of 3 - bedroom each situate, lying and being at Amilegbe, Asa Area of Ilorin, Kwara State. That the Auctioneers' law commenced on 21st June, 1917. That the sale was carried out in recourse to the Auctioneers' Law provisions sections 19, 20, 21 in that no notice was given to the chairmen of Ilorin East Local Government after the sale. That the agreement by the parties contracted out the statute, Auctioneers' Law E aforesaid and so the non-compliance with the provisions of that law rendered the sale of Appellants property null and void. He cited the cases of *Oseni v American International Insurance Ltd.* (1985) 1 NWLR F (pt. II) 229 at 233; *Fojule v. Federal Mortgage Bank of Nigeria, Ltd.* (2001) FWLR (Pt.36) 893.

The 1st and 2nd Respondents contended that the 2nd Respondent is the agent of the 1st Respondent and that with the Appellant defaulting in repaying the loan facilities granted to it in 1976 and 1978 by the 1st Respondent, the 1st Respondent had the right to instruct the 2nd Respondent to sell the mortgaged property to recover their money. That the Deeds of Legal Mortgage executed between the Appellant and the 1st Respondent are Exhibits 5, 6 and 7 H being the contracts between property of the Appellant to the 3rd Respondent by the 2nd Respondent on the instruction of the 1st Respondent is assailable in view of the terms of the contract of mortgage between the appellant and the 1st Respondent are Exhibit 5, 6

and 7 being the contracts between the Appellant and the 1st Respondent and by clause 3(b) thereof the parties had excluded the application of any statute that would impede the exercise of the power of sale of the mortgagee - the 1st Respondent. He said by this exclusion, the Appellant waived the protection or benefit of any statute as
 B the Auctioneers the contract was legal and was not against public policy or tainted with dishonesty or fraud or misrepresentation. He cited several authorities such as: *Okonkwo v. CCB (Nig.) Ltd. Plc.* (1997) 6 NWLR (Pt.507) 48, *Amori v. Elemo* (1983) 1 SCNLR P. 1, *Okwunakwe v. Opara* (2000) FWLR (Pt.13) 2282 at 2287, *Niger Dam Authority v. Lejude* (1973) 4 SC 203, *Oduye v. Nigeria Airways Ltd.* (1987) 2 NWLR (Pt.55) 126, *UBN Ltd. v. Ozigi* (1994) 3 NWLR (Pt.333) 385 at 404.

For the 3rd respondent it was contended that the provisions of
 D the Auctioneer's Law was not applicable to Kwara State in respect of this suit as the area part of the subject matter of this suit was not part of the area covered within Ilorin, Kwara State as Mala Road, Isale Asa, Ilorin Kwara State was not one of the area forming part of Ilorin enclosed within the red verge line of plan No. 7 TPO 353. That if the
 E court finds the area is within Ilorin and covered by Auctioneer's Law then a consideration of Exhibits 6 and 7 shows they substantially complied with sections 19, 20 and 21 of that law. He cited *Oseni v. American International Insurance Limited* 237; *Fajule v. Federal Mortgage Bank of Nigeria Limited & 2 Ors.* (2001) FWLR (Pt.36) 893.

F The much talked of Auctioneer's law would have the relevant sections quoted below thus:

Section 19:

G "No sale by auction of any land shall take place until after at least seven days 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 may be prescribed, or if not prescribed, as
 H 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. Penalty: a fine of twenty pounds.

Section 20:

"Two days before any sale by auction shall take place, or within

such shorter time as the divisional officer of the district where shall sale is to take place, may in special circumstances, authorize in his discretion, notice thereof in writing together with a catalogue of the goods or lands to be sold shall be delivered by the auctioneer to such divisional officer, specifying the place and time at which such sale begins and within sixty hours after such sale shall have terminated, a complete account of the sale verified by oath or affirmation of the auctioneer shall be delivered to the said divisional officer, specifying the price at which each lot shall have been sold". Penalty: a fine of five pounds.

Section 21:

"Every auctioneer, before beginning any auction, shall affix or suspend and during the whole time of such action keep affixed suspended or in some conspicuous part of the room or place where the auction is held a ticket or board containing his true and full name and residence printed or written in large letters, publicly visible and legible. Penalty: a fine of five pounds.

The Appellant went through a lot of trouble in arguing profusely that the Auctioneer's Law, Northern Nigeria applied to the transaction and that the Respondents had not complied and therefore the sale when Appellant defaulted in repayment of the loan facility was invalid, null and void. The Respondent's position is that the parties are bound by the terms of the agreement between them within the ambit of the Deed of Legal Mortgage which was silent on the Auctioneer's Law.

It is easy for the Appellant to propound new theories not covered by the agreement he well considered before entering and deriving benefit. The court of law is bound to give effect to the intention of the parties when they entered into a contract or agreement well spelt out in the document they had executed and it is not within the mandate of a court of law to go outside it with the importation of a law with fresh conditions before what the parties had agreed to would be implemented. Going that contrary way would in effect be a re-writing of a contract for parties by the court which would be interloping into what did not concern it. See *Owoniboy Technical Services Ltd. v. U.B.N. (2003) 15 NWLR (Pt.844) 545*; *UBN Ltd. v. Ozigi (1994) 3 NWLR (Pt. 333) 385*; *Dalek (Nig.). v. OMPADEC (2007) 7 NWLR (Pt.1033) 402*.

There is no basis for a finding other than what the court below did in regard to this issue and that is that the Auctioneers Law was not part of the agreement and nothing would bring it in. Also there is nothing to show that the agreement was either tainted with fraud or illegal or against public policy. The issue is resolved in favour of the
B Respondents.

ISSUE NO 2:

Whether having regard to the provisions of the delegation of Powers Ministry of Lands, Surveys and Environment Notice No. 8 of 1975 of Kwara State, the approval by the Commissioner for Lands
C dated 25/10/76 in relation to Exhibit 6 dated 26/10/76 was valid.

ISSUE NO 3:

Whether exhibit 7 dated the 18th day of September, 1978 is null and void and of no effect whatsoever as the consent of the appropriate authority was not obtained before the execution of same.
D

For the Appellant it was submitted that the approval of the Commissioner for Lands communicated by the Permanent Secretary of the Ministry was null and void and not in conformity with the Land Use Act Section 27 (a) & (b). He referred to Savannah Bank Ltd v.
E Ajilo & Anor (1989) 1 SCNJ 159; Adedeji v. N.B.N. Ltd (1991) NWLR (pt.96) 212 at 215.

1st and 2nd Respondents point of view is that the approval by the Commissioner was effective and within the Land Use Act. 3rd respondent on his part submitted that under Section 46(1) of the
F Land Tenure Law the Governor can delegate his powers of consent and that can be communicated by the Permanent Secretary was in order.

With regard to these two issues, it is indeed lame to say that the
G communication of the consent on the Deed of Mortgage communicated by the Permanent Secretary was not within the contemplation of section 27 of the Land Use Act. The essential thing is that there was such a consent as has been established by the parties, the fact that it was through the Permanent Secretary is neither here nor there. This
H is so since it cannot be suggested that while a commissioner is yet to be appointed or anything that would have created such a vacuum that a crucial transaction necessitating either a Governor's consent or that of the Commissioner would be on hold pending whenever such an officer takes position. That is not the way Government functions

as the structures of Government are permanent and whoever is on sit as official can do what is intended for the smooth running of Governmental affairs leaving no vacuum.

These two issues are resolved in favour of the Respondents. Therefore those Deeds of Mortgage Exhibits 6 and 7 are valid.

ISSUE NO. 4:

Whether having regard to the Deed of Legal Mortgage Exhibit 1, executed between the appellant and United Bank For Africa Ltd, the sale of the Appellant's property by the 1st and 2nd Respondents was valid.

Learned counsel for the Appellant said the landed property with the buildings thereon of Mr. Julius Babatunde (now deceased) the Appellant later substituted by Segun Babatunde at Mala Road, Isale Asa, Ilorin, Kwara State of Nigeria on Site Plan signed by the Supervisor of Work, Ilorin Local Government Authority and dated 28/10/73 and with Permit to alienate Land No. 1120 dated 10/3/76 and signed by the Resident, Ilorin Division and the land is on area of 10,000 square feet and contains four semi-self contained 3 bedroom flats, each flat containing sitting room, 3 bedrooms, kitchen, bathroom, W.C. and store. That the transaction was registered at the Lands Registry, Ilorin at No. 23 page 23 Vol. VI.

That 1st respondent in the purported exercise of her power of sale sold the property that was mortgaged to United Bank for Africa Ltd vide Exhibit 5. That there was nowhere in the pleadings where issue was joined on the purchase of half plot of land for the building of the 6 flats which were mortgaged to U.B.A. Ltd and so evidence in that matter of half plot purchase goes to no issue. That the dimensions in Exhibit 5 are different from that in Exhibits 6 and 7. That the judgment of the trial court was therefore right.

For the 1st and 2nd Respondent it was submitted that no document had been exhibited by the Appellant that he had approval of the appropriate authority to mortgage the customary right of occupancy of No.248 to United Bank for Africa Ltd. That the sale of the mortgaged property was validly carried out pursuant to Exhibits 6 and 7.

3rd Respondent emphasized that the sale by the 2nd & 3rd Respondents of the Appellant's property to the 1st Respondent is valid and so the Court of Appeal was right when it evaluated the

evidence before the trial court and held that the sale was valid. That the fraud alleged by the Appellant was not established. He cited *A.G. Oyo State v. Fairlakes Hotels Limited & Anor.* (1989) 12 SCWJ 1; *Olale v. Ekwekendu* (1989) 7 SCWJ 181; *Johnson Imah & Anor v. Chief Ajomale Okogbe & anor* (1993) 12 SCWJ 157; *Ofondi v. Nwegba* (1993) 2 SCNJ 73.

The issue here has been adequately answered by issues 2 and 3 and that is that the sale of the mortgaged property is valid. This issue is in favour of the Respondents.

In conclusion this appeal lacks merit and is hereby dismissed. I affirm the judgment of the Court of Appeal.

APPEAL NO: SC.350/2002

This is an appeal against another judgment of the Court of Appeal, Ilorin Judicial Division delivered on the 18th of October, 2001. The judgment was delivered in the appeal filed by the 1st Respondent, *Alhaja Bamidele Adepte* against the judgment of the trial court delivered on the 3rd of December 1999. The 1st Respondent had purchased the property of the Appellant the six flats of three (3) bedrooms each at a public auction that was carried out by the 3rd Respondent *A.I.A. Ayantunde* on the 5th of November 1992. The 3rd Respondent acted as an agent of the 2nd Respondent in the Bank of the North. This appeal SC.350/2002 is the other half of the consolidated appeals, which order of consolidation was made on 10/10.11.

The facts herein are similar to the facts in Appeal No. SC/350A/2002 above considered and determined. The point of dispute of the appellant in this appeal is that the 3rd Respondent on the instructions of 2nd Respondent advertised the Appellant's property for sale of the building of six flats mortgaged to the United Bank for Africa Ltd in Exhibit 2 and sold on 5/11/92. The position of the Appellant is that the sale was conducted without compliance with the provisions of the Auctioneer's Law of Northern Nigeria as applicable to Kwara State. At the trial, reliance was placed by both parties on both oral and documentary evidence and the trial court finding for the plaintiff / appellant granted all the reliefs he sought. The three respondents appealed to the Court of Appeal, Ilorin division which court allowed their appeals. Aggrieved with the two judgments the Appellant has appealed to this court in this SC/350/2001.

The Appellant adopted his brief filed on 15/1/03 in which were formulated five issues which are stated below thus:

1. Whether the sale of the Appellant's property by the 3rd respondent to the 1st respondent on the instructions of the 2nd Respondent was null and void having failed to comply with the mandatory provisions of the Auctioneer's Law Cap. 10, Laws of Northern Nigeria as applicable to Kwara State. B

2. Whether having regard to the provisions of Delegation of Powers of the Ministry of Lands, Surveys and Environment Notice No.8 of 1975 of Kwara State, the approval by the commissioner for Lands dated 25/10/76 in relation to Exhibit 6 dated 27/10/76 was valid. C

3. Whether Exhibit 7 dated the 18th day of September, 1978 is null and void and of no effect whatsoever as the consent of the appropriate authority was not obtained before the execution of same. D

4. Whether having regard to the Deed of Legal Mortgage, Exhibit 1 executed between the Appellant and united Bank for Africa Ltd, the sale of the Appellant's property by the 1st and 2nd Respondents was valid. 5. Whether from the totality of the pleadings of the Appellant and the documents tendered, the Appellant proved fraud by the Respondents in the sale of his property. E

The 1st Respondent couched four issues for determination which are as follows:-

1. Whether the sale of the Appellant's property by the 3rd Respondent on 5/11/92 to the 1st Respondent which sale was on the instruction of the 2nd Respondent was valid and the whether 2nd and 3rd Respondents on 5/11/92 were under any obligation to comply with the provision of the Auctioneers Law Cap. 10 Laws of Northern Nigeria as Applicable to Kwara State. F

2. Whether the commissioner for Lands vide the Approval dated 25/10/76 validly in law approved Exhibit 6 dated 27/10/76 in conformity with the provisions of Delegation of Power (Ministry Lands. Survey and Environment) Notice No. 8 of 1975 G

3. Whether Exhibit 7 dated 18th day of September 1978 is valid having regard to the fact that it was the Permanent Secretary that conveyed the fact of the grant of the consent. H

4. Whether the sale by the 2nd and 3rd Respondent, of the Appellant's property to the 1st Respondent is valid and whether the

Appellant proved fraud by the respondents in the sale of his property.

The 2nd and 3rd Respondents framed four issues for determination which are:-

B 1. Whether the sale of the mortgaged property of the Appellant to the 1st respondent by the 3rd Respondent on the instruction of the 2nd Respondent is assailable in view of the terms of the contract of mortgage between and the Appellant the 2nd Respondent.

C 2. Whether the deeds of legal mortgage between the Appellant and the 2nd Respondent, Exhibits 5, 6 and 7 are void for any alleged want of appropriate consent/approval under the law.

D 3. Whether Exhibit 1 (if valid at all) can stand in the way of exhibits 5, 6 and 7 which were perfected earlier in time than exhibit I such as to invalidate sale carried out pursuant to power conferred by them.

4. Whether fraud was properly pleaded or raised and proved by the Appellant

E All the issues having been already answered in Appeal No. SC.350A/2002 except Issue No.5 of the Appellant which the other Respondents tackled as their No.4, there would be no need to revisit those issues aforesaid and so only Issue No.5 of the Appellant would be utilized and handled.

ISSUE NO.5:

F Whether from the totality of the pleadings of the Appellant and the documents tendered, the Appellant proved fraud by the Respondents in the sale of his property.

G Learned counsel for the Appellants said in Appellants Further and Further Amended statement of claim paragraph 13, 15(a), (b), 25 and 27 thereof, he pleaded the element of fraud committed by the Respondents. That the Respondent failed to deny those averments and so those facts are to be deemed admitted and needed no further proof. He cited Section 75 of the Evidence Act; Owosho v. Dada (1984) 7 SC 149.

H He went on to contend that the areas of fraud from evidence had to do with the few times of advertisement of the sale and the brief period thereof. Also that the Auction Notice issued by 3rd Respondent did not indicate when it was issued but only contained the date when the property was to be sold.

Again that while the reserved price in Exhibit D7 is N250,000.00, the Respondents sold same for N240,000, 00. Also that Exhibit 3, the Valuation Report of the Appellant's property showed N800,000.00 in 1992 (open market value) while the forced sale value in 1992 would have been N650,000.00.

It was submitted for the 1st Respondent that 2nd and 3rd Respondents adequately advertised the sale of the property in the Herald Newspaper and the Nigerian Television Authority (NTA) which gave notice to the whole public that the property was going to be sold by Auction. That prior to the eventual sale of the property on 5/11/92 many attempts to the knowledge of the Appellant had been made to sell the property but those attempts failed because of the low price offer and on the 5/11/92, 1st Respondent was the highest bidder. That the sale was valid and fraud was not proved. B
C

Having considered the elements of fraud as alleged in the pleadings and the evidence in support thereof in the light of the submission of the Appellant, I would like to refer to the relevant pleadings which are as follows:- D

1. The Plaintiff says that on the 6th July, 1982, he (plaintiff) by a deed of Legal Mortgage, mortgaged his house built in 1980 and containing 6 flats (referred to in paragraphs 10 and 11 above) to the United Bank for Africa Limited, Ilorin for a loan of N170,000.00. E

The Plaintiff says that what was mortgaged to the 1st Defendant as security for the overdraft taken in 1978 was his (plaintiff's) house containing 4 flats (3 bedrooms each) and not 6 flats (3 bedrooms each). F

2. The Plaintiff says that on the 4th day of November, 1992 in the Herald Newspaper, the 1st Defendant acting through the 2nd Defendant advertised for sales (sic) the Plaintiff's house at Isale Asa G Area, off Sabo-line, Ilorin containing 6 flats which was not mortgaged to the 1st Defendant. The plaintiff hereby pleads the Herald Newspaper of 4th November, 1992 page fifteen thereof. G

3. The Plaintiff says that on the same day (4/11/92) at about 11.00 pm, the Defendants came to paste Auction Notice papers on the 6 flats to the effect that the 1st Defendant shall dispose the said building by way of public auction on the 5th day of November, 1992. H

4. Further to paragraph 15 above, the plaintiff says that the 1st and 2nd Defendants purportedly sold by public auction the Plain-

tiff's house containing six flats to the 3rd Defendant on the 5th day of November, 1992. The Plaintiff shall rely on a Deed of Assignment dated 5th day of November, 1992 between the 1st and 3rd Defendants and notice is given to the Defendants to produce the original at the hearing of this suit.

B 5. The Plaintiff says that the Defendants hurriedly, fraudulently and maliciously sold the house containing six flats on the 5th day of November, 1992 at an undervalued rate of N240,000.00. The plaintiff shall contend that the house was worth more than N1,000,000.00 (One Million Naira) as at the date of the purported sale.

C It is indeed well settled that any allegation of crime in a civil proceedings must be pleaded and the particulars of such crime must be expressly pleaded. Looking at paragraph 27 of the Further Amended Statement of Claim, the attempt to refer to fraud was so D vaguely stated without particulars. Worse still the evidence did nothing to add to the value of the averment in the Statement of Claim. That the forum of this dispute is Civil does not reduce the standard of proof of a crime imputed or alluded to in the civil transaction as that crime referred to must be proved beyond reasonable doubt. That is E a reality that cannot be diluted nor can it be accepted as the proof needed that the learned counsel on his behalf passionately attempts to persuade the court. I rely on *Fabunmi v Agbe* (1985) 1 NWLR (pt.2) 299.

F Without doubt, the Court below properly evaluated the evidence which the trial Court failed to deal with in the manner required. I agree with what the Court of Appeal did and along with the fuller reasons adumbrated by my learned brother, I too dismiss the appeal. I affirm the decision of the Court below.

G I award N50,000.00 in this consolidated appeal in favour of the Respondents.

H